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NOTES

Educating *Sony*: Requiem for a "Fair Use"

INTRODUCTION

> "[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded."[1]

In the two centuries since Lord Mansfield uttered these words, the courts have been torn in attempting to decide how to balance these two extremes. As a result, judicial precedent developed a common law fair use doctrine. "Fair use" is a privilege possessed by a person other than the owner of a copyright " 'to use the copyrighted material in a reasonable manner without [the owner's] consent, notwithstanding the monopoly granted to the owner.' "[2] The ambiguity inherent in the doctrine led to its codification in the Copyright Revision Act of 1976 [hereinafter referred to as Copyright Act].[3] Common law and statutory interpretation of the fair use doctrine had always held educational photocopying to be a protected fair use as long as it involved teaching, research, or a scholarly purpose.[4] In 1976, guidelines[5] were established to give educators a definitive framework to regulate their photocopying practices. A simple solution to a complex problem, but this solution *is* one of the problems.

Specifically, many educators invoke the fair use doctrine as a blanket of protection to shield them from any liability for infringe-

1. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 479 n.33 (1984) (Blackmun, J., dissenting) (*citing* Sayer v. Moore, 1 East 361 n. (B), 102 Eng. Rep. 139, 140 n. (B) (K.B. 1785) (*quoting* Lord Mansfield)).

2. Meeropol v. Nizer, 361 F. Supp. 1063, 1067 (S.D.N.Y. 1973) (citations omitted).

3. 17 U.S.C. §§ 101-808 (1976).

4. Lawrence v. Dana, 15 Fed. Cas. 26 (C.C.D. Mass. 1869) (No. 8136); MacMilliam Co. v. King, 223 F. 862 (D. Mass. 1914); Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962). It must be noted that the doctrine of fair use was recognized neither in the Constitution nor in the 1909 Copyright Act; before the 1976 Act, it was solely a creature of the courts. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5678.

5. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 68-70, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5681-83.

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ment.[6] They view "fair use" as an open invitation to photocopy as they wish, even though they infringe on a copyright owner's right to control copying. Traditionally, the courts favored education over a creative person's monopoly of a copyright,[7] but when rampant abuse by educators became apparent in the 1980's,[8] legal proceedings followed. In fact, section 107 of the 1976 Copyright Act[9] was beginning to achieve a semblance of definition through the advent of litigation until the Supreme Court decided *Sony Corp. of America v. Universal City Studios, Inc.*[10] Its effects on creative individuals can only be viewed as a giant step backwards. Although commercial in nature, the use in *Sony* parallels the educators' use, thus establishing a free rein for those who infringe upon copyrights in the name of education.

This Note will examine *Sony* and the xerography[11] suits that came before it in the early 1980's. It shall look at fair use and the established guidelines, to acquaint the reader with an understanding of the parameters distinguishing fair use from infringement. Finally, it will present a proposed solution that calls for the elimination of a fair use distinction in the educational context.

I. *SONY*

On January 17, 1984, the United States Supreme Court decided *Sony Corp. of America v. Universal City Studios, Inc.*[12] The Court found that unauthorized home time-shifting of respondent Universal's programs through the use of a Betamax video tape recorder (VTR) is a legitimate fair use.[13] The Supreme Court applied an "equitable rule of reason"[14] to this particular claim of infringement, and hinged its decision on the "commercial or nonprofit character of an activity."[15] The "equitable rule of reason" analysis enabled the Court to hold that unauthorized time-shifting was simply a

6. N.Y. Times, Mar. 21, 1980, at C19, col. 1; Wall St. J., Feb. 6, 1980, at 33, col. 1.

7. Loew's Inc. v. Columbia Broadcasting System, Inc., 131 F. Supp. 165, 176 (S.D. Cal. 1955); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975).

8. N.Y. Times, Apr. 15, 1983, at A1, col. 2.

9. 17 U.S.C. § 107 (1976).

10. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) [hereinafter cited as *Sony*].

11. Xerography is defined as "a process for copying graphic matter by the action of light on an electrically charged photoconductive insulating surface in which the latent image is developed with a resinous powder." WEBSTERS NEW COLLEGIATE DICTIONARY 1356 (8th ed. 1981).

12. *Sony*, 464 U.S. at 417.

13. *Id.*

14. *Id.* at 454.

