

A STUDY OF THE LEGAL IMPLICATIONS OF COPYRIGHT LAW
TO THE USE OF COMPUTER SOFTWARE IN PUBLIC EDUCATION

by

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(ABSTRACT)

The purpose of this study was to review, synthesize and document federal statutes and litigation; utilizing literature pertaining to copyright and the use of computer software by educators. A combination of legal and historical research methodology was used to conduct the study.

The historical research involved primary and secondary source documents, from England and America. The legal research involved the use of law guides, finding-tools, legal sources, law journals, case law, and computerized search systems.

The study indicated that copyright litigation began as early as 567 A.D. The concept of copyright in England began as a method to control the publishing industry and evolved into a right of authors. Copyright in the United States is based on the Constitutional clause granting to 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 first American copyright act, passed in 1790, has been the subject of two major revisions; the first in 1909 and the second in 1976.

The study also indicated that educators and publishers have opposing beliefs regarding the use of copyrighted materials. These beliefs are logical and defensible, and are not likely to be resolved without further revisions to the copyright laws. In an attempt to adjudicate these arguments, the judiciary has developed the "Doctrine of Fair Use." A review of federal case law revealed that teachers and educators have not fared well under this doctrine. Of the six cases in which educators pleaded fair use, only two were resolved in favor of the defendant educator. The trend of federal case law, involving computer programs, is to afford greater protection for these programs.

With regard to the copying of computer software for use in the public school classroom, that copying copyrighted software is illegal. Serial use of instruction programs does not infringe the copyright; however, any use which would increase the number of simultaneous users would violate the copyright owner's exclusive rights. School systems should develop written policies regarding the duplication and use of copyrighted software. The use of multiple licensing agreements is recommended.

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To all my friends, both personal and professional, an expression of gratitude for promoting my confidence and helping me maintain my perspectives.

DEDICATION

This study is dedicated to my family, whose love, support and patience made the whole effort possible.

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As with any project of this magnitude, the pressures can weigh a family down, the separations can pull a family apart, and the financial strain can break a families spirit. In our case, we were strengthened by the adversities, and we learned to savor the rewards. For this, we thank God.

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CHAPTER I

An Overview

This study was designed to investigate the legal implications of copyright law to the use of computer software in public education. Among the many problems facing the founding fathers of the New Nation was that of providing its literary authors with some form of protection and financial remuneration for their work, while maintaining the free flow of information necessary to make the new democracy a reality. To accommodate the conflicting interests of the authors and the general public, a copyright clause was included in the drafting of the constitution. Article 1, Section 8, Clause 8 of the United States Constitution specifically confers to Congress the power "[t]o 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."¹

From its inception, the copyright law has struggled to keep pace with developing technology. Beginning in 1476, when William Caxton introduced the printing press in England, technology has rapidly produced products capable of duplicating copyrighted materials, thus stretching the canons of statutory law to new and seemingly endless limits. Originally, the producers of copyrighted materials were not overly concerned with infringement of their exclusive rights due to the difficulties of copying. Manual duplication of copyrighted

materials was laborious and time consuming, resulting in little effect on the author's market for his work. The subsequent development of primitive copying machines, i.e. mimeo and ditto duplicators, posed few problems for the copyright owners. These crude copying devices required a specially prepared stencil, referred to as a master, before copies could be produced. The time and expense of preparing said master rendered the making of single copies uneconomical.² The state of copying was to change drastically with the introduction of the photocopying machine. Referred to as a "do-it-yourself" tool for infringement,³ the photocopier's impact on copyright law was without precedent. Even the infamous piano roll; the subject of heated judicial debate in White-Smith Music Publishing Co. v. Apollo Co. (1908),⁴ paled in comparison to technology's newest creation. The publishing community reacted quickly to this new threat and brought intense pressure on the legislature to revise the existing copyright law. On January 1, 1978, Congress responded by enacting a new copyright statute.⁵ The impact of this new technology was not limited to the field of statutory law. Education became one of the most profoundly affected professions. Technology has enhanced a virtual revolution in educational philosophy and in new approaches to learning.⁶

Modern technology has provided today's educator with a variety of electronic media for use in the instructional process. One important product of this new technology is the microcomputer. "It is almost gospel that the most important factor in our technological revolution is the computer."⁷ Educational institutions have quickly recognized

the potential of this new innovation. "In a single year, the number of public schools with computers has more than doubled."⁸ A nationwide survey, conducted by the National School Boards Association, in consultation with the National Institute of Education, revealed that 96% of those school districts surveyed use microcomputers for instructional purposes. "The use of computers for instruction in the public schools is fast becoming universal, . . ."⁹ Concomitant with this increased usage of computers in education, is the increased growth of the software industry. "As recently as three years ago, software was still a cottage industry. . . This year . . . sales are expected to top \$10 billion."¹⁰

The increased use of technology in support of the educational process is not without problems. These problems are both ethical and legal in nature. Teachers are now able to duplicate, with relative ease, most commercially available software for use in the classroom. "As technology continues to create new modes of communication, the possibilities for infringement will multiply."¹¹ Thus, the immediate problem, concerning the legality of such copying practices, is that of "copyright". This is a growing concern for publishers and educators alike.

The actual extent of the copying problem is not known. "Estimates are that illegal copies account for from two to nine times the number of programs sold legally."¹² Are educators involved in the production of illegal copies of software? Allan Wittman, Chairman of the American Association of Publisher's Copyright Committee, calls copyright abuses in academe, "widespread, flagrant,

and egregious."¹³ R.S. Talab, in his article, "The Problem of Copying Computer Programs Without Breaking The Law", states; "The copying of purchased or borrowed software is happening at all levels of education."¹⁴ Daniel Brooks, a copyright attorney and author of several legal articles on copyright and computer software, is much more forceful, charging, "The only teachers who aren't copying software are the ones who don't know how."¹⁵

Why do educators engage in the making of such illegal copies? Educators argue that budget constraints prohibit them from obtaining the necessary numbers of copies for use in the classrooms, and that copies are vulnerable to damage when used by students. Teachers further argue that the classroom, as a non-profit environment, justifies such practices. While there may be some merit in this logic, the courts have not accepted it in defense of a copyright infringement. Because the courts are holding educators accountable to the copyright law; and because software producers are bringing suit to protect their investments, it is necessary that educators come to understand the copyright law and its application to educational settings. As David Wormser, Attorney to the Association of Data Processing Service Organizations (ADAPSCO), summarizes; teachers need to understand the societal impact and value of using computers. The copying of computer programs, widely practiced and accepted, is but one part of the problem.¹⁶ The International Council for Computers in Education (ICCE) in its "Policy Statement on Network and Multiple Machine Software" charge educators with the ". . . need to face the legal and ethical issues involved in copyright laws and

publisher license agreements, and to accept the responsibility for enforcing adherence to the laws and agreements."¹⁷ The ICCE further charges educators with the responsibility for ". . . educating students about the legal, ethical, and practical problems caused by the illegal use of software."¹⁸ Where should educators turn for guidance to fulfill the charges of the ICCE? The obvious answer is to the copyright law. Unfortunately, educators will find that the law is subject to judicial interpretation, and as such, contains no definitive answers.

Historically, copyright law has been vague as to what constitutes infringement by educators. The 1909 Copyright Law did not contain reference to the educational use of copyrighted works, leaving the issue to interpretation by the judiciary. "The emergence of a 'fair use' doctrine enabled the courts to broadly interpret the Copyright Law, even though in many cases the courts had not been consistent in defining what constitutes 'fair use' of a copyrighted work."¹⁹ A split decision (4-4) and the absence of a written opinion by the Supreme Court in the landmark copyright infringement case, Williams and Wilkins Company v. United States,²⁰ highlighted the confusion over the law. The Congress of the United States, after years of deliberation, succeeded in passing a new copyright law; the Copyright Act of 1976.²¹ During its deliberations, Congress recognized the limitations of the pending 1976 Act in dealing with the new technology of photocopying and computers. To resolve this situation, Senator John L. McClellan introduced a bill calling for the establishment of a National Commission on New Technological Uses

of Copyrighted Works (CONTU).²² This commission was given three years to study and compile data, and to make recommendations. The recommendations of the commission eventually became part of the 1980 Amendments²³ to the 1976 Copyright Act.

James Russell Lowell, although writing on another topic, provides a poetic description of the ever changing state of copyright law:

The world advances, and in time outgrows
The laws that in our fathers' days were best;
And doubtless after us, some purer scheme
Will be shaped out by wiser men than we,²⁴
Made wiser by the steady growth of truth.

While the law struggles to maintain the constitutional balance between the rights of the authors to the fruits of their labors and the rights of the general public to the access of information, educators find themselves caught in the proverbial middle. This current state of confusion and uncertainty for educators results, in part, from a paucity of case law dealing with the doctrine of "fair use" in an educational context. To date, only three cases involving teachers and infringement have been adjudicated before the federal bench. Educators are unsure of their legal standing under "fair use" and are concerned by the philosophical and ethical problems which this ambiguity presents to a profession that is supposed to set a good example for the nation's youth.²⁵ Considering the fact that the Congress of the United States and the Supreme Court has had

difficulty determining what constitutes infringement and fair use of a copyrighted work, it seems unlikely that educators would be able to do so. "In terms of the copyright laws. . . the major obstacle appears not to be a willingness to disobey the laws as much as it is a lack of knowledge of them."²⁶ Phillip Ennis, author of Copying and Duplicating Practices in American Education, holds that, "The extent of the educators' opinions about copyright law, old and new, is ambivalent where it is not confused."²⁷ The initial problem for educators then is not so much one of willfully violating copyright law, as it is a matter of understanding the concept of copyright and how it applies to the use of copyrighted materials.²⁸

Traditionally, teachers have not been exposed to the copyright laws. While volumes of literature exist on the topic, much is written in legal terminology and is often conflicting or confusing. As a consequence, teachers enter the classroom with little, or no, understanding of the copyright law. In conjunction with this ignorance, technology places in their hands, the ease of duplicating almost any software program. This lack of understanding and the ability to duplicate copyrighted materials creates a situation in which expensive litigation becomes a real possibility. Familiarity with copyright, not ignorance of the law, is a teacher's best protection.

Statement of the Problem

One problem, fundamental to all educators, is the lack of a working knowledge of copyright law for use in the classroom. . . In no other field of law. . .are interpretations more broad and vague, and sometimes more difficult to understand, than the implementation that the courts have sought to give on the copyright statute. Where does this leave the teacher, who in this field, lacks expertise?²⁹

Because the means to duplicate computer software is a relatively new technological tool in the hands of educators, few, if any, legal decisions exist on what constitutes illegal copying. The primary problem thus becomes; to review cases adjudicated in the federal courts, dealing specifically with the infringement of copyright law, by educators, and to note implications of these decisions to the duplication of computer software.

Purpose of the Study

The purpose of this study is to review, synthesize and document federal statutes and litigation, together with literature pertaining to copyright and the use of computer software. This is in an effort to provide educators with a conceptual framework for applying the principles of Copyright Law to the use of computer software in the educational setting.

Need for the Study

The need for this study evolves from the educators' lack of understanding of copyright laws, as they apply to the use of computer software; and, the growing propensity of publishers and authors to bring action for infringement of copyrighted materials. Few educators understand the application of copyright laws to computer software.³⁰ This lack of understanding is not entirely the fault of, nor limited to, the educator. Congress is currently trying to grapple with the problem. The House Subcommittee on Copyright, Patents, and Trademarks, chaired by Wisconsin's Robert W. Kastenmeir, has doubled in size in recent years; attesting to copyrights growing legislative importance.³¹ The final determination, as to the applications of the copyright law, will emerge through court tests, but these interpretations will not be forthcoming immediately.³² The present state of confusion has not hindered publishers from bringing legal action. The National Music Publisher's Association, in 1980, brought action against Longwood College, Farmville, Virginia, for "willful and intentional copyright infringement."³³ The case did not reach the federal bench, but was resolved for \$20,000 in an out-of-court settlement. Recently, the American Publisher's Association, on behalf of several of its members, brought action against New York University (NYU) and several "copy shops" in the area for alleged copyright infringement. Sheldon E. Steinbach, General Counsel for the American Council on Education advises that

the NYU case, " sends a clear signal. . . that copyright law cannot be disregarded." ³⁴ The name of the game then, is prevention of legal problems before they occur. After-the-fact controversy involves headaches and expenses.³⁵ There is a need to review case law to assist educators to determine the limitations of the copyright law, as it is applied to the use of computer software.

Definition of Terms

The definitions listed here will be used throughout the study. Except when noted, all definitions are taken from Black's Law Dictionary, fifth edition.

Amendment - To change or modify for the better. To alter by modification, deletion, or addition.

Computer program - ". . . a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." (Public Law 96-517, Sec. 10. (a), amending Section 101 of Title 17, United States Code).

Copy - A transcript, double, imitation, or reproduction of an original writing, painting, instrument, or the like.

Copyright - The right of literary property as recognized and sanctioned by positive law. An intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions, whereby he is invested, for a limited period, with the sole and exclusive privilege of multiplying copies of the

same and publishing and selling them.

Copyright owner - ". . .with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right. (17 USC 101.)

Derivative work - ". . .a work based upon one or more pre-existing works, . . . (17 USC 101.)

Device, machine, or process - ". . . refers to one now known or later developed." (17 USC 101.)

Display - ". . . to show a copy of it, [the copyrighted work], either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." (17 USC 101.)

Educational Institution - A school, seminary, college, university, or other educational establishment, not necessarily a chartered institution.

Fair use - Privilege in other than the owner of copyright to use copyrighted material in reasonable manner without consent, notwithstanding monopoly granted to the owner.

Federal Courts - The courts of the United States as created either by Act III of the U.S. Constitution, or by Congress.

Infringement - A breaking into; a trespass or encroachment upon; a violation of law, regulation, contract or right.

Contributory infringement - The intentional aiding of one person by another in the unlawful making or selling of a patented invention; usually done by making or selling one part of the patented

invention, or one element of the combination, with the intent and purpose of so aiding.

Criminal infringement - Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain is subject to a fine and/or imprisonment.

Literary work[s] - ". . . are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied." (17 USC 101.)

Litigation - A lawsuit. Legal action, including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy. A judicial contest, a judicial controversy, a suit at law.

Performance of a work - "[t]o 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process . . ."

Public performance - "[t]o perform a work 'publicly' means: (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of

receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." (17 USC 101.)

School - An insitution or place for instruction or education.

Public schools - Schools established under the laws of the state (and usually regulated in matters of detail by the local authorities), in the various districts, counties, or towns, maintained at the public expense by taxation, and open, usually without charge, to the children of all the residents of the city, town or other district. Schools belonging to the public and established and conducted under public authority.

Software - Software can have multiple meanings. For the purposes of this paper, software equates with the term, computer program, as supra.

Statutory Law - That body of law created by acts of the legislature in contrast to law generated by judicial opinions and administrative bodies.

Shepardize - To verify current legal authority. (M.E. Cohen, "How to Find the Law", at 161.)

Teacher - One who teaches or instructs; especially one whose business or occupation is to teach others; an instructor; preceptor.

Work made for hire - ". . . is (1) a work prepared by an employee within the scope of his or her employment. . ." (17 USC 101.)

Design and Methodology

This study was conducted using a combination of historical and legal research methods.³⁶ The purpose of the historical review was to provide an overview of the history of copyright. To accomplish this the terms "copyright" and "literary property" were researched in texts and journal articles dealing with the following subjects: copyright, English common law, and early American law.

Before conducting the legal research, it was first necessary to become familiar with legal research methodology. To obtain the needed research techniques, the following guides were consulted:

How to Find the Law, M.L.Cohen, ed.

Legal Research Illustrated, J.M. Jacobstein and R.M.

Mersky.

Legal Research in a Nutshell, Morris L. Cohen.

Legislative Analysis: How to Use Statutes and Regulations,

W.P. Statsky.

Effective Legal Research, Price and Bitner.

To locate pertinent legal materials and case law, the following finding-tools were used:

American Digest System, including the Second Decennial Digest (1907-1916), to the present General Digest Ninth Series;

Federal Digest;

Modern Federal Practice Digest;

Federal Practice Digest, 2d.;
United States Supreme Court Digest;
Digest of United States Supreme Court Reports
Corpus Juris Secundum;
American Jurisprudence, 2d.
Words and Phrases;
Shepard's Citations.
Index to Legal Periodicals

The following legal sources were used to locate relevant federal legislation and case law:

United States Constitution;
United States Code;
United States Code-Annotated;
U.S. Code Service;
United States Reports;
Supreme Court Reporter;
Lawyer's Edition of the U.S. Supreme Court Reports;
American Law Reports-Federal;
Federal Supplement;
Federal Reporter;
Federal Rules Decisions;
Statutes At Large;
U.S. Code Congressional and Administrative news.

In addition, two computer research services were utilized to identify applicable case law; "Westlaw", a service of the West Publishing Company, and "Lexis", a service of The Lawyers Co-operative Publishing Company and Bancroft-Whitney Company.

Limitations of the Study

1. The historical review of copyright law was limited to the following time periods:

English Copyright Law, 1476-1774

American Copyright Law, 1790-1980

2. The study did not address any aspect of International Copyright Law.

3. The study was limited to an analysis of the legal implications of copyright, as it applied to the use of computer software, in the educational environment.

4. The study was limited to cases litigated in the federal courts, dealing with education and copyright.

5. The study did not address the subject of "Common-law Copyright".

6. The study was limited to a review of pertinent federal cases reported as of November, 1984.

7. The study did not address computer data bases, new works made by computers, or the internal functioning processes of the computer.

Organization of the Study

The study is organized into five chapters. Chapter 1 presents an overview of the problem; a statement of the problem; the purpose of the study; the need for the study; the definition of terms used in the study; the methodology used in conducting the study; the limitations of the study; and the organization of the remaining chapters.

The second chapter reviews the historical development of copyright law in England from 1476-1774 and in the United States from 1790-1930. The purpose of the review provides the reader with a historical perspective of the concept of copyright.

Chapter 3 presents a review of the copyright issue from both the educator's and publisher's viewpoints; a review of current literature in the field of copyright as it applies to the controversy; and examines the 1976 Copyright Act, as well as the 1980 Amendments.

Chapter 4 chronologically reviews selected federal court cases from 1903 to November, 1984. Concepts and principles of the law pertinent to educators are examined, as well as the varied judicial interpretations of the doctrine of "fair use".

Chapter 5 provides a general summary and a legal case review summary; the conclusions of the study; and recommendations for further research.

Notes - Chapter 1

¹ United States Constitution, Article 1, Section 8, Clause 8.

² Steven Allan, Sharon Green, Jerald Freidman, Bruce E. Harrington and Lawrence R. Johnson, "New Technology and the Law of Copyright: Reprography and Computers," 15 UCLA Law Review 938 (1968), 941.

³ Roger Needham, "Tape Recording, Photocopying, and Fair Use," ASCAP Copyright Symposium, 90 (1953), 75.

⁴ White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 19 (1903)

⁵ 1976 Copyright Act, Public Law 94-553, 90 STAT. 2541 (codified at 17 U.S.C. Copyrights).

⁶ "Education and the Copyright Law: Still An Open Issue," Fordham Law Review, 46, No. 1, Oct. 1977, 93.

⁷ Linda L. Kreicher, ed., "Copyright Protection For Computer Programs In Read Only Memory Chips," Hofstra Law Review, 11, No. 1 (Fall 1982), 330.

⁸ Bill Camarda, ed., "A School Computer Explosion", Family Computing, 2, No. 4 (Apr. 1984), 12.

⁹ National School Boards Association news release, NSBA NEWS (Virginia), 15 June 1984, 1-2.

¹⁰ William D. Marbach, William J. Cook, and Michael Rogers, "A Turn To Integrated Software", Newsweek, 5 March 1984, 90.

¹¹ "Education and the Copyright Law: Still An Open Issue," 93.

¹² Gayle Young, "Maryland Firms Agree to Pay in Computer Software

Piracy Suit", Washington Post Business Magazine, 19 March 1984, 15, passim.

¹³Stacey E. Palmer, "Publishers Sue 9 Professors: Charge Them and New York University with Copyright Infringement", The Chronicle of Higher Education, 25, No. 17 (5 Jan. 1983), 1, 26-27.

¹⁴R. S. Talab, "The Problem of Copying Computer Programs Without Breaking the Law", Instructional Innovator, 29, No. 1 (Jan. 1984)37.

¹⁵Daniel T. Brooks, "As New Technology Booms, What is 'Fair Use' of Educational Software?", NASSP Bulletin, 68, No. 469, (Feb. 1984), 68.

¹⁶Sandra H. Kirk and Christopher H. Sterling, eds., "Overcoming Impediments To New Technology: A Summary of the Third Invitational Postsecondary Educational Review Panel", 7 Dec 1983, George Washington University, Washington, D. C., 8.

¹⁷"ICCE Policy Statement on Network and Multiple Machine Software", Policy Statement of the International Council For Computers in Education, 5 Jun 1983, University of Oregon, 1.

¹⁸"ICCE Policy Statement", 1.

¹⁹Ronald Anthony Juliette, "Copyright and Fair Use As They Relate To The Educational Use of Copyrighted Materials With Guidelines For Determining the Legality of Classroom Copying Practices", Diss. Indiana University, 1977, 1-2.

²⁰Williams and Wilkins Company v. United States, 497 F. 2d 1345, 95 S. Ct. 1344.

²¹Public Law 94-583, 90 Stat. 2541.

²²National Commission on New Technological Uses of Copyrighted Works, Final Report of the National Commission on New Technological Uses of Copyrighted Works, U. S. Government Publication, No.

030-002-00143-8 ([Washington, D.C.: GPO, 1978]), 4.

²³Public Law 96-517, 94 Stat. 3028-29 (dated December 12, 1980, amending Title 17, United States Code).

²⁴Henry Varnum and Henrietta Heron, Character: A Textbook on Principles of Moral Conduct, (Ohio: Standard Publishing Co., 1926), 212.

²⁵"Education and the Copyright Law: Still An Open Issue," 93.

²⁶Juliette, 17.

²⁷Phillip Ennis, Copying and Duplicating Practices in American Education (Chicago: National Opinion Research Center, 1966), 3.

²⁸Juliette, 6.

²⁹Owen Love, "Audio-Visual Materials in Education", in Reprography and the Law (Baltimore: Port City Press, Inc., 1964).

³⁰Brooks, 63.

³¹Kirk and Sterling, eds., 2.

³²Martha R. Gore, "The Wonderful World of Copyright Confusion", Creative Computing, (August, 1980), 140.

³³Michael P. Prescott and Charles L. Gary, "Copyright In the Legal Spotlight", Music Educators Journal, 63, No. 6, (Feb. 1982), 40.

³⁴ Palmer, 26.

³⁵ Gore, 140.

³⁶ Carter V. Good and Douglas E. Scates, Methods of Research (New York: Appleton-Century-Crofts, Inc., 1954), 234, and John W. Best, Research in Education (New Jersey: Prentice-Hall, Inc., 1959), 96-99.

CHAPTER II

An Overview

This chapter presents a review of the historical development of copyright from early Rome through present-day statutory law. Emphasis is placed on the development of copyright in England, during the years from 1476 - 1774; and on the development of copyright in the United States, from 1790 through the 1980 Amendatory Act. The purpose of reviewing the historical development of copyright is to place in perspective some of the forces and events that have shaped present-day law. With this background, the reader will have a basis for understanding the complexities of protecting literary property.

THE BEGINNING

The first recorded decision regarding the ownership of literary property was handed down in 567 A.D. According to legend, Saint Columba reproduced a copy of Finnian's Psalter,

which he had borrowed from the author. Finnian complained and demanded that Saint Columba return the original, as well as, the pirated copy. The dispute was heard by King Diarmed, who settled the disagreement with a legendary proclamation issued from his bench at Terra's hall:

To every cow
her calf,
and accordingly
to every book
its copy.¹

The subject of literary property is next found in Roman times. Roman literature mentions the sale of "playrights" by dramatic authors such as Terrence. Booksellers in Rome sold copies of poems written out by slaves.² In some instances, one slave would read a popular work aloud while thousands of other slaves copied it.³ During the Renaissance, "illuminators", connected with the church, replaced the slaves and copying took on a grandiose style. Universities became involved in the production of books during the twelfth and thirteenth centuries.⁴ As books became more popular and copying more prevalent, authors became alarmed and protested the increased copying of their works.

Rights of literary property remained legally unprotected until the fifteenth century, when the introduction of the printing press to Europe made the rewards of publishing - or plagiarism - far greater than ever before. Like the earliest patents, the first known copyrights appeared in Renaissance Italy.⁵

The craft of printing was introduced in Venice in circa, 1467. City officials promoted the industry by granting printing monopolies known as "privilegii". This practice was not founded on the rights of authors, but on the theory of eminent domain and the state's right to a monopoly of such property.⁶

The rights of authors were not considered until 1486. In that year, the Venetian government granted Marc Antonio Sabellico control over his publication, Decades rerum Venetarum.⁷ This first copyright was followed by similar agreements with other writers. In 1491, Venice gave to the publicist, Peter of Ravenna, and to the publisher of his choice, the exclusive right to print and sell his Phoenix.⁸

In spite of the copyrights that had been created, Venetian presses frequently printed the works of authors without their consent and sometimes in the face of their objections. In 1544-45 . . . the Council of Ten, seeking to protect authors, issued a decree which prohibited the printing of any work unless written permission to do so from the author or his immediate heirs had been submitted to the Commissioners of the University of Padua . . . Books otherwise produced were to be seized and burned, while the infringer himself faced a month's imprisonment and a fine of one ducat for each book and author affected . . . This brief, but important measure, was probably the first general copyright law in the world.⁹

Similar provisions were enacted in other countries. Germany, in 1501, afforded protection to the works of a nun-poet who had been dead for 600 years. Beginning with the reign of Louis XII,

in "letters of the king", France forbade the unauthorized reprinting of books to which such letters were appended.¹⁰

In England, authors initially fared no better than in other countries. The copyright law in England was influenced by the Crown, the Church, the Parliament, the Courts and organized trade. Each group played an important part in shaping and changing the meaning of copyright.¹¹

Caxton and the Press

William Caxton introduced the printing press into England in 1476. This, in historical perspective, established the English trade in printing and also the beginning of the "right to copy" (copyright). For the first time people of modest income had access to printed materials. This access was to create a myriad of problems for Church and State. The demand for printed matter was such that Richard III enacted the Statute of Richard, which encouraged the importation of books. This practice resulted in production exceeding demand. As there was no popular education, there were insufficient numbers of readers, causing many printers to go bankrupt. Responding to pressures from the printers' guilds, Henry III enacted legislation stopping the importation of books.

The act provided that no persons "resident or inhabitant within this realm shall buy to sell again any printed books brought from any parts out of the King's obeisance ready bound in boards, leather or parchment."¹²

HISTORICAL EVENTS OF 1476 - 1710

Influence of the Church and Crown

During this period, the Church of England had separated from the Catholic Church in Rome. The Crown was not a stable government head. From 1476 to 1559, no less than seven monarchs ruled.¹³ Critics found a new way to disseminate their views, via the printing press. Therefore, both Church and State had a compelling interest in controlling the press.

The first privilege granted by the sovereign was to Richard Pace for a Latin sermon.¹⁴ This was followed, in 1538, by a royal proclamation of Henry VIII. This proclamation marked the beginning of a system of censorship that would last until 1694.

