

Photocopying of Copyrighted Works for Educational Purposes: Does it Constitute Fair Use?

Dharam Veer Singh and Pankaj Kumar†

National Law Institute University, Bhopal, Bahadrbhada Road, Barkheri Kalan, Post Box No. 369, Bhopal 462 003 Madhya Pradesh

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The paper analyses whether photocopying of copyrighted works for an educational purpose constitutes fair use. The statutory provisions on the issue in different countries have been enlisted. The provisions of the US law have been exhaustively dealt with followed by the guidelines as prescribed by the government body under the US congressional mandate. A case analysis has been done in order to ascertain the approach of the courts in applying the statutory provisions to the instances of making multiple copies of copyrighted works for educational purposes. Fair use under the US statute depends on the four factors of purpose, nature, amount, and effect. The guidelines, however, make fair use dependent on brevity, spontaneity, and cumulative effect. In the last part of the paper, the prevalent US law is compared with the prevalent Indian law.

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Copyright law begins with the premise that the copyright owner has exclusive rights to many uses of a protected work, notably rights to reproduce, distribute, make derivative works, and publicly display or perform the work. But the Copyright Act also sets forth several important exceptions to these rights. Individual statutes make specific allowance for such concerns as distance learning, backup copies of software, and some reproductions made by libraries. The best-known and important exception to the owner's rights is fair use.

In the Indian Copyright Act, 1957¹, Section 52 deals with fair uses. This section has only two subsections, Section 52 (1) (g) and Section 52 (1) (h) dealing with fair use or fair dealing in an educational context. The Section 52 (1) (g) provides that the bona fide publication of non-copyright matter in a collection intended for the use of educational institutions would not amount to an infringement of copyright².

Section 52 (1) (h) of the Copyright Act, 1957, further provides that any reproduction of a literary, musical or artistic work by the teacher or pupil in the course of instruction or in answers to questions asked in examinations shall not amount to an infringement of copyright³. These statutory provisions indicate that the law in India does not expressly deal with the issue

of photocopying of copyrighted works for educational purposes.

According to the statutory provisions on the issue in Australia, the inclusion of works in collections to be used by places of education shall not be regarded as acts constituting infringement of copyright in works⁴.

In Canada, educational institutions and persons acting under their authority may make copies and give performances of works for educational purposes, with restrictions where such works are commercially available⁵. It is not an infringement of copyright to publish in a collection, mainly composed of non-copyrighted matter, intended for the use of schools, of short passages from published literary works, not themselves published for the use of schools, if not more than two passages from works by the same author are published by the same publisher within five years, and the source from which the passages are taken is acknowledged⁶.

In the USA, the fair use doctrine allows a person to use copyrighted material in a reasonable manner without the copyright owner's consent and irrespective of the monopoly granted to the owner⁷.

Section 107 of the Copyright Act, 1976, provides for limitations imposed on the exclusive rights of copyright owners by fair use.

Notwithstanding the provisions of Sections 106 and 106 A, the fair use of a copyrighted work, including

†Email: dharamveersinghchauhan@yahoo.com

such use by reproduction in copies or by any other means specified in 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. The factors to be considered in determining whether the use made of a work in any particular case is a fair use shall include: (i) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, (ii) the nature of the copyrighted work, (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole,- and (iv) the effect of the use on the potential market for or value of the copyrighted work.

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

While fair use is intended to apply to teaching, research, and other such activities, a crucial point is that an educational purpose alone does not make a use fair. The purpose of the use is in fact only one of four factors that users must analyse in order to conclude whether or not an activity is lawful⁸.

Moreover, each of the factors is subject to interpretation as Courts struggle to make sense of the law. Some interpretations, and their subsequent reconstruction by policy-makers and interest groups, have been especially problematic. For example, some copyright analysts have concluded that, if a work is a commercial product, the 'nature' factor weighs against fair use⁹. By that measure, no clip from a feature film or copy from a trade book could survive at least that fair-use factor. Similarly, some commentators argue that if a licence for the intended use is available from the copyright owner, the action will directly conflict with the market for licensing the original. Thus, the availability of a licence will itself tip the 'effect' factor against fair use. Neither of these simplistic constructions of fair use is a valid generalization, yet they are rooted in some truths under limited circumstances. Only one conclusion about the four factors is reliable: each must be evaluated in the light of the specific facts presented.

A central tenet of this analysis is that fair use is a flexible doctrine that Congress wanted to test and adapt for changing needs and circumstances¹⁰. The law provides no clear and direct answers about the scope of fair use and its meaning in specific situations. Reasonable people will always differ

widely on the applicability of fair use, but any reliable evaluation of fair use must depend upon a reasoned analysis of the four factors of fair use. The four factors also need not lean in one direction. If most factors lean in favour of fair use, the activity is allowed; if most lean in the opposite direction, the action will not fit the fair-use exception and may require permission from the copyright owner¹¹.

First Factor-Purpose and Character of the Use

Under the first factor, the purpose and character of the use, including whether the use is commercial or for nonprofit educational purposes, it has been held that every commercial use is presumptively unfair¹². However, in *Consumers Union Inc v General Signal Corp*¹³, a commercial use was found to be fair, while in *Marcus v Bowley*¹⁴, a non-profit educational use was found to infringe. Since most uses are commercial and meant to turn a profit, the commercial/noncommercial distinction is not dispositive¹⁵. As the Supreme Court stated in *Harper and Row Publishers Inc v Nation Enterprises*¹⁶, the 'crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.'

