

## *Chapter VI*

# **COPYRIGHTS**

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- ❑ Viewing copyright law as protecting the rights of the owner of a piece of property is accurate, but greatly oversimplified. First, the nature of this property—known as intellectual property—creates intrinsic difficulties in defining ownership rights. A successful novel can spawn a film adaptation, unabashed imitators, parodies, verbatim excerpts in reviews, and even a breakfast cereal based on the book’s characters. It can be challenging to determine where the book author’s property ends and where another person’s creative property begins.
- ❑ Second, technological advances relentlessly challenge any attempts at precise definitions within copyright law. Lawmakers cannot anticipate how future computer and communications technology will create unique uses of copyrighted works. Meanwhile, the widespread availability of photocopy machines, videocassette recorders, and the internet creates the opportunity for copyright infringement at the touch of a button.
- ❑ Third, an overriding public interest in free and open discussion often demands certain uses of copyrighted works without compensating the owner. The result is exemptions to the copyright owner’s right to sue for infringement. These narrowly drawn exemptions often apply to educational, religious, or charitable institutions.
- ❑ These issues are addressed in the Copyright Act of 1976, which can seem to be hopelessly bogged down in details while simultaneously leaving important issues to be decided in the courtroom. While interpretation of the countless nuances is best left to counsel, administrators should be aware of the broader implications of the Act.

## **Copyright Act of 1976**

### **The Act**

- ❑ The Act protects original works of authorship through a limited monopoly. The copyright owner has the right to exploit and copy the work and to prevent others from doing so without paying a royalty.
- ❑ Copyright law protects such works as writing, music, artwork, and computer programs. Similar laws protect other creative ventures. Patent law protects inventions. Trademark law protects names and designs that identify products or businesses. Other laws relate to such areas as unfair competition, misappropriation, and trade secrets.

### **Purpose**

- ❑ Copyright law is designed to create an incentive for creativity by allowing the author to profit from his or her work. This protection allows the author to widely communicate his or her ideas to others who will benefit from them. The Act balances this need to protect the author with the public's need for free and open discussion.

### **Institutions and Individuals Affected**

- ❑ Any individual or private institution is capable of owning a copyright or infringing upon another's copyright. Under certain conditions, a public college can be held liable for copyright infringement. Educational institutions enjoy some special privileges.

### **Effective Date**

- ❑ The Copyright Act of 1976 and the recently passed Copyright Term Extension Act affect works created since January 1, 1978. An individual's copyright lasts for the life of the author plus seventy years. For joint works, copyright lasts for seventy years after the death of the last surviving author. A work made for hire

is protected for ninety-five years after its publication or one hundred-twenty years after its creation, whichever ends sooner.

- ❑ Works copyrighted before 1978 are protected by the Copyright Act of 1909, which offers the same basic protections but with more technical requirements. These works generally can be protected for seventy-five years from the original copyright date.

## **Copyright Law Provides Broad Protection to a Variety of Works**

- ❑ Copyright law protects a variety of works:
  - literary works;
  - musical works, including any accompanying words;
  - dramatic works, including any accompanying music;
  - pantomimes and choreographic works;
  - pictorial, graphic, and sculptural works;
  - motion pictures and other audiovisual works;
  - sound recordings;
  - computer programs.
- ❑ A work does not have to pass a test of creativity, quality, or merit; it merely has to be an “original work of authorship.” Telephone books can be copyrighted, as can a professor’s lecture notes.
- ❑ The work must be fixed in a tangible medium: written, recorded, drawn, stored in a computer.
- ❑ The copyright owner has numerous express rights:

- to reproduce copies of the work;
  - to prepare derivative works based upon the copyrighted work;
  - to distribute copies of the copyrighted work to the public by sale, gift, rental, or lending;
  - to publicly perform or display works that are literary, musical, dramatic, choreographic, pantomime, pictorial, graphic, or sculptural.
- ❑ Copyright protects the expression of an idea, which must be distinguished from the idea itself. Copyright does not protect any idea, procedure, concept, discovery, or fact. For example, a researcher who makes a discovery cannot have a copyright in the discovery itself, but can have a copyright in a journal article he or she writes about the discovery. Patent or other laws may protect the discovery itself.
- ❑ The expression of an idea also must be distinguished from the tangible medium upon which the expression is copied. When a professor buys a book, he or she owns the paper, cardboard, and cloth that make up the book. The professor is free to read it, sell it, lend it, or burn it. Complex copyright issues arise, though, when the professor photocopies the book or writes a journal article based on the book.