Henry VIII's decree began the censorship of literature challenging the authority of the Church and the King and his lords. Its preamble restated the grievance which has arisen since the laws of Richard:

. . . there hath come to this realm sithin the making of the same, a marvelous number of printed books, and daily doth; and the cause of the making of the same provision seemeth to be, for that there were but few books, and few printers within this realm at that time, which would well exercise and occupy the said science and craft of printing; nevertheless, sithen the making of the said provision, many of this realm, being the King's natural subjects, have given them so diligently to learn and exercise the said craft of printing, that at this day there be within this realm a great number cunning and expert in the said science or craft of printing, as able to exercise the said craft in all points, as any stranger in any other realm or country; and furthermore, where there be a great number of the King's subjects within this realm, which live by the craft and mystery of binding of books, and that there be a great multitude well expert in the same, yet all this notwithstanding, there are divers persons that bring from beyond the sea great plenty of printed books, not only in the Latin tongue, but also in our maternal English tongue, some bound in boards, some in leather, and some in parchment, and them sell by retail, whereby many of the King's subjects, being binders of books, and having no other faculty wherewith to get their living, be destitute of work and like to be undone, except some reformation herein be had. ¹⁵

Henry VIII was to maintain his attempts to control the press throughout his reign. Censorship was a product of the conflict between religious groups. "An Act of the Advancement of true Religion, and for the abolishing of all false Doctrines" enacted in 1542 - 1543, prohibited publication of English versions of the scriptures.¹⁶ Henry VIII's last proclamation of press control (July 8, 1546) provided that "no printer do print any manner of englishe boke, balet or plays, but he put in his name to the same,

with the name of thautour, and daye of the printe, and shall presente the fyrst cople to the mayre of the towne where he dwelleth . . ."¹⁷ Henry VIII's proclamations would have followed him in death except that Parliament passed a statute giving these proclamations the force and effect of an act of Parliament.

Edward VI ascended to the throne and "repealed all acts of Parliament dealing with religion."¹⁸ Thus the press in England was free for a few years, but it was a short-lived freedom. Edward VI returned to censorship on April 28, 1551.

The use of censorship was to take on new meaning with the ascension of the Catholic Mary. Immediately resorting to censorship, Mary's reign was not a happy one: She forced upon the English people, her husband, the Spanish King Philip; she failed in her attempt to force her religion on the nation; and she found it necessary to impose increasingly harsh restrictions on the press.

The most important act of Mary's reign - probably the most significant act in Anglo-American copyright - occurred on May 4, 1557, when Philip and Mary granted a charter to the Stationers' Company.¹⁹

The Stationer's Company

When Caxton moved his press to Westminster in 1478, his success established the need for public recognition of the craft of printing. Caxton, et al., formed a Brotherhood, known as the Craft of Stationers, not the Craft of Printers as one would expect. Booksellers at that time called themselves "stationarii". The word derives from the booksellers adopting a stationary point or booth on the street as opposed to the practice of itinerant peddlers. They were brokers; selling or renting manuscripts for high prices.²⁰

The Brotherhood tried unsuccessfully to obtain a charter in 1542. Their second attempt was fruitful, and on May 4, 1557, Philip and Mary granted the charter and the Stationers' Company was created. There is some disagreement among historians as to who initiated the charter request. To understand this debate, one need only to review the intent of each party.

The Crown's interest had not changed. The "New Learning" menaced Church and State with heresy. By knowing where and when a printing press was operated and by licensing books before they were printed, attacks upon the Church and heads of state could be prevented. The Stationers' charter provided for the suppression of seditious and heretical books, which "both in rhymes and tracts, were daily printed, renewing and spreading great and detestable

heresies against the Catholic Doctrine of the Holy Mother Church".²¹ Mary granted the charter to gain an effective agency for censorship. The chartering of the Stationers' Company created a small group, easily policed, whose own motives for seeking the charter complimented those of the Crown.

The Stationers' motives were purely capitalistic. The charter granted them an exclusive monopoly over the book trade. Authors may have owned their creations but this was a cold comfort at best. If they wished to share their works with the community, they were compelled by statute and decree to sell their works to the Stationers for printing. Obviously, there was no great need to pay the authors a fair price for their work, nor were there any price controls. The Stationers totally controlled the book trade. In return, they agreed to print only those works which were politically acceptable.

The charter incorporated 97 named individuals as an official society of the art of a stationer. No person, not a member of this society, was permitted to practice the art of printing. Three principal groups could be identified within the company; bookbinders, booksellers, and printers. The structure of the company consisted of a Master, an upper and lower Warden and the company clerks. These officers comprised the Court of Assistants

which had jurisdiction over the stationers. Members could not carry disputes to any other court before having appealed to the Court of Assistants. The Master and the Wardens of the society were empowered by statute to search, seize, and burn all prohibited books, and to imprison any person found exercising the art of printing without authority; a duty they exercised with despotic zeal. Years later, the U. S. Supreme Court, in Holmes v. Hurst, would say of the Stationers' Company: "They were particularly ruthless and exercised the power of search, confiscation, and imprisonment without interruption from Parliament."²²

The concept of copyright during the era of the Stationers' Company was the publishers' right to copy. This right was granted in perpetuity; the only requirement being the work be registered in the Company Registers. The author's rights were not recognized. If he wanted his work published, the author must sell the copyright, established by common-law, to the publisher. On the death of the copyright owner, the copyright was at the disposal of the Company. Usually it was reassigned to the widow, if one existed, and was hers to keep until she remarried. If she remarried within the company, the copyright became the property of her new husband. If she remarried outside the company, the copyright became the property of the company to dispose of as they saw fit.²³

The company was able to develop this concept of copyright because the government remained indifferent to the private ownership of copyright. Their primary interest was in censorship.

Entrance of a claim into the Register was necessary to ensure the protection of the copyright. Once registered, other members of the company recognized the right of copy and refrained from printing unauthorized copies.

The Star Chamber's Influence

The power of the Stationers' Company was further strengthened by a series of Star Chamber Decrees beginning in 1566. The Court of the Star Chamber, officially known as "The Lords of the Council sitting in the Star Chamber", was so named because its sessions were held in a "starred chamber" at Westminster. Primarily a court of criminal jurisdiction; one of its functions was the enforcement of royal proclamations and adjudications of their bench.²⁴

The Stationers' monopoly could not stop secret presses from operating. The lucrative printing business, combined with the Reformation Movement, were far too powerful to be contained.

The Star Chamber Decree of 1586 was issued to control the rebellious likes of Robert Waldegrave, printing under the alias of Martin Marprelate. Waldegrave published articles promoting

puritanism. John Whitgift, Archbishop of Canterbury, issued the 1586 decree in an attempt to stem the puritan tide. The aim of the decree was to prevent the publication of dangerous books. A relatively short decree, consisting of only nine items, it limited the number of printing presses in operation, provided licensing requirements, empowered wardens to seize prohibited materials and unauthorized presses, and provided a penalty of three months imprisonment for violation of the decree. The theory behind the decree was valid: By controlling the number of presses in operation and seizing prohibited materials, the threat to Church and State was eliminated.²⁵

The members of the Stationers' Company found their powers, as created in the 1586 decree, to be insufficient. They, therefore, petitioned for expanded authority. On July 11, 1637, the Star Chamber issued its most famous and harsh decree. Modeled after the Spanish decree of 1550, issued by Philip II of Spain, the English decree was designed to end heresy. It ordered:

IMPRIMIS, That no person or persons whatsoever shall presume to print or cause to be printed, either in the parts beyond the Seas, or in this Realme, or other Majesties Dominions, any seditious, scismaticall, or offensive Bookes or Pamphlets, to the scandall of Religion, of the Church, or the Government, of Governours of the Church of State, of Commonwealth, or of any Corporation, or particular person or persons whatsoever, . . . ²⁶

This decree, issued during the reign of the Stuart Kings, provided severe penalties. Leaving out the penalties of burning

alive and burying alive contained in the original Spanish version, the decree contained penalties for public whippings and pillory. These penalties were as much as the King's men and the Church thought the English temper would tolerate.

The Long Parliament

The Star Chamber Decree of 1637 was short lived as the Long Parliament abolished the Chamber in 1641. It was significant, however, in that it made censorship a political instrument of despotic government.²⁷

The abolishment of the Star Chamber did not end the attempts at censorship. The Long Parliament issued a series of orders for the regulation of printing. The first such order was issued in January 1642.

It is ordered that the Master and the Wardens of the Company of Stationers shall be required to take especiall Order, that the Printers doe neither print, nor reprint any thing without the name and consent of the Author: And that if any Printer shall notwithstanding print or reprint any thins without the consent and name of the Author, that he shall then be proceeded against, as both Printer and Author thereof, and their names to be certified to this House.²⁸

This ordinance contains one of the first legal references to the author's rights; the need for the consent of the author. However, it probably was not issued for the benefit of the author, but for the purpose of identifying him for punishment should the material prove offensive to Church or State.

In June 1643, the Long Parliament issued its most famous order. Confessing that the Ordinance of 1637 had failed to suppress abuses, even though the Stationers' Company had diligently tried to put it into effect, Parliament issued the Ordinance of 1643. Its preamble provided:

WHEREAS divers good Orders have bin lately made by both Houses of Parliament, for suppressing the great late abuses and frequent disorders in Printing many, false, forged, scandalous, seditious, libellous, and unlicensed Papers, Pamphlets, and Books to the great defamation of Religion and government. Which orders (notwithstanding the diligence of the Company of Stationers, to put them in full execution) have taken little or no effect. ²⁹

The Ordinance re-established the rights of the members of the Stationers' Company and enacted:

. . . that no person or persons shall hereafter print, or cause to be reprinted any Book or Books, or part of Book, or Books heretofore allowed of and granted to the said Company of Stationers for their relief and maintenance of their poore, without the licence of consent of the Master, Wardens and Assistants of the said Company; Nor any Book or Books lawfully licenced and entered in the Register of the said Company for any particular member thereof, without the licence and consent of the owner or owners thereof. ³⁰

The Ordinance of 1643 was challenged less than a year after its passage. John Milton experienced an unhappy marriage which resulted in his wife deserting him. To express his feelings, Milton wrote, "The Doctrine and Discipline of Divorce; Restored to the good of both Sexes, from the Bondage of Canon Law, and Other Mistakes." Milton published this work without benefit of license

registration. The Stationers filed a complaint against Milton and the matter came before the House of Lords in 1644. During the course of this hearing, Milton gave an eloquent defense for freedom of the press and the freedom for man to write what he wants. "Areopagitica; a Speech of John Miltons for the Liberty of Unlicensed Printing to the Parliament of England", was published on November 25, 1644; also unlicensed and unregistered. The effect of Milton's pamphlet was so profound that it negated Parliament punishing him.

The concept of an author's right to copyright had begun. The inclusion of the proviso demanding the author give his consent prior to publication of the work was a major step. Milton's position, as stated in Areopagitica, gave weight to the author's argument. Milton was to take a second important step for authors with his famous work, Paradise Lost.

Milton entered into an agreement with Samual Simmons, a printer, to publish Paradise Lost. This contract was significant because Milton was to be paid for his creation. Signed on April 27, 1667, the contract provided a down payment of 5 francs, and 5 francs more after the sale of the first edition consisting of 1300 copies. Two additional sums of 5 francs each were promised after the sale of two more editions of the same size,

respectfully. As it turned out, the publisher struck a bad deal. Milton received payment of 10 francs and, following his death, his widow received 8 francs for transferring her rights to the publisher. The publisher's investment of 18 francs took him 7 years and 5 new title pages to recoup.³¹

Authors would undergo another 50 years of struggle before taking the next significant step. Censorship had a negative effect on authors and the book trade in general. Type being used in Scotland was far superior to that being used in England. Imported work was of a superior quality. Typographical carelessness was commonplace. Printers, during the reign of Charles I, printed an edition of the Bible in which the word "not" was omitted from the Seventh Commandment; translating a negative command into the positive. In the Bible of 1653, printers permitted to pass uncorrected, "Know ye not that the UNrighteous shall inherit the Kingdom of God".³²

The early 1700s saw the appearance of subscriptions to published books. Two editions were issued; one for the nobility, which commanded a high price, and one of a lesser quality and price for the public. The subscription business flourished. Authors such as Dryden and Pope made good livings, while other authors found subscriptions distasteful; a kind of patronage.

In 1690, John Locke wrote, "Two Treatises on Civil Government". In his work, Locke postulated the theory of an intellectual property right in the author. The theory maintained that the author's rights were not created by law but existed in the legal consciousness of man. Copyright was a right growing out of natural law.³³

Locke's argument found fruitful ground in England at the turn of the century. The book trade found itself in a chaotic situation. The Stationers' power had been diminished by Civil War and the decline in the use of censorship by the government. The artificially high prices created by the booksellers' monopoly had created ill feelings with the public. George Wither summarizes those feelings in his work "The Scholler's Purgatory". Wither wrote of the bookseller: "For many of our moderne booksellers are but needlesse excrements, or rather vermine . . ." ³⁴ Cognizant of public feelings, the House of Commons refused to renew the Stationers' privileges. A vacuum followed and the market was flooded with pirated copies of books.

Following the expiration of the Licensing Act of 1694, there followed numerous attempts to enact legislation to regulate the printing trade: All to no avail. Chaos ensued and lasted until the passage of the Statute of Anne in 1710.

The Statute of Anne

Historians credit the likes of Swift, Addison, and Steele with the rough proposal that would eventually be enacted as an "Act for the Encouragement of learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies During the Times Therein Mentioned".³⁵ Enacted when Anne was Queen of England, the legislation would become famous as the Statute of Anne.

For the first time, legal recognition was given to the position of the author. Copyright was now his sole right. The intension of the statute was clearly to end the "permanent copyright", which had existed for the previous 150 years and the "right" belonging to the Stationers who had works registered in the Registers of the Stationers' Company in London at that time.³⁶

The preamble to the act illustrated the thoughts of the day:

. . . printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing . . . books and other writings, without the consent of the authors or proprietors of such books and writings to their very great detriment and too often to the ruin of them and their families.³⁷

The object of the act was to prevent "such practices for the future, and for the encouragement of learned men to compose and write useful books."³⁸

The provisions of the Statute of Anne limited rights in time but broadened these rights in terms of those eligible to own them. Anyone owning an existing copyright retained that right for a period of 21 years, after which time the work belonged to the public. New copyrights could be obtained for a period of 14 years, with the author, if living, being able to renew his rights for an additional 14 years.

Anyone could now obtain copyright, and if the Stationers' Company refused to register the copyright in its registers, copyright could be obtained by advertising in recognized, official publications.

While authors had made significant progress, they had not attained Nirvana. Authors were still not in an equal position with the booksellers, either economically or in the power to trade. The booksellers still controlled the trade.

In the 18th century, the power of the book trade passed from the hands of the Stationers' Company into the hands of a few booksellers known as the "Conger". The Conger controlled the book trade by obtaining a monopoly on copyrights. This group strictly regulated the sale and transfer of these copyrights. An understanding soon developed among the members that they were not to interfere with each others lapsed copyrights. The Conger maintained control over the authors by refusing to publish their works unless the author transferred

the copyright to them. The Society for the Encouragement of Learning was founded in May 1736, to oppose the Conger's control over publication. Thus began the famous battle of the booksellers.

The origin of the conflict was found in the differing ideas of copyright. The principal weapon of the booksellers was the idea of a common-law copyright which existed in perpetuity. This copyright was a natural right of the author, perpetual in nature, and could be conveyed to the bookseller; thereby circumventing the 21 year limitation imposed by the Statute of Anne. The author's argument advanced the idea that copyright could only be conveyed by statute, i.e., the Statute of Anne. Since this statute contained a time limit, copyright would expire, thereby preventing the booksellers from maintaining their monopoly.

English Judiciary - Statute of Anne

Several lower court decisions were rendered in favor of the booksellers claim to a perpetual copyright. In 1735, an injunction was granted restraining publication of "The Whole Duty of Man," first published in 1657. Also, Lord Hardwicke petitioned for, and was granted, an injunction restraining publication of Paradise Lost.

The question would remain at court for approximately 50 years before being resolved. In 1767, Andrew Miller, a bookseller, brought action in the Court of King's Bench, against Robert Taylor for printing James Thomson's The Seasons. Miller had purchased the work from Thomson in 1729, and had registered his claim in the Stationers' Register. The period of protection granted by the Statute of Anne had expired. Two legal questions were involved in Miller v. Taylor:

- Did the author of a book have a copyright in common-law after publication?

- If so, was this common-law right taken away by the Statute of Anne?

The issues of the case were stated by Mr. Justice Willes:

If the copy of the book belonged to the author, there is no doubt but that he might transfer it to the plaintiff. And if the plaintiff, by the transfer, is to become the proprietor of the copy, there is as little doubt that the defendant has done him an injury, and violated his right: . . . But the term of years secured by 8 Ann. c. 19, is expired. Therefore the author's title to the copy depends on two questions - 1st. Whether the copy of a book, or literary composition, belongs to the author, by the common-law: 2nd. Whether the common-law right of authors to the copies of their own works is taken away by 8 Ann. c. 19. 39

The way in which the issue was presented made it necessary that judges treat copyright as essentially and fundamentally a right of the author.

The Court answered the first question in the affirmative, reasoning that a man has a right to the rewards of his labor and that a man has a right to protect his fame. These rights, stated the Court, exist before and after publication. The second issue was resolved in favor of the booksellers. Statutory law did not replace the common-law right, therefore, the booksellers could obtain copyright and hold it for perpetuity. The Statute of Anne had been circumvented. Taylor attempted to bring a writ of error but was "nonprocessed" by the Court.

Miller v. Taylor is an important case in English copyright law for several reasons. It represents the first case in which the problem of the meaning of copyright was judicially defined and, because the Court was concerned with the author's rights, it is natural, after this case, to think of copyright as an author's right.

The question in Miller v. Taylor would come before the courts again in Donaldson v. Beckett. Thomas Beckett purchased the copyrights of several poems by James Thomson from Miller's estate in 1769. Under the Statute of Anne, the copyrights to these works had expired, at the latest in 1757. A Scotsman, Alexander Donaldson, claimed the works involved, free of charge.

In November 1772, Beckett received, on the authority of Miller v. Taylor, a perpetual injunction to stop Donaldson's publication of the work in question. Donaldson appealed to the House of Lords.

Donaldson argued that the author's common-law right to the sole printing, publishing, and vending of his work was taken away and replaced by statutory law, i.e., The Statute of Anne. Thomson countered with the argument that his work was protected by common-law copyright, whose protection was perpetual.

The case was adjudicated by the House of Lords in 1774. The House of Lords was the supreme judicial body of Great Britain at that time. Etiquette may have dictated the decision in this instance. Lord Mansfield, an eminent jurist, had declared himself in favor of perpetual rights in earlier, lower court decisions. However, it was considered bad etiquette in England, at that time, for a peer to support his own lower court decisions in the House of Lords. Lord Mansfield, always a gentleman with impeccable manners, kept silent, resulting in a victory for the other side.⁴⁰

The issues and subsequent court decisions of Donaldson v. Beckett are as follows:

1. Did an author of a book or literary composition have at common-law "the sole right of first printing and publishing the same for sale", and a right of action against someone else for doing same?

Yes. By a vote of 10 - 1.

2. If the author had such a right, did the law take it away upon publication; and could any person, thereafter, be free to reprint and sell the work?

No. By a vote of 7 - 4.

3. Assuming the right of common-law, was it taken away by the Statute of Anne, and is the author limited to the terms and conditions of that Statute for remedy?

Yes. By a vote of 6 - 5.

4. Does an author or any of his assign have sole rights to printing and publishing of same in perpetuity by common-law?

Yes. By a vote of 7 - 4.

5. Was this right restrained or taken away by the Statute of Anne?

Yes. By a vote of 6 - 5.⁴¹

The Donaldson decision was widely accepted. The only exceptions were a few monopolists who had invested large sums of money, based on the Miller decision, in the purchasing of old copyrights not protected by statute. The monopolist claimed

economic ruin and brought a bill before the House of Commons seeking relief. This bill met much opposition, both inside and outside of Parliament. The opposition submitted counter petitions claiming only a few of the booksellers were actually affected by the Donaldson decision. Mr. Dempster in the House of Commons charged, during deliberations on the bill, that "this bill was not meant to restore the law concerning copyright as it formerly stood, but as the individual booksellers of London thought it stood; . . ." ⁴¹ In spite of strong opposition, the bill passed the House of Commons and was sent to the House of Lords, where it again met with bitter opposition.

Lord Denbigh stated, "the very principle of the bill was totally inadmissible, and that it was not necessary to call witnesses or to make any inquiry into a bill that so violated the rights of individuals, and affronted that House". ⁴²

The Lord Chancellor said, "the booksellers never could imagine that they had a common-law right, . . . that the monopoly was supported among them by oppression and combination, and that there were none of their allegations nor any part of the bill which required further inquiry". ⁴³ Following such strong opposition, the bill was rejected.

Late in the 18th Century, the Battle of the Booksellers ended. Copyright ceased to be a right of the publisher and had become an author's right. It was thus received into the new American nation a few years later.⁴⁴

Early American Copyright Legislation

Initially, the American Colonies, being British possessions, were controlled by British copyright law. Following the Revolution, general copyright laws were nonexistent. Further, the Articles of Confederation did not address the issue. A small group of American writers launched the initial copyright movement. These authors, while seeking protection for their own works, convinced America that she would never boast her own literature until she protected her writers from piracy. Then, and only then, could America hold up her head among the other great civilizations of the world.⁴⁵ The importance of an author's right to his property was indicated in a letter written by Thomas Paine; "The state of literature in America must one day become a subject of legislative consideration. Hitherto it hath been a disinterested volunteer in the service of the Revolution and no man thought of profit; but when peace shall give time and opportunity for study, the country will deprive itself of the honour and service of letters, and made to prevent depredation on literary property."⁴⁶

Copyright was the subject of extensive litigation as soon as the new nation was founded. Considering the absence of an author class, this was unusual activity, and is a remarkable tribute to the intellectual qualities of the new Americans. Perhaps the "best" measure of the intellectual ferment which characterized the young United States.⁴⁷

Four stages are distinguishable in the early development of copyright in the United States:

- State copyright statutes
- Constitutional provision
- Federal Copyright Act of 1790
- Wheaton v. Peters (1834)

State Copyright Laws

The first copyright laws in the new nation were enacted by the individual states, as the nation was not yet united under a single government. The Constitutional Convention convened in May of 1787, for the purpose of forming a government and establishing a body of laws.

The Continental Congress formed a committee to study the need for copyright legislation. James Madison, a member of this committee, recognized the need to offer protection to America's authors. Madison used his considerable influence to move the

matter from committee to Congress for action.⁴⁸ On May 2, 1783, the Continental Congress passed a resolution "recommending to the several States to secure to the Authors or Publishers of New Books, the Copyright of such books".⁴⁹ The resolution closely followed the Statute of Anne. It recommended to the Original States, that the States should pass laws which granted copyright to authors and publishers for a "certain time not less than fourteen years, with a similar renewal term for authors, if they shall survive the term first mentioned". This double term of protection was copied directly from the British statute then in force, the Act of 1709. The right secured was the "right of printing, publishing, and vending".⁵⁰

Three states, Connecticut, Massachusetts, and Maryland, already had existing legislation at the time of the Continental Congress' Resolution. The remaining states, with the exception of Delaware, complied with the wishes of the Congress and enacted copyright legislation. The State acts fell into two broad categories; those patterned after English law; Maryland, New Jersey, Pennsylvania, and North Carolina; and those that were not; Massachusetts, New Hampshire, Rhode Island and Virginia.⁵¹

The first state to enact copyright legislation was Connecticut in January 1783. As noted earlier, this legislative action occurred prior to the resolution of the Continental Congress. The

Connecticut statute was the result of the efforts of Dr. Noah Webster, who was seeking protection for his new work, A Grammatical Institute of the English Language.⁵² Webster made many journeys to the other state capitals to encourage passage of copyright legislation. His arguments enabled the legislators to see a need and a value for copyright protection. Dr. Webster was influential in the passage of copyright legislation in twelve of the thirteen states, and became known as the Father of State Copyright Laws.⁵³

The State copyright laws differed from each other in some manner or form. Some closely followed the Statute of Anne; in some the terms of protection differed; some granted reciprocity with each other and some others did not. These differences occurred because each state had dissimilar backgrounds in religion, politics, social-economics, and national origins. The dominant idea of copyright under the state statutes was that of an author's right. The states must have been aware of a choice between copyright as a publisher's right or the right of an author. Both the Statute of Anne and the resolution of the Continental Congress dealt with securing copyrights to authors OR publishers. With the exceptions of South Carolina and Virginia, not one state statute provided copyright protection to the purchaser of a copy, or publisher.⁵⁴

The purpose of copyright, to secure profits to the authors; the reason for its existence, to encourage learning; and the legal theory on which it is based, i.e., the natural rights of authors; can be found in the preambles⁵⁵ of the states acts, listed in an Appendix to this paper.

The state copyright laws offered the only protection to authors in the early years of the Republic. As each succeeding state passed a law on the subject of copyright, some added provisions of reciprocity with the other states which had similar legislation; but authors who desired a national reputation found it best to secure copyright protection for their works in each individual state. A chronological review of the state statutes reveals some of the differences authors had to contend with.

In January 1783, Connecticut became the first state to enact copyright legislation. Protection was offered for a period of 14 years, with renewal available for a like term. Registration was required. The act contained provisions for price controls and a penalty for infringement. Works which were "prophane, treasonable, defamatory, or injurious to government, morals or religion" were excluded from protection.⁵⁶

Massachusetts followed on March 17, 1783, by enacting legislation granting the author exclusive property to his work; if the name of the author was printed in the published work. The term of protection was 21 years from the date of publication. A penalty of 5 to 3,000 pounds could be extracted from anyone printing, publishing, or selling a copyrighted work without the permission of the author. Two copies of the copyrighted book had to be given to "the library of the University of Cambridge."⁵⁷

On April 21, 1783, Maryland enacted legislation giving an author sole liberty of printing or reprinting his works for 14 years. The term of protection was renewed automatically, if the author was still living at the end of the first term. The act provided a penalty of two pence for every sheet of the work in an offenders custody, if the work was registered.⁵⁸

New Jersey passed legislation on May 27, 1783, by which protection was given for a period of 14 years, with a renewal period of another 14 years available if the author was still living. Registration was required and a penalty clause included.⁵⁹

New Hampshire essentially copied the Massachusetts Act. Passed on November 7, 1783, the differences were: terms of protection, 21 years; amount of penalty, from 5 to 1,000 pounds; and omission of the requirement to furnish copies of the work to the University of Cambridge.⁶⁰

The Rhode Island Act, passed in December 1783, was identical to the New Hampshire Act.⁶¹

A month later Pennsylvania enacted legislation distinguished by its duplication of the language in the Statute of Anne. Pennsylvania's Act contained similar provisions as contained in the Maryland Act.⁶²

On March 26, 1784, South Carolina passed the longest and most comprehensive act of all the state acts. Protection was offered for 14 years with the usual renewal term. Infringers were required to submit offending works to the proprietor of the Copyright "who shall forthwith damask and make waste paper of them". A penalty of one shilling per sheet could be assessed; half of the money going to the state and the other half to the person bringing suit. Registration was required and price control provisions were included. The act was not to be construed as prohibiting importation of books in foreign languages printed beyond the sea. "Inventors of useful machines" were given like exclusive privileges for their works".⁶³

Virginia's Act was passed on October 17, 1785. Copyright protection was provided for 21 years for the "printing and reprinting" of any book or pamphlet. Registration was required with "the clerk of the council". The act provided penalties "double the value of all the infringing copies".⁶⁴

North Carolina ratified a somewhat diverse act on November 19, 1785. The act gave an author, his heirs or assigns, the sole liberty of printing, publishing, and vending the work for a period of 14 years. There was however, no renewal term. No protection was afforded authors of "books, maps, or charts which may be dangerous to civil liberty, or to the peace of morals of society". A penalty of double the value of the infringing

articles plus forfeiture was included. As with South Carolina's Act, one-half of the money went to the state and the other half to the person suing.⁶⁵

The last two states to enact legislation were Georgia, on February 3, 1786;⁶⁶ and New York, on April 29, 1786.⁶⁷ Both of these states essentially copied the Statute of Connecticut.