Although the profit element is a significant factor in the fair use analysis, it is not itself controlling; whether a use is fair depends on the totality of all the factors. Recently, the United States Supreme Court in *Campbell v Acuff-Rose Music Inc*¹⁷, explained that the statement that every commercial use is presumptively unfair did not call for a 'hard evidentiary presumption'. The commerciality of the use merely tends to weigh against a finding of fair use. As an equitable defence, fair use presupposes faith so that the fairness of defendant's conduct is relevant fairness of its use.

Courts are more likely to favour a use that is transformative and productive over a non-productive, merely superseding use. A productive use is one that produces a new result different from the original¹⁸, i.e., a use that transforms rather than supersedes original. A transformative non-superseding use should overcome the presumption that all commercial uses are unfair. The more transformative the use, the less will be the significance of its commerciality.

Second Factor-Nature of the Copyrighted Work

The second factor concerns the nature of the work that has been copied. An important distinction is whether the work is fact or fiction¹⁹. Where the copyrighted work is fact rather than fictional, the scope of fair use is broader. The scope of fair use is narrower for fictional works, unpublished works and for limited-circulation newsletters. Another consideration is whether the copied work is creative and imaginative.

The scope of fair use is greater with respect to works that are essentially factual in nature or primarily informational rather than creative²⁰. However, there is no clear line between works that are factual and those that are creative or expressive, because the creation of a nonfiction work, even a compilation of pure fact, entails originality. Since biographies, for example, are personal histories, it is reasonable for biographers to use earlier works dealing with the same subject, and occasionally to quote directly from such works.

In *Harper & Row v Nation Enterprises*²¹, the Supreme Court held that the fact of a work being unpublished is a *key, though not necessarily determinative, factor*, it impliedly rejected a *per se* rule.

As a result of this uncertainty, Section 107 was amended in 1992 to clarify that the unpublished nature of a work does not itself bar fair use. Another factor to be considered is whether the copyrighted work is still in print and available to the public. Copying from an out of print work may be fair, since there is little market effect²².

Third Factor-Amount and Substantiality of the Portion Used

The Third factor deals with the amount and substantiality both quantitatively and qualitatively of the portion used in relation to the copyrighted work as a whole. Generally, where the portion used is a substantial part of the copyrighted work, or is essentially the heart of it, the use is not fair²³.

The fair use defence assumes that defendant copied plaintiff's copyrighted work. But the fact that a work is copyrighted does not mean that every part of it is protected. Since not all parts of a copyrighted work are protected, not all copying constitutes infringement. Copying unprotected parts of a work does not infringe. Copyright protection, for example, does not extend to material traceable to common sources or the

public domain, or to incidents, characters, or settings, which are, as a practical matter indispensable to or at least standard in the treatment of a given topic. Words, metaphors, and clichéd language are not protectable nor are phrases or expressions conveying an idea typically expressed in a limited number of stereotyped ways. Copying those elements of a copyrighted work does not constitute copyright infringement²⁴. Therefore, before determining whether defendant's use is fair, it should first be determined whether the use infringes. If the use does not infringe because the copied parts are unprotectable or the amount copied is too insubstantial, it is irrelevant whether the use is fair. What is relevant is the amount and substantiality of protected expression of the copyrighted work that has been used by the defendant, not the unprotectable material of plaintiff contained in the defendant's work. Thus, the third factor tracks the substantial and the qualitative degree of the copying: how much of the essence of the copyrighted work was copied in relation to the whole²⁵.

Fourth Factor-Effect on the Market for the Copyrighted Work

Effect on the market is perhaps even more complicated than the other three factors. Some Courts also have called it the most important factor, although such rhetoric is often difficult to validate. This factor means fundamentally that if a use is made for which a purchase of an original theoretically should have occurred regardless of your personal willingness or ability to pay for such purchase-then this factor may weigh against fair use. 'Effect' is closely linked to 'purpose'²⁶. If the purpose is research or scholarship, market effect may be difficult to prove. If the purpose is commercial, then adverse market effect is often presumed. Occasional quotations or photocopies may have no adverse market effects, but reproductions of software and videotapes can make direct inroads on the potential markets for those works.

The Fourth factor looks at the effect of defendant's use upon the potential market for or value of the copyrighted work. Although the fourth fair use factor has been called the most important element, its significance should not dominate the analysis, otherwise fair use is rendered unfair merely because of its market impact. Where the other factors clearly point to fair use, its potential loss to the copyright owner should not affect the outcome. All the factors

must be considered and weighed and no one factor must dominate.

Moreover, the fair use doctrine, as an equitable rule of reason, permits the Courts to avoid rigid application of the copyright when, on occasion, it would stifle the very creativity which that law is designed to foster. Furthermore, since the four factors listed in Section 107 are not exclusive, Courts are free to consider equitable arguments that do not necessarily fit into the four-factor analysis²⁷.

Educational uses, particularly classroom uses, of copyrighted works occupy a preferred place in Section 107's design. Recognizing that even Section 107's specific directives left a need for greater certainty and protection for teachers, the Congress encouraged the producer and user groups to devise clear cut guidelines for classroom uses of literary, musical and audio visual works that could be agreeable to all the sides. The guidelines, which do not have the controlling force of law²⁸ aim to create a safe harbor for classroom photocopying. They do not minimize photocopying by commercial copy centers, even if a non-profit educational institution orders the photocopying²⁹. Teachers may also make, or have made, multiple copies for use in their classes, so long as the number of copies does not exceed the number of students in the class³⁰. Multiple copying must further meet the specified tests of brevity, spontaneity and cumulative effect³¹.