## **Some Technical Requirements Are Required to Protect Published Works**

- ❑ Technically speaking, an author enjoys some copyright protection as soon as the ink dries on the paper. As a practical matter, the author must take additional steps to enjoy full protection under the Copyright Act.
- ❑ The technical requirements apply to works that are “published.” Publication is the distribution of copies of a work to the public by

sale, gift, rental, or lending. An academician can “publish” a work by distributing it among colleagues or students. A public performance or display of a work does not of itself constitute publication.

- ❑ If a work is published, the owner must place a copyright notice on all copies of the work. Omission of notice from a significant number of copies can invalidate the copyright. A copyright notice consists of three elements:
  - The symbol © (the letter C in a circle) or the word “Copyright” or the abbreviation “Copr.”; and
  - The year of the first publication of the work; and
  - The name of the copyright owner.
- ❑ The owner must register a published work with the Copyright Office. Registration is a prerequisite to filing a lawsuit and allows the recovery of enhanced damages, including attorney’s fees.

### **The Act Determines Ownership of Works Made for Hire by an Employee**

- ❑ Copyright ownership becomes muddled when a work is created as part of the author’s job. Ideally, the written employment contract will explicitly state who owns the copyright to such works. Otherwise, the Copyright Act states that the employer owns such “works for hire” that meet certain criteria. A work for hire is:
  - A work prepared by an employee within the scope of his or her employment; or
  - A work specifically ordered or commissioned for use as a contribution to a larger work if the parties expressly agree in writing that the work is to be considered a work for hire. Examples are a translation of an existing work, a foreword to a book, answer materials for a test, and a contribution to a collective work.

- ❑ Serious disputes have arisen over the ownership of the copyright in a faculty member's publication. Since a "publish or perish" tenure track requires faculty to publish, the "scope of employment" test arguably is broad enough to make every academic article a work for hire. To determine whether a work is within the scope of employment, courts examine such factors as the degree of employer supervision and the use of the employer's resources.
  
- ❑ In a major case, one court bypassed the scope of employment doctrine to hold that, as a general rule, faculty members own the copyright to their works unless the employment contract explicitly states otherwise. A university ordered three faculty members to write an article on a clinical pharmacy clerkship that they supervised. The faculty members' contracts stated that the university would own the copyright in works created as a specific requirement of employment or as an assigned university duty. The court ruled that the contract was not explicit enough to overcome the strong academic tradition that faculty members owned the copyright of their works. Therefore, the faculty members owned the copyright. This case adds another consideration to the already complex area of work for hire.

## **Non-Infringing Uses of Copyrighted Material**

- ❑ The Copyright Act contains several exemptions that allow a person or institution to use or copy a copyrighted work without the owner's permission. Works that never were copyrighted or whose copyright has expired are in the public domain, with no copyright protection whatsoever. Works created by the federal government also are in the public domain.
  
- ❑ The Act has three major exemptions that concern colleges. These provisions are distinct but often will overlap in an academic setting. The doctrine of "fair use" allows the copying of works for such purposes as teaching, scholarship, and criticism. A second provision allows libraries and archives to make limited copies. A third provision exempts certain performances and displays for teaching or religious purposes.