Delaware was the only state which failed to enact a copyright law.

Constitutional Provision

Enactment of legislation by the States was insufficient to handle the copyright problem. The state statutes varied in procedures, offered no protection until all states had enacted legislation, and did not cover residents from other states. The country looked to the Continental Congress to meet the existing need for uniformity. James Madison, writing in No. 43 of the Federalist Papers, summarized the situation: "The States cannot separately make effectual provision for copyright." There was good cause to include copyright as a matter for the delegates consideration.

On August 18, 1787, delegates James Madison and Charles Pinckney submitted lists of powers they felt would be proper for the general legislature. Madison's list included 3 powers of

particular interest to copyright: "To secure to literary authors their copyrights for a limited time. To establish a university. To encourage, by premiums and provisions, the advancement of useful knowledge and discoveries."⁶⁸ Pinckney advocated the following powers: "To establish seminaries for the promotion of literature, and the arts and sciences . . . To grant patents for useful inventions. To secure to authors the exclusive rights for a limited time."⁶⁹ Madison's and Pinckney's proposals were referred to the appropriate committee for study and recommendations.

On September 5, 1787, two weeks short of adjournment of the Continental Congress, David Brearly of New Jersey, offered five suggested Constitutional Amendments, regarding the powers of the future government. The first four amendments came as no surprise, as they expanded, restricted, or in some way modified, powers already under consideration. This was not the case with the fifth proposal. This amendment would create a new Federal power designed to protect the works of authors and inventors. Brearly's fifth proposal was accepted without debate and became the eighth clause of Article I, Section 8, of the United States Constitution.

The Congress shall have 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 . . . To make all laws which shall be necessary and proper for carrying into Execution the Foregoing Powers . . . ⁷⁰

The Constitution was ratified on September 17, 1787, and became the supreme law of the new nation. Later, James Madison would defend the Constitutional copyright clause:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The public good fully coincides with the claims of the individual. The States cannot separately make effectual provision . . . and most of them have anticipated the decision of this point by laws passed at the instance of Congress. ⁷¹

Copyright Act of 1790

The First Congress convened and was asked to deal with the copyright issue in its first session. On April 15, 1789, David Ramsey of South Carolina presented a petition to the House of Representatives stating that he wrote and published, at great expense of time and money, a book entitled, The History of the Revolution of South Carolina from a British Province to an Independent State. Ramsey prayed for a law securing to the petitioner, his heirs and assigns for a certain term of years, the sole and exclusive right of vending and disposing of the

book within the United States. The House of Representatives sent the petition to committee on April 20 with orders "that a bill or bills be brought in, making a general provision for securing to authors and inventors the exclusive right of their respective writings and discoveries, . . ." ⁷² On June 23, 1789, Representative Benjamin Huntington from Connecticut, reported from committee and introduced H. R. Bill No. 10; "A bill to promote the progress of science and useful arts, by securing to authors and inventors the exclusive right to their respective writings and discoveries." ⁷³ H. R. Bill No. 10 was then referred to a committee of the whole House. A series of postponements followed and action on the bill was delayed until the next session of Congress.

President Washington addressed the second session and indicated his support for federal legislation dealing with copyright. ". . . Nor am I less persuaded that you will agree with me in opinion, that there is nothing which can better deserve your patronage than the promotion of science and literature." ⁷⁴ Congress did not respond to President Washington's request immediately, but chose to deal with new business before the House. On January 25, 1790, Mr. Burke, Representative from South Carolina, moved that a committee be appointed to bring in a copyright bill. His remarks are recorded in the "Annals of Congress", Vol. I, page 1080:

. . . A bill of some consequence was brought forward at the last session, which had been left in an unfinished state; and as the House seemed inclined to direct all such business to commence anew, he would beg leave to call upon them to appoint a committee for the purpose of securing literary property. Such a bill was very much wanted, as several gentlemen had lately published the fruits of their industry and application, and were every hour in danger of having them surreptitiously printed. He believed this was no unfounded surmise, for he had been informed that it had taken place in some instances already; he would mention one of them: Mr. Morse had published an American geography, illustrated with two sheet maps of the Southern and Northern States; these had been surreptitiously copied, and annexed to another publication, since the business was brought before the House at the last session; and the same gentleman is under apprehension that the whole work will be reprinted without his consent, unless a law was speedily passed to secure to him his copyright.

It was ordered that a committee be appointed to prepare and submit a bill making a general provision for securing to authors and inventors the exclusive right to their respective writings and discoveries. The pending legislation was revised and amended several times before winning House approval on April 30, 1790. "An act for the encouragement of learning, by securing the copies of maps, charts, books and other writings to the authors and proprietors of such copies, during the times therein mentioned," was sent to the Senate for their concurrence.

The Senate passed the bill, with amendments, on May 14, 1790, and sent the bill back to the House for its concurrence with the amendments. The House concurred and the bill was sent to the President for his approbation.

On May 31, 1790, a message was received from the President of the United States by Mr. Lear, his secretary, notifying that the President approved of the act, entitled, "An act for the encouragement of learning by securing to the authors and proprietors of such copies, during the times therein mentioned", and has this day affixed his signature thereto.⁷⁵

The 1790 Copyright Act (1 Stat. 124) was the tenth piece of legislation passed by the First Congress. This first federal copyright statute, modeled after the Statute of Anne, was relatively short; consisting of 7 sections.

A copy of the Act may be found in the appendix section of this study. A brief description of each section follows:

Section 1 provided for two copyrights; one for maps, books, and charts already in print in the United States; and one for maps, books, and charts to be printed or published. For those works already in print, protection was extended to the author, being a citizen of the United States, and who had not transferred the copyright, their assigns, and anyone who had purchased the copyright. For those works to be printed or published, protection was extended to the author, being a citizen or resident of the United States, and his executors, administrators or assigns. The term of protection for both types of works was 14 years with a like period of renewal.

Section 2 listed the purpose of copyright as a means to protect printed works from piracy. Three methods of infringing copyrighted works were included: 1) to print, reprint, or publish a copyrighted work, 2) to import copies of copyrighted works, and 3) to sell a work which infringed a copyright, with the knowledge that the work was an infringing copy. None of these actions were unlawful if the consent of the author or proprietor was obtained in writing, "signed in the presence of two or more credible witnesses."

Section 3 established the method for obtaining a copyright. A copy of the work had to be deposited "in the clerk's office of the district court where the author or proprietor shall reside". Within two months, a copy of the record was to be published "in one or more of the newspapers published in the United States, for the space of four weeks."

Section 4 required the owner of the copyright to deliver a copy of the work to the Secretary of State, within six months after publication.

Section 5 permitted the pirating of foreign works, "That nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting, or publishing within the United States, of any map, chart, book, or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or placed without the jurisdiction of the United States".

Section 6 provided protection for manuscripts.

Section 7 allowed a defendant to "plead the general issue, and give the special matter in evidence" in any action under the statute.

The 1790 Act established copyright as a statutory privilege, granted at the will of the government. This was a complete reversal from the state statutes, which recognized the natural rights of authors. This change from a natural right to a statutory right, occurred in a short time. The state of New York had enacted its legislation only four years before the Federal Act. This change is even more remarkable if one considers the time period in which the change occurred. This was a time of natural rights; the Rights of Man, the Declaration of Independence, and the Bill of Rights. The Federal Act represented a complete antithesis to all of the above. Why such an abrupt change in such a short time? Historians have pondered this question, and have explained it best as a gross confusion of ideas, resulting in a significant reversal of ideology.⁷⁶

The 1790 Act was the subject of numerous amendments during the 19th Century, being amended or revised approximately thirty times.

Copyright Legislation in the 1800's

During the 19th Century, a number of copyright statutes were enacted. When taken as a whole, these enactments demonstrated three trends: 1) the subject matter afforded copyright protection was gradually enlarged from books to works of the fine arts, 2) the maximum term of copyright protection was extended from 28 to 42 years, and 3) the scope of protection was broadened.⁷⁷

Selected amendments and revisions, in chronological order, included:

1802 - amendment required copyright information to be included on the title page, or on the page immediately following the title page, of all copyrighted works. Protection was extended to prints, i.e., designs, engraving, and etchings.

1831 - act extended copyright protection to musical productions, and contained language which limited the benefits of the act to American authors only. The act extended the original term of protection to 28 years with a 14 year renewal. This began a trend towards lengthening the term of copyright protection, which reflected the fact that published works were profitable to authors for longer periods of time.

1834 - copyright claims could be recorded in the office where the original copyright was recorded and deposited.

1846 - legislation required two copies of the copyrighted work; one copy for the Library of Congress and one copy for the Smithsonian Institution.

1856 - granted performance rights to dramatists, extending copyright protection to the public performance of dramas.

1861 - provided that cases involving a question of copyright, regardless of amount, could be appealed to the United States Supreme Court.

1865 - extended protection to photographs.

1870 - protection was extended to works of fine arts, i.e., paintings, statues, chromos, models, and designs. The Copyright Office was established within the Library of Congress. Two copies of all copyrighted works were required to be deposited with the Register of Copyrights.

1874 - specified the details of the copyright notice which appeared in all copyrighted works. The notice had to include the word "copyright", the date, and the name of the copyright owner.

1891 - the Chase Act, as this legislation became known, contained two significant additions to copyright law. Congress authorized copyright protection for works of foreign authors whose countries granted similar protection to American authors. American publishers had been freely pirating the works of Charles Dickens and other foreign authors. This practice, complained

American authors, led publishers to ignore the works of American authors in favor of the royalty-free foreign works. The second significant addition was the "manufacturing clause". This clause, included to pacify the American printing trade, required all copies of books, photographs, chromos, and lithographs be manufactured in the United States. Importation of copies or plates made elsewhere was prohibited, except for minor exceptions.

Thorvald Solberg, the first Register of Copyrights, and a champion of copyright reform, was aware that revision of the copyright laws was imperative. He campaigned for reform of the copyright law, in his annual reports, from 1901 through 1904. The inadequacies of the 1790 Act were best summarized by Solberg in his annual "Report on Copyright Legislation", delivered in 1903:

The copyright legislation now in force is not flexible enough to meet the needs of the present age of great material development. It is also difficult of interpretation, application, and administration. Textual contradictions and inconsistencies abound, but the interpolation of the provisions of the amendatory acts into those of the revised statutes is frequently the cause of difficulty and doubt. ⁷⁸

Solberg further advised Congress that:

. . . the subject ought to be dealt with as a whole, and not by further merely partial or temporizing amendments. The acts now in force should be replaced by one consistent statute of simple and direct phraseology, of broad and liberal principles, and framed fully to protect the rights of all literary and artistic producers and to guard the interests of other classes affected by copyright legislation. ⁷⁹

It was obvious that the 1790 Act had outlived its usefulness and a complete revision of the copyright law was in order.

The 1909 Copyright Act

Early in the 20th Century a strong movement developed for a general revision of the copyright law. Federal legislation had now assumed a definite pattern. A major emendation of copyright law had occurred approximately every forty years; 1831, 1870, and now 1909. Following a major revision, numerous amendments were enacted by Congress. The cause of these amendatory acts may be attributed to the haste with which the law was changed. However, the amendments were most probably due to the development of technology; a problem plaguing copyright since the introduction of the printing press. Amendatory acts were passed in an attempt to up-date the law in light of technological advances and judicial interpretations. Kaplan summarized the problem with the existing law:

I do not mean to reproach the draftsmen for failing to face squarely the questions of validity and infringement which are in the end insoluble. Rather I make the point that the statute, like its predecessors, leaves the development of fundamentals to the judges. Indeed the courts have had to be consulted at nearly every point, for the text of the statute has a maddeningly casual prolixity and imprecision throughout. 80

Solberg suggested the appointment of a commission to draft a new statute. His suggestion was rejected by the Chairman of the Senate Committee of Patents. However, the need for a revision of the copyright law was supported. Subsequently, the Chairman authorized the Librarian of Congress to hold a series of meetings to solicit ideas for the impending rectification. Two meetings were held; the first in May of 1905, and the second in November of that same year, producing a 57 page draft of the new copyright law.

President Theodore Roosevelt recognized the need for a complete revision of the law. In a message to Congress, Roosevelt indicated his displeasure with the current state of copyright law. Echoing the claims of Solberg, Roosevelt stated that the present laws were difficult to interpret; failed to keep up with the advances in modern reproduction techniques; did not offer protection to all works deserving it; worked a hardship on the copyright holder; were difficult to administer; and the attempts at amendatory improvements had further confused the issue. He recommended the enactment of one comprehensive act and charged Congress to give the matter prompt attention.⁸¹

A final conference was held in March 1906, which resulted in a final draft bill, dated May 19, 1906. The bill was introduced in the House as H. R. 19853 and in the Senate as

S. 6330.⁸² Hearings on the Bill began on June 6, 1906, and were conducted through December 1906. The hearings produced two major areas of contention; importation of foreign works by public libraries, and the mechanical reproduction of copyrighted music. Attempts to address these issues resulted in the bill being revised and redrafted. Both the House and Senate committees of the 59th Congress acted favorably on the bill, however, the short time period did not permit introduction of the bill to Congress prior to adjournment.

The bill was introduced to the 60th Congress in December 1907.⁸³ Hearings on the legislation resulted in seven new bills being introduced in the House between May 1908 and February 1909. Representative Currier introduced the bill which attained approval by the House on February 22, 1909, and subsequent approval by the Senate on March 1, 1909. Presidential approval was obtained on March 4, 1909. Public Law 349, the Copyright Act of 1909, became effective on July 1, 1909.

The 1909 Act was a remarkable piece of legislation. It was shaped in the sessions of the sub-committees, which made the final decisions and gave the final touches to the phrasing of the bill. At the insistence of Chairman Currier in the House, and Senator Smoot, and as a consequence of this preliminary study, the measure became law, almost without discussion or consideration by Congress itself. This represented one of the few examples of legislation by committee rather than by the Congress as such.⁸⁴

The 1909 Copyright Act contained some definite improvements over its predecessors:

- The subject matter of copyright was extended to include "all the writings of an author":

- The act exempted books of foreign origin, printed in a foreign language, from the need to be reprinted in the United States:

- The effective date of copyright protection was changed from the date of filing the title, to the date of publication:

- The act extended copyright protection to unpublished works designed for exhibition, performance, or oral delivery;

- The renewal term was doubled from 14 to 28 years, bringing the possible term of protection to 56 years:

- The certificate of registration attained the status of prima facie evidence of the facts recorded in relation to any work; and,

- The act exempted the mechanical reproduction of music on a jukebox from the owner's right to public performance.⁸⁵

Much time and effort was devoted to the wording of the act to make it easier to understand and interpret. A serious attempt was made to clarify the law and make it easier to apply and administer.

In spite of these efforts, the lack of continuity and clarity between the various sections of the bill would eventually cause problems for both copyright officials and the courts. As passed, the Act of 1909 was a compromise measure embodying the points of view of different interests, but with ambiguities and a lack of clearness in certain sections common to many legislative compromises. As such, the Act did not effect resolution to the most pressing copyright problems; international copyright protection, expanding technology, and the doctrine of "fair use".

The 1909 Law served to " . . . preserve much of the hostility to foreign authors that had dominated American copyright . . . and made it impossible for the United States to become a member of an international copyright agreement that would reciprocally provide protection for American works abroad".⁸⁶

No period in history had produced the technological changes occurring with such rapid speed as in the late 19th and early 20th Centuries. Radio had reached into the homes of millions of Americans and television, still in the womb of time, was an emerging force. The 1909 Act, framed mainly with reference to the printed word, became less and less relevant to a world filled with many new devices for copying or performing the works of creative artists.

Although the concept of "fair use" was a well established part of litigation at that time, the 1909 Act did not mention the doctrine, leaving the question to the courts. Clear direction was not forthcoming from the courts, i.e., Williams v. Wilkens, and the question was to remain unresolved.

Despite the care with which the 1909 Act was drafted, the Act was out of step with the times from its inception. The following years would see at least 27 enactments, amendments, and extensions granted by Congress to change or extend the coverage of the law.

Revision of the 1909 Copyright Act

Efforts to revise the 1909 Copyright Law appeared soon after its enactment. Beginning in 1912, only three years after the new law became effective, a series of amendments and revisions were passed which attempted to strengthen, clarify, or extend the coverage of the 1909 Act. As with the 1709 Act, there would be approximately thirty such alterations to the new law.

When the original legislation was drafted, Congress was not overly concerned with infringement due to the difficulties of making copies. Technology was in an infant stage; thus, sound recordings, motion pictures, radio, television, xerographic reproduction, and computers were just emerging or had not yet been

developed. Education remained at the textbook-blackboard stage. As technology grew, the owners of copyrighted materials became more sensitive to the violation of their rights. The following legislation is representative of the attempts to appease this heightened sensitivity:

- The Act of August 24, 1912 (37 Stat. 488), extended copyright protection to "motion picture photoplays and motion pictures other than photoplays".

- The Act of March 2, 1913 (37 Stat. 724), expanded the entry requirements to be provided by the copyright claimant for a certificate of registration.

- The Act of March 28, 1914 (38 Stat. 311), changed the "best copy" depository requirement of a foreign work by a foreign author in a foreign language from two copies to one.

- The Act of December 18, 1919 (41 Stat. 368), extended ad interim protection of a foreign published, English language work to four months.

- The Act of July 3, 1926 (44 Stat. 818), extended protection to works produced by printing processes other than lithograph or photo engraving.

Numerous attempts to revise the copyright law were submitted to Congress from 1926 through 1940. The majority of these attempts fell short of enactment because of disharmony among private interest groups. A total of seven amendments were passed between 1926 and 1941. Only one of the acts, the legislation passed on September 25, 1941 (55 Stat. 732), was significant. This act extended the time period of copyright protection until after the end of World War II.

Congress did not deal with copyright legislation while the war endured. The subject of copyright revision would, however, reappear a few years after the armistice. On July 30, 1947, Congress codified and enacted into positive law the 1909 Copyright Act as Title 17, United States Code, entitled, "Copyrights".⁸⁷ Subsequent changes in the copyright law were enacted on April 27, 1948 (62 Stat. 202); June 25, 1948 (62 Stat. 992); June 3, 1949 (63 Stat. 153); October 31, 1951 (65 Stat. 710); July 17, 1952 (66 Stat. 752); and August 31, 1954 (68 Stat. 1030).

In 1955 the United States became a signatory to the Universal Copyright Convention (UCC). As a result of this international agreement, Congress' attentions were again focused on the subject of revising the copyright law.

Under increasing pressure to act, Congress authorized the Copyright Office to undertake a program of studies for the purpose of generally revising the current copyright law. The Register of Copyrights initiated research and a series of studies to serve as a basis for the revision. Thirty-five studies were prepared by a Panel of Consultants on General Revision. Brown,⁸⁸ lists twenty of the studies, their titles, and a brief description of their responsibilities:

Study 1 - "The Compulsory License Provisions of the United States Copyright Law", studied the mechanical reproduction rights in the field of music.

Study 2 - "The Damage Provisions of the United States Copyright Law", treated two related areas: 1) damages for copyright infringement, and 2) costs and attorney's fees.

Study 3 - "Duration of Copyright", investigated two basic issues: 1) the date from which the term of protection is to be measured, and 2) the length of the term of protection.

Study 4 - "Divisibility of Copyrights", addressed two areas: 1) assignment, which dealt with a complete transfer of all rights, and 2) license, a transfer of any portion of those rights.

Study 5 - "The Unauthorized Duplication of Sound Recordings", considered the legal rights of three distinct contributors to sound recordings: 1) authors, 2) performers, and 3) recording producers.

Study 6 - "Notice of Copyright", dealt with the requirements of notice.

Study 7 - "Protection of Unpublished Works", examined the dual issue of common law versus statutory law protection.

Study 8 - "Liability of Innocent Infringers of Copyrights", addressed the question of the different types of infringement. Infringement could be intentional, negligent, or accidental. Should the unintentional violator of a copyright be considered an infringer? Should the remedies against him be limited?

Study 9 - "The Operation of the Damage Provisions of the Copyright Law", is supplemental to Study 2, "The Damage Provisions of the United States Copyright Law".

Study 10 - "Fair Use of Copyrighted Materials", considered the advantages and disadvantages of a fair use statutory provision.

Study 11 - "Works Made for Hire and On Commission", attempted to resolve the question; who owns the copyright if the work is made in the course of one's employment?

Study 12 - "The Economic Aspect of the Compulsory License in the Copyright Law", dealt with the copyright problems in the area of music, pertaining to compulsory license and statutory fee.

Study 13 - "Joint Ownership of Copyright", investigated the problems of joint ownership of copyright.

Study 14 - "Registration of Copyright", addressed registration formalities.

Study 15 - "The Recordation of Copyright Assignments and Licenses", addressed the need to provide copyright owners the benefit of an effective registration system and to furnish prospective users with reliable records of copyright ownership.

Study 16 - "Limitations of Performing Rights", included the right to perform dramatic and musical works.

Study 17 - "Uses of the Copyright Notice", discussed the subject under two headings: 1) the commercial use of copyright notice, and 2) the libraries use of copyright notice.

Study 18 - "Miscellaneous Copyright Problems", covered: 1) remedies other than damages for infringement, 2) authority of the Register of Copyrights to reject applications for registration, 3) false use of the copyright notice, and 4) copyright in the territories and possessions of the United States.

Study 19 - "Photoduplication of Copyrighted Materials by Libraries", looked at the proposed fair use doctrine in light of photocopying.

Study 20 - "Protection of Works of Foreign Origin", examined the problems of protecting works by foreign authors.

An examination of the studies reveals that many of the same problems encountered in the revision efforts of the 30's and 40's continued to be unresolved in the present effort.

". . . It was clear that the main thrust of the revision efforts would need to deal with the effect of modern technology."⁸⁹

In July 1961, the Register of Copyrights issued a report summarizing the work to date, and offered tentative recommendations for a copyright statute revision. The report contained the following recommendations:

- statutory recognition of the fair use doctrine,
- single photocopy duplication privilege for libraries,
- exclusion of "not for profit" public performance from the copyright owner's general public performance right,
- divisibility of copyright,
- extension of the copyright statute to all foreign works,
- elimination of the manufacturing clause, and,
- expansion of the "scope of works protected" provision to include future works presented in newly developed forms or media.⁹⁰

This report was the subject of regular discussions for the next three years. The panel of Consultants met four times during 1961 and 1962 to consider the Register's recommendations. An advisory group was formed to work on the actual preparation of a draft bill. On July 20, 1964, Emmanuel Celler, Chairman of the House Committee on the Judiciary, introduced legislation⁹¹ intended to serve as a basis for further deliberations.

From the deliberations, it was obvious that several issues remained unresolved. A new draft was prepared, which attempted to reconcile these divergent viewpoints, and was submitted to Congress on February 4, 1965, as the Copyright Law Revision Bill of 1965.⁹² An identical bill⁹³ was introduced to the Senate

on the same date. House and Senate hearings followed. The House Committee on the Judiciary approved H.R. 4347 in October 1965.

The 1966 Annual Survey of American Law summarizes the 1965 Revision Bill as follows:

- The term of protection was extended by substituting a term of life of the author, plus fifty years, for the current two, twenty-eight year terms.

- The bill provided for a limited right of revision in place of the existing renewal system.

- The present dual system of common-law copyright and statutory copyright would be replaced by a proposed single federal copyright system.

- Copyright protection was extended to sound recordings, pantomines, and choreographic works. Any original work of an author would qualify for protection as long as the work had been "fixed" in a tangible medium of expression.

- The present principle of indivisibility would be abolished. Any of the exclusive rights of copyright may be transferred and owned separately.

- The basic notice requirements would be retained, but they would no longer be a condition precedent to the validity of copyright.

- The manufacturing clause and "ad interim" requirements would be considerably softened.

- The bill suggested modifying the "jukebox exemptions" and the compulsory license for the making of phonograph records.⁹⁴

The 1965 Revision Bill⁹⁵ was reintroduced to the 90th Congress where it received House approval on April 11, 1967, but failed in the Senate because of a disagreement on the cable television provisions.

The bill⁹⁶ became the subject of much debate in the Senate sessions of the 91st Congress. Three issues accounted for the discord: 1) cable television, 2) library photocopying, and 3) the use of copyrighted materials in automated storage and retrieval systems, particularly computers.

The disagreement over the cable television issue was so great that Senator McClellan proposed deletion of those sections of S. 543 dealing with the issue so that the remainder of the bill might pass.⁹⁷

The issue of library photocopying was not a new one for the copyright revisors. As early as 1935, the National Association of Book Publishers and a joint committee of the American Council of Learned Societies and the Social Science Research Council agreed to voluntary guidelines governing the use of a single reproduction of copyrighted manuscripts. This voluntary agreement

did not carry the force of law and was unsatisfactory to the publishing industry who foresaw the ease and availability of photocopying in the future.⁹⁸ The Register's Report of 1961 outlined the problem as follows: Researchers and scholars frequently called upon libraries to furnish them with copyrighted materials. If the requested material was not available for loan, the library furnished a photocopy. The publishing community argued that the continued use of photocopies diminished the author's market, depriving him of economic gain.⁹⁹

An attempt to resolve the issue was included in Section 7 of the Register's Preliminary Draft, entitled "Limitations on Exclusive Rights: Copying and Recording by Libraries". This section provided that libraries, under certain conditions, should be permitted to supply single copies of copyrighted materials to any patron so requesting.¹⁰⁰ Section 7 failed to satisfy the concerns of either party and was deleted. Both sides were left to rely on the fair use doctrine for guidance in the controversy. The Senate Judiciary Committee was again petitioned by both parties in 1969 to adopt a provision dealing with the photocopying issue. In response, Section 108 was drafted and included in S. 543. This section exempted libraries from copyright infringement for photocopying; provided the copy was made without commercial advantage. Several conditions of the exemption were encompassed, including the display of copyright warning and the prohibition of multiple reproductions of a work.¹⁰¹

In an attempt to resolve the computer issue, legislation¹⁰² would be introduced and approved in the 93rd Congress, establishing a National Commission on New Technological Uses of Copyrighted Works (CONTU). This commission would serve two purposes: to resolve the conflicts between copyright owners and computer users, and to recommend a structure which would promote the growth of the computer without sacrificing the rights of copyright owners.

Further action was not taken until the 92nd Congress convened. Senator McClellan reintroduced a slightly modified bill, S. 644.¹⁰³ A separate bill¹⁰⁴ dealing with the dubbing and piracy of sound recordings was also introduced and enacted as Public Law 92-140¹⁰⁵ on October 4, 1971. Continuing controversies regarding the cable television and photocopying issues prevented action by the 92nd Congress on Senate Bill S. 644.

The 93rd Congress, in yet another attempt, reintroduced the bill as S. 1361¹⁰⁶ which became the subject of hearings conducted in July and August of 1973. The bill was reviewed and revised by various committees of the House. As this was a time-consuming process, Senator McClellan introduced interim legislation¹⁰⁷ to focus Congress on three matters deserving immediate attention:

1 - All copyrights expiring on December 31, 1974, would be extended an additional two years.

2 - Sound recordings and tapes would be granted permanent copyright protection beyond December 31, 1971.

3 - CONTU would be established to investigate the computer and new technology issue.