Guidelines Developed to Deal with the Issue of Photocopying of Copyrighted Works for Educational Purposes

Early fair-use guidelines failed to reflect accurately the law or to embody workable standards, yet they have persisted as models for a new generation of interpretations applicable to the extraordinary demands of digital technology. The newest incarnations of guidelines perpetuate deficiencies of the past and create new hazards for copyright owners, users, and anyone else seeking to understand the law. Because case law in 1976 had not begun to address common educational needs, and because the four factors in the statute could be interpreted differently to produce divergent outcomes, educators and other parties were resolved to identify with some greater certainty the meaning and scope of fair use. Negotiations in the mid-1970s gave rise to the first set of guidelines on the issue of photocopying for classroom handouts. Soon came guidelines on making copies of musical works for education, and later

emerged guidelines on sending copies of journal articles for interlibrary loans and recording television broadcasts off air for classroom use (see table). A few Court decisions since then have relied on them, although with mixed impressions.

Three proposals for new fair-use guidelines were included in a December 1998 report of the Conference on Fair Use, also known as CONFU. These guidelines only stated the minimum and not the maximum standards of educational fair use under Section 107³². In this regard, the Guidelines apparently offered a safe harbor from infringement.

Gentlemen's Agreement (1935)

The earliest example of such a fair-use guideline was the so-called 'Gentlemen's Agreement' of 1935 that identified instances of reproduction of short copyrighted works that would be allowed under the law at that time. The relatively simple standard was a response to the introduction of photographic and other photo-duplication equipment in libraries. As technologies evolved in the following decades, particularly, with the growth of high-speed photocopying, the debate over fair use shifted from isolated copies to multiple copies that more likely held the risk of replacing purchases of copyrighted works.

Classroom Guidelines (1976)³³

The best known of all fair-use guidelines emerged in 1976, not coincidentally in conjunction with the passage of the newly revised Copyright Act. For the first time, the law embodied fair use in statutory terms, and not merely as a judicial doctrine. To many copyright proprietors, particularly publishers, the newly codified fair use was a challenge or even a threat. Although the new statute was fundamentally unspecific and susceptible to broad interpretations, it nevertheless made unequivocal that fair use would exist and could be raised in a wide range of cases. The new statute also stated explicitly that fair use would generally apply to educational uses, including multiple copies of protected works for teaching purposes³⁴. The new law, as enacted in 1976, was astonishingly simple in its reliance on four factors: the purpose of the use; the nature of the work; the amount of the work used; and the effect of the use on the value of or the market for, the original work.

The copyright law sets limits on the use of protected works. In particular, the Copyright Act of 1976 granted to copyright owners exclusive rights of

Table—Fair use restrictions for educational purposes

Work or materials to be used for educational purposes	Fair use restrictions for face-to-face teaching	Illegal use without explicit permission from creator/author
Chapter in a book	Single copy for teacher for research, teaching, or class preparation.	Multiple copies used again and again without permission
	Multiple copies (one per student per class) okay if material is (a) adequately brief, (b) spontaneously copied, (c) in compliance with cumulative effect test	Multiple copies to create anthology Multiple copies to avoid purchase of textbook or consumable materials
	Copyright notice and attribution required	
Newspaper/magazine article	Same as above	Same as above
Prose, short story, short essay, Web article	Multiple copies of complete work of less than 2,500 words and excerpts up to 1,000 words or 10% of work, whichever is less	Same as above
	For works of 2,500-4,999 words, 500 words may be copied. Same as for first item	
Poem	Multiple copies allowed of complete poem up to 250 words-no more than two printed pages	Same as above
	Multiple copies of up to 250 words from longer poems	
Artwork or graphic image	Same as for first item	Same as first item
Chart, diagram, graph, drawing, cartoon, picture from periodical, newspaper, or book, Web page image	No more than 5 images of an artist/photographer in one program or printing and not more than 10% or 15% of images from published collective work, whichever is less	Incorporation or alteration into another form or as embellishment, decoration for artistic purposes for other than temporary purposes
Motion media- film and videotape productions	Single copy of up to 3 minutes or 10% of the whole, whichever is less	Multiple copies prohibited
	Spontaneity required	Incorporation or alteration into another form as embellishment for artistic purposes for other than temporary purposes prohibited
Music- sheet music, songs, lyrics, operas, musical scores, compact disk, disk, or cassette taped recordings	Single copy of up to 10% of a musical composition in print, sound, or multimedia form	Same as immediately above
	Broadcast programmes	Same as immediately above
	Single copy of off-air simultaneous broadcast may be used for a period not to exceed the first 45 consecutive calendar days after recording date	
	Use by only individual teachers	May not be done at direction of superior
	Copyright notice required	May not be altered

reproduction and distribution of their works, along with various other rights. Without a fair-use right, all copying of materials for the simple pursuit of classroom handouts would be prohibited. The new fair-use statute, however, allowed copies for teaching, but only within the limits of the four factors.

The Classroom Guidelines were built on the premise that some photocopying of materials for distribution to students is within fair use, but with limits. These guidelines allowed single copies of short items, such as an article or book chapter, to be made by a teacher for research or class preparation. Multiple copies for distribution, however, were subject to the rigorous limits of 'brevity,' 'spontaneity' and 'cumulative effect'³⁵. Copies were to include 'a notice of copyright'³⁶.