15. *Id.* at 449.

means of watching a program at a time more convenient for the home viewer. Moreover, the court noted that challenging a noncommercial use of copyrighted work requires proof either that the particular use is harmful, or that upon becoming widespread, it would adversely affect the potential market for the copyrighted work.[16]

In sum, the Court found that "Sony demonstrated 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."[17] Further, the respondents, according to the Court, had failed to carry their burden of demonstrating that "time-shifting would cause any likelihood of non-minimal harm to the potential market for, or the value of, their copyrighted works."[18] Thus, the Supreme Court determined that the Betamax[19] was capable of substantial noninfringing uses and, therefore, concluded that the unauthorized home video tape recording was a "fair use."[20]

II. THE FAIR USE DOCTRINE

It is well-established that the owner of a copyright does not have a license to regulate all use, because this would defeat the purpose

16. *Id.* at 451.
17. *Id.* at 456.
18. *Id.*
19. The Supreme Court defined the Betamax VTR as follows:

> Sony's Betamax VTR is a mechanism consisting of three basic components: (1) a tuner, which receives electromagnetic signals transmitted over the television band of the public airwaves and separates them into audio and visual signals; (2) a recorder, which records such signals on a magnetic tape; and (3) an adapter, which coverts the audio and visual signals on the tape into a composite signal that can be received by a television set.
>
> Several capabilities of the machine are noteworthy. The separate tuner in the Betamax enables it to record a broadcast off one station while the television set is tuned to another channel, permitting the viewer, for example, to watch two simultaneous news broadcasts by watching one "live" and recording the other for later viewing. Tapes may be reused, and programs that have been recorded may be erased either before or after viewing. A timer in the Betamax can be used to activate and deactivate the equipment at predetermined times, enabling an intended viewer to record programs that are transmitted when he or she is not at home. Thus a person may watch a program at home in the evening even though it was broadcast while the viewer was at work during the afternoon. The Betamax is also equipped with a pause button and a fast-forward control. The pause button, when depressed, deactivates the recorder until it is released, thus enabling a viewer to omit a commercial advertisement from the recording, provided, of course, that the viewer is present when the program is recorded. The fast forward control enables the viewer of a previously recorded program to run the tape rapidly when a segment he or she does not desire to see is being played back on the television screen.

Sony at 422-23.
20. *Id.* at 456.

of the Copyright Act, which is "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[21] This constitutional purpose is best advanced when works may be "used" for the benefit of the public.[22] However, the public interest should not be used to justify such free use of copyrighted works so that authors, by being unable to obtain any benefits, are left with no motive for continuing to create or publish their creations.[23] Not only would the copyright owner suffer, but the public interest would be harmed because fewer works would be produced.[24] In satisfying the divergent needs of these two interests, the goal is to strike a statutory balance which will best enhance the public's right to benefit from intellectual and artistic endeavors.[25]

The Copyright Act specifically grants some rights to the copyright owner,[26] leaving the public free to use the works in a manner which will not infringe upon those rights.[27] Permissible uses, however, extend further than this. Courts have developed the concept that, notwithstanding the exclusive rights granted to the copyright owner, certain limited uses are to be allowed because they are reasonable under the circumstances. This concept is called the "doc-

21. U.S. CONST. art. I, § 8, cl. 8.

22. Mazer v. Stein, 347 U.S. 201, 219 (1954). The Supreme Court has said that, because of the constitutional basis for the copyright laws, "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

23. The law grants rights in order "to encourage people to devote themselves to intellectual and artistic creation." Goldstein v. California, 412 U.S. 546, 555 (1973).

24. *See* cases cited *supra* note 22.

25. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

26. 17 U.S.C. § 106 (1976) provides as follows:

> 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 pictoral, graphic, or sculptural works, including the audiovisual work, to display the copyrighted work publicly.

27. 17 U.S.C. § 107 (1976) provides as follows:

> 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. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

trine of fair use."[28]

In the educational context, questions of fair use arise primarily in two types of situations. Often teachers reproduce or adapt copyrighted materials for classroom presentation.[29] Additionally, scholars or independent researchers in the arts and sciences reproduce copyrighted works for non-profit private use.[30] The reproduction of copyrighted materials by teachers and scholars generally falls within the sphere of protection provided by the fair use doctrine, even though the market for the works appropriated has been significantly diminished.[31]

In the classroom setting, teachers have traditionally felt free to reproduce and distribute copyrighted materials to students.[32] Pre-1978 litigation of this practice was almost non-existent, and few cases held teachers liable for copyright infringement if they reproduced protected works for classroom use without the owner's consent.[33] Courts have been unequivocal in their expression of the view that the doctrine provides greater protection to education uses: "[B]roader scope will be permitted the [fair use] doctrine where the field of learning is concerned. . . ."[34]

The impracticability of litigating each isolated "infringement" under pre-1978 law made publishers and authors reluctant to initiate infringment actions against educators who copied their materials. With the advent of the Copyright Act, publishers[35] have been motivated to seek redress in the courts against teachers and researchers who reproduce their works without permission.[36]

The impetus behind publishers resort to court action is the technological advancement in the area of xerography. This new tech-

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(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.