McClellan's interim legislation passed both Houses and became law on December 31, 1974.¹⁰⁸

Revision efforts continued into the 94th Congress. Representative Kastenmeier and Senator McClellan introduced legislation identical to S. 1361 to their respective Houses.¹⁰⁹ Additional amendments and revisions followed and a Copyright Royal Tribunal was established. Following alignment of the House and Senate versions of the bill, the legislation was adopted by both Houses on September 30, 1976. President Ford signed the bill into law on October 19, 1976.¹¹⁰ The new copyright law became effective on January 1, 1978.

The 1976 Copyright Act

The 1976 Copyright Act seeks to meet many of the scientific and technological challenges to the copyright laws. How well the legislation meets these challenges remains a secret of the future. As with all of its predecessors, the Act reflects many compromises. The fact that the Copyright Revision Bill passed the Senate by a unanimous vote (97-0) is indicative of the fact that the bill represents the best possible piece of legislation that the current circumstances would permit. "Ultimately it will be the courts that will decide the specifics of its meaning. Thus the full implications of this legislation may not become clear for some time." ¹¹¹

The 1976 Act is written in broader terms which are not as confining and narrow in nature as the 1909 law. It is hoped that the new law will be flexible enough to meet the demands of an emerging technological society. The new act is more detailed, containing eight chapters compared to the three chapters found in the 1909 Act. The issues of fair use and photocopying are addressed in Sections 107 and 108 of Chapter One, "Limitations on Exclusive Rights: Fair Use", and "Limitations on Exclusive Rights: Reproduction by Libraries and Archives", respectively.

A unique feature of the law is found in Chapter 8, which provides for the establishment of a Copyright Royal Tribunal. The basic functions of this Tribunal are "to make determinations concerning the adjustment of reasonable copyright royalty rates, to distribute royalty fees deposited with the Register of Copyrights, . . . and to determine, in cases where controversy exists, the distribution of such fees".¹¹²

To date, the 1976 Act has been amended six times: twice in 1978 (92 Stat. 2549 and 91 Stat. 653, 676, 682), once in 1980 (94 Stat. 3028-29), and three times in 1982 (96 Stat. 91, 96 Stat. 178, and 96 Stat. 1759).

The most significant amendment was passed on December 12, 1980 and is reproduced below:

SEC. 10. (a) Section 101 of title 17 of the United States Code is amended to add at the end thereof the following new language:

"A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."

(b) Section 117 of title 17 of the United States Code is amended to read as follows:

"§ 117. LIMITATIONS ON EXCLUSIVE RIGHTS: COMPUTER PROGRAMS

"Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

"(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or"

"(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful."

"Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only with the authorization of the copyright owner."

Summary

The concept of ownership of literary property is first mentioned in 567 A. D. In England, copyright began as a publisher's right and evolved into the right of an author. American copyright law recognized the authors right to profit from his work and tried to balance this with the need to

disseminate information to the general public. Three major copyright laws were enacted: the Acts of 1790, 1909 and 1976.

Technology has had the greatest influence on copyright law through the years. First, William Caxton revolutionized the book trade in England with the introduction of the printing press. Next, the emergence of mass communication: radio, television, motion pictures, etc., impacted heavily on the existing law. Presently, the effects of electronic mail, computers, satellites, and laser technology have already raised new questions under the current law. The future will undoubtedly hold new concerns and dictate yet another revision in the copyright law. The following quote concerning the nature of copyright revision is applicable to the past, the present, and the future:

Revising U. S. Copyright Law has proved to be an undertaking built on shifting sands. As new technologies evolve, as new means of distributing intellectual works develop, as the commercial importance of intellectual creation grows, the battles between conflicting interests have to be fought all over again, and new compromises between legitimate demands have to be forged. ¹¹³

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CHAPTER III

OVERVIEW

This chapter presents a review of the current literature in the field of copyright as it applies to the educational use of computer software. The purpose of this review is to provide the reader with an understanding of the controversy surrounding the copying of computer programs by educators for use in the public school classroom. Beginning with a review of the Constitutional dilemma posed by copyright, the chapter continues by presenting the views of educators and publishers relative to the controversy. The chapter concludes with an examination of the legislation enacted by Congress to address the complexities of copyright. Applicable sections of the 1976 Copyright Act and the 1980 Amendatory Act are examined in combination with opinions and comments from leading authorities in the field. The purpose of this legislative review is to determine the legal underpinnings which support the polarized positions of the concerned parties.

INTRODUCTION

The field of literature involving copyright is copious. George Bush in his work, Technology and Copyright: Annotated Bibliography and Source Materials,¹ lists over 300 books and articles addressing the issue of technology and copyright. Copyright: A Selected

Bibliography of Periodical Literature Relating to Literary Property in the United States,² by Matt Roberts, lists over 6200 entries dealing exclusively with articles concerning literary property. A bibliography compiled by Anthony White, Copyrights: A Selected Bibliography,³ contains 102 entries, 24 being actual court cases dealing with copyright.

Much of the reviewed literature addresses the questions raised by the conflicting positions of those who produce and copyright the materials, and the positions of those who consume them. Questions of this nature are not new. "Before and since Queen Anne's Statute, the rights of those who write and publish and the interests of those who use what is written and published have come into conflict."⁴ While these questions are founded in antiquity, technology has cast them in a new and often confusing light. Enter the age of the pirate; an interloper who has at his/her command an array of technological wizardry designed to both serve and challenge the legal tenants of society. Charles Phillips, Senior Vice President of special markets for Radio Shack, elaborates: "We're living in the age of the Pirate. People are using everything from tape recorders to satellite transmissions to steal."⁵ The invention of the micro-chip and its subsequent application to the personal computer industry has thrust the problem of piracy into the educational arena. Realizing the educational potential of the computer, foresighted educators have attempted to incorporate technology's latest creation into the curriculum. As with any attempt at educational innovation, the introduction of the computer was not without controversy. While much

of the conflict centered on the introduction of computer literacy, critics also complained about the inherent problems associated with the software necessary to utilize the computers. "The most controversial issue surrounding computer education is software copying."⁶ "The reproduction of copyrighted microcomputer software has become one of the most controversial and difficult topics of the electronic age, and nowhere is the question debated more heatedly than in educational circles."⁷

Lauren Letellier, author of several journal articles on the subject, provides a succinct summation of the educators' and the publishers' philosophical viewpoints regarding the copying of computer software:

On the one hand, teachers believe they should have the right to copy educational programs because they are acting in the public interest. On the other hand, producers feel teachers should not copy because they [the producers] are not being compensated for their creative efforts.

Letellier's synopsis surfaces the two basic elements, irrespective of the legality of the practice, involved with the copying problem: economics and ethics. The controversy between educators and publishers regarding the copying of computer software is of growing importance to both parties. The implications of the opposing positions extend far below the surface and involve fundamental questions of social policy. ". . . [B]oth producers [of educational software] and educators are facing enormous problems in attempting to balance the competing needs of commercial incentives and academic access to information."⁹

To fully understand the controversy, a review of the basic legal

doctrine involved is necessary. The impetus for the issue is cast in the wording of the copyright clause of the United States Constitution, to which we turn to begin our review.

The Constitutional Copyright Provision

The framers of the Constitution were immediately confronted with the problem of balancing the rights of authors to the profits from their labors against the rights of the general public to the acquisition of knowledge. This dichotomous issue first surfaced in proposals submitted at the Constitutional Convention. On August 18, 1787, delegates James Madison and Charles Pinckney submitted lists of powers they felt would be proper for the new government. Madison's list included 3 powers relevant to the copyright issue: "To secure to literary authors their copyrights for a limited time. To establish a university. To encourage, by premiums and provisions, the advancement of useful knowledge and discoveries."¹⁰ Pinckney advocated the following powers: "To establish seminaries for the promotion of literature, and the arts and sciences . . . To grant patents for useful inventions. To secure to authors the exclusive rights for a limited time."¹¹

Upon first perusal, the powers advocated by Madison and Pinckney appear to be harmonious. However, a closer examination reveals that the two delegates espoused conflicting orders of priority. Madison gave top priority to the rights of the author, listing as his first proposal: "To secure to literary authors their copyrights . . ." ¹² He reiterates the author's preeminence in his last advocacy:

"To encourage, by premiums and provisions, the advancement of useful knowledge and discoveries."¹³ Delegate Pickney submitted his list in exactly the opposite order. Listing the ". . . establish[ment] of seminaries for the promotion of literature, and the arts and sciences . . ." ¹⁴ as his initial concern, Pinckney culminates his submission with the rights of the authors.

Madison's and Pinckney's proposals were referred to the appropriate committee for study and recommendation. On September 5, 1787, the Continental Congress adopted an amendment which would become the eighth clause of Article I, Section 8, of the United States Constitution. The founding fathers apparently embraced Pinckney's beliefs as the clause grants the promotion of ". . . the Progress of Science and the Useful Arts, . . ." ¹⁵ eminence over the rights of the authors.

To the uninformed, the order of the phrases in the Constitutional provision would appear trivial. Nothing could be further from the truth. Since its inception, the clause and its order have been the subject of heated debate between producers and consumers of copyrighted materials. Various tribunals have made reference to it in adjudicating claims of copyright infringement. Educators have cited it as grounds for educational exemptions from copyright law. What may have been an inconsequential phraseology, to the framers of the Constitution, has developed into a matter of incredulous importance to copyright.

The Constitutional provision for copyright consists of two distinct ideas: (1) the reason behind the copyright clause, i.e. the

promotion of the arts and sciences; and (2) the grant of a monopoly, for a limited time, to the author for his writings.¹⁶ It appears from a review of the legislative history of major copyright legislation and from numerous judicial interpretations of the copyright clause, that the primary intent of the Constitutional provision is to advance the cause of learning.

For example, the Committee of Patents, Trademarks and Copyrights, recommending passage of the 1909 Copyright Act, issued the following statement:

The enactment of copyright legislation by the Congress . . . is not based on any natural right that the author has . . . but upon the grounds that the welfare of the public will be served and the progress of science and the useful arts will be promoted . . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.¹⁷

This viewpoint was reaffirmed during deliberations leading to the passage of the 1976 Copyright Act:

As a condition of obtaining the statutory grant, the author is deemed to consent to certain reasonable uses of his copyrighted work to promote the ends of public welfare for which he was granted copyright.¹⁸

Judicial interpretations are replete with examples which confirm the primary purpose of the Constitutional copyright provision as being the promotion of the arts and sciences. Chief Justice Hughes, in Fox Film Corp. v Doyal,¹⁹ stated:

The sole interest of the United States and the primary object in conferring the monopoly [copyright] lie in the general benefits derived by the public from the labors of authors.²⁰

In the same case the court further advised that "[t]he copyright law, like the patent statute, makes reward to the owner a secondary consideration."²¹

When asked to rule on questions of copyright infringement, the courts have typically asked if the nature of the infringing use is such that the "distribution [of the work in question] would serve the public interest in the free dissemination of knowledge."²² To serve the Constitutional purpose of the copyright clause, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry."²³ The Berlin court continued, ". . . the financial reward guaranteed to the copyright holder is but an incident of this general [constitutional] objective, rather than an end in itself."²⁴

The Constitutional purpose is best advanced when copyrighted works are used for the benefit of the public.²⁵ "It is the availability of ideas to society, not the economic interest of the author that the copyright laws are designed to primarily protect."²⁶

After reviewing the legislative history and the judicial interpretations, one may deduce that the rights of the author have been totally subjugated by the public's right to the acquisition of knowledge. Such a conclusion would be an egregious error and non sequitur. While the primary purpose of the Constitutional provision is the advancement of the arts and sciences, the drafters of the amendment recognized that, in order to stimulate the creativity of

authors to produce literary works, some form of protection and remuneration had to be afforded them. The authors' rights are noted in the second part of the clause: ". . . by securing for limited Times to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries . . .".²⁷

The past, present, and future goal, then, becomes to strike a statutory and judicial balance between the public's rights and the rights of the authors.²⁸ The courts have persevered in the pursuit of this goal throughout judicial history. The Supreme Court, in the recent case, Sony Corporation of America v Universal City Studios, Inc.²⁹ provides an accurate summary of the judicial efforts directed towards the Constitutional balance issue:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activities of authors . . . and to allow public access to the products of their genius after the limited period of exclusive control has expired.³⁰

This balance between the interests of the copyright owners and the free flow of ideas is nowhere more delicate than in the field of education.³¹ During the revision efforts leading to the 1976 Copyright Act, educators lobbied extensively for exemptions from the copyright laws.

The Educational Argument

Technology, new educational philosophies, and the need to expose students to a rapidly-growing body of knowledge have combined to create new and plenary demands for the use of copyrighted materials.³²

Educators are caught in a dilemma; on the one side they must adhere to the laws of society, while on the other side they must use all available resources to do the best teaching job possible. These resources include the new media, much of which is copyrighted.³³

Computer technology, at the vanguard of the new media, poses multiple copyright problems for the educator. ". . . [T]o function, computers must reproduce the work in copies."³⁴ This very act of copying, essential to the utilization of computer programs, presents challenges to traditional interpretations and applications of the copyright law in an educational setting. Confusion reigns. "Among the worst victims of the current muddled state of [copyright] laws, are teachers, . . . who are left with little or no guidance. . . ." ³⁵ This current state of affairs has inspired educators to seek legislative exemptions from the copyright laws relative to the use of computer software. Educators most often cite the following theorem in support of an exempted status: (1) the Constitutional purpose of copyright, (2) the historical precedent, (3) the economics (4) the lack of preview opportunities, and (5) the fragile nature of the floppy disk.

Educators claim that the United States Constitution, Article I, Section 8, Clause 8, consists of two distinct phrases: (1) the purpose of the clause, i.e. the promotion of the arts and sciences; and (2) the statutory grant of a limited monopoly to the author, for a limited time. Educators argue that the founding fathers placed the phrases in their respective order of importance and that they must be interpreted in that light. So interpreted, continues the argument,

the thrust of the clause is the public benefit of the promotion of the arts and sciences, i.e., education. The profit and rights of the author are incidental, subservient to the benefit of the public. An author may only profit insofar as the primary objective has been served.³⁶

Historically, the producers of copyrighted materials have not been overly concerned with infringement of their exclusive rights due to the difficulties of copying. Manual duplication of copyrighted materials was laborious and time consuming, resulting in little economic harm to the author. Hand copying, although technically an infringement, has been tolerated because of the built-in limitation of human capacity. Technological duplicating devices are only modern forms of handcopying, argue the educators; the principle and the practice remain the same.³⁷

The real crux of the copying issue is simple economics. Teachers argue that they cannot afford the high costs of software. The problem facing teachers is understandable, especially at a time when schools are plagued by tight budgets and chronic financial troubles.³⁸ Abuse occurs when teachers feel the need for a particular piece of software and the money is not available to purchase the item. "I have to copy it illegally! Our [school] district has no money!" has become an all-too-familiar theme.³⁹ Stan Silverman, President of the National Institute for Microbased Learning, elaborates: "Say you have 76 [computer] stations in a school. Schools are not in a position to buy in multiples of 76."⁴⁰ Does such copying have a detrimental effect on the market value of

the copyrighted work? Educators say no. "Teachers give visibility to the authors' works and create markets for them."⁴¹ Further, such use in the classroom whets, not satisfies, the students' appetites.⁴² Sony Corporation, in a recent Supreme Court case,⁴³ followed this educational line of reasoning. Sony argued that home recording of commercially broadcast copyright materials would actually increase the public's access to programming, resulting in an improved market for the copyright holder.

A corollary to the economic argument is the educators' contention that publishers' policies prohibiting preview of software prior to purchase forces educators to make unauthorized copies. This action, claim the educators, arises from a need to preview software to insure the best purchase with limited funding. Todd Hoover and Sandra Gould, coauthors of "The Pirating of Computer Programs," conducted a random sample survey of software producers for the Apple brand computers. Their survey results revealed that 75% of the companies surveyed (N=63) did not permit customers to preview the software prior to purchase.⁴⁴ Educators offer the response of a self-confessed software pirate as illustrative of their concern. Writing in response to a newspaper editorial requesting information on why people turn to software piracy, the pirate states:

. . . I have been burned several times by false mail order claims [for quality software]. I am very shy now. Before I purchase, I want to know that I am getting value for my money. Because of the lack of hands-on software stores, I personally believe that pirating is my only inexpensive alternative.⁴⁵

Another argument advanced by the educators involves the making of archival or "back-up" copies of software programs. Teachers

argue that programs stored on floppy disks are very vulnerable. Power shortages, power surges, or improper placement next to an electrical or magnetic source can have catastrophic results.⁴⁶ Disks can also be damaged or destroyed by human negligence. Dirty fingers on a disk or prolonged exposure to direct sunlight can destroy expensive programs.⁴⁷ Teachers argue that programs will inevitably become damaged in the hands of students. A shortage of funds, which prohibits purchase of multiple copies or replacement of damaged disks, forces teachers to copy the disk so that the program is not lost to the entire class through accidents.⁴⁸ Educators also fault software producers for failing to provide back-up copies or for "copy protecting" their software. Protection schemes such as "copy protecting" prevent educators from making their own archival copies as authorized by the 1980 Amendatory Act. The survey by Hoover and Gould, revealed that 71.9% of the survey respondents provided no back-up copies.⁴⁹ Educators bitterly complain about the unfairness of the archival copy issue and are frustrated with their inability to reach resolution. A school district is unlikely to bring legal action costing thousands of dollars because the manufacturer of a \$125 program failed to provide a back-up copy.⁵⁰ Teachers accuse manufacturers of being insensitive to this problem;⁵¹ inflaming the issue all the more.

Educators saw the need to become involved in the copyright revision efforts. These efforts provided educators the needed forum to express their arguments and to seek redress. In 1955, educators formed an Ad Hoc Committee of Educational Institutions and

Organizations on Copyright Law Revision. This committee, representing some 40 educational agencies, became the voice for educational users of copyrighted materials. During the revision efforts, the committee studied bills, established positions on various issues, and gave testimony before congressional committees.⁵²

Harold E. Wigren, Chairman of the Ad Hoc Committee, testified during hearings conducted on proposed copyright legislation.

Advancing the constitutional purpose for copyright, Wigren outlined the educators' position:

Educational users need special protection over and above that provided commercial users because they have a public responsibility for teaching the children entrusted to them.⁵³

Educators lobbied Congress for inclusion of a section in the new law specifically granting educators exemption from the copyright law.

Wigren's proposal began:

Notwithstanding other provisions of this Act, nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship and research is not an infringement of copyright.⁵⁴

A perusal of the educators' arguments terminates in the conclusion that the fundamental reason advanced by the educational community for copyright exemptions is economic. Shrinking educational dollars combined with increased demands for services have placed educators in a fiscally precarious position. The new technology is expensive, prompting educators to seek relief from the statutory restrictions contained in the current copyright law.

The educational community, through the efforts of their ad hoc committees, applied considerable pressure on the legislators during

deliberations on the revision of the copyright law. Congress carefully considered the arguments by educators for broader exemptions for educational uses of copyrighted materials. While persuasive, the arguments advanced by the educational community were countered by equally persuasive arguments from the producers of copyrighted materials. After hearing the arguments and counter-arguments, Congress rejected the educators' plea for an exemption:

The Committee also adheres to its earlier conclusion, that a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified.))

The exemptions status sought by the educational community was defeated by strong opposition from the Authors League of America. As the outcome suggests, this group presented strong arguments in favor of the publishing community.

Publishers have their own self-economic interests to protect. Their position, grounded in the theory of a free market system, represented a formidable barrier to the inroads sought by educators.

The Publishers' Position

The publishers of copyrighted materials lay the foundation for their refutation on three basic assertions: (1) their right to make a profit from their creations, (2) copying is unethical, and (3) copying is illegal.

The publishing community does not take issue with the fact that the Constitutional copyright clause addresses the promotion of the

arts and sciences prior to the rights of the authors. Publishers do, however, dispute the interpretations of the purpose of this clause. Robert B. Chickering and Susan Hartman argue in their book, How to Register A Copyright and Protect Your Creative Work, that the prevailing purpose behind the copyright law is to stimulate development of original works. The law is intended to encourage creativity by granting exclusive rights to authors.⁵⁶ The publishers further contend that the Constitutional provision provides authors with a property right; such right being deprived the author by the person who uses his/her work without permission.⁵⁷ Depriving the author of his profit deprives him of his incentive to produce and he will not write.⁵⁸ The end result would be a diminution of intellectual producton.⁵⁹

The owners of copyrighted materials adamantly insist that educators should bear the economic burden of using their materials in the classroom. "The contractor, plumber, and hardware merchant are not required to furnish their labor free to schools. Neither should the intellectual producer."⁶⁰ In response to educators' claims that software is too expensive, the publishers make reference to the free market system. Dennis Coleman, author of Spellguard and a general partner with Innovative Software Applications Company, Menlo Park, California, questions: "In a free market system and a competitive market, how can you say that something is too expensive?"⁶¹ Barney Stone, author of D.B. Master, a data-base program for the Apple

Computer, adds: "There is a certain amount of 'buyer beware'. If you [educators] think my product is too expensive, buy something else. We're not selling a necessity of life!"⁶²

Publishers are no less forceful when responding to justifications of illegal software copying based on shrinking educational budgets. The International Council for Computers in Education (ICCE) has issued a policy statement which says: "Budget constraints do not excuse illegal use of software."⁶³ Each time educators substitute copying for the purchase of copyrighted software, the market for the sale of the item, which would have otherwise existed, has been diminished. This practice deprives the copyright owners of their just rewards and cannot be rationalized as fair because of a paucity of funds.⁶⁴

The publishers strengthen their argument for a fair economic return by associating profit with quality. States the Editorial Director of Creative Computing, magazine, George Blank:

The level and quality of software is determined by income. We cannot afford to invest more than we can recover from it Basically, because of the copying problem, I have to decide how much money I can afford to lose each year, and then I produce that much educational software.⁶⁵

Blank's opinion is supported by LeRoy Finkel, computing coordinator for the Office of Education of San Mateo County,

California. Finkel adds: "There's no question that the only way to keep the quality of software high is for it to be profitable for publishers and manufacturers."⁶⁶

The publishers' also raise the question of ethics in support of their position. "Educators need to face the . . . ethical issues involved in copyright laws. . ."⁶⁷ It is unethical to steal, and the illegal copying of computer software is stealing, say the publishers. According to Carol Risher, Director of Copyright and New Technology for the American Publishers' Association, educators are charged with far more than the mere teaching of subject matter:

Every teacher, every educator, and every school administrator has responsibility for far more than a given subject matter. Entrusted to each is the job of educating the citizens of tomorrow.⁶⁸

Risher continues by drawing analogies between the stealing of intellectual property and other equally intolerable acts:

Schools and faculty do not condone cheating, or rude behavior. Teachers and principals do not condone stealing books from one another to avoid the cost of purchase. Theft of intellectual property is equally a crime. No less so, because it is easy to do. No less so, because the property is not a tangible object. No less so, because the author may be unknown to the person doing the stealing.⁶⁹

Producers of copyrighted materials also point out that the question of unethical behavior, i.e. the illegal copying of software, has a negative consequence for education, teachers and students. Dick Ricketts, managing editor of The Computing Teacher, offers: Educators who illegally copy software "are setting a terrible example for the students. In effect, they are defrauding society by not

reflecting the true cost of education." ⁷⁰ Teachers and students have a vested interest in creating an environment in which copyright can survive. Many teachers and students are writing computer programs. Publishers are eager to enter into contracts for the development and distribution of this potentially valuable software. Publishers and creators have a vested stake in a secure copyright system. If educators do not commit themselves to this goal, everyone ends up a loser. ⁷¹

The publishers' contention regarding the legalities of the copying practice appears to be a superficial issue. It is obvious, claim the publishers, that the copyright law prohibits the unauthorized duplication of protected works. This leads publishers to conclude that it is illegal to copy computer software without permission of the copyright owner or without paying royalties for the privilege. However, the issue is not limited to a simple determination of "right or wrong; can or can't." The copyright law provides numerous limitations on the exclusive rights of the copyright owner. Judicial interpretations of these statutory limitations have broadened the scope of their application even further. The legalities of the copying process are discussed at length in the remaining sections of this study. Suffice for our purposes here, the publishers advance the argument that the copying of copyrighted programs is illegal.

In summation, both the educators and publishers advance arguments which are inherently logical, although antithetical. The opposing positions, summarized in Table No. 1, Page 19, are

Table No. 1 - Educator-Publisher Position Summary

	EDUCATORS	PUBLISHERS
Constitutional Purpose of Copyright Clause	Advancement of the Arts and Sciences, i.e., Education	Stimulate creative efforts of authors to produce additional works
Historical Precedent of Copying	Manual duplication has been accepted. Publishers have not complained	Modern copying capabilities far exceed human limitations. Publishers have been reluctant to sue because of educational purpose.
Quality of Software	Educational software is of poor quality. Not worth purchasing.	Quality and profit go hand-in-hand. Producers are not going to invest funds in developing software to be stolen.
Lack of Preview Opportunity	Prior review is necessary to insure the best possible purchase with limited funds.	Prior review results in educators copying software, negating purchase.
Archival Copies - Legality - Fragile nature of disks	Law grants right to make back-up copy of software. Students will inevitably damage disks, destroying program.	Publishers will supply back-up copies for nominal fee. Producers are not responsible for abuse of disks

reflective of the self-interests of each group, and as such resist a mutually agreeable solution. Such a situation results in an impasse, with neither side winning an uncontested victory. Fortunately, society provides legislation to assist in the dispute. The 1976 Copyright Act is representative of efforts directed towards a fair resolution to the copyright delimma.

Much debate and discussion preceded the passage of the 1976 Copyright Act. Congressional committees were subjected to hours of testimony originating from members of both the educational and publishing communitites. The Act seeks to accommodate the varied interests of both parties as well as meet the challanges posed by the new technology. The statute reflects many compromises. Unanimous passage in the U.S. Senate (97-0) is indicative of the fact that the bill represents the best possible piece of legislation that the current circumstances would permit.

The 1976 Copyright Act

The 1976 Copyright Act provides direction to both educators and publishers. It does not, however, answer all the questions. ". . . [U]ltimately it will be the courts that will decide the specifics of its meaning. Thus the full implications of this legislation for schools and for educators may not become clear for some time."⁷² While awaiting judicial clarification, educators can and should seek guidance from those sections of the Act applicable to the issue; the legality of copying copyrighted software for use in the public school classroom.

Copyright: A Federal Issue

The doctrine of pre-emption holds ". . . that certain matters are of such a national, as opposed to local, character that federal laws pre-empt or take precedence over state laws."⁷³ The pre-eminence of federal law over state law is established in Clause 2, Article VI, of the United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁷⁴

Copyright law is an example of pre-emption. The field of copyright is governed exclusively by federal statute. The new Act extends this federal pre-emption even further:

All legal or equitable rights that are equivalent to the exclusive rights within the general scope of copyright as specified by section 106 [of the New Law] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after [January 1, 1978] and whether published or unpublished, are governed exclusively by [the New Law.] Thereafter, no person is entitled to any such right or equivalent right in any such work under the Common Law or Statutes of any State.⁷⁵

Thus the 1976 Act abolished the common law copyright and mooted the issue of what constituted publication. Copyright is now automatic, attaching itself upon creation. The Act also grandfathered in all works created prior to the effective date of the new legislation.

The New Law, while not granting a specific exemption to

educators as was desired, does accommodate the concerns of educators in two ways: (1) The doctrine of fair use was codified in the law for the first time; and, (2) The law specifically exempts some actions of educators which would otherwise be grounds for an infringement suit. We turn our attention now to pertinent sections of the 1976 Copyright Act which hold information relevant to the practice of copying computer software.