Even if the copying was scrupulously within the three conditions of brevity, spontaneity, and cumulative effect, some activities were still forbidden under the guidelines. For example, students may not be charged for the material beyond the actual copying cost; the copying cannot substitute for a purchase of books and other publications; a teacher may not copy the same material in more than one term; and the copying 'shall not be used to create or to replace or substitute for anthologies, compilations or collective works.'³⁷ The Classroom Guidelines thus not only blatantly diverged from the four factors in the fair-use statute and replaced them with three different mandates, but also added blanket prohibitions that could not be overcome by any balancing of factors or equities. The guidelines unquestionably displaced the law with a standard that was a departure from the statute in many respects.

Leading Case Law on the Issue

While the fair-use guidelines have had a central function of assisting educators, librarians, and other individuals as they apply fair use in common situations, the guidelines also shaped several judicial decisions. Some of these decisions provide detailed applications of the guidelines to the given facts, often with insightful discussion of the legal standing of the fair-use interpretations. Other decisions have offered only passing mentions of the guidelines. Each of these Court opinions is important in its own way. The detailed examinations provide essential scrutiny of the guidelines, allowing one to examine the Court's comprehension of fair use and the negotiated guidelines.

*Association of American Publishers v New York University*³⁸

The first infringement litigation against photocopying for educational uses arose not long after the fair-use statute took effect on 1 January 1978. In 1980 and 1981, publishers brought copyright actions against two for-profit shops that were photocopying materials for student use. The parties settled both cases, and the settlement included an agreement that the shops would adhere to the Classroom Guidelines as a limit on fair use. The faculty at colleges and universities, however, had an enormous range of places and possibilities for securing photocopies of class materials, and the publishing industry faced the daunting prospect of litigation against numerous shops and other outlets. To make the point of copyright infringement directly against educators, the publishers filed a lawsuit against New York University (NYU) and several named faculty members in December 1982. Only four months later, the parties settled that suit as well. Again, the settlement incorporated the Classroom Guidelines. This time the guidelines were adopted as the formal standard of fair use at NYU— a major research university. The incorporation of the guidelines in the NYU settlement had several consequences of tremendous importance. First, the measure of fair use in the guidelines became the formally adopted standard at a major university and established a precedent or model that other institutions could follow. Second, other institutions did follow it. They followed it out of concern that they also may face unwanted litigation. They followed it because the publishing industry sent hundreds of letters to colleges and universities throughout the country urging them to adopt the guidelines or face a risk of litigation. Third, the NYU settlement restructured the Classroom Guidelines into an even more rigid standard than was embodied in the original version. That rigid version became the model or precedent that other institutions often adopted. Of particular note, the NYU settlement adopted the guidelines without the opening preamble about 'minimum' standards³⁹. Faculty making copies under the settlement were expected to follow the strict limits, not as a minimalistic safe harbor, but rather as a ceiling on fair use. Any uses beyond those limits required advance approval from university counsel. For all practical purposes, the minimum standards of the original guidelines became maximum standards at NYU.

One Court decision questioned critically at least one major portion of the Classroom Guidelines and

ultimately ruled that those guidelines were not consistent with fair-use law.

*Basic Books Inc v Kinko's Graphics Corp*⁴⁰

In this case, several prominent commercial publishers of textbooks and other books alleged that Kinko's had infringed their copyrights by making multiple copies of lengthy excerpts from the books and compiling them into 'course packs' or 'anthologies' sold to students at nearby colleges and universities. Faculty members at those institutions selected the materials, and the students acquired the copies for reading in connection with specified courses. Kinko's at that time operated a 'Professor Publishing' programme to solicit from professors the business of making and selling copies.

Based on an analysis of the four factors from Section 107, the district Court had little trouble concluding that the copying was not fair use. Only after reaching its conclusion did the Court turn its attention to the Classroom Guidelines. That sequence is revealing. It affirms that the statute, and not the guidelines, is the source of the law, and by first having reached a decision based on the law, the Court was free to explore the merits of the guidelines as dictum and not as a rule of law⁴¹. The Court even seemed reluctant to look at the guidelines at all, acknowledging that they should apply to copying by an instructor or an educational institution, and not by a for-profit copy shop. Yet the Court found 'the circumstance of copying for college students to be particularly compelling in this case.' The Court proceeded to evaluate the 'brevity,' 'spontaneity,' and 'cumulative effect' of the copying, concluding that the actions of Kinko's were outside the bounds of those rigorous confines.

Not content with winning the Court's rejection of fair use based on analysis of Section 107 and of the Classroom Guidelines, the plaintiffs argued further that Kinko's should be held in violation of a specific 'prohibition' contained in the guidelines, a provision that would bar any copying 'used to create or to replace or substitute for anthologies, compilations or collective works'. The plaintiff-publishers argued that this language was a sweeping gesture to place all course packs outside the ambit of fair use.

The Court refused the bait, accepting instead Kinko's urging for a less rigid view of the meaning of the Guidelines. Although the Court acknowledged that the construction of anthologies might be a factor

weighing against fair use, largely because the cumulative effect (on the income to copyright owners) would be disastrous, it nevertheless concluded that not all the unconsented anthologies were prohibited without a fair use analysis. The Court added that while the Congress had not manifested a specific apprehension of the use of anthologies, it was also not clear that the Congress intended strict application of this prohibition without fair use balancing.