## Anyone Can Make Fair Use of a Copyrighted Work

- ❑ The doctrine of fair use was intended to allow free discussion and reasonable use of copyrighted works without requiring the author's permission. Examples of fair use are parody, satire, and quoting excerpts of a copyrighted work in a book review or scholarly work. The Act states:
  - [T]he fair use of a copyrighted work, including such use by reproduction in copies...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.
- ❑ The Act lists four factors to consider in deciding whether the use of a copyrighted work was a fair use:
  - The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - The nature of the copyrighted work;
  - The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - The effect of the use upon the potential market for or value of the copyrighted work.
- ❑ These factors create a definition of fair use that can be so flexible as to be illusive. With no clear boundaries, copyright owners aggressively sue institutions whose copying practices approach the outer edge of fair use.
- ❑ Of importance to educators is the 1991 case of *Basic Books, Inc. v. Kinko's Graphics Corp.* A nationwide photocopying business was found to have infringed on copyrights by copying excerpts from books for course packets to sell to students. The court found that the copying was not fair use. Although the students

used the material for educational purposes, the business' copying was for commercial purposes. Weighing in Kinko's favor was that the copied books were factual in nature, creating a greater public interest in their content. But the copying included substantial portions of books: up to 110 pages or 25 percent of some books. Finally, the court ruled that the sale of the class packets significantly hurt the sales of the copyright owners' books. The court did not address the university's role in the copying, but the court found Kinko's liable for \$510,000 plus costs and attorney's fees.

## **Guidelines Help a College Determine What Is Fair Use in Copying Books and Periodicals for Classroom Use**

- ❑ At Congress' urging, a group of publishers and educators in 1976 developed "Guidelines for Classroom Copying in Not-For-Profit Educational Institutions With Respect to Books and Periodicals." While the Guidelines do not have the force of law, their importance is growing. Currently, revisions of the Guidelines are being discussed.
- ❑ The Guidelines were intended to state only an institution's minimum rights under the fair use doctrine; uses that are not listed in the Guidelines still could be fair use. In practice, though, a university that was sued for infringement entered a consent decree establishing the Guidelines as the maximum rights that the university would claim under the fair use doctrine. Other courts have used the Guidelines as persuasive authority in deciding lawsuits. The result is that institutions face increasing risks with copying practices that exceed the Guidelines.
- ❑ The Guidelines have been criticized as impractical and unrealistic in modern educational institutions. Similar guidelines exist for the educational copying of music, allowing single copies of entire works and multiple copies of excerpts. Because of their growing importance, the Guidelines for books and periodicals are summarized below.

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- ❑ Under the Guidelines, the copies must not create or substitute for anthologies or collective works. Nor can instructors copy “consumable” works such as workbooks, exercises, and tests. The copies cannot substitute for the purchase of books, reprints, or periodicals. Each copy must contain a formal copyright notice. Charges to the students cannot exceed actual photocopying costs.
  
- ❑ The Guidelines allow an instructor to make a single copy of the following items for his or her own use in research, teaching, or preparation to teach:
  - A chapter from a book;
  - An article from a periodical or newspaper;
  - A short story, short essay, or short poem;
  - A chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.
  
- ❑ The Guidelines allow an instructor to make multiple copies (up to one copy per student in a course) for classroom use or discussion under the following conditions:
  - The copies excerpt must be brief. The excerpt cannot exceed: 250 words of a poem, a complete prose piece of 2,500 words or less; 1,000 words (up to ten percent) of a longer prose piece; one illustration from a book or periodical issue; two pages or ten percent of a children’s book.
  - The need for the copying must be spontaneous. The decision to use the work must be made so soon before it is time to use it in the classroom that there is not reasonable time to obtain permission from the copyright owner. An instructor does not act spontaneously in repeatedly copying the same item from semester to semester. It likely is not spontaneous to copy course material at the beginning of a semester for use weeks or months later. The copying must be at the instance and inspiration of the individual teacher, not a supervisor or administrator.

- The cumulative effect of the copying must not be great. The copying can be for only one course in the school. Copying must be limited to one short item or two excerpts from the same author, and three items from the same collective work or periodical volume (other than news articles). There must not be more than nine instances of such multiple copying for one course during one class term.
- ❑ Since the Guidelines apply only to educational institutions, they were not decisive in the *Kinko's* case discussed above. Still, the court examined the Guidelines and ruled that the copying exceeded them. The packets did not contain appropriate copyright notices. The excerpts exceeded the brevity requirements. Nor was the copying spontaneous: it occurred regularly before every semester (with discounts for instructors who submitted material early), and the packets were intended to last the entire semester, which was adequate time to obtain permission from the copyright owner. The packets exceeded the limit of nine items copied per course. Finally, the copying violated the Guidelines' specific prohibition that copies must not be used to substitute for anthologies or compilations.