TITLE 17, UNITED STATES CODE, "COPYRIGHTS"

CHAPTER 1. - SUBJECT MATTER AND SCOPE OF COPYRIGHT

Section 101. Definitions

Computer programs are afforded copyright protection in Section 102, and are classified by the Register of Copyrights, as "literary works." "Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied."⁷⁶

Public Law 96-517, dated December 12, 1980, amended this section of the copyright law adding the following definition of a computer program: "A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."⁷⁷

Section 102. Subject Matter of Copyright.

Under the 1909 Copyright Act, publication was a necessary prerequisite to obtain copyright protection. The New Law abolishes this requirement and grants copyright upon the creation of the work. "Copyright protection subsists, . . ., in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 78

This section of the law reflects Congressional attempts to deal with the impact of the new technology. History contains many examples of new inventions which impacted so severely on copyright law as to render it inapplicable. To compensate for the new technological inventions of the future, Congress included the phrase "now known or later developed". While the value of this phrase will undoubtedly be called into question in future litigation, its inclusion does underscore the foresightedness of the drafters of the current statute.

Section 106. Exclusive Rights in Copyrighted Works.

The legislative history of the Copyright Act outlines the approach legislators took when drafting the legislation. Section 106 lists, in broad terms, the five exclusive rights granted to the copyright owner:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.⁷⁹

These five exclusive rights comprise the owners "copyright."

They are exclusive in that only the owner, someone authorized by the owner, or someone exempted by the Act may perform them.⁸⁰ The owner of the copyright may retain all of the exclusive rights or he may transfer the rights individually to another party. Copyright protection is also afforded to the new owner. "Anyone who violates any of the exclusive rights of the copyright owner . . . , or who imports copies or phonorecords into the United States . . . , is an infringer of the copyright."⁸¹

The first three rights, generally characterized as the rights of copying, recording, adaptation, and publishing, extend to every kind

of copyrighted work.⁸² The rights to copy and to distribute can be infringed both publicly and in private, whereas the remaining three rights, the rights of distribution, performance and display, can only be infringed if exercised in public.⁸³

Copyright protection of computer programs embodies all of the exclusive rights contained in this section. This protection "... extends to the literary or textual expression contained in the computer program. Copyright protection is not available for ideas, program logic, algorithms, systems, methods, concepts, or layouts."⁸⁴ Duplication of computer programs by educators may be an infringement of the exclusive "right to copy", which Nimmer considers the most fundamental of all the exclusive rights. To avoid a finding of infringement, the actions of the educator would have to be exempted by the limitations on the owner's exclusive rights as contained in the following sections of the Act.

Section 107. Limitations of Exclusive Rights: Fair use

"Fair use" is given statutory recognition for the first time in the 1976 Copyright Act. The doctrine is not new, originating in early English law.

Limited copying of copyrighted works was permitted by English law under a judicial finding of "fair dealing." "Fair dealing" was codified by the English Parliament in the English Copyright Act of 1911. The concept represented an attempt by the English courts to

reconcile the dual purposes of the Statute of Anne: To reward the author, and to stimulate other English authors to produce for the benefit of society.⁸⁵

The concept of "fair dealing" was embraced by American courts and became known as the "doctrine of fair use." Referred to as a judicial rule of reason, fair use came to be accepted over the years and was finally codified into the New Law. This codification was intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.⁸⁶

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright ...⁸⁷

In the opening sentence of the fair use section, Congress identified six substantive areas as fair use of copyrighted works. The first three areas, "criticism, comment, and news reporting," are traditional exemptions grounded in rights created under the First Amendment. The remaining three areas, "teaching, scholarship, and research," are new additions, and represent Congress' compromise with the educational community who sought an exemption from the copyright law.⁸⁸

Nimmer reminds us that section 107 does not attempt to define fair use. "It does not, and does not purport, to provide a rule which may automatically be applied in deciding whether any particular use is 'fair'."⁸⁹ The law merely provides a list of factors to be considered in deciding on a ruling of fair use.

". . . 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.⁹⁰

The factors are intended to be examples, as they are not all encompassing. The words "shall include-" precede the listing of the factors. Section 101. Definitions, states: "The terms 'including' and 'such as' are illustrative and not limitative."⁹¹ These factors, collected from prior case law, leave the courts with complete discretion of interpretation and application. "Other factors, not codified, may have an equal bearing on a consideration of infringement."⁹²

Section 107 has been criticized for a number of reasons. Leon Seltzer, in "Exemptions and Fair Use in Copyright: The 'Exclusive Rights' Tensions in the New Copyright Act," offers three valid criticisms of the section: (1) No attempt is made to define fair use; (2) The section does not prioritize or weight the four factors, thus implying that there is no general order of priority; and (3) The inclusion of the expansive and ambiguous uses, teaching, scholarship, and research, have raised issues dealing with exemptions from copyright, i.e. it muddies the distinction between fair use and exempted status.⁹³

Fair use will be discussed again in chapter four of this paper.

The purpose of that discussion will be to review the application of the fair use doctrine to cases at bar.

Section 108. Limitations on Exclusive Rights: Reproduction by
Libraries and Archives.

Section 108 is a new addition to copyright law resulting from the Supreme Court case, Williams and Wilkins, Co. v United States.⁹⁴ In that case, the high court was asked to rule on a question of infringement concerning the extensive duplication practices of the libraries involved. As a result of that litigation, libraries and archives now have an exemption allowing them to reproduce copies of copyrighted works under specific conditions.

(a) Notwithstanding the provisions of section 106 [exclusive rights], it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy of phonorecord, under the conditions specified by this section . . .⁹⁵

The section continues with the following three restrictions:

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright.⁹⁶

Section 108 continues and is one of the more lengthy sections of the 1976 Act. The reader is referred to the appendix for the entire contents of the section.

Section 109. Limitations on Exclusive Rights: Effect of transfer of Particular Copy or Phonorecord.

Section 109 makes an important distinction between ownership of an original copyrighted work and ownership of a copy of that original.

(a) Notwithstanding the provisions of Section 106 (3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of of that copy or phonorecord.⁹⁷

Copyright owners would like to retain control over copies of their original copyrighted works. If such control could be acquired, and copies could not be lent, leased, or sold to third parties, the market for the copyright owner's original work would be enhanced; anyone desirous of a copy would have to purchase one from the owner. However, Congress did not elect to grant control of the copies to the copyright owner as evidenced in section 109.⁹⁸

Inherent in this section is the "first sale" doctrine. This doctrine assures copyright owners that, until parting with ownership, they have the right to prohibit all others from vending the work. However, once a sale has occurred, the "first sale" rule allows the new owner to treat the object as his own. "Copyright law and the

distribution right only secures to the copyright owner the right to control the first transfer of ownership." 99

Under the "first sale" doctrine where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy, and vendee is not restricted by statute from further transfers of that copy. 100

Software manufacturers have attempted to circumvent the "first sale" rule, thereby maintaining control over their copies, by granting licenses to software "purchasers." This is accomplished via the so called "shrink-wrap license." Shrink-wrapping is a process of wrapping a commodity in a tough, transparent plastic material which is then shrunk by heating to form a sealed, tightfitting package. 101 This type packaging prevents the consumer from inspecting the contents prior to purchase. Upon opening the package, after the purchase, the consumer is confronted with a licensing agreement similar to the one found in the appendix to this paper. Theoretically, via this license agreement, the copyright holder would retain control over the copy.

However, as Debra Wilson argues in her article in the Computer Law Journal, software packages are consumer products sold to unsophisticated consumers. The assertion that the copy is not the owner's property may not be valid. If there is no meeting of the minds, or mutual understanding regarding the "right to use"

limitation, the limitation may be struck from the contract as unconscionable.¹⁰² Arthur Miller and Michael Davis add: "It is unlikely that attempts to make an actual sale resemble something less than that. . . will be unsuccessful."¹⁰³

A recent development in the computer software industry is providing the first legal test of the "shrink-wrap license." Entrepreneurs have begun software rental companies. For fifteen to twenty-five percent of the purchase price, lessors rent software for a one to three week trial period. This rental fee is then applied to the purchase price if the lessee decides to buy the software. Manufacturers of copyrighted software have brought action claiming the rental action is violative of section 109 (c) of the 1976 Copyright Act:

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan,¹⁰⁴ or otherwise, without acquiring ownership of it.

The case, MicroPro International Corp. v United Computer Corp. is currently in litigation in the federal district court in San Francisco.¹⁰⁵ The outcome of this case will obviously help resolve the licensing question.

The remaining portion of section 109 deals with display rights:

Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.¹⁰⁶

Section 109 must be balanced against other sections of the Copyright Act. The stringent nature of some of the exemptions found in section 109 may become less restrictive under the related effect of applicable provisions found elsewhere in the Act. For example: section 109 appears to severely restrict the right to display or perform the work, but this restriction is softened, perhaps negated, by section 110(1) dealing with "face-to-face teaching activities."¹⁰⁷

Section 110. Limitations of Exclusive Rights: Exemptions of Certain Performances and Displays.

Section 110 is another example of the attempts by Congress to address the concerns of the educational community. This section establishes educational exemptions regarding the display or performance of a copyrighted work.

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;¹⁰⁸

When drafting this section of the copyright revision, Congress provided definitions of key terms contained in the statute.

"Instructors" are teachers in the normal sense of the word, but this can include a variety of guest lecturers, provided instruction given remains classroom oriented.¹⁰⁹ The term "teacher" includes

"instructional specialists on the staff of a school, such as reading specialists, curriculum specialists, audiovisual directors, guidance counselors, and the like."¹¹⁰ "Face-to-face" requires that instructors and pupils be in the same general location, at least "the same building or general area."¹¹¹ "Teaching activities" include a wide variety of "systematic instruction," but not activities given for "recreation or entertainment."¹¹² A "classroom or similar place devoted to instruction" encompasses numerous types of facilities such as studios, workshops, athletic facilities, libraries, and auditoriums, provided they are used for "systematic instructional activities" and not for the benefit of the general public.¹¹³

The remainder of section 110 deals with such topics as transmission of performances, use of copyrighted materials in religious services, the charging of admissions fees, transmission to private homes, use of copyrighted materials by government agencies, promotion of copyrighted works, use of copyrighted materials by the visually impaired or other handicapped persons, and transmission of works aimed at serving handicapped persons.

Sections 111 Through Sections 116.

These sections, while having great significance and impact on copyright, i.e., the cable television issue contained in section 111, are not germane to this study. For the convenience of the reader, a listing of the sections and their headings appears below. The reader whose interest is piqued by a certain topic is referred to the appendix of this study for a full text of the section.

Section 111. Limitations on Exclusive Rights: Secondary Transmissions.

Section 112. Limitations of Exclusive Rights: Ephemeral Recordings.

Section 113. Scope of Exclusive Rights in Pictorial, Graphic, and Sculptural Works.

Section 114. Scope of Exclusive Rights in Sound Recordings.

Section 115. Scope of Exclusive Rights in Nondramatic Musical Works: Compulsory License for Making and Distributing Phonorecords.

Section 116. Scope of Exclusive Rights in Nondramatic Musical Works: Public Performances by Means of Coin-operated Record Players.

Section 117. Scope of Exclusive Rights: Use in Conjunction With Computers and Similar Information Systems.

As discussed in chapter two of this study, it became apparent to Congress that the copyright revision bills, then pending before the House of Representatives and the Senate, were unable to deal with the copyright problems raised by computer users. It was also clear that an adequate study of the problem would seriously delay the enactment of an urgently needed general revision bill. Senator John L. McClellan, after meeting with concerned parties, introduced a bill into the 90th Congress calling for the establishment of a National Commission on New Technological Uses of Copyrighted Works (CONTU). CONTU was "to study and compile data on the reproduction and use of copyrighted works of authorship (1) in automatic systems capable of storing, processing, retrieving, and transferring information, and (2) by various forms of machine reproduction."¹¹⁴

Various delays ensued, and the commission was not established

until the 93d Congress. Public Law 93-573, the text of which may be found in the appendix of this study, was enacted on December 31, 1974. The Commission was given three years to study and compile data and made recommendations on legislation or procedures. The Copyright Act of 1976 was enacted during the life of the Commission. Section 117 of that act provided that the law on the use of copyrighted works in computer systems would be unaffected by its enactment:

Notwithstanding the provisions of sections 106 through 116 and 118, this title does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.¹¹⁵

National Commission on New Technological Uses of Copyrighted Works:
Its Organization, Conclusions, and Recommendations.

According to the criteria set forth in the organic legislation, President Ford appointed twelve Commissioners on July 25, 1975. Said Commissioners are listed in the Appendix to this paper.

The Commission was charged with gathering data on two topics: computers and photocopying. Since Congress was still considering the photocopying issue, the Register of Copyrights recommended that the Commission concentrate its efforts on the computer issue. The Commission rejected this advice and decided to conduct parallel studies. Relative to the computer study, the Commission established a research plan to guide its work. The issues identified for study

included: (1) computer uses of conventional works of authorship, (2) proprietary rights in data bases, (3) computer software, and (4) new works created by application of a computer. Hearings were scheduled to begin in the summer of 1976, for the purpose of hearing public testimony on the issue. The subcommittee dealing with the computer issue would then analyze the data and draft reports which would be circulated for comment and refined into a final recommendation to Congress.¹¹⁶

During the course of the Commission's investigations, the subcommittee considered background information relevant to the issue of copyright and computer programs. The subcommittee acknowledged the growth of the computer industry and the subsequent growth and importance of software. The commissioners considered the need for copyright protection of computer programs, concluding:

Computer programs are the product of great intellectual effort and their utility is unquestionable. The Commission is, therefore, satisfied that some form of protection is necessary to encourage the creation and broad distribution of computer programs in a competitive market.¹¹⁷

The Commission's work resulted in a recommendation to Congress to amend the recently enacted Copyright Act of 1976:

To clarify the law for both producers and consumers of copyrighted computer software, the Commission suggested the following changes[:]. . .

1. That section 117 as enacted be repealed.

2. That section 101 be amended to add the following definition:

A 'computer program' is a set of statements or instructions to be used directly in a computer in order to bring about a certain result.

3. That a new section 117 be enacted as follows:

Sec. 117: Limitations on Exclusive Rights: Computer Programs.

Notwithstanding the provisions of sec. 106, it is not an infringement for the rightful possessor of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful. Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner. ¹¹⁸

The recommendations of the National Commission on New Technological Uses of Copyrighted Works was, with minor modification, accepted by Congress and codified into law on December 12, 1980. ¹¹⁹

Title 17 of the United States Code was amended as suggested; the only change made by Congress being the substitution of the word "owner" for the phrase "the rightful possessor." The amended opening paragraph now reads:

Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of the computer program provided: . . . ¹²⁰

The remaining section of chapter one of the 1976 Copyright Act, Section 118. Scope of Exclusive Rights: Use of Certain Works in Connection with Noncommercial Broadcasting, does not directly apply

to the instant issue and will not be discussed here. The reader is again referred to the appendix for the full text of this section.

CHAPTER 2.—COPYRIGHT OWNERSHIP AND TRANSFER

Section 201. Ownership of Copyright.

This section consists of five subsections: (a) Initial ownership, (b) Works made for hire, (c) Contributions to collective works, (d) Transfer of ownership, and (e) Involuntary transfer.

Subsection (a) establishes ownership of a work, protected under the act, in the author or authors of the work. The authors of a joint work are considered co-owners of the copyright.

Subsection (b) "Works Made for Hire", is of great importance to school systems and the employees of these systems. The subsection states:

. . . In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright. ¹²¹

The computer industry is full of anecdotal stories of successful programmers reaping financial rewards totaling millions of dollars. It is not unreasonable to assume that in the vast educational system of the United States, a teacher may develop a computer program, that if exposed to a national market, may return large financial rewards.

The question arises as to whom would accrue these financial rewards: the employee teacher, or the employer school board? The general rule for copyright purposes is that the copyright belongs to the author of the program. Sometimes it is difficult to determine who is the author for copyright purposes. Such is the case in our immediate question.

Works made for hire can come about in two ways: (1) works made by employees acting within the scope of their employment, or (2) works made by consultants or other independent contractors as a result of a contract with the employer.¹²² The latter is easily established by the existence of a written contract between the two involved parties. The first instance, employees acting within the scope of their employment, raises some interesting questions in the public school setting. Does the copyright in a work created by a teacher belong to the school board? If a teacher develops the program at home, does the teacher or the school board own the copyright?

David Novick, noted copyright attorney, suggests the following questions as guidelines for determining "for hire" status:

1. Did the employer have the right to assign the employee to work on the program and to tell the employee how to proceed with the work?
2. Was the employee being paid by the employer for the hours actually spent developing the program?
3. What use, if any, did the employee make of the employer's equipment in developing the program?¹²³

Obviously, a program developed by a teacher during the school day would be considered a "work made for hire" and as such, the copyright would belong to the employer. But what of the program developed in the teacher's home, after school hours? Robert B. Chickering and Susan Hartman advise that the school board would be considered the author of such a work and entitled to the copyright. These two authors base their belief on the reasoning that creativity cannot be regulated to a school day. Break-throughs, solutions, and/or creative insights can occur at anytime; not just during office hours.¹²⁴ Therefore, a computer program for spelling, for example, written by an English teacher, would be considered a work made for hire, and the employer would hold the copyright.

School systems, ever cognizant of the potential revenues from a popular piece of software, have exercised their rights to copyright under the statute. Prince William County Public Schools, in Prince William County, Virginia, has issued the following policy statement regarding "works made for hire:"

Prince William County Public Schools shall be the copyright holder in all "works made for hire." Works made for hire include all works prepared by school employees within the scope of their duties, and any work ordered or commissioned from others, if specifically agreed to by the parties.¹²⁵

Other districts have sought to strike a compromise with its employees. The Bellflower (California) Unified School District has issued a policy which allows the author/teacher to maintain the copyright in exchange for the right to use the courseware:

Bellflower Unified School District maintains full-use rights on all software, manuals and related materials developed by district employees during periods for which they are being compensated.

Copyright ownership of software belongs to the individual who has developed such software. No other compensation to the district is mandated other than full-use of such software, manuals and other related materials.¹²⁶

In the absence of such written policies as the Bellflower Unified School District and in light of the Prince William Policy which emphasizes the school board's right to the copyright, how does a teacher retain both authorship and copyright? As David Novick points out, the easiest solution to this problem is to avoid it. Teachers desiring to retain the copyright in programs they develop should reach a clear, written agreement to that effect with the school board before developing the program.¹²⁷ Daniel Brooks adds that the statute requires the employee, not the employer, to seek written agreements to alter the statutory presumption that the employer is the author.¹²⁸

What of programs developed by students? Does the school board own the copyright in such works? The answer is a simple: No. Students are not employees of the board and as such have no relationship, barring a contractual arrangement, under the works made for hire statute. As non-employees, students are considered the authors of programs developed by themselves, and as the authors, the students retain the copyright.¹²⁹

Subsection (c), Contributions to Collective Works, makes a

distinction between copyright in each contribution to a collection as opposed to a copyright of the whole. Copyright, in the absence of an express transfer of the right, vests initially in the author of the contribution.

Subsection (d), Transfer of Ownership, provides for the transfer of copyright in whole or in part. The exclusive rights, specified in section 106, may be subdivided and owned separately.

Subsection (e), Involuntary Transfer, provides protection to the owner of copyright from any action designed to take the right away involuntarily.

Sections 202, 203, 204, and 205.

The remaining sections of Chapter 2 provide statutory information regarding ownership of material objects, termination of transfers and licenses, execution of transfers of copyright ownership, and recording transfers and other documents. The interested reader is again referred to the appendix of this paper for the full text of these sections.

CHAPTER 3 - DURATION OF COPYRIGHT

Section 301. Presumption With Respect to Other Laws.

This section establishes the federal statute as the pre-eminent law of copyright, thus abolishing the dual federal-state system which existed under the 1909 Act: " . . . [Works] created before or after

[January 1, 1978], and whether published or unpublished, are governed exclusively by this title.¹³⁰ Copyright is no longer dependent on the publication of the work, but affixes as soon as the work is in a tangible medium of expression.

Section 302. Duration of Copyright: Works Created On or After January 1, 1978.

Under the 1909 Statute, copyright was granted for a twenty-eight year period with the privilege of renewing the copyright for another period of the same length. The 1976 Act eliminated the renewal provision, and, depending on the life-span of the author, granted copyright protection for a longer period of time:

(a) In General. - Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death.¹³¹

Works prepared by two or more authors, referred to as "joint works" in the statute, are granted copyright protection for ". . . a term consisting of the life of the last surviving author and fifty years after such last surviving author's death."¹³²

The remainder of this section addresses the length of copyright protection for anonymous works, pseudonymous works, and works made for hire. Copyright protection for works in these categories ". . . endures for a term of seventy-five years from the year of first publication, or a term of one hundred years from the year of its creation, whichever expires first."¹³³

Sections 303, 304, and 305.

The last three sections of this chapter deal with the length of the copyright term in works created prior to January 1, 1978, in works already subsisting on January 1, 1978, and establishes a terminal date for all copyrights granted by subsections 302 through 304.

CHAPTER 4. - COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION.Section 401. Notice of Copyright: Visually Perceptible Copies.

Computer software that is copyrighted with the intent to distribute to the public must have a notice of copyright attached to all copies of such work: ". . . a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device." 134

The statute is explicit as to the form of the copyright notice to be affixed to the work:

(b) Form of Notice - The notice appearing on the copies shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), or the word "Copyright", or the abbreviation "Copr."; and

(2) the year of first publication of the work;

. . . and

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. 135

The copyright symbol, ©, was agreed upon by the Universal Copyright Convention and is recognized worldwide. However, Chickering advocates the use of the word "copyright" in lieu of the

symbol, arguing that the word is better understood by non-legal users of copyrighted materials.¹³⁶

Sections 402, 403, and 404.

These sections address notice of copyright in phonorecords of sound recordings, United States Government publications, and contributions to collective works.

Section 405. Notice of Copyright: Omission of Notice.

Omission of notice does not invalidate the copyright if: (1) the notice was omitted from a relatively small number of copies, (2) registration of the work was made prior to publication or within five years of publication and a reasonable effort is made to add notice to those copies already distributed, and (3) the notice was omitted in violation of a written agreement with the copyright owner.¹³⁷ A person who innocently infringes a copyright, in reliance on a copy which does not have the notice affixed, is not liable for actual or statutory damages. In such a case, the court may allow or disallow recovery of any profits accrued by the infringer.¹³⁸

Section 406. Notice of Copyright: Error in Name or Date,

and

Section 407. Deposit of Copies or Phonorecords for Library of

Congress.

The first of these sections provide statutory remedies for an error in name or date occurring during the registration procedure.

The second section sets forth the number of copies that must be deposited with the Library of Congress as part of the registration procedure. The section also grants the Copyright Office the right to exempt or alter the deposit requirements. The Copyright Office has chosen to exercise this right in registering computer programs:

For published or unpublished computer programs, one copy of identifying portions of the program, (first 25 and last 25 pages), reproduced in a form visually perceptible without the aid of a machine or device, either on paper or in microform, together with the page or equivalent unit containing the copyright notice, if any.

The Copyright Office believes that the best presentation of the authorship in a computer program is a listing of the program in source code.¹³⁹

Section 408. Copyright Registration in General.

The 1976 Copyright Act adopted the principle of "automatic copyright." As soon as the work appears in a tangible medium of expression, copyright is granted. The work no longer has to be published, and registration of the copyright is optional. This section establishes registration requirements and procedures.

Jon A. Baumgarten, author of "Copyright and Computer Software," encourages registration of copyrights for two important reasons: (1) registration is required before the author can initiate action for infringement, and (2) a certificate of registration issued before or within five years of publication is considered prima facie evidence of copyright. If the infringing action occurred prior to the date of registration, the courts are not likely to award the plaintiff statutory damages or attorney's fees. Prima facie evidence is important if the plaintiff is seeking injunctive relief.¹⁴⁰

Chickering and Hartman strongly recommend registration of all computer programs. "The potential of the work and its use cannot be predicted. . . . What might appear to be an insignificant work could later catch on and become a real money-maker or professional plum." ¹⁴¹

Sections 409 through 412.

The closing sections of Chapter 4 outline procedures for applying for copyright registration, registering a claim and issuance of the copyright certificate, and establishes the fact that registration of copyright is a prerequisite to an infringement suit and to certain remedies for infringement.

CHAPTER 5. - COPYRIGHT INFRINGEMENT AND REMEDIES.

Section 501. Infringement of Copyright.

Infringement has been defined in many ways, most of which reflect the provisions found in subsection (a): "Anyone who violates any of the exclusive rights of the copyright owner. . . is an infringer of the copyright." ¹⁴² "Copyright infringement occurs whenever someone exercises any one of the exclusive rights. . . without permission of the copyright owner, unless the act constitutes fair use or some other specific statutory exception to the exclusive rights." ¹⁴³ "Infringement exists where the alleged infringer copied the protected work and where there is a substantial similarity between the copyrighted material and the challenged work." ¹⁴⁴

Computer programs represent the expression of an idea or ideas by an author. Infringement occurs when this expression of an idea is copied.¹⁴⁵ In Atari v JSA, the court held that "absent [section 117,] . . . the duplication of . . . copyrighted programs is an infringement."¹⁴⁶

Sections 502 through 505.

The next four sections of Chapter 5, identify the remedies available under the statute for infringement of copyright, and are summarized as follows:

Section 502. Remedies for Infringement: Injunctions; provides injunctive relief to prevent or restrain infringement of a copyright.

Section 503. Remedies for Infringement: Impounding and Disposition of Infringing Articles; grants the court of jurisdiction the right to impound all copies made or used in violation of the copyright owner's exclusive rights. The court may also, as part of its final decree, order the destruction of all copies found to have been made or used in violation of the copyright. Both impounding and disposition apply to all copies, plates, molds, matrices, masters, tapes, film negatives, or other articles from which copies may be made.

Section 504. Remedies for Infringement: Damages and Profits; identifies two areas of liability for the infringer of copyright: (1) actual damages, or (2) statutory damages.

Plaintiff is entitled to recover any actual damages suffered by

him plus any profit the infringer accrued. Profit is established by providing proof of the infringer's gross revenue. The infringer is then allowed to deduct expenses and any other amount attributable to factors other than the copyrighted work.

The copyright owner may elect, at any time prior to final judgement, to recover statutory damages instead of actual damages. The initial award is not less than \$250 or more than \$10,000. If the copyright owner can prove to the court that the infringement was willful, the court, at its discretion, may increase the award to not more than \$50,000. If the infringer can prove that the infringement was a result of "innocent intent," the court, at its discretion, may reduce the award to a sum of not less than \$100. If the infringer was an employee of an educational institution, acting within the scope of his/her duties, the court will remit statutory damages.

Section 505. Remedies for Infringement: Costs and Attorney's Fees. At the discretion of the court, the plaintiff may recover the full costs of the action. The court may also award a reasonable attorney's fee to the prevailing party.

Section 506. Criminal Offenses.

The 1976 Copyright Act also has provisions for criminal infringement, as well as the civil actions previously noted.

Subsection (a) provides penalties for willful infringement of copyright when the purpose is for commercial advantage or private financial gain. Penalties include a fine of not more than \$10,000, and/or imprisonment for not more than one year. Additionally, more

stringent penalties are provided for the infringement of sound recordings and motion pictures.

Subsection (b) impowers the court, upon rendering a conviction of infringement, to order the forfeiture and destruction or other disposition of all infringing copies or equipment used in the manufacturing of such copies.