In the final analysis, the Court in the *Kinko's* case gave the Classroom Guidelines some important Credibility. They captured the Court's attention, and they received a systematic application to a given situation. But a close reading of the case confirms that the guidelines were never given the weight of law. Moreover, the ruling undercut the guidelines in one crucial respect: the prohibition against anthologies was rejected categorically. The Court also demonstrated that the guidelines were subject to close scrutiny in light of the four factors of Section 107. Despite the congressional attention and the importance of having guidelines to address common fair-use dilemmas, the Court was not prepared to take them at face value.

*Princeton University Press v Michigan Document Services (MDS) Inc*⁴²

This case further demonstrates the lack of resolution on some of the most common fair-use issues, and the case reveals the struggle even among federal judges over the meaning of fair use in general, and the applicability of the Classroom Guidelines in particular.

In this case, a private copy shop created and sold course pack under circumstances similar to Kinko's and the copy shop was also found to have acted outside the limits of fair use.

The Court evaluated the facts of this case in respect of the four factors laid down in Section 107 of the Copyright Act:

Purpose: When performed by commercial shop, copying is infringement even if professors select the course pack materials. *Nature:* Copied excerpts contained some degree of creative expression. *Amount:* Defendant used more than five percent in all instances of copying. *Effect:* Licensing or potential licensing opportunities existed for all copied works, and other commercial copy shops routinely requested permission to reproduce copyrighted works. It then held that the effect on the market is the most important factor of a fair-use determination;

accordingly, the Court provided relatively little analysis of the other three factors. The decision is built on market effect and particularly emphasizes that (i) an existing licensing system will weigh heavily against fair use, and (ii) 'course pack' production by a commercial copy shop does not constitute fair use even if professors select the copied materials. As in the *Kinko's* case, this Court did not address the question of whether 'course pack' production may be fair use if conducted by a university or nonprofit copy shop.

All judges of the Court of Appeals heard this appeal for the Sixth Circuit. Eight judges ruled against fair use, and five judges dissented, finding that the copying should be fair use.

The Court observed that the copying undertaken by MDS greatly exceeded the rigid, minimal standards of fair use set forth in the guidelines. The Court justified its reliance on the guidelines by noting their appearance in congressional reports accompanying passage of the Copyright Act of 1976. Yet the Court also pointedly noted that the Classroom Guidelines 'state the minimum and not the maximum standards of educational fair use'.

The Court in the MDS case confirmed that the Classroom Guidelines are not the law. They have not been read into law in this case or any other case, and Congress has not made them law. Their appearance in congressional reports does not make them law. Second, the guidelines may be helpful 'general guidance'. They may articulate useful concepts for understanding the meaning of fair use in particular circumstances, but they do not necessarily offer a definition for ultimately establishing fair use. Third, activities may be outside the ambit of the Classroom Guidelines, but they are not necessarily infringements.

*American Geophysical Union v Texaco Inc*⁴³

Employing between 400 and 500 researchers nationwide, Texaco used to conduct considerable scientific research seeking to develop new products and technology primarily to improve its commercial performance in the petroleum industry. As part of its substantial expenditures in support of research activities at its Beacon facility, Texaco subscribed to many scientific and technical journals and maintained a sizable library with these materials. Among the periodicals that Texaco received at its Beacon research facility was the *Journal of Catalysis*

('Catalysis'), a monthly publication produced by Academic Press Inc, a major publisher of scholarly journals and one of the plaintiffs in this litigation. Texaco had initially purchased one subscription to Catalysis for its Beacon facility, and increased its total subscriptions to two in 1983. Since 1988, Texaco had maintained three subscriptions to Catalysis.

Each issue of Catalysis contained articles, notes, and letters (collectively 'articles'), ranging in length from two to twenty pages. The journal's editors through unsolicited submission by various authors received all of the articles. Authors were informed that they must transfer the copyright in their writings to Academic Press if one of their articles is accepted for publication, and no form of money payment was ever provided to authors whose works were published. Academic Press typically owned the copyright for each individual article published in Catalysis, and every issue of the journal included a general statement that no part of the publication was to be reproduced without permission from the copyright owner. The average monthly issue of Catalysis ran approximately 200 pages and comprised 20 to 25 articles.

Chickering, a chemical engineer at the Beacon research facility, had been working for Texaco since 1981 conducting research in the field of catalysis, which concerned changes in the rates of chemical reactions. To keep abreast of developments in his field, Chickering reviewed works published in various scientific and technical journals related to his area of research. Texaco assisted in this endeavor by having its library circulate current issues of relevant journals to Chickering when he placed his name on the appropriate routing list.

The copies of the eight articles from Catalysis found in Chickering's files that the parties have made the exclusive focus of the fair use trial were photocopied in their entirety by Chickering or by other Texaco employees at Chickering's request. Chickering apparently believed that the material and data found within these articles would facilitate his current or future professional research. The evidence developed at trial indicated that Chickering did not generally use the Catalysis articles in his research immediately upon copying, but placed the photocopied articles in his files to have them available for later reference as needed. Chickering became aware of six of the photocopied articles when the original issues of Catalysis containing the articles

were circulated to him. He learned of the other two articles upon seeing a reference to them in another published article. As it turned out, Chickering did not have occasion to make use of five of the articles that were copied.