## **The Copyright Act Contains an Exemption for Reproduction by Libraries and Archives**

- ❑ This exemption, found in section 108 of the Act, provides that certain copying by libraries and archives does not constitute infringement. If an instance of copying does not fit this exemption, it still may be allowable under fair use or another exemption.
- ❑ The Act allows library or archive employees to make a single copy of a single work under certain conditions:
  - The copying or distribution must not have a purpose of direct or indirect commercial advantage;
  - The library's collections must be open to the public, or at least available to people not associated with the institution who are doing research in a specialized field; and

- The copy must contain a copyright notice.
- ❑ A library can copy an item for a library user's private study, scholarship, or research. This type of copying is limited to one article from a collection or periodical; a small part of another work; or an entire out-of-print work for which the library cannot reasonably obtain an unused replacement at a fair price. The copy must become the property of the user, i.e., the library cannot lend this copy. The library must display copyright warnings, conforming to federal regulations, at the place where orders are accepted and on the order form.
- ❑ The library can copy a visual work or unpublished writing in its collection for purposes of preservation and security. If a work is published but out of print and the library cannot reasonably obtain an unused replacement at a fair price, the work can be copied to replace one that is damaged, deteriorating, lost, or stolen.
- ❑ This section generally does not create permission to copy musical, visual, and audiovisual works. A provision does allow limited off-the-air copying of television news broadcasts, such as the evening news, but not documentaries or magazine-format shows such as 60 Minutes.
- ❑ A library can avoid liability for copyright infringement by an individual using the library's unsupervised copying equipment. To be protected, the library must post copyright warnings conforming to federal regulations. The individual, though, can be held liable for such infringement.

### **The Library Exemption Does Not Protect Copying That Is Systematic, Concerted, or Excessive**

- ❑ The exemption does not allow systematic copying of articles in periodicals or collections or small portions of other works. For example, a library cannot make multiple copies of a journal article

to distribute to faculty members. Nor can a library make a single copy to route to numerous faculty members. Of course, the library is free to route the original.

- ❑ The library exemption allows limited copying for interlibrary arrangements. For example, a library receiving a request for an interlibrary loan may instead send a copy of the item requested. The arrangement must not have the purpose or effect of a library receiving such aggregate quantities of copies as to substitute for a subscription or purchase of the work.
  - Guidelines suggest limits on periodical articles and excerpts from other works that are less than five years old. Within a calendar year, a library should not request more than six copies from a given periodical (as opposed to a given issue of a periodical) or six copies of excerpts from other works.

## **Exemptions for Certain Performances and Displays**

- ❑ While the discussion above focused on the copying of printed material, colleges should be aware of the copyright laws relating to works that are visual, auditory, or audiovisual. Such works can be “performed,” which means to recite, render, play, dance, or act, either directly or through a device, such as playing the sights and sounds of a movie. Such works also can be “displayed,” which means to show a copy, either directly or by such means as film, slide, or television image.
- ❑ Section 110 of the Copyright Act allows certain performances and displays without the copyright owner’s permission. These exemptions generally apply to nonprofit uses by educational, religious, or charitable organizations. The greatest protection is for performances in the classroom. Protection lessens if the performance is open to people outside the classroom or an admission is charged.
- ❑ The section allows the performance or display of a work in the course of face-to-face teaching at a nonprofit educational institution. This wide-ranging exemption covers all types of works:

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reading aloud from copyrighted text, performing a play, singing a song, or displaying an illustration on an overhead projector.