Subsection (c) prescribes a fine of not more than \$2,500 for anyone who, with fraudulent intent, places a false notice of copyright on any article.

Subsection (d) provides a fine of not more than \$2,500 for anyone who fraudulently removes or alters a notice of copyright.

Subsection (e) prescribes a fine of not more than \$2,500 for falsifying an application for copyright registration.

Section 507. Limitations on Actions.

Any criminal or civil action brought under this title must be commenced within three years after the cause of action arose.

Section 508. Notification of Filing and Determination of Actions.

The Register of Copyrights must be notified within one month after the filing of any action brought under this title. The clerks of the courts of the United States must send written notice to the register when action is begun, when there is an amendment to the original action, and upon the final order of the court.

Sections 509 and 510.

The concluding sections of chapter 5 provide guidelines for the seizure and forfeiture of infringing materials and remedies for alteration of programming by cable systems.

CHAPTERS 6, 7 AND 8 OF THE 1976 COPYRIGHT ACT.

The concluding chapters of the 1976 Copyright Act address issues absent of direct applications to this study. Therefore, a detailed review of the sections contained therein, will not be pursued here. Suffice for our purpose will be a cursory summation of the contents of each chapter.

CHAPTER 6. MANUFACTURING REQUIREMENTS AND IMPORTATION.

This chapter deals with the importation and public distribution of works manufactured outside the United States and Canada. Manufacturing requirements are outlined and infringement of the distribution right is addressed. Provisions for enforcing the statute and disposing of the infringing articles conclude the chapter.

CHAPTER 7. COPYRIGHT OFFICE.

The Register of Copyrights, as director of the Office of Copyrights of the Library of Congress, is charged with all administrative functions and duties having bearing under this title. The Register of Copyrights is empowered to establish regulations not

inconsistent with the law for the administration of the functions and duties made the responsibility of the Register under this title. All works submitted to the Copyright Office, including those whose claims have been refused, become the property of the United States Government. Procedures for establishing forms, publications, and fee structures are outlined. The chapter concludes with sections dealing with delays in delivery caused by the disruption of the postal service and the reproduction of copyrighted materials for use by the blind and physically handicapped.

CHAPTER 8. COPYRIGHT ROYAL TRIBUNAL.

An independent Copyright Royal Tribunal is created by this chapter. Purposes of the Tribunal are enumerated, membership is determined, and proceedings and procedures of the Tribunal established.

TRANSITIONAL AND SUPPLEMENTARY PROVISIONS.

The Copyright Act of 1976 concludes with provisions designed to effect a smooth transition from the 1909 Act to the 1976 Act.

LEGISLATION ENACTED SUBSEQUENT TO THE 1976 ACT

Following the enactment of Public Law 94-553 on January 1, 1978, Congress has passed several amendments to the Act reflective of their efforts to keep the Act viable. Subsequent legislation includes:

-Public Law 96-517, dated December 12, 1980, contained a section amending sections 101 and 117. This legislation is discussed PREVIOUSLY in the respective sections of the 1976 Copyright Act;

-Public Law 97-180, dated May 24, 1982, enacted to amend titles 18 and 17 of the United States Code to strengthen the laws against record, tape, and film piracy and counterfeiting, and for other purposes;

-Public Law 97-215, dated July 13, 1982, to amend the manufacturing clause of the copyright law; and

-Public Law 97-363, dated October 25, 1982, to amend title 17 of the United States Code with respect to fees.

SUMMARY

The founding fathers, when drafting the United States Constitution, made a concerted effort to both advance the cause of learning and to ensure to creative geniuses their just rewards. The wording chosen by the drafters of the constitution created a dichotomy between educators and publishers which is unlikely to be resolved for some time.

Educators argue for exemption from the copyright statute, claiming their cause is in the public good. Publishers counter with their needs to financial returns as incentive to continue production of educational materials.

The 1976 Copyright Act and subsequent amendments, extend copyright protection to computer software. This legislation also

recognizes for the first time the judicially developed doctrine of "fair use." This doctrine grants educators and others certain exemptions and privileges concerning the educational and scholarly use of copyrighted materials. These provisions of the Act, like all legislation, is subject to judicial interpretation.

Court dockets have been crowded with infringement claims since the passage of the Act. A few cases do involve educators or the educational use of copyrighted materials. The computer issue is new, but not without case law. For a judicial interpretation of the fair use provision of the 1976 Copyright Act, we turn our attention now to a review of cases adjudicated in the federal court system dealing with the educational use of copyrighted materials.

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CHAPTER IV

OVERVIEW

This chapter presents a review of federal case law involving questions of copyright infringement by educators or educational institutions and questions of infringement which involve the use of the latest technology. The purpose of this review is to examine the various interpretations of the copyright statutes by the federal court system and the subsequent application of copyright law to questions of infringement by educators. Inherent in this review is a close examination of the "fair use" doctrine, which represents, for educators, an important statutory limitation on the exclusive rights of the copyright owner. The chronological review of federal case law includes cases decided under previous copyright law and cases adjudicated under the current federal statute. Cases selected for review meet one or more of the following criteria:

- the case has historical significance;
- the question of copyright infringement directly involved an educator or an educational institution;
- the question of copyright infringement involved the use of the latest technology available; or
- the question of copyright infringement involved computer technology.

This review of judicial applications of the copyright law will provide the reader with a thorough understanding of the complexities

involved in resolving disputes relating to unauthorized use of copyrighted materials. Questions of alleged infringing actions are seldom simplistic. Usually the demarcation point between legal and/or illegal actions is unrecognizable. Judicial interpretations of copyright law, while resolving the instant questions at bar, often create confusion for future action under the statutes. The need to review case law arises out of such judicial action; as tribunals interpret the intent and purpose of existing legislation, they often create new law via their decisions.¹

INTRODUCTION

The history of copyright legislation is replete with examples which illustrate Congressional attempts to maintain the delicate balance between the rights of the authors and the rights of the general public. To accommodate the interests of both parties, legislation enacted is usually written in broad terms which often leaves the intent of the legislators in question. Statutes are sometimes ambiguous, vague, and confusing. ". . . [O]ne of the functions of a court is to interpret the language of statutes when there is a dispute over facts that have arisen which are either not explicitly mentioned in the statute or which were never anticipated when the legislators originally wrote the statute."² ". . . [T]he ultimate test of legal procedures is in the language of the act itself and how it is interpreted in future judicial decisions."³ The final determination as to the limitations of copyright law will emerge through court tests.⁴

The court's role in interpreting and applying the copyright statute has not been an easy task. Attempting to understand the intent of two separate legislative bodies, the United States Senate and the United States House of Representatives, has provided a continued challenge to the judicial branch of a complex governmental system. The courts have tried to maintain flexibility in applying the copyright law. Two areas, technology and education, have continually challenged the court's attempts at this flexibility. Technology continually provides new means for using copyrighted materials, whereas, education brings into sharp focus the conflict between the rights of the copyright owner and the public's right to information.

Justice Blackmun, in his dissenting opinion from a recent Supreme Court case,⁵ outlined the problem the federal courts face in attempting to litigate questions arising out of technological innovations. Justice Blackmun opined that the problems posed by the new technology are the problems of Congress and not the problems of the judiciary. The court's role, advises Blackmun, is to apply existing law, not to make new law: "Our task . . . is to resolve these [technological] issues as best we can in light of the ill-fitting existing copyright law."⁶

Congress did attempt to adapt its legislation to accommodate the problems associated with technological change. Section 101 of the new copyright statute has identified devices, machines, and processes, as ones "now known or later developed."⁷ Congress also acknowledged its inability to deal with developing computer

technology and established CONTU to study the effects of the new technology and to recommend changes in the law.⁸ However, as Justice Blackmun pointed out, these attempts by Congress have fallen short of resolving the questions posed by continued technological advancements. Thus, the immediate problem still rests with the courts.

The courts have attempted to adjust their interpretations of the copyright statute to account for technology, as long as the situation at hand was within the intent and meaning of the law.⁹ In ruling on the Sony case, the Supreme Court acknowledged the limits of the New Act in dealing with the new technology: ". . . [I]n a case like this, in which Congress has not plainly marked the course to be followed by the judiciary, this Court must be circumspect in construing the rights created by a statute that never contemplated such a calculus of interests."¹⁰

Thus, the problems created by technology await resolution by the courts who, by their own admission, admit that the law enacted by Congress, on which they must base their decisions, is inadequate. Compounding the court's problems further is the issue of applying copyright law to educational uses of copyrighted materials.

Congress considered and rejected a request from the educational community for exemption from the copyright statute. The lawmakers considered "the possible harm to authors and publishers to be too great to justify the enactment of a specific exemption" for teachers or any other group.¹¹ Thus, as with the problems of technology, interpretation of the copyright statute regarding questions of

educational usage rests with the courts. ". . . [U]ltimately it will be the courts that will decide the specifics of its meaning. Thus, the full implications of this legislation for schools and for educators may not become clear for sometime."¹² The courts must apply the law cautiously in situations involving education. To strictly apply the copyright law in the classroom context would be an undermining of the overarching Constitutional concern for promoting access to knowledge.¹³

Teachers assume they can use copyrighted materials without permission. Usually this is illegal. ". . . [B]ut the illusion of 'fair use' in classroom teaching has been created in part by the failure of publishers to bring infringement suits against teachers and librarians."¹⁴ "Although the body of copyright law has grown in recent years, it is [virtually] untested in education."¹⁵ Confusion results from a paucity of cases. To date, only three cases have been adjudicated involving questions of infringement by teachers.

Over the years, the courts have developed a concept that, notwithstanding the exclusive rights granted the copyright owner, certain limited, unauthorized uses of copyrighted materials are allowed because these uses are reasonable under the circumstances in which the use occurred. This concept is the "Doctrine of Fair Use." Certain guidelines have evolved over the years, however, fair use has never been clearly articulated. The courts treat it as an equitable rule of reason; weighing each case upon its own merits.¹⁶ The 1976 Copyright Act codifies "fair use" for the first time. Section 107 is

a step forward for this judicial doctrine and through its legislative history, it illuminates the minimum standards for application of the fair use concept in certain limited circumstances; and, it provides some degree of certainty for those individuals who limit their copying practices accordingly. The statute leaves the door open for courts to take a reasonable approach in the more difficult fair use cases.¹⁷

Section 107 does not attempt to define fair use but lists "the factors to be considered" for the purpose of "determining whether the use made of a work in any particular case is a fair use."¹⁸

These four factors are:

(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.¹⁹

Nimmer points out that section 107 does not propose a rule which can be applied in any given case. He elaborates by explaining that the factors are merely by way of example, and are not necessarily an exhaustive enumeration. Nimmer argues that the factors listed in this section are preceded by the words "shall include," and that, as defined in section 101 of the copyright act, the use of the term "including" is illustrative and not limitative. He continues by

explaining that the section provides no guidance as to the relative weight to be credited to each factor and that each factor is defined in the most general of terms, leaving the courts complete discretion to apply the factors as they deem appropriate.²⁰

Traditionally, the courts have never applied the fair use doctrine with any degree of predictability, even before the emergence of technology and educational uses. For example, in Time, Inc. v Bernard Geis Associates, the court viewed the doctrine historically as "so flexible as virtually to defy definition,"²¹ and in Dellar v Samuel Goldwyn, Inc., the court described the doctrine as "the most troublesome in the law of copyright."²²

David Hayes, in his article, "Classroom Fair Use: A Reevaluation," notes 2 institutional shortcomings of the courts in determining fair use:

(1) in a court setting the defendant, usually an individual, gains the sympathy of the court in opposing the plaintiff, usually a company or large corporation; and,

(2) the courts have only the option of ruling yes or no as to the question of whether the use is fair or not.²³

The sum result of these shortcomings, claims Hayes, is that arguments of fair use often win in litigated cases.²⁴

Referring to the six areas designated as fair use in section 107 of the 1976 Copyright Act, criticism, comment, news reporting, teaching, scholarship, or research; Saul Cohen, author of "Fair Use in the Law of Copyright," points out that there is a lack of litigation involving these areas. This lack of litigation, says

Cohen, affirms the propriety of such uses.²⁵ Despite this lack of litigation involving the six areas identified, teachers cannot assume that all uses involving these areas will be ruled "fair use." To assume that a blanket exemption exists for the classroom teacher would be fool hardy.²⁶

How have the courts applied the fair use doctrine? What factors were considered and were persuasive to the judiciary? Are all educational uses of copyrighted materials considered fair use? How have the courts reacted to questions of infringement originating from the use of the new technology? A review of federal case law in this area provides some insightful and somewhat surprising answers.

Cases With Historical Significance

As noted in chapter two of this study, the American Colonies, being British possessions, were controlled by British copyright law. Following the ratification of the United States Constitution, cases involving questions of copyright began to appear on federal court dockets. In January, 1834, the Supreme Court heard arguments in Wheaton v Peters, which has become known as the landmark case of American copyright law.²⁷ The case presented a unique problem for the justices as the litigants were both court reporters; Peters being succeeded by the current reporter, Wheaton. To avoid embroiling themselves in the bitter personal issues, the court chose to consider the broader issue of "literary property."²⁸

The court had very little legal precedent to consider in deciding the case. Only two cases involving questions of copyright

had been adjudicated in the federal court system from 1790 to 1834. The first such case, Nichols v Ruggles,²⁹ was an action of debt heard in the Supreme Court of Errors of Connecticut. Nichols sought payment for printing part of a book entitled The Federal Calculator. The defendant, Ruggles, argued that the printing contract was void because the printing infringed another party's copyright in the work. Plaintiff countered this argument by pointing out that no proof was submitted to the court to show that the copyright owner had met the requirements for copyright as established by statute. The court found for the defense and denied claim for payment, holding that the provisions of the statute were only directory, "and constituted no part of the essential requisites for securing copyright."³⁰

The second case, Ewer v Coxe,³¹ involved an alleged infringement of a copyrighted work, The Pharmacopoeia of the United States of America. In this case, the court held that compliance with the statutory requirements for copyright was mandatory to ensure protection. Plaintiff had deposited a copy of the work but had neither published notice in the newspaper nor sent a copy to the Secretary of State as required by statute. Justice Washington found for the defendant reasoning that plaintiff had not met the requirements for copyright under the 1790 Copyright Act, as amended by the 1802 Amendment.

Thus, having little legal precedence, the court heard the facts in Wheaton v Peters. In June, 1828, Richard Peters, the reporter for the United States Supreme Court, announced plans to publish the decisions of cases heard in the Supreme Court from its organization

until the close of the January term, 1827. Peters planned to include in his volumes, decisions previously recorded and published by his predecessors, Alexander Dallas, William Cranch, and Henry Wheaton. The first two court reporters, Dallas and Cranch, received no salary for serving as court reporters; obtaining their livelihood instead, by publishing the decisions of the court for general sale. Wheaton, after a year of the same arrangement, petitioned Congress for an annual salary. Congress complied with his wishes, authorizing an annual salary of \$1,000, in return for publishing the decisions of the high tribunal, within six months after they were rendered. Eighty copies were to be delivered to the Secretary of State for use by various government officials.

Wheaton contracted with Matthew Carey and Sons of Philadelphia to publish the reports. The first volume was published in 1816. Sales were so small that Wheaton assigned his rights as publisher to Robert Donaldson of New York, who then had the right to publish from 1,000 to 1,500 copies of subsequent volumes. Upon hearing of Peter's plans to publish the previously recorded decisions, Donaldson pleaded with Peters not to continue. Ignoring these pleas, Peters proceeded with his plans and began publishing Condensed Reports of Cases in the Supreme Court of the United States. In February, 1831, Peters published his third volume, which included a replication of the first volume of Wheaton's Reports.

In May, 1831, Wheaton and Donaldson brought action against Peters in the Circuit Court of Pennsylvania, claiming a copyright under both the Copyright Act and in common law. Wheaton felt that

there was still a potential market for his works and that his Reports were particularly valuable "not only on account of the nature and importance of the decisions, but also because of the manner in which they were reported and the extensive supplementary material provided by [him]." ³²

Wheaton's complaint alleged that Peters published in his Condensed Reports, all the decisions contained in Wheaton's first volume of reports without any material abbreviations or alterations. Peters did not dispute the allegation, but denied the complaint because (1) Wheaton had not complied with the requisites of the Copyright Act, (2) there was no common-law copyright in the United States, and (3) Wheaton's Reports was not a work entitled to copyright, either statutory or common-law.

Judge Joseph Hopkinson of the Circuit Court of Pennsylvania, reasoned that copyright was a governmental grant, a privilege not a right. Therefore, all statutory requirements must be met to secure copyright protection. "When a statute creates a right, confers a benefit, a privilege on any individual, and at the same time . . . enjoins upon him to do certain things in relation to the right or privilege granted, can we separate them?" ³³ Judge Hopkinson ruled that the grantee had a duty to meet the requirements of the statute. By not doing so, the author forfeited his claim to the remedies of the statute, because he did not obey the injunctions of the statute. There was no valid claim under statutory law. Did Wheaton have a claim under common law? Hopkinson concluded that there was no federal common law, and turned his attention to state law. Hopkinson

ruled that the states had not adopted the common-law copyright of England, therefore, Wheaton had no claim under common law.

Judge Hopkinson refused to recognize the co-existence of statutory copyright and common-law copyright. To do so, stated Hopkinson, would result in confusion. Why would authors choose the limited period of protection granted by statutory law if they could enjoy in perpetuity the same protection afforded under common law? What would prevent authors from using the statutory copyright and then, upon its expiration, revert back to common law? Judge Hopkinson relied upon the intent of the statute to resolve the problem:

We shall keep ourselves free from such embarrassments . . . by resting the protection of authors upon the statutes expressly enacted for that purpose, and in believing that our legislature has done that which is just to them, and without inconvenience and danger to the public.³⁴

Hopkinson dissolved the injunction and dismissed the charge. Wheaton appealed to the Supreme Court of the United States.

The Supreme Court returned a split decision (4-2), with the majority and dissenting judges agreeing on only one narrow point; that the opinions of the Supreme Court are not the proper subject of copyright. "It may be proper to remark, that the court is of the unanimous opinion, that no reporter has, or can have, any copyright in the written opinions delivered by this court . . ."³⁵ However, "the marginal notes, or syllabus of the cases and points decided, the abstract of the record and evidence, and the index to the several volumes, were the proper subject matter of copyright."³⁶ Peters did not dispute the fact that he freely copied Wheaton's

interpretations and annotations. Thus the fact that the decisions themselves were not subject to copyright protection did not dispose of the question at bar. The court had to resolve two basic legal issues to settle the instant case: (1) whether an author has a common-law copyright in his work after publication; and, (2) whether the statutory requirements for copyright protection are mandatory or directory.

The majority held that no federal common law existed. The dissenters did not comment, holding that since the law of Pennsylvania applied, the question of the existence of federal common law was irrelevant. The court split as to opinions regarding the existence of common-law copyright in Pennsylvania. The majority expressed doubt that such law existed in England, and assuming it did held that Pennsylvania had not incorporated that right in its laws. The dissenters believed common-law copyright existed in England without doubt, and that Pennsylvania had indeed incorporated that right into its body of state law.

As to the second question, were the statutory requirements mandatory or directory, the dissenting judges followed the opinion in Nichols v. Ruggles, holding the requirements to be merely directory. The majority cited the ruling in the later case, Ewer v Coxe, and held that all statutory steps were essential in acquiring copyright protection.

Justice John McLean wrote the opinion for the majority. McLean concluded that authors at common law have a property right in their

manuscripts and can obtain redress against those who improperly publish copies. However, once the author publishes his work to the world, it is a different right from that which asserts a perpetual property in the future publication of the work.³⁷ This was the right granted by Congress when it enacted the Copyright Statute, and this right was limited in term. Justice McLean further penned that the requisites for copyright were of equal importance and must be followed. "All the conditions are important; the law requires them to be performed; and, consequently, their performance is essential to a perfect title."³⁸

The majority opinion was based on the premise that copyright is a monopoly granted by Congress, and that all the statutory requirements must be met. The basic premise of the dissenters held that an author, as the creator of a work, is entitled to be protected in and to enjoy his property as a matter of justice and equity. They strongly believed in the existence of a common-law copyright and the remedies associated with such an existence. As to the statutory requirements for obtaining copyright protection, the dissenters took a liberal view. Justice Henry Baldwin, writing for the dissenters, remarked: "I cannot believe that it was ever intended by Congress, that any publication in a paper, or delivery of the book, should be indispensable to the vesting, as well as to the enjoyment of the right."³⁹

The court, by virtue of the majority opinion, found for Peters and reversed the district court's decision dissolving the injunction. The case was remanded to the circuit court to determine whether the copyright statute had been complied with.

The Supreme Court, in the Wheaton case, followed the ruling in the English case, Donaldson v Beckett. By following the Donaldson decision, the Supreme Court effectively blunted efforts in America to gain recognition for common-law copyright protection of published works. The ruling also limited protection of works after publication to statutory copyright, as was the case in England.⁴⁰ "The concept of copyright as a statutory grant of a monopoly for the benefit of the author was settled."⁴¹

The next copyright case with historical significance occurred in 1841. In deliberations on the case, Folsom v Marsh,⁴² Justice Story developed guidelines for determining if a particular use of a work was fair. These guidelines, codified in section 107 of the 1976 Copyright Act, have evolved little since their judicial pronouncement in Folsom v Marsh. The court considered the "nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work."⁴³ Justice Story's contributions in the area of fair use are extremely important to teachers as the following review of case law involving educators or educational institutions reveals.

Cases Involving Educators

The overwhelming majority of court decisions on copyright involve noneducational situations. To date, there are only three cases dealing directly with educators which may be used as a guide in future actions. This paucity of case law is attributable to several factors. Traditionally, publishing companies have been somewhat reluctant to bring action against their customers or users. Under the 1909 Act, the statutory penalty and damages for infringement were not of sufficient magnitude to warrant the time and expense of a trial. A third reason for the lack of case law involving educators and copyright is that out-of-court settlements by the parties involved are common-place.⁴⁴

One of the earliest cases involving education was Baker v Selden,⁴⁵ in 1879. Selden devised a bookkeeping system which consisted of "an introductory essay explaining the system of bookkeeping referred to, to which are annexed certain forms or blanks, consisting of ruled lines and headings, illustrating the system and showing how it is to be used and carried out in practice."⁴⁶ Selden obtained a copyright on his work entitled Selden's Condensed Ledger or Book-keeping Simplified. Later, Baker introduced a textbook which contained bookkeeping forms, whose purpose was identical to that of Selden's system. The only noticeable difference between the two systems was a differing arrangement of the columns and lines on the forms. Selden brought action, claiming that Baker's textbook infringed the copyright previously obtained by Selden for his original work. The Supreme Court reversed the finding of the

Circuit Court, dismissing the case on the grounds that "there can be no finding of copyright infringement if the only similarity is of ideas and not the expression of ideas."⁴⁷ The court held that Baker did not infringe on Selden's work because: the description of an art in a book, although entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. Blank account-books are not the subject of copyright. The mere copyright of Selden's "Condensed Ledger or Book-keeping Simplified," did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book."⁴⁸

The next copyright case involving an educator occurred thirty-five years later in 1914, MacMillan Co. v King.⁴⁹

Melaim L. King was a faculty member at Harvard . . . and his teaching involved individual tutoring on a scheduled, weekly basis. Before each tutoring session, King prepared a one-page, typed, "memorandum" or outline of the matter covered that week. The student received the outline at the start of each tutoring session, and returned it at the following session. Only one copy was made and was destroyed after the student returned it to King. Many of the outlines included quotations from the required text, Principles of Economics, by F.W. Toussig, 1911 ed. King testified that, as far as he knew, each student had purchased the required text.⁵⁰

King pleaded "fair use," citing the educational nature of his efforts, the limited amount of copying being done, and the fact that the copies were not being sold. The court held that mimeographing

and distributing a work was, by definition, copying and publishing; and, also by definition, that this action was an infringement of the copyright. Justice Lodge, commenting on the educational nature of the infringing usage, stated, "I am unable to believe that the defendant's use of the outlines is any less infringement of the copyright because he is a teacher."⁵¹ Plaintiff, the Macmillan Book Co., did not request a monetary award, requesting only injunctive relief. Plaintiff's request was granted.

Clarinda, Iowa was the site of the next lawsuit involving an educator. In Wihtol v Crow,⁵² defendant Crow was the head of the vocal department in one of Clarinda's high schools. Mr. Crow was also the organist and choir director of the First Methodist Church in the community. The school's library contained 25 copies of plaintiff's copyrighted version of "My God and I." The song, as Wihtol had arranged it, was very difficult for the school's chorus to perform. Crow rearranged the work to meet the needs of his school chorus and ran approximately 48 copies of the new arrangement on the school's duplicating machine. The school chorus' performance of the work was so well received, Crow was asked to have the performance repeated at the Methodist Church; which he did. Elated over the success of the performances, Crow wrote Wihtol a letter informing him of the new arrangement and asking Wihtol if he would like to see a copy. Wihtol replied in the affirmative, and Crow sent him a copy of the new arrangement with a suggestion that Wihtol might want to copyright it. Wihtol brought action against Crow, the school district, and the First Methodist Church, for infringement of

copyright. The District Court held that, the use made of Wihtol's work by Crow was a "fair use", negating the charge of infringement.

In the court's words:

. . . defendant Crow wrote the owners of the copyright advising of his new arrangement and inquired if they were interested. He attempted no use of the new arrangement other than testing and experimentation with the school and church choirs. The use of the new arrangement by the school and church choirs on one occasion was not an infringement. Under all the circumstances the Court finds that defendant Crow made "fair use" of the plaintiff's copyright and there was no infringement.⁵³

Wihtol appealed to the Court of Appeals, which reversed the District Court's decision. The Court of Appeals stated that plaintiffs had an exclusive right to copy their copyrighted song and Nelson E. Crow had no right whatever to copy it. The fact that he did not intend to copy is of no benefit if the copying constituted infringement. "Whatever may be the breadth of the doctrine of 'fair use,' it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a 'fair use' merely because the infringer had no intent to infringe . . ." ⁵⁴

Both Crow and the First Methodist Church were held liable for infringement, but the school district was not. "We hold; that. . . Crow is an infringer and that the church, as his employer, is jointly liable with him under the doctrine of respondeat superior..." ⁵⁵

Crow was fined and required to pay court costs.

The final case directly involving an educator, Marcus v Rowley, occurred in January, 1983. Plaintiff, Eloise Toby Marcus, was employed by the San Diego Unified School District from September 1972 to June 1974. Shortly after leaving the district's employ, she

wrote a booklet entitled "Cake Decorating Made Easy." Marcus obtained a copyright for her work and published 125 copies in the spring of 1975. All of the copies of plaintiff's book contained notification of copyright in accordance with statutory requirements. Marcus sold her booklets for \$2.00 each to the students enrolled in her cake decorating classes. Defendant, Shirley Rowley, enrolled in one of plaintiff's cake decorating classes and purchased a copy of plaintiff's book. Rowley prepared a booklet entitled "Cake Decorating Learning Activity Package" (LAP) for use in her food service career classes that she taught for the San Diego Unified School District. Rowley's LAP consisted of twenty-four pages and was designed for students who wanted to study cake decorating. Fifteen copies of the LAP were made and used by the students during the 1975, 1976, and 1977 school years. Although the LAP was used by sixty students during this time period, neither Rowley nor the school district received any profit from the usage. Marcus learned of Rowley's LAP when a student in her class refused to purchase her book. The student's son had obtained a copy of the LAP from Rowley's class and, after examining Rowley's work, the student accused Marcus of plagiarizing the LAP. Marcus then initiated action for a claim of infringement by Rowley. The trial court dismissed the case on the merits. The grounds for dismissal were that the defendant's copying of the plaintiff's material for nonprofit educational purposes constituted "fair use". Marcus appealed.