The *issue* involved in the case was whether the photocopying of individual articles by a Chickering for his own research needs was fair use.

The Court noted that the Congress had thus far provided scant guidance for resolving fair use issues involving photocopying, legislating specifically only as to library copying, and providing indirect advice concerning classroom copying. With the Classroom Guidelines as virtually the only clue of congressional insight on fair use for photocopying, traces of the guidelines crept into the Court's analysis of the copying involved in this case, despite the case's for-profit enterprise context. In particular, the Court's analysis of the 'purpose' factor examined the scientist's reason for making the copies. The Court sympathized with the argument that copying for immediate laboratory use may well be fair use. The Court brought in the concept of spontaneity in order to settle the dispute. Thus the Court incorporated the provisions of the Classroom Guidelines.

The Court ruled that photocopying of individual journal articles by a Texaco scientist for his own research needs was not fair use. *Purpose*: While research is generally a favored purpose, the ultimate purpose was to strengthen Texaco's corporate profits. Moreover, exact photocopies are not 'transformative;' they do not build on the existing work in a productive manner. *Nature*: The articles were factual, which weighs in favor of fair use. *Amount*: An article is an independent work; so copying the article is copying the entire copyrighted work. *Effect*: The Court found no evidence that Texaco reasonably would have purchased more subscriptions to the relevant journals, but the Court did conclude that unpermitted photocopying directly competes with the ability of publishers to collect licence fees.

According to the Court, the Copyright Clearance Center (CCC) provided a practical method for paying fees and securing permissions, so the copying directly undercut the ability to pursue the market for licensing through the CCC. Despite an impassioned dissent from one judge who argued for the realistic needs of researchers, the Court found three of the four factors weighing against fair use in the corporate context.

The Second Circuit later amended its decision to clarify that it applied only to 'systematic, institutional' copying, and that the ruling does not reach the isolated copying of independent researchers.

In the final analysis, the *Texaco* decision confirmed in a small way the trend apparent in all other cases addressing the Classroom Guidelines: "they are not law, they are a minimal standard of fair use; they are a compelling source of congressional insight on fair use, they are a useful crutch for the Courts that are struggling with fair-use ambiguities as much as are the stakeholders in the fair use debates; and they add some authority for a judicial decision that is first and foremost based on the law and not the guidelines.

*Marcus v Rowley*⁴⁴

Eloise Marcus, the plaintiff, wrote a thirty-five-page booklet on cake decorating and used it to teach adult-education classes. She sold copies to her students for two dollars each, and she properly included a copyright notice on all copies and registered the work with the Copyright Office. Shirley Rowley, the defendant, enrolled in one of Marcus's classes and purchased a copy of the booklet. Rowley later developed her own booklet for her own classes, and eleven of the twenty-four pages in her work were copied directly from Marcus's original work. Rowley neither gave the plaintiff credit for her work nor acknowledged her copyright.

The Ninth Circuit ruled that the use was not fair in a decision based on the four factors of the statute. As in the *Kinko's* case, the Court turned to the Classroom Guidelines, but only after already reaching a conclusion based on the law, and only to affirm the decision already rendered. The opinion confused the fundamental nature of the guidelines in a series of contradictory statements. It added that the guidelines represent 'the Congressional Committees' view' of fair use.

The Ninth Circuit first appeared to have ratified the Classroom Guidelines as definitive by observing that the guidelines were designed to give teachers direction as to the extent of permissible copying. After giving the guidelines that conceptual boost, the Court then promptly marginalized them. The guidelines were intended to represent minimum standards of fair use. The Court observed that while they are not controlling on the Court, they are instructive on the issue of fair use in the context of this case.

The Court proceeded to apply the Classroom Guidelines, concluding that the defendant's use of the plaintiff's booklet did not meet the standards of the guidelines. The Court looked to the tests of 'brevity' and 'spontaneity', concluding, among other findings, that the copying was excessive, and that the use of the materials during three academic years was not spontaneous. The Court found that the defendant met the 'cumulative effect' test of the guidelines, but did not include a copyright notice on the copied portions as required by the guidelines. The Court therefore held that the defendant had indulged in an infringement of the copyright as his action failed to meet the requirements of spontaneity as provided in the Guidelines.

As in the *Kinko's* and *MDS* decisions, the Court turned to the Classroom Guidelines only after reaching a conclusion based on the four factors. The guidelines largely served the purpose of affirming the decision that the Court had already reached. Given their relatively strict or at least literal application in the *Kinko's*, *MDS*, and the *Marcus* decisions, perhaps the real value of the guidelines is to serve as a tool for judges to find some degree of assurance about a decision that is in reality based on the factors from Section 107.

Bridge Publications Inc v Vien⁴⁵

In this case the defendant was accused of reproducing or instructing students to reproduce literary works and sound recordings for use in a for-profit course taught by the defendant.

The Court evaluated the act of the defendant *vis-à-vis* the four factors specified in section 107 of the Copyright Act and came to the conclusion that all the four factors were against the defendant. It held that the defendant's use did not fit within the special guidelines approved by Congress as to fair use in the educational context. Defendant's copying and use of the works was not restricted to one copy for her own use in teaching. Additionally, the undisputed evidence showed that the defendant's copying was not limited and spontaneous, but was extensive and methodical, and consisted of copying from the same author, time after time. Being violative of the letter and spirit of the Congressional guidelines, the action would be illegal.