- The performance or display must be for the purpose of education, not for the entertainment of anyone in the audience. The performance or display must be by the instructor or students, and must occur in a classroom or similar place devoted to instruction.
  - While this exemption allows the class to act out a play, it does not allow the instructor to photocopy copyrighted scripts. Nor does this exemption allow a person to show an audiovisual work that was illegally made.
- Some of the exemptions for face-to-face teaching also apply if the instruction is transmitted outside the classroom. Instruction can be sent via closed circuit to several classrooms, or broadcast over television or radio to students at home.
- The transmission must be made primarily to classrooms or similar places normally devoted to instruction, or to people who cannot be in the classroom because of disability or other circumstances. This allows instructional television courses broadcast by a college as long as the primary audiences consists of regularly enrolled students.
  - Unlike the face-to-face exemption, the transmission exemption limits performances to nondramatic literary or musical works. Thus, the instructor can read from a novel, but cannot act out a play, perform an opera, or show a filmstrip without the copyright owner's permission.
  - To be allowed under this exemption, the performance or display must be a regular part of the systematic instructional activities of a nonprofit educational institution.
- Another exemption allows certain performances and displays in the course of services at a place of worship or other religious assembly. Allowed are performances of a nondramatic literary or musical work or a dramatico-musical work of a religious nature. This

allows the performance of sacred music that might be considered dramatic, such as oratorios and musical settings of the mass.

- The Act allows the nonprofit performance of a nondramatic literary or musical work without the copyright owner's permission. This would include public poetry readings and concerts, but not plays or operas.
  - There must be no purpose of direct or indirect commercial advantage. If admission is charged, the proceeds (after deducting costs) must be used exclusively for educational, religious, or charitable purposes.
  - Performers, promoters, and organizers must not receive payment specifically for the performance. While a salaried music instructor may be involved in the performance, a paid soloist may not.
  - As with the other exemptions, the college does not have to obtain the copyright owner's permission or pay royalties. Unique to this provision, though, is the copyright owner's right to prohibit the performance with seven days' notice. This allows a copyright owner to prevent his or her work from being used to promote a cause that he or she opposes.
- A common-sense exemption allows a person to turn on a radio or television set in a public place without paying royalties. The exemption was intended to allow a small business to play a radio or television to add to the ambiance.
  - The broadcast must be received on an apparatus of a kind commonly used in private homes. With college students often owning thousand-dollar sound systems, it may be difficult to distinguish a "home-style" system from a "commercial" system. Certainly, a college can place a television set in a student lounge or a portable radio in the campus convenience store. A college may be forced to pay royalties, however, for publicly playing a radio with more than four speakers, or whose speakers are placed far apart.

- Other limits apply. This exemption addresses broadcasts only, not cable television or recordings, such as videotapes or cassette tapes. Also, the audience cannot be directly charged to see or hear the broadcast. For example, a campus pub that has a cover charge to watch a pay-per-view cable television show must pay royalties.

## **Digital Millennium Copyright Act**

- ❑ In 1998, Congress passed the Digital Millennium Copyright Act. The law prohibits circumvention of technological measures used by a copyright holder to restrict access to materials and prohibits the manufacture of devices or offering services primarily to defeat technological protection measures.
- ❑ The Act also requires the Register of Copyrights to make recommendations on promoting distance learning through digital technologies.
- ❑ Although not expressly extending the fair use doctrine to works published on the Internet, software, or other digital formats, the bill makes no changes to the fair use doctrine or other privileges enjoyed by users under current law.

## **The Technology Education and Copyright Harmonization Act of 2002 (TEACH Act)**

- ❑ In 2002, Congress passed the Technology Education and Copyright Harmonization Act of 2002 (TEACH Act) that amends the Copyright Act by allowing instructors who teach by way of the Internet at accredited nonprofit educational institutions to use copyrighted works in electronic courseware without obtaining permission from the copyright owner. The TEACH Act expands the face-to-face classroom exception, which allows the use of protected displays and performances in live classroom instruction, to remote digital distance education.
- ❑ The Copyright Act allows instructors to use protected visual, auditory, or audiovisual displays or performances in the course of

face-to-face teaching in the classroom without obtaining permission from the copyright owner. However, prior to the TEACH Act, students receiving instruction online were barred from viewing or hearing protected works or performances because they were outside the classroom. The concern was that protected works transmitted digitally could be easily copied and distributed by students, which would violate the Copyright Act. The TEACH Act provides clarity on when and how copyrighted displays and performances can be digitally transmitted to students.