The United States Court of Appeals for the Ninth Circuit heard the case and decided that "its resolution turned entirely on the

application of the doctrine of fair use."⁵⁶ The court considered each of the four factors to be used in determining whether the use made of a work in any particular case is a fair use.

The Purpose and Character of the Use. "It is uncontroverted that Rowley's use of the LAP was for a nonprofit educational purpose and that the LAP was distributed to students at no charge. These facts necessarily weigh in Rowley's favor. Nevertheless, a finding of a nonprofit educational purpose does not automatically compel a finding of fair use."⁵⁷ The court also applied the "same functions test" and found that both plaintiff's and defendant's books were prepared for the purpose of teaching cake decorating, a fact which weighs against a finding of fair use.

The Nature of the Copyrighted Work. The court considered whether the work was "informational" or "creative." The court believed that "the scope of fair use is greater when informational type works, as opposed to more creative products, are involved."⁵⁸ Upon examination, the court determined that the booklet contained elements of both information and creativity. Thus, on balance, this factor was not of any real assistance in reaching a conclusion as to the applicability of fair use.

The Amount and Substantiality of the Portion Used. "Any conclusion with respect to this factor requires analysis of both the quantity and quality of the alleged infringement."⁵⁹ In considering the quantitative aspects of the copying, the court examined previous case law. The Eighth Circuit, in Wihl v Crow, stated: "Whatever may be the breadth of the doctrine of 'fair use,' it is not

conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a 'fair use'"⁶⁰ In Encyclopedia Britannica Educational Corp. v Crooks, the court held that ". . . the taping of entire copyrighted films was too excessive for the fair use defense to apply."⁶¹ "In this case, almost 50% of defendant's LAP was a verbatim copy of plaintiff's booklet and that 50% contained virtually all of the substance of defendant's book."⁶² This factor fails to support defendant's claim of a fair use.

The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work. In deliberations of this fourth and final factor, the court referred to the legislative history of the fair use section. In the 1967 House Report, this factor was often considered the most important criterion of fair use. But, the report also warned that it "must almost always be judged in conjunction with the other three criteria."⁶³ The fact that Marcus had not offered any evidence of actual pecuniary damage did not require a finding of fair use.

Finally, the court considered the question of fair use in light of the Congressional Guidelines and in accordance, thereof, concluded that Rowley's copying did not qualify as fair use.

The court considered the evidence and issued the following ruling:

We conclude that the fair use doctrine does not apply to these facts as that doctrine has been articulated in the common law, in section 107 of the revised Copyright Act, or in the special guidelines approved by Congress for nonprofit educational institutions. Rowley's LAP work, which was used for the same purpose as plaintiff's booklet, was quantitatively and qualitatively a substantial copy of plaintiff's booklet with no credit given to plaintiff. Under these circumstances, neither the fact that the defendant used the plaintiff's booklet for nonprofit educational purposes nor the fact that plaintiff suffered no pecuniary damage as a result of Rowley's copying supports a finding of fair use.⁶⁴

The order of the district court was reversed; summary judgement was entered for the plaintiff; and, the case remanded to the trial court for a determination of damages.

Cases Involving Educational Institutions

The federal courts have heard only two cases which directly involve educational institutions. In the first case, Williams and Wilkins, Co. v United States,⁶⁵ a small publisher of medical journals brought action against the governmental medical research organization and its library for making photocopies of articles in medical journals. Plaintiff, Williams and Wilkins Company, charged that the Department of Health, Education, and Welfare, through the National Institutes of Health (NIH) and the National Library of Medicine (NLM), had infringed plaintiff's copyrights in certain medical journals by making unauthorized photocopies of articles contained in those periodicals. The trial judge, Judge James F. Davis, after an extensive trial, found the Government liable for copyright

infringement. On review, the United States Court of Claims reversed the lower court ruling, finding the Government free from liability. The United States Supreme Court granted certiorari, and returned a split decision (4-4) affirming the Court of Claims' holding that the use made of the work by the governmental research organizations was a fair use, thereby absolving the government of liability.

Williams and Wilkins Co., a small publisher of medical journals and books, published 37 journals, dealing with various medical specialties. The four journals named in the suit were: Medicine, Journal of Immunology, Gastroenterology, and Pharmacological Review. The journals were published for profit, were widely disseminated throughout the United States, and had a range of annual subscriptions from 3,100 to 7,000. Most of the revenue derived from the journals came through subscription sales. Each journal was published with proper notice of copyright.

NIH is the Government's principal medical research organization, employing approximately 12,000 personnel. To assist its staff in conducting medical research, NIH maintained a technical library with

an annual budget of \$1.1 million in 1970. The NIH library subscribes to about 3,000 different journals, including the four journals mentioned in the suit. Each subscription consists of two copies of the ordered journal; one copy remains in the library and one copy is allowed to circulate. Demand for the journals cannot be met with the subscription copies. To accommodate the research staff, the library offers a photocopy service. On request, a researcher can obtain a copy of a particular article from any of the journals in the library's collection. The library has no system to monitor the reasons behind the requests nor does the library require the photocopies be returned.

The library has a general policy limiting each request to a single copy of a journal article and each request is limited to about 40 to 50 pages in length. Also, requests for photocopying are generally limited to a single copy from a single journal, although routine exceptions are made to this policy as long as the copying is limited to less than 50% of the journal.

NIH's copying service employs four full-time employees. The equipment consists of microfilm cameras and Xerox copying machines. In 1970, the library photocopy budget was \$86,000 and the library filled 85,744 requests for photocopies.

NLM, formerly the Armed Forces Medical Library, is a repository of much of the world's medical literature. NLM cooperates with other libraries and educational agencies via an "interlibrary loan" program. Upon request, NLM will loan materials from its collection. Request for journal articles are filled by photocopying the original

article and sending it, free of charge, to the requesting party. No attempt is made by NLM to monitor the usage of the photocopy or to obtain its return. NLM will furnish only one photocopy of an article per request, and will not photocopy an entire journal issue. NLM will not fill a request if the requested article can be found in a journal on the "widely-available list." This list contains 104 of the most readily available medical journals. The four journals named in this suit can be found on this list. In 1968, NLM filled approximately 120,000 requests for photocopies of journal articles.

Defendant concedes that, within the pertinent accounting period, NLM and NIH made at least one copy of each of the eight articles from one or more of the four journals in suit. After hearing arguments from both sides, the court weighed the multiplicity of factors which had a bearing on the photocopying practices of the two libraries involved.

In the fifty-odd years since the 1909 Act, the major tool for probing what physical copying amounts to unlawful "copying" . . . has been the gloss of "fair use" which the courts have put upon the words of the statute. Precisely, because a determination that a use is "fair," or "unfair", depends on an evaluation of the complex of individual and varying factors bearing upon the particular use, there has been no exact or detailed definition of the doctrine. The courts, congressional committees, and scholars have had to be content with a general listing of the main considerations These factors are said to be: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and

substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on a copyright owner's potential market for and value of his work.

During careful application and analysis of the four factors, the court identified eight major points on which they based their conclusions:

(1) Both NIH and NLM are non-profit institutions, whose sole purpose is the advancement of medical knowledge. They are not attempting to gain financially from the photocopying;

(2) Both libraries have declared and enforced reasonably strict guidelines to keep the photocopying within acceptable limits. The court dismissed the large numbers of copies made, holding that in considering the great size of the libraries involved the amount of copying does not seem to have been excessive or disproportionate;

(3) Photocopying by libraries, such as the Library of Congress, has been going on since the enactment of the 1909 statute;

(4) Medical science would be seriously hurt if library photocopying practices were stopped;

(5) Plaintiff has presented no proof, other than assumption, that they have sustained economic harm because of the photocopying practices;

(6) There is grave uncertainty as to the coverage of "copy" in Section 1 of the 1909 Act and some doubt whether it applies at all to periodicals;

(7) The 1909 Act has been the subject of revision efforts for some years now. As part of those efforts, Congress has made it

clear, in reports on its bill,⁶⁶ that photocopying can be a "fair use", in proper circumstances; the report negates the notions that copying of a complete work can never be a "fair use"; and that the doctrine is flexible, depending on the particular situation; and

(8) In foreign countries, the practice of photocopying for purposes of research or private study is not an infringement.⁶⁷

Taking all 8 points together, the court concluded ". . . that plaintiff has failed to show that the defendant's use of the copyrighted materials has been "unfair," and conversely we find that these practices have up to now been "fair." There has been no infringement."⁶⁸

The second case involving an educational institution occurred in 1982. The alleged infringing activity in Encyclopedia Britannica Educational Corporation v C.N. Crooks⁶⁹ was the videotaping of copyrighted films.

Plaintiffs are three profit motivated organizations engaged in the business of producing, acquiring, and licensing educational audiovisual materials. Defendants are: The Board of Educational Services, First Supervisory District, Erie County, New York (BOCES), and its individual officers and directors.

The BOCES Print Film Service and the Television and Videotape Services are administered as two separate organizations. The Print Film Service operation is not involved in the action.

The Videotape and Instructional Television Service has extensive facilities and equipment for off-the-air recording of television broadcasts. The electronic equipment owned by BOCES for this purpose

is valued at, from one-half million to one million dollars. During the 1976-77 school year, BOCES' videotape library contained 4,500 videotaped programs. Most of these library holdings were obtained by off-the-air recording of programs broadcast by television stations. BOCES employs 9 employees and has a budget of approximately \$297,000 per school year. Budgetary dollars originate from the 15 participating school districts.

In 1967, BOCES initiated a policy of taping all programs broadcast on station WNED; an instructional television station. Defendant's acknowledged, they videotaped the programs in their entirety, including the copyright notice. They concede, there was no prior permission obtained authorizing this videotaping.

BOCES prepared and distributed, to the teachers in the member school districts, a catalog listing over 5,000 "master" videotapes. Each of the plaintiff's 19 copyrighted works, involved in this law suit were listed in this catalog. Teachers, desiring a certain tape, filled out an order form and returned their request to BOCES. BOCES would copy the requested program from the master videotape, kept in the BOCES library, and return the copy to the requesting teacher, usually within seven days of the request. If the copy was used, testimony by teachers indicated it would be shown five or six times to different class sections.

The Videotape Service kept no records concerning the use of the videotapes. Neither were there restrictions placed on their use by BOCES, nor were the tapes required to be returned to the service. Some schools kept the tapes, creating their own tape library.

Plaintiff, Encyclopedia Britannica Corporation, produces and distributes non-theatrical films, with over 1,500 active titles available for classroom use. Films may be purchased outright, rented, or leased. The Corporation produces approximately 70 new films per year, at an estimated average cost of \$66,000 per 30-minute film. Plaintiff owns the copyrights of 7, of the 19 works in issue.

In late 1973, plaintiff, in response to the development of the videotape recorder, began offering its film works in video cassette and video disc formats. The Corporation also offers a licensing agreement permitting duplication of their copyrighted films by institutions already owning copies of the work. This license is based upon a rate of \$5 for the first 10 minutes of film running time and \$3 per minute, for the remaining length of film. This license provides for only one copy of the work at a time. If additional copies are desired, further licenses must be purchased.

Encyclopedia Britannica also has a licensing agreement for educational institutions which allows them to make unlimited copies of works already owned by the institution. The fee for this license is dependent on the number of playback machines owned by the institution. The license requires that videotape copies, made under the agreement, be destroyed or erased at the expiration of the agreement.

Plaintiffs' argument is; as the copyright owners of the works in question, they have the exclusive right to control the copying and

use of their works. They claim three kinds of copyright infringements for the 19 films in issue:

(1) the making of five original master videotapes and videotape copies derived from all the master tapes in violation of 17 U.S.C. § 1(a);

(2) the vending of these copyrighted works by BOCES in violation of 17 U.S.C. § 1(a), based upon contributions from school districts to BOCES for participation in the Videotape Service; and

(3) the public performance of these works in the classrooms caused by BOCES' videotape duplication and closed circuit cable television transmission in violation of 17 U.S.C. § 1(d).⁷⁰

The defendant's position is; that if technological change has rendered the Copyright Act ambiguous, the Act must be construed in light of its basic purpose,⁷¹ and that the equitable doctrine of fair use is applicable to the videotaping practices of BOCES. The defendants also claimed protection under the First Amendment of the United States Constitution because they are in the business of promoting education, a matter of paramount interest. Finally, if the court finds liability, defendants argue that no injunction may issue, because the claim of future damages is too speculative, and that, in the interest of justice, only actual, rather than statutory damages should be awarded.⁷²

The court first considered defendant's claim of fair use. Both parties in this action sought support from the two Sony cases, Universal City Studios, Inc. v Sony Corporation of America,⁷³ and the subsequent appellate decision, Universal City Studios, Inc. v

Sony Corporation of America.⁷⁴ In the Sony case, the district court found that the private home use of a videotape recorder and off-the-air copying for private, non-commercial use was fair use and did not constitute infringement. On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court, holding that home videotape recording did constitute copyright infringement.

Both this case and the conflicting Sony decisions evolve from the relationship of the copyright laws to the use of new and similar technology. Beyond this threshold, however, the similarity ends. The analysis of fair use and the copyright laws in the Sony opinions are at times helpful and instructive to the legal issues presented here. However, the Sony cases are, in comparison to the instant case, no more alike than an apple to an oyster. Of foremost concern are the copyright laws and their application to off-the-air videotape recordings used for classroom educational use.

In applying the four factors used to determine fair use, the court first considered the effect of the use upon the potential market for the copyrighted work. "Clearly, BOCES's videotaping practices interfere with this aspect of the marketability of plaintiffs' copyrighted works; these practices tend to diminish and prejudice the potential sale of plaintiffs' works in videotape format." ⁷⁶

The second factor considered, the purpose and character of the use, also weighed in favor of the plaintiff. Noting that the purpose of the use was for education, the court noted similarities found in the Williams and Wilkins decision. But, the court also noted that

the concept of fair use is based upon reasonableness. Although the purpose and character of the use here is clearly educational, the massive scope of the videotape copying and the sophisticated methods employed cannot be deemed reasonable.⁷⁷

The third factor considered, the nature of the copyrighted work, generally refers to the type of material used and whether distribution of the material would serve the public interest.⁷⁸ In this instance, the nature of the copyrighted works is clearly educational. "Nevertheless, the educational contents of the works in this case cannot be employed as a means to justify as in the public interest the extensive and systematic copying as documented here."⁷⁹ The educational content and nature of the films in this case does not, in and of itself, empower "a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance."⁸⁰

The fourth factor, substantiality of the use, refers to the quantity and quality of the copyrighted material appropriated by the defendants.⁸¹ Generally, the more substantial the appropriation from the copyrighted work, the less likely fair use will be considered a defense.⁸² Defendant admitted they had copied the entire work verbatim. The court found this practice to exceed the framework of reasonableness. "Such substantial use and appropriation cannot be considered fair use in relation to the plaintiffs' copyrighted works."⁸³

The court concluded the defendant, BOCES, was guilty of copyright infringement. Plaintiff was granted injunctive relief;

directed to file any additional affidavits or briefs concerning the award of actual or statutory damages for the court to consider; denied attorneys' fees; and, ordered that all infringing copies be sold, delivered to plaintiff, or disposed of in some way that would best serve the ends of justice.⁸⁴

Cases Involving the Use of Technology

The first case involving the application of technology to the then current copyright laws was White-Smith Music Publishing Co. v Appollo Co. in 1908.⁸⁵

Technology had provided a new means by which music could be produced on the piano; the piano roll. The first such piano rolls, when inserted into a player piano, would mechanically reproduce a song. Some of the songs reproduced were copyrighted works, resulting in charges of copyright infringement, as in the instant case. The question before the court was, whether the piano roll constituted an unauthorized copy of the copyrighted work.

The court ruled that a piano roll was not a copy of the copyrighted sheet music, but rather part of the machine itself, i.e., the piano. The court reasoned that a copy must be visually perceptible to the human eye and, "give to every person seeing it the idea created by the original."⁸⁶

Technological innovations have continued to test the application of the copyright laws. In each new case, the courts have struggled with the questions raised by this new technology. This is most evident in the recent Supreme Court case involving technology, Sony Corporation of America v Universal City Studios, Inc.⁸⁷

Plaintiff, Universal Studios Inc., owned the copyright in several television programs being broadcast over the public airwaves. Universal Studios argued that some owners of video cassette recorders (VCR) were using these devices to make unauthorized copies of copyrighted programs broadcast on television; and, that this copying was an infringement on the owner's copyright. Plaintiff further argued that Sony Corporation, makers of the VCR, was guilty of contributory infringement under the theory of vicarious liability. Plaintiff claimed irreparable monetary harm to themselves because of defendant's actions.

Defendant, Sony Corporation, denied the charge of contributory infringement, arguing that the VCR was indeed capable of many other uses besides the alleged infringing activity, and that such copying was exempted from copyright by section 107, Fair Use.

The trial court noted that "[t]his case invites application of the fair use doctrine to new technology in a new context: . . . and while no court has previously addressed this issue, the fair use doctrine does suggest both an approach and an answer."⁸⁹ The court considered the fair use factors.

Purpose and character of the use. Plaintiffs argued that "Betamax"⁹⁰ owners use the copy for the same purpose as the

original." ⁹¹ The court recognized this fact as truth, but held that this was too narrow of an application regarding this factor. "The salient characteristics of the use here are, that it is noncommercial and occurs in the home." ⁹²

Nature of the copyrighted work. The Court of Appeals for the 9th Circuit adopted the principle of "productive use." The court held that a mere reproduction of a copyrighted work in order to use it for its intrinsic purpose may not be considered fair use. The Supreme Court reversed on this point, holding that the fair use defense is not "rigidly circumscribed" by the productive use requirement. ⁹³ The Supreme Court acknowledged that "the distinction between 'productive' and 'unproductive' uses may be helpful in calibrating the balance, but it cannot be wholly determinative." ⁹⁴

Amount and substantiality of the portion used. The court recognized that the copyrighted work had been copied in its entirety, but skirted the issue of total reproduction by stating that this factor must be considered in relation to all of the other fair use criteria. ⁹⁵ "It is true that, taken out of context, dicta in Meeropol and Rosemont appear to preclude resort to a fair use defense when copying is nearly verbatim, but the context of the dicta reveals that the Second Circuit was concerned about substantiality only when it produced harm to the complaining party."⁹⁶ "Substantiality is simply listed as one of [the] factors; it is given no special position in relation to the others." ⁹⁷

Effect of the use on the potential market. Plaintiffs argued that defendant's actions would cause harm to their copyright and this harm would not only be a probable effect but would be an imminent effect. In response, the court stated:

A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that "some" meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.⁹⁸

Because plaintiffs' prediction of harm was based on many assumptions, the court was hesitant to identify the probable effects of home copying. The court held that even if this issue was found in plaintiffs' favor, fair use could still be found. The other three criteria, plus other relevant data, must be considered by the court, and balanced against the harm.⁹⁹

The district court entered judgment for the manufacturers, but was reversed by the United States Court of Appeals for the Ninth Circuit. The Supreme Court reversed the Court of Appeals, holding that the sale of VCR's to the public did not constitute contributory infringement of copyrighted television programs. The court reasoned there was a significant likelihood that substantial numbers of copyright holders, who license their works for broadcast on free television, would not object to having their broadcasts time-shifted

by private viewers; and, that the plaintiff copyright holders did not demonstrate that time-shifting would cause any likelihood of non-minimal harm to the potential market for, of the value of, their copyrighted works. In ruling on the Sony case, the Supreme Court acknowledged the limits of the New Act in dealing with new technology:

. . . in a case like this, in which Congress has not plainly marked the course to be followed by the judiciary, this Court must be circumspect in construing the rights created by a statute that never contemplated such a calculus of interests.¹⁰⁰

The court also noted the limitations of its findings. The court did not rule on tape swapping, formal or informal; on duplication of tapes in or out of the home; and on off-the-air recording for use outside the home, i.e., by teachers for use in the classroom.¹⁰¹

Four of the Supreme Court Judges; Blackmun, Marshall, Powell, and Rehnquist, dissented with the majority opinion. The dissenting view held that taping a copyrighted television program is an infringement, that time-shifting is not fair use, and that VCR manufacturers were guilty of inducing and materially contributing to the infringement. The conflicting views of the bench only emphasize the difficulties the courts encountered when trying to resolve questions generated by the new technology. As the Supreme Court noted in the Sony case: "The ramifications of this new technology are greater than the boundaries of this lawsuit."¹⁰²

Cases Involving Computers, Computer Programs, or Computer Technology.

Developers of computer programs have sought copyright protection for their works under both the 1909 and 1976 Acts. Under the 1909 Act, computer programs were accepted by the copyright office and registered as books. Under the New Act, Section 101 defines a computer program as a "set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."¹⁰³ As early as 1980, the courts were asked to rule on questions of infringement of copyrighted computer programs.

Data Cash Systems, Inc. retained an independent consultant, D.B. Goodrich and Associates, to design and develop a computer program for a computerized chess game. As the program evolved, it passed through all four phases of development associated with computer programs, ending up as an object program: Read Only Memory (ROM). The ROM was then installed as part of the computer's circuitry.

In late 1977, Data Cash began to market CompuChess, a hand-held computer containing the ROM developed by the Data Cash consultants. No copyright notice appeared on the ROM, the CompuChess computer itself, its packaging, or any accompanying literature. Notice of copyright did appear on the source program and all copies thereof. The source program was filed with the Register of Copyrights in November 1978, and received a Certificate of Copyright Registration on November 28, 1978.

In late 1978, defendant, J.S. & A., began marketing the J.S. & A. Chess Computer. The ROM in the J.S. & A. Chess Computer was

identical to the ROM in plaintiff's CompuChess. In early 1979, plaintiff filed action for copyright infringement and unfair competition.

In Data Cash Systems, Inc. v J.S. & A. Group, Inc.,¹⁰⁴ the court applied the copyright law as it existed before January 1, 1978. The district court held that a read-only memory (ROM) computer chip was not a copy of the plaintiff's copyrightable source program. The court said that at some point computer programs become mechanical devices. The source program is writing; the object program is a mechanical tool; i.e., a machine part. Thus, the court held to the meaning of a "copy" handed down in the 1909 case, White-Smith Music Publishing Co. v Appollo Co. In that case the court stated:

It may be true in a broad sense a mechanical instrument, which reproduces a tune, copies it; but this is a strained and artificial meaning. When the combination of musical sounds is reproduced to the ear, it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term is generally understood, and as we believe it was intended to be understood in the statutes under consideration.¹⁰⁵

Thus, a ROM is not in a form which one can "see or read" with the naked eye: It is not a copy within the meaning of the 1909 Act. In its object phase, the ROM, the computer program is a mechanical tool or device but not a copy of the source program.

Additionally, the seventh circuit held that plaintiff's pre-1978 publication of its ROM without notice of copyright resulted in a loss of copyright protection; the work fell into the public domain. The

appellate court explicitly refused to consider whether the district court had been correct in holding that a ROM could not be a "copy" and that publication under the 1909 Act could be effected only with "copies" of the copyrighted work.

In 1981, the question of a ROM being afforded copyright protection came before the courts again in Tandy Corp. v Personal Micro Computers, Inc.¹⁰⁶

Plaintiff, Tandy Corporation, sued Personal Micro Computers, stating five causes of action, the first of which was copyright infringement. The dispute centered around the alleged duplication of a computer program imbedded in a ROM, for which plaintiff held the copyright.

Tandy Corporation developed an "input-output" routine for its Radio Shack TRS-80 home computer. This program was essential to the operation of the computer and was imprinted directly onto silicon chips. These chips were permanently wired into the computer as a ROM. Personal Micro Computers admitted duplicating plaintiff's ROM, and argued that the ROM chips were not copies of the original computer program within the meaning of the federal copyright laws. Therefore, a ROM chip, which is a copy of another ROM chip, does not infringe the copyright granted to the original computer program. Defendant moved for dismissal of all claims for relief.

The trial court applied the Copyright Act of 1976 and concluded, under sections 101 and 102 of Title 17, that:

(1) a computer program is "a work of authorship" and the proper subject of copyright, and,

(2) a silicon chip is a "tangible medium of expression" within the meaning of the statute, such as to make a program fixed in that medium subject to copyright protection.

Defendant's motion to dismiss the action was denied.

A comparison of the first two cases illustrates the problems encountered by the courts in applying the copyright statute to the rapidly changing world of computer technology. In the first case, Data Cash, the court held that a ROM was not the proper subject matter of copyright. Less than a year later, in the Tandy Case, a ROM was held to be protected by copyright laws.

To fully understand the difficulties of applying copyright law to the area of computer technology, it would be helpful to review the component parts of a computer program. Basically, a computer program goes through four phases of development.

The first phase is represented by a flow chart. This chart is a schematic representation of the program's logic. The second phase is referred to as the source program. The source program is a translation of the flow chart into a computer programming language such as FORTRAN or COBOL. Source programs may be punched on cards or imprinted on discs, tapes, or drums. The third phase, the assembly program, is a translation of the programming language into machine language, i.e., mechanically readable computer language. Unlike source programs which are readable by trained programmers, assembly programs are virtually unintelligible except by the the computer itself. The fourth and final stage is known as the object program. This program is a conversion of machine language into a mechanical

device commanding a series of electrical impulses. Object programs cannot be read without the aid of special equipment and cannot be understood by even the most highly trained programmers. Thus, computer programs, at given times in their development, are both a "source program" and an "object program." The source program is an actual writing, as known in the traditional sense, while the object program is a mechanical tool or machine part.

The next case, again from California, dealt with source and object codes. In GCA Corp. v Raymond Chance,¹⁰⁷ the court indicated that the plaintiff's copyright of the source code of its computer programs also protected the object code because object code is merely the encryption of the copyrighted source code. The court said that the two codes are to be treated as the same work and that copyright of the source code protects the object code as well. The court found that since the object code version of the program was distributed to purchasers for limited purposes the defendants were not rightful owners within the meaning of 17 U.S.C. § 117 and that the copies they made were not within the scope of § 117.¹⁰⁸

The third circuit affirmed the Tandy court in the 1982, ruling that a ROM was indeed a copy. In Williams Electronics, Inc. v Artic International, Inc.,¹⁰⁹ the court held that despite the changing images of plaintiff's electronic videogame, the work was fixed under Title 17. The court also found that the computer program, fixed in the permanent read only memory devices, was protected by copyright law. Computer programs expressed in source code or object code are protected as "copies." "[T]he copyrightability of computer programs

[was] firmly established after the 1980 amendment to the Copyright Act. . . ." ¹¹⁰

Hubco Data Products Corp. v Management Assistance Inc. ¹¹¹ again brought before the courts the issue of whether object codes were copyrightable. This case also introduced the issue of publication of computer programs. Management Assistance Inc. (MAI) had developed a computer operating system which had certain "governors" built into the program to limit the program's capabilities. Hubco Data had developed a program, named Nilsson Method II, which enhanced the capabilities of the original operating system developed by MAI. MAI sought to enjoin plaintiff from using its Nilsson Method II, claiming infringement of its copyrighted object code. The court found that when Hubco enhanced MAI's operating system by the application of its Nilsson Method II, it was necessary to reproduce copies of MAI's program in order to locate the encoded "governors" that limited the capabilities of the MAI operating system. The court ruled that the production of those copies is prohibited by the Copyright Law, and constituted an infringement. The result was the same whether the copies were reproduced on paper for human examination or in the memory of a computer for further processing by a computer. ¹¹²

Operating programs were also the subject of the next case; Apple Computer, Inc. v Formula International, Inc. ¹¹³ Apple developed five operating programs; two were embodied in ROMs, the other three

in diskettes. All five programs were published with proper notice of copyright. Formula duplicated Apple's programs causing Apple to bring action, moving for a preliminary injunction. The court faced three issues:

(1) Were the programs fixed in a tangible medium of expression, i.e. are ROMs and diskettes copies?