Overview

Fair use explicitly allows use of copyrighted materials for educational purposes such as criticism,

comment, news reporting, teaching, scholarship, and research. Rather than listing exact limits of fair use, copyright law provides four standards for determination of the fair use exemption:

Before using or copying materials for educational purposes, the following factors should consider:

Will the Expression by the Author/Creator be Used?—Will the particular way, words are sequenced or a concept is expressed, be used? If the answer is without a doubt 'no,' then the work may be used. The duplicating or photocopying someone else's work is the same as using the author's expression. If the answer to this question is 'yes' or 'maybe,' the next question must be considered.

Is the Expression/Rendering Protected by Copyright?—If the answer is 'no,' then the work may be used. For example, a work might be old enough to be part of the public domain or perhaps unprotected for another reason. If the answer is 'yes' or 'maybe,' the third question must be considered.

Will the Use go Beyond the Fair Use?—If the application falls within one of the exceptions listed for fair use, then the material or work may be used. However, certain limitations still apply. If the answer to these all the above questions is 'yes,' then permission from the author is needed. If the answer to any of these questions is 'no,' the fair use provision might apply. Still, there are certain restrictions.

Brevity—Numerical limits apply stipulating what extent or percentage of the whole work may be copied.

Spontaneity—The idea to use the materials may not be preconceived or preplanned. Administrators are prohibited from instigating fair use exemption for specific copyright material for classroom purposes. The time between the decision to use the material and the occasion to use it in the classroom must be so close together that a timely request for permission from the author could not be made.

Cumulative Effect—The copying must not have a negative cumulative effect on the market of the copyrighted work. The copying must be for (a) only one course in the school where copies are made, (b) not more than one short poem, article, story, essay or two parts from longer works copied from the same author; nor more than three from the same anthology or collection or periodical volume during the one class term.

Copyright Notice—along with the attribution, this must be included on all copies.

No Photocopy Profit—the students may not be charged more than the actual cost incurred in making the copies.

Conclusion

An analysis of the cases shows that if the guidelines are useful tools for judges and other arbitrators of fair-use controversies, then these are still only a tool for bolstering a decision already made after applying the four factors of Section 107 to the facts of the case. For educators and others who need to live by some measure of fair use for routine classroom copying, the cases manifest some definite lessons about the weaknesses of the guidelines. They are not the law. They may even contradict the law in past and future cases. For all practical purposes, Courts may view them as a 'safe harbor,' but even many of the most vigorous supporters will not give them that level of credibility.

On the other hand, if the Courts look to them as crutches, in roughly analogous cases, one can be certain that a Court will look to the guidelines in a case against an educator or educational institution, the situations where the guidelines are intended to apply. Yet the cases from the past also suggest that the Court will most certainly look to the guidelines only after applying the four factors. Thus, even when guidelines are available for a specific application, educators would be remiss to rely on them without applying the four factors that actually form the foundation of fair-use law.

Specifically, fair use under the statute depends on the four factors of purpose, nature, amount, and effect. The guidelines, however, make fair use dependent on brevity, spontaneity, and cumulative effect. By focusing on those variables, rather than the statutory four factors, guidelines depart abruptly from the law itself and may in fact make decisions based upon standards that are legally less sound. To the extent that the variables from the Classroom Guidelines have recast conceptualizations and articulations of fair use, the guidelines may be a subversive force on the law, as they purport to displace the congressionally sanctioned factors with a privately negotiated alternative.

Thus while addressing the issue of photocopying for classroom purposes, it would be safe to conclude that it should satisfy the requirements of the four factors as provided under Section 107 of the US Copyright Act. The Guidelines, having only a suggestive value, have to be referred once the

statutory requirements are met. Thus as long as the photocopying is for a non-commercial purpose and does not affect the market of the copyrighted work, circulating multiple copies among students would be legal. This is because such a step would help in promoting the value of the copyrighted work, a primary goal of which is to increase the awareness and knowledge among the masses about the subject matter of the protected work. This in turn could also have the effect of increasing the market for the work of the copyright owner, fetching him better returns for his labor.

In India, as in the UK, the concept of fair dealing has been adopted in the Copyright Act, 1957, instead of fair use. A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of copyright if it is for the purpose of research or study. The tests applied in India to determine whether an act falls under the category of fair dealing are that of substantial amount copied and bona fide use of the copyright work.

Thus if one is copying for himself, for other staff or for distribution to on-campus students, the first question which arises is whether the copy is made for the purpose of research or study.

If the copying is a part of the research function, such as preparing an article or book chapter, or part of an academic's general reading to maintain current awareness in his or her field, then it is very possibly made "for the purpose of research and study". Some teaching functions, such as preparation of new courses, or copying of an article or other material for an individual student or small group of students to study, could also fall within the test. But multiple copying for distribution or other use in teaching would not usually be considered to be for the purpose of research or study.

Thus to conclude, it would not be out of place to state that the law in India should be brought in line with the law prevailing in the US with regard to the fair use of the copyright work. With increasing digitization, the need of the hour is to enact and implement laws that are in tandem with the technological advancements. Such a step would help in doing a world of good for the public at large and the intellectual property right owner in particular.