- ❑ The TEACH Act authorizes college and university instructors to digitally transmit reasonable and limited portions of copyrighted displays or performances (i.e., video tapes and films, and any dramatic musical work), in an amount comparable to that which is typically displayed in the course of a live classroom session if:
  - The instructor directs such activities as an integral part of a class session as a regular part of the systematic mediated instructional activities of the institution.
  - The performance or display is directly related and of material assistance to the teaching of the content of the transmission.
  - The transmission is made solely for the reception to official students enrolled in the course.
- ❑ Institutions that transmit copyrighted displays or performances must institute policies regarding copyright laws that apply to faculty, students, and relevant staff members that promote compliance. The policy must provide notice to students that copyrighted materials used in connection with the transmission of online courses may be subject to copyright protection.
- ❑ Technological measures that reasonably prevent retention of a work or block the unauthorized dissemination of the work in accessible form to others should be utilized.

## Matters to Review

- ❑ A college should establish a clear policy determining who owns the copyright in employees' works. Steps should be taken to protect those copyrights, including copyright notices and registration.
- ❑ With the vast amount of creative endeavors conducted at a college, it is important to review activities to prevent infringement. A review should include not only obvious situations such as libraries, student publications, the campus radio station, the marching band, videotaping, and photocopying, but less obvious areas such as computer programs, semiconductor chips, blank forms, and the radio playing in the campus pub. Educating employees about copyright law can prevent infringement as well as limiting liability in case infringement occurs.
- ❑ In the near future, the most expensive copyright litigation concerning colleges most likely will involve large-scale photocopying. The latest target was faculty members who photocopy hundreds of pages of copyrighted material to assemble their own "textbook." A college should compare their library photocopying practices with the Guidelines that Congress endorsed. The Guidelines provide a safe haven, albeit a very limited one. Outside the Guidelines, unauthorized photocopying is becoming an increasingly risky proposition.
- ❑ Copyright law should be outlined on signs at photocopy machines—including self-service machines—and on forms by which photocopies are ordered at campus copy shops or libraries. These warnings can limit the college's liability in case of infringement.
- ❑ A college should have a system to make certain that it has the right to stage a performance, whether it is the college acting troupe, a touring lecturer, a campus radio station, or an elaborate sound system in the campus pub. For music, institution-wide licenses are available from licensing societies such as ASCAP and BMI.
- ❑ Despite its uncertainties, copyright law has one sure way to avoid infringement: obtain permission from the copyright owner. Many scholarly journals allow photocopying without paying royalties,

although others charge hefty fees. Faculty should be given a form for requesting permission from the copyright owner. Often, publishers do not respond to requests for permission or the copyright holder cannot be identified. If a good-faith effort is made and there is no response, then faculty members can use the material.

- ❑ If distance education is offered through the Internet, a clear policy on digital transmissions of copyrighted displays and performances must be implemented to comply with the TEACH Act. Faculty and students must be put on notice that unauthorized copying and distribution violates the Copyright Act.

## **Enforcement**

- ❑ A copyright owner protects a copyright through a lawsuit against the alleged infringer. If successful, the owner can receive an injunction prohibiting further infringement; impoundment of the infringing articles; and monetary damages.
- ❑ Enhanced damages, including attorney's fees and costs, are available if the copyright owner registered the work. A nonprofit educational institution can avoid these enhanced damages if it reasonably believed its copying was fair use.
- ❑ Criminal penalties can be imposed for willful violations for a financial or commercial motive.

## **Compliance Agency**

- ❑ For information on registration and regulations, contact:

Copyright Office  
Library of Congress  
James Madison Memorial Building  
101 Independence Avenue S.E.  
Washington, D.C. 20540  
(202) 479-0700