(2) Are operating programs copyrightable? and

(3) Does the conversion of the program into object code deprive it of its copyrightability?

The court granted the requested preliminary injunction finding that ROMs are copies, all computer programs are ultimately useful, and noted that CONTU recommended inclusion of programs which operate a machine. The court quoted from the CONTU Final Report: "There should be . . . no distinction made between programs which are used in the production of further copyrighted works and those which are not."¹¹⁴

In 1983, Midway Manufacturing Co. v Strohon, involved the installation of a modification kit to the Pac-Man video game, developed and copyrighted by Midway. The kit required the substitution of five of the ROMs in Midway's game. The instructions sold with the kit also told the purchaser to remove one of the other ROMs and to substitute nothing in its place. Removal of this ROM resulted in the shape of the Pac-Man characters to become squares, thereby, according to Strohon, negating infringement of the

audiovisual work. The court held that the object code was protected by copyright, and that a ROM was a copy, also protected by copyright. The court did not see any difference between ROMS and floppy discs. Strohan was found guilty of infringing the copyright in the computer program since 89% of the object code was copied.¹¹⁵

Apple Computer, Inc. returned to court in 1983 to protect the same computer programs which were the subject of its earlier suit against Formula International, Inc. In Apple Computer, Inc. v Franklin Computer Corp.,¹¹⁶ the trial court denied Apple's motion for a preliminary injunction stating that it was "not clear that object code, which was not designed to be 'read' by a human reader and can be read by an expert with microscope and patience, is a language of description. It cannot teach. It can be used to control the operation of the computer."¹¹⁷ The court noted it might be more accurate to say that operating systems are an essential element of the machine. It also said it may be more accurate to say that object code in its binary form or chip form is a useful version of the machine's electrical pulse.

Apple appealed and found the third circuit more receptive to their arguments. The appellate court reversed the lower court decision holding that object code is protected by copyright. The court said that:

the category of "literary works" . . . is not confined to literature in the nature of Hemingway's, For Whom the Bell Tolls. The definition . . . includes expression not only in words but also "numbers, or other . . . numerical symbols or indicia," thereby expanding the common usage of "literary works."¹¹⁸

The statutory requirement of fixation was held to be satisfied through the embodiment of the expression in ROMs. The key issue, however, was whether operating system programs are the proper subject of copyright. The court noted that the statute defines a computer program as "a set of instructions to be used in a computer in order to bring about a certain result."¹¹⁹ The court observed there was nothing in the definition to suggest a distinction should be made based on the function that a program serves within the machine.¹²⁰

The next case involving computers was heard on December 6, 1983. Atari, Inc., manufactures and sells a home computer video game system called the "2600." Atari also manufactures and distributes game cartridges for use in the "2600." These game cartridges consist of a heavy plastic housing, containing a chip which controls the operation of the computer. Atari's chips are in the form of ROMs, which can neither be reprogrammed nor erased.

J.S. & A. is a retailer of electronic products. They began selling a device known as "Prom Blaster," a device designed for duplicating video game cartridges. The purpose of the Prom Blaster, as advertised by J.S. & A., was for making archival copies of computer programs, as authorized by section 117 of the 1976 Copyright Act.

Atari claimed the duplication of game cartridges would be a violation of its copyright and, by selling a device for this purpose, J.S. & A. was guilty of contributory infringement. Atari brought action in the case, Atari, Inc. v J.S. & A. Group, Inc. ¹²¹

The court concluded that J.S. & A. was guilty of contributory infringement since the Prom Blaster had no substantial non-infringing use. In the court's opinion, the back-up copying, permitted by Section 117, was very limited and applied only when copying to guard against destruction by mechanical or electrical failure. Since J.S. & A. failed to show that the cartridges were subject to damage or loss due to electrical or mechanical failure during their ordinary use, the court concluded that the copying was an infringement and that J.S. & A. was a contributing infringer.¹²²

The question of ownership of a computer program arises in the next case, but in a somewhat different perspective. Micro-Sparc, Inc. publishes a monthly magazine for Apple computer users known as Nibble. Each issue of Nibble contains 12 to 15 computer programs, which readers may type into their Apple computers and use. Micro-Sparc owns the copyright to these published programs and also offers them for sale on disk to users who do not want to take the time to type in their own programs.

Amtype Corporation offers a "typing service" to purchasers of Nibble and other, similar publications. For a fee, Amtype will put on one disk, all the programs that appear in any one issue of a magazine. The procedure used by Amtype is to type the programs into a computer, transfer them to a master disk, copy them from the master disks onto blank disks, and send them to requesting customers.

Micro-Sparc claimed that the "typing service" constituted infringement of their copyrighted works and sought injunctive relief and damages in Micro-Sparc, Inc. v Amtype Corporation.¹²³

Both parties agreed that the Nibble purchaser is the owner of the copy of the computer program which appeared in the magazine. At issue is whether that owner may "authorize the making of another copy" by the defendant under either subsection (1) or (2) of the recently enacted amendment to the copyright law, Section 117.

Subsection (1) permits the creation of a copy for a limited purpose: "as an essential step in the utilization of the computer program in conjunction with a machine."¹²⁴ The court interpreted this as placement of a program into a computer - "Inputting it." The legislative history of Section 117 indicated to the court that subsection (1) was enacted to permit the rightful possessor of a program to input and to use it. The court held that subsection (1) did not apply to defendant's actions in this case. Having been denied subsection (1), defendant relied on the archival "exception" contained in subsection (2). The purpose of this subsection is to protect the use of a copy against a particular type of risk: "destruction or damage by mechanical or electrical failure."¹²⁵ The court ruled that subsection (2) permitted the Nibble purchaser who, under subsection (1), may type in the program himself to create a disk copy. This typed program, which is contained in the computer's memory, is subject to "destruction or damage by mechanical or electrical failure." But, the court held that subsection (2) did

not permit the purchaser to authorize the defendant to put the Nibble programs on disks for archival purposes because purchaser had not first created a "destructable" or "damageable" copy.

The court ruled that defendant's actions do not fall within the exceptions contained in subsections (1) or (2), and held that the copying of programs appearing in the Nibble magazine infringed on the plaintiff's copyright. Injunctive relief was granted and the court ordered plaintiff to submit a claim for damages.¹²⁶

The final case involving computers is presently still under litigation in the federal district court in San Francisco. The case of MicroPro International Corporation v United Computer Corporation, deals with a recent development in the computer industry; software rental. For 15% to 25% of the purchase price, a lessor can rent software for a one to three week trial period. The rental fee may be applied to the purchase price if the lessor buys the software. The manufacturers of the software are claiming copyright infringement. The leasing parties cite Section 109 (a) of the 1976 Copyright Act: "The owner of a copy of a copyrighted material is free to alienate that copy in any manner, including lease."¹²⁷ The outcome of this case will have obvious impact on the software industry.

Summary

Early American copyright law followed the leadership of the English Courts and established statutory copyright as the pre-eminent law of copyright.

Throughout history, the copyright statutes have been written in vague and sometimes ambiguous terms. The legislators depended on the federal court system to interpret and apply the law to the myriad of circumstances that would be presented by claims of copyright infringement. The judicial system developed a concept, that under certain circumstances and conditions, limited use of copyrighted materials, for purposes other than for profit, would be acceptable. This concept became known as the Doctrine of Fair Use, and was codified into law for the first time in the 1976 Copyright Act.

A review of federal copyright case law reveals a lack of litigation involving educators. To date, there are only four cases directly involving teachers. In all but one of the cases, the defendant educator pleaded the fair use defense. In three cases, the high tribunal ruled against fair use, and held the educator involved, guilty of infringement.

In cases involving educational institutions, the review of case law revealed a split opinion as to fair use. In one case, heard under the 1909 statute, the Supreme Court held fair use, a library's duplication of journal articles. In another case, the court ruled the duplication of video tapes for educational purposes infringement.

A review of cases involving computers shows a definite trend towards increased protection of computer programs. Initially, ROMs were considered part of the machine and, as such, were not the proper subject matter for copyright. In later case law, ROMs were afforded protection, as well as, programs in source and object codes. As tribunals come to understand more of the complexities involved with computer programs, they seem to be affording greater legal protection to these works.

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CHAPTER V

GENERAL SUMMARY, LEGAL CASE SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

General Summary

Modern technology has provided today's educators with a variety of electronic media for use in the instructional process. The microcomputer, found in schools throughout the United States, is one such technological innovation. To function, these microcomputers utilize a variety of computer programs, usually referred to as software. This software is generally copyrighted, and as such, is protected by federal statutes. Each time a teacher "boots up" a copyrighted software program, he/she is infringing the exclusive rights of the copyright owner, unless;

- the use is authorized by the copyright owner;

- the use is authorized by the "Limitations on exclusive rights:" sections of the 1976 Copyright Act;

- the use is authorized by section 117, of the Act, "Scope of exclusive rights: Use in conjunction with computers and similar information systems," or,

- the use is considered a "fair use."

The purpose of this study was to review, synthesize and document federal statutes and litigation, together with, literature pertaining to copyright and the use of computer software. This effort provides

educators with a conceptual framework for applying the principles of Copyright Law to the use of computer software in the educational environment.

The study was organized into five chapters. The first chapter defined the problem and outlined the methodology to be followed. The second chapter reviewed the historical development of copyright in England and in the United States. The third chapter reviewed current literature in the field of copyright and examined applicable federal copyright legislation. The fourth chapter reviewed federal case law dealing with questions of copyright infringement by educators; and questions of copyright protection for computer programs. The fifth, and final chapter, summarizes the study, and presents the findings, conclusions, and recommendations.

History of Copyright. The first recorded decision regarding copyright was handed down in 567 A.D. Copyright began in England as a "right of printers" and evolved into a "right of authors." The first written copyright law was enacted in 1710 with the passage of the Statute of Anne - "An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Author or Purchasers of Such Copies During the Times Therein Mentioned." In America, the Continental Congress, responding to pressure from its own authors, agreed in Article I, Section 8, of the United States Constitution, that: ". . . Congress shall have 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." Congress responded by enacting the first American Copyright Law in 1790.

Following a series of revisions and modifications, a new copyright law was enacted in 1909. With the rapid advancements in science and technology, the 1909 statute proved to be inadequate. Efforts to revise this Copyright Act appeared soon after its passage. Following the Universal Copyright Convention in 1955, Congress authorized a program of studies for the purpose of generally revising the copyright laws. Over twenty years later, a new statute was enacted; the Copyright Act of 1976. This act has also struggled with the impact of technological advances, with a significant amendment resulting in 1980, which established limitations on the exclusive rights of the copyright owner of computer programs.

The Current Dilemma. The framers of the Constitution were faced with the issue of balancing the rights of authors to the profits of their labors; with the rights of the public to the access of information. The wording of the Constitutional copyright provision created a controversy which remains with us today. Educators and publishers have entrenched themselves on opposing sides of this controversy and offer substantive arguments advancing their respective contentions. The New Act provides direction to both educators and publishers, but does not answer all of the questions.

The federal courts have developed a concept which recognizes that; in spite of the limited monopoly granted to authors, i.e., copyright, certain uses of copyrighted works are "fair use." The

judicially developed "Doctrine of Fair Use," codified for the first time in the 1976 Copyright Act, instructs, but does not limit, the courts to consider four factors in deciding whether a certain use of a work is a fair use:

(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 1976 Copyright Act, and its subsequent amendments, extend copyright protection to computer programs.

Federal Case Law. The 1976 Copyright Act establishes the federal statute as the pre-eminent law of copyright; eliminating the dual system of statutory and common-law protection existing under the old statute. There is a lack of case law directly involving teachers and the question of infringing a copyright. To date, only four such cases have come to bar. The courts rejected the teacher's plea of "fair use," and found the defendants guilty of infringement in each case.

In cases involving copyright infringement by educational institutions, the courts accepted one plea of "fair use" and rejected another. A review of cases involving computer programs, reveals a definite trend towards increased protection for these programs.

Federal Case Summary

The initial question presented to the American federal court system was essentially the same question presented to the English courts in Donaldson v Beckett: Is there common-law copyright protection after publication? In Wheaton v Peters, the United States Supreme Court effectively blunted efforts in America to gain recognition for common-law copyright protection for published works. Protection after publication was limited to the federal statute.

Teachers have not recognized success in utilizing the "fair use" defense. Melaim L. King pleaded "fair use" when he was charged with infringing the copyright of a publisher's textbook. King provided his students with an outline of the material to be covered. The court held, in MacMillan Co. v King, that such use was not fair, even though the defendant was a teacher.

Nearly half a century later, another educator, a vocal music teacher, infringed a copyright when he rearranged a version of the song "My God and I." The trial court supported the teacher's claim of fair use, but was reversed by the Court of Appeals. In Wihtol v Crow, the appellate court held that plaintiff had an exclusive right to copy his work and that Nelson E. Crow had no right whatever to copy it.

Twenty years later, the courts again rejected the "fair use" defense in a case involving a teacher. In Marcus v Rowley, the

United States Court of Appeals for the Ninth Circuit, held that Rowley's, nearly verbatim, copying of plaintiff's work was not a "fair use" even though the copying was done for an educational purpose.

Educational institutions have progressed somewhat better, under the doctrine of fair use, than have individual teachers. In Williams & Wilkins v United States, the massive, systematic, photocopying of medical journals was held to be a fair use. The Supreme Court affirmed the finding on a split decision (4-4), which indicated the difficulties the courts were having in dealing with the concept of fair use. Ten years later, a decision in Encyclopedia Britannica v Crooks, confused the issue again. BOCES was found guilty of infringing the copyright in certain films by videotaping and distributing them to educational institutions.

The courts difficulty in trying to apply the fair use doctrine can be clearly demonstrated by reviewing the judicial history of the recent Supreme Court decision in Sony v Universal Studios. The trial court held that the taping of copyrighted programs, broadcast over the public airwaves, was a fair use. The United States Court of Appeals for the Ninth Circuit, affirming its decision in Marcus v Rowley, held that such use infringed the owner's copyright. The United States Supreme Court reversed the Court of Appeals, ruling that time-shifting was a fair use. Four of the Supreme Court justices dissented from the majority opinion, highlighting even further the difficulties of applying the doctrine.

Decisions of the courts have afforded increasingly greater copyright protection to computer programs. The decision of the Data Cash v J.S.& A. court, that a ROM was not the proper subject matter of copyright, was reversed, three years later, in Tandy v Personal Micro Computers. The Tandy court concluded that:

- (1) a computer program was a work of "authorship"; and,
- (2) a silicon chip is a "tangible medium of expression."

The protection afforded the source code was extended to the object code in GCA v Raymond Chance, and later affirmed in Hubco v MGA. Operating programs were included as a result of the decision in Apple v Formula International.

Devices designed to duplicate computer programs were ruled illegal in Atari v J.S.& A. The court held that the "Prom Blaster" developed by J.S.& A. had no use other than infringing the owner's copyright by duplicating the program. The court rejected defendant's argument of the "archival copy" exemption granted by section 117 of the New Act.

Conclusions

The following conclusions were developed from the study based on a review of related literature, federal legislation, federal case law, and historical documents:

1. Historically, copyright was conceived to control the publishing industry in England, and evolved into a right of authors.

2. American copyright is a federal issue, resulting from the clause in the United States Constitution empowering Congress "to promote the Progress of Science and Useful Arts, by securing for a limited time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." ¹

3. Copyright is a monopoly. It is created for the benefit of the people and for the public interest by granting a limited monopoly to authors and creators; granting them limited control over their exclusive works.

4. Technological innovations have been, are, and will continue to be years ahead of statutory regulation.

5. The 1790, 1909, and 1976 Copyright Acts reflect many compromises between those that produce the copyrighted materials and those that use these materials.

6. The polarized viewpoints of educators and publishers are, in the end, insolvable.

7. The 1976 Copyright Act should be amended in light of the new technological innovations.

8. Computer programs are the proper subject matter of copyright.

9. The owner of copyright has five exclusive rights:

- to prepare copies of the work,
- to prepare derivative works,

- to distribute copies of the work,
- to perform the work, and,
- to display the work.

10. Anyone who violates any of the five exclusive rights of the copyright owner without authorization or statutory exemption is guilty of copyright infringement.

11. Fair use is not a defense to copyright infringement, but rather a statutory exemption.

12. The judicially developed doctrine of fair use turns, in part, on consideration of four factors:

- the purpose and character of the use,
 - the nature of the copyrighted work,
 - the amount and substantiality of the portion used,
- and,
- the effect of the use on the potential market for the work.

13. The fair use factors listed in section 107 are not limiting or all inclusive. Other factors may be considered in a finding of fair use.

14. The "shrink-wrap license," utilized by software manufacturers to circumvent the first sale doctrine, will not withstand judicial scrutiny.

15. Barring a written agreement to the contrary, the employer school board is the author of any software programs developed by its employees, within the scope of their employment.

Scope of employment does not limit the development of the program to the school day.

16. Students are considered the author and rightful owner of copyright in any software developed by them.

17. Any employee should obtain a written agreement with his employer as to the rightful owner of the copyright before developing any software program.

18. Neither publication nor registration with the Copyright Office is necessary to obtain copyright. Copyright exists upon creation of the work.

19. Copyright subsists in a work from the time of its creation until the death of the author plus fifty years.

20. Proper notification of copyright must appear on all computer software produced for distribution.

21. Statutory remedies for infringement include: injunctions; impoundment and disposition; damages and profits; and, costs and attorney's fees.

22. Damages may be either actual or statutory. Statutory damages range from \$250 to \$50,000.

23. Copyright infringement can be a criminal offense, which may include fines of not more than \$10,000, and up to one year imprisonment.

24. There is a paucity of case law involving copyright infringement by educators.

25. There will be a dramatic increase in the number of infringement actions brought against educators and public schools.

26. Educators are duplicating copyrighted software daily.

27. Educators are setting a poor example for future generations by their infringing teaching techniques.

28. The publishing industry needs to recognize that a prime motivator for software piracy is exorbitant prices.

29. Teachers are not going to pursue obtaining permission to use copyrighted works because of the delays involved.

30. The fair use guidelines developed for music and photocopying provide some guidance in the area of computer software.

31. Making multiple copies of a computer program and using them simultaneously in multiple computers is illegal.

32. Schools who permit their computers to be used to make illegal copies of software programs are guilty of contributory infringement.

33. School systems should adopt written policies regarding the use of copyrighted software.

34. Serial use of a computer program, in multiple machines and by multiple users, is legal.

35. Multiple showings of copyrighted images, through multiple computer terminals, would constitute a public display; and therefore, violate the owner's copyright.

36. Duplicating computer software entails copying the entire work. This practice falls outside the limits of fair use.

37. Teachers should consult an attorney for legal advice if questions of copyright infringement are involved.

RECOMMENDATIONS

Based on a review of the literature, federal legislation, and federal case law, various recommendations can be developed. The following recommendations should be considered:

1. Congress should follow the advice of the judiciary and amend the current copyright law to accommodate technological advances.
2. Publishers must recognize the limitations of educational budgets and adjust the costs of instructional software accordingly.
3. In-service programs must be conducted in every school to familiarize teachers with the copyright law.
4. Copyright law should be included in the curriculum of teacher-training institutions.
5. Educators must recognize the ethical and legal ramifications of illegal copying practices and cease to engage in such practices.
6. Educators and publishers should negotiate a set of guidelines for duplicating computer software similar to those for photocopying and copying music.

7. School systems should develop written policies for the use of copyrighted software; and,

8. Case law involving educators, copyright, fair use, and/or infringement should be monitored to determine judicial direction in interpreting the copyright statute.

Notes - Chapter V

¹United States Constitution, Article I, Section 8,
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APPENDIXES

APPENDIX A
STATE COPYRIGHT PREAMBLES

Connecticut - "Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind."

New Jersey - "Whereas learning tends to the embellishment of human nature, the honour of the nation, and the general good of mankind; and as it is perfectly agreeable to the principles of equity, that men of learning who devote their time and talents to the preparing of treatises for publication, should have the profits that may arise from the sale of their works secured to them."

North Carolina - "Whereas nothing is more strictly a man's own than the fruits of his study, and it is proper that men should be encouraged to pursue useful knowledge by the hope of reward; and as the security of literary property must generally tend to encourage genius, to promote useful discoveries, and to the general extension of arts and commerce: . . ."

Massachusetts - (copied by New Hampshire and Rhode Island)
 - "Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a mans own than that which is produced by the labour of his mind: . . ."

APPENDIX B
1790 COPYRIGHT ACT

An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passing of this act, the author and author of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same, his or their executors, administrators or assigns, who hath or have not transferred to any other person the copyright of such map, chart, book or books, share or shares thereof; and any other person or persons, being a citizen or citizens of these United States, or residents therein, his or their executors, administrators or assigns, who hath or have purchased or legally acquired the copyright of any such map, chart, book or books, in order to print, reprint, publish, or vend the same, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the term of fourteen years from the recording the title thereof in the clerk's office, as is herein after directed: And that the author and authors of any map, chart, book or books already made and composed, and not printed or published, or that shall hereafter be made and composed, being a citizen or citizens of these United States, or resident therein, and his or their executors, administrators or assigns, shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the like term of fourteen years from the time of recording the title thereof in the clerk's office as aforesaid. And if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years: *Provided,* He or they shall cause the title thereof to be a second time recorded and published in the same manner as is herein after directed, and that within six months before the expiration of the first term of fourteen years aforesaid.

SEC. 2. *And be it further enacted,* That if any other person or persons, from and after the recording the title of any map, chart, book or books, and publishing the same as aforesaid, and within the times limited and granted by this act, shall print, reprint, publish, or import, or cause to be printed, reprinted, published, or imported from any foreign Kingdom or State, any

copy or copies of such map, chart, book or books, without the consent of the author or proprietor thereof, first had and obtained in writing, signed in the presence of two or more credible witnesses; or knowing the same to be so printed, reprinted, or imported, shall publish, sell, or expose to sale, or cause to be published, sold, or exposed to sale, any copy of such map, chart, book or books, without such consent first had and obtained in writing as aforesaid, then such offender or offenders shall forfeit all and every copy and copies of such map, chart, book or books, and all and every sheet and sheets, being part of the same, or either of them, to the author or proprietor of such map, chart, book or books, who shall forthwith destroy the same: And every such offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet which shall be found in his or their possession, either printed or printed, published, imported or exposed to sale, contrary to the true intent and meaning of this act, the one moiety thereof to the author or proprietor of such map, chart, book or books who shall sue for the same, and the other moiety thereof to be for the use of the United States, to be recovered by action of debt in any court of record in the United States, wherein the same is cognizable. *Provided always,* That such action be commenced within one year after the cause of action shall arise, and not afterwards.

SEC. 3. *And be it further enacted,* That no person shall be entitled to the benefit of this act, in cases where any map, chart, book or books, hath or have been already printed and published, unless he shall first deposit, and in all other cases, unless he shall before publication deposit a printed copy of the title of such map, chart, book or books, in the clerk's office of the district court where the author or proprietor shall reside: And the clerk of such court is hereby directed and required to record the same forthwith, in a book to be kept by him for that purpose, in the words following, (giving a copy thereof to the said author or proprietor, under the seal of the court, if he shall require the same). "District of _____ to wit: *Be it remembered,* that on the _____ day of _____ in the _____ year of the independence of the United States of America, A. B. of the said district, hath deposited in this office the title of a map, chart, book or books, (as the case may be) the right whereof he claims as author or proprietor, (as the case may be) in the words following to wit: [Here insert the title] in conformity to the act of the Congress of the United States, intitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.' C. D. clerk of the district of _____ For which the said clerk shall be entitled to receive sixty cents from the said author or proprietor, and sixty cents for every copy under seal actually

given to such author or proprietor as aforesaid. And such author or proprietor shall, within two months from the date thereof, cause a copy of the said record to be published in one or more of the newspapers printed in the United States, for the space of four weeks.

Sec. 4. *And be it further enacted*, That the author or proprietor of any such map, chart, book or books, shall, within six months after the publishing thereof, deliver, or cause to be delivered to the Secretary of State a copy of the same, to be preserved in his office.

Sec. 5. *And be it further enacted*, That nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.

Sec. 6. *And be it further enacted*, That any person or persons who shall print or publish any manuscript, without the consent and approbation of the author or proprietor thereof, first had and obtained as aforesaid, (if such author or proprietor be a citizen of or resident in these United States) shall be liable to suffer and pay to the said author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof.

Sec. 7. *And be it further enacted*, That if any person or persons shall be sued or prosecuted for any matter, act or thing done under or by virtue of this act, he or they may plead the general issue, and give the special matter in evidence.

Approved, May 31, 1790.

APPENDIX B

1790 COPYRIGHT ACT

(continued)

APPENDIX C
COMMISSIONERS
NATIONAL COMMISSION ON NEW TECHNOLOGICAL
USES OF COPYRIGHTED WORKS

Commissioners: National Commission on New Technological
Uses of Copyrighted Works

Representing authors and other copyright owners:

John Hersey, President of the authors League of America,
Inc.

Dan Lacy, Senior Vice-President, McGraw Hill, Inc.

E. Gabriel Perle, Vice-President of Law, Time, Inc.

Hershel B. Sarbin, President, Ziff-Davis Publishing Co.

Representing copyright users:

William S. Dix, Librarian Emeritus, Princeton University

Arthur R. Miller, Professor of Law, Harvard Law School

Robert Wedgeworth, Executive Director, American Library
Association

Alice E. Wilcox, Director, Minnesota Interlibrary
Telecommunications Exchange

Representing the public:

George D. Cary, Retired Chief Judge of the State of New
York and the New York Court of Appeals

Rhoda H. Karpatkin, Executive Director, Consumers Union

Melville B. Nimmer, Professor of Law, University of
California at Los Angeles Law School

APPENDIX D
FAIR USE GUIDELINES

AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN
NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS

WITH RESPECT TO BOOKS AND PERIODICALS

The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. *Single Copying for Teachers*

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

II. *Multiple Copies for Classroom Use*

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that*:

- A. The copying meets the test of brevity and spontaneity as defined below; *and*,
- B. Meets the cumulative effect test as defined below; *and*,
- C. Each copy includes a notice of copyright

Definitions

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an 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.

(it) "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) Copyright 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 same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.

Agreed MARCH 19, 1976.

Ad Hoc Committee on Copyright Law Revision:

By SHELDON ELLIOTT STEINBACH.

Author-Publisher Group:

Authors League of America:

By IRWIN KARP, Counsel.

Association of American Publishers, Inc.:

By ALEXANDER C. HOFFMAN,
Chairman, Copyright Committee.

GUIDELINES FOR EDUCATIONAL USES OF MUSIC

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of HR 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future, and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

A. *Permissible Uses*

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.

2. (a) For academic purposes other than performance, multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10% of the whole work. The number of copies shall not exceed one copy per pupil.

(b) For academic purposes other than performance, a single copy of an entire performable unit (section, movement, aria, etc.) that is, (1) confirmed by the copyright proprietor to be out of print or (2) unavailable except in a larger work, may be made by or for a teacher solely for the purpose of his or her scholarly research or in preparation to teach a class.

3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.

4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.

5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

B. *Prohibitions*

1. Copying to create or replace or substitute for anthologies, compilations or collective works.

2. Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.

3. Copying for the purpose of performance, except as in A(1) above.

4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.

5. Copying without inclusion of the copyright notice which appears on the printed copy.

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