References

- 1 Chapter 14 of Indian Copyright Act, 1957
- 2 The publication in a collection, mainly composed of non-

- copyright matter, bona fide intended for the use of educational institutions, and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, not themselves published for the use of educational institutions, in which copyright subsists: Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years
- 3 The reproduction of a literary, dramatic, musical or artistic work (i) by a teacher or a pupil in the course of instruction; or (ii) as part of the questions to be answered in an examination; or (iii) in answers, to such questions
- 4 Copyright Act, Section 44
- 5 Copyright Act, Section 32.2(1) (e)
- 6 Copyright Act, Sections 29.4-29.9
- 7 Ieuan G Mahony, *Copyright infringement in the USA, in Copyright Infringement*, 437 (dennis campbell & susan cotter, eds-, kluwer law international 1997)
- 8 Ralph S Brown & Robert C Denicola, *Cases on Copyright, Unfair Competition, And Related Topics bearing on The Protection of Literary Musical And Artistic Works*, 361 (7ed., Foundation Press 1998)
- 9 *Id* 369
- 10 *Supra* n 8
- 11 Cornish W R, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights*, 437 (4 Ed., Sweet & Maxwell 1999)
- 12 *Sony Corp v Universal City Studios*, 464 US 417 (1984)
- 13 *Consumers Union Inc v General Signal Corp* 724 F .2d 1044 14
- 14 *Marcus v Rowley*, 695 f.2d 1171
- 15 Neil Boorstyn, *Boorstyn on Copyright*, 12-7 (Dovra packer, Ed, 2ed, Clark Boardman Callaghan 1994)
- 16 *Harper and Row Publishers Inc v Nation Enterprises* 471 US 539,562 (1985)
- 17 *Campbell v Acuff- rose Music*, 972 f.2d 1429
- 18 *Supra* n 12
- 19 *Supra* n 13
- 20 *Supra* n 15, 12-10
- 21 *Supra* n 16, 564
- 22 *Basic Books Inc v Kinko's Graphics Corp*, 758 F. Supp. 1535, 1540
- 23 *New Era Publication Int'l Inc v Carol Publishing Group F.* 2d 152, 158
- 24 *Hoehling v Universal City Studios*, 618 F. 2d 972, 977
- 25 *Salinger v Random House Inc* 811 F .2d 90
- 26 *Supra* n 15, 12-15
- 27 *Weissmann v Freeman*, 868 F.2d 1313
- 28 *Supra* n 14
- 29 *Supra* n 22, 1535-1536; It would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself
- 30 *Paul Goldstein, Copyright, 10: 35 (2 ed., Aspen Law & Business 2000)*
- 31 *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,
 (iv) 'Special' works: Certain works in poetry, prose or in 'poetic prose' which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety .Paragraph 'ii' above notwithstanding such 'special works' may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.
- Spontaneity*
 (i) The copying is at the instance and inspiration of the individual teacher, and (ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.
- Cumulative Effect*
 (i) The copying of the material is for only one course in the school in which the copies are made,
 (ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term,
 (iii) There shall not be more than nine instances of such multiple copying for one course during one class term
 [The limitations stated in 'ii' and 'iii' above shall not apply to current news periodicals and newspapers and current news sections of other periodicals]
- III. Prohibitions as to 1 and 11 above
 Notwithstanding any of the above, the following shall be prohibited:
 (A) Copying shall not be used to create or replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts there from are accumulated or reproduced and used separately,
 (B) There shall be no copying of or from works intended to be 'consumable' in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material,
 (C) Copying shall not:
 (a) Substitute for the purchase of books, publishers' reprints or periodicals;
 (b) be directed by higher authority;
 (c) be repeated with respect to the same item by the same teacher from term to term,
 (D) No charge shall be made to the student beyond the actual cost of the photocopying
- 32 *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals*, H R REP No.94. -1476, at 68-70 (1976)
- 33 *Supra* n 32

- 34 17 USC Section 107 (1976)
- 35 *Supra n 31*
- 36 The Congress has recently clarified the matter by amending the statute to provide that the copies made under Section 108 must include the formal notice as it appears on the original
- 37 Edmund W Kitch & Harvey S Perlman, *Intellectual Property & Unfair Competition*, 667 (7 ed, Foundation Press 1998)
- 38 *Association of American Publishers v New York University* 759 F Supp. 1234
- 39 The agreement with the NYU provided that the University would adhere to the Classroom Guidelines. The faculty was called on to adhere to the guidelines and the substantive standards set therein without inclusion of the *minimum language*
- 40 *Basic Books Inc v Kinko's Graphics Corp* 758 F Supp. 1522 (S.D.N.Y. 1991)
- 41 Kinko's was held to be infringing copyrights when it photocopied book chapters for sale to students as 'course packs' for their university classes. *Purpose*: When conducted
- by Kinko's, the copying was for commercial purposes, and not for educational purposes. *Nature*: Most of the works were factual-history, sociology, and other fields of study-a factor which weighed in favor of fair use. *Amount*: The Court analyzed the percentage of each work, finding that five to twenty-five percent of the original full book was excessive. *Effect*: The Court found a direct effect on the market for the books, because the course packs competed directly with the potential sales of the original books as assigned reading for the students. Three of the four factors leaned against fair use. The Court specifically refused to rule that all course packs are infringements, requiring instead that each item in the "anthology" be subject individually to fair-use scrutiny
- 42 *Princeton University Press v Michigan Document Services Inc* 99 F. 3d 1381 (6th Cir. 1996)
- 43 *American Geophysical Union v Texaco Inc.*, 60 F.3d 913 (2nd Cir. 1994)
- 44 *Marcus v Rowley*, 695F.2d1171
- 45 *Bridge Publication Inc v Vien* 789 F. 2d 342