28. *See* case cited *supra* note 2 and accompanying text.

29. Note, *Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearing House System*, 56 VA. L. REV. 664 (1970).

30. *Id.*

31. *Id.*

32. A. MILLER & M. DAVIS, INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT 346 (1983).

33. Greenbie v. Nobel, 151 F. Supp. 45 (S.D.N.Y. 1957); Thompson v. Gernsback, 94 F. Supp. 453 (S.D.N.Y. 1950).

34. Loew's, Inc. v. Columbia Broadcasting System, Inc., 131 F. Supp. 165, 176 (S.D. Cal. 1955).

35. *See infra* note 93 and accompanying text.

36. *See infra* notes 84-102 and accompanying text.

nology dramatically increases the speed and efficiency, and decreases the cost, of duplicating copyrighted materials.[37] Publishers are increasingly concerned that the widespread use of photocopying machines by teachers and researchers significantly diminishes the market for their publications.[38]

III. THE GUIDELINES

Section 107 of the Copyright Act,[39] which went into effect in January of 1978, codifies minimum standards for the "fair use" doctrine.[40] This section does not totally resolve the most sharply debated conflicts between copyright owners and users such as educators.[41] The statute provides an area within which educators may freely operate, thereby limiting the exclusive rights of copyright holders. By the terms of the Copyright Act, fair use includes purposes such as "criticism, comment . . . teaching (including multiple copies for classroom use), scholarship, or research."[42] The measure of "fair use" essentially reiterates tests utilized in *Williams & Wilkins Co. v. United States*:[43] "(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."[44]

One major advantage of section 107 is that it provides guidelines to determine whether materials are being copied in conformance with the terms of the statute. Educators rely on the presumption that they will be protected if copying is done prudently and in good faith.[45] However, the legislature has only provided minimum stan-

37. Nimmer, *New Technology and the Law of Copyright: Reprography and Computers*, 15 UCLA L. REV. 931, 941-43 (1968).

38. *Id.*

39. 17 U.S.C. § 107 (1976). *See supra* note 27 for text of section.

40. *Id.*

41. *Id.*

42. *Id.* Section 107 is essentially the codification of the fair use doctrine. *See supra* notes 4 and 27 and accompanying text.

43. 487 F.2d 1345 (Ct. Cl. 1973); *aff'd by an equally divided ct.*, 420 U.S. 376 (1975).

44. 17 U.S.C. § 107 (1976).

45. 17 U.S.C. § 504 (1976). Section 504(c)(2) provides in part:

> In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum not less than $100. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under Section 107 [17 U.S.C. § 107], if the infringer was:

dards.[46] As such, anything beyond this is left to judicial interpretation. The Supreme Court has said that section 107 does not set the outer limits of fair use, thus allowing the courts some discretion to handle complex fair use cases.[47]

These guidelines were set down as a reasonable interpretation of fair use[48] in the educational context. They are not part of the statute enacted by Congress and are, therefore, considered an unofficial understanding of the fair use doctrine.[49] Courts may or may not rely on them depending upon whether they find the statutory language to need clarification.[50] Courts have viewed the guidelines as "designed to eliminate doubt which had previously existed in copyright law."[51] "The guidelines represent the Congressional Committees' view of what constitutes fair use under the traditional judicial doctrine developed in the case law."[52]

The intention of the House of Representatives' committee[53] was to establish minimum standards of educational use under section 107. Teachers may reproduce for research or teaching a single copy of "[a] chapter from a book; . . . [a]n article from a periodical or newspaper;" a literary segment (i.e., story, poem, or essay); or graphic material.[54] For classroom use, a copy of any given piece can be made for each student provided that each copy bears a notice of copyright.[55] Further, an educator making multiple copies must meet the requirements of brevity, spontaneity, and cumulative effect, and must consider the effect of the use upon the potential market.[56]

A. Brevity

The brevity section lists criteria for poetry, prose, and illustration, which set word and page quantity limitations on what may be reproduced.[57] The language of the guidelines does not permit re-

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(i) an employee or agent of a nonprofit educational institution, library or archives acting within the scope of his or her employment . . . .

46. The fact that only minimum standards are enunciated further convolutes the problem. Courts are searching for rigid, black letter law to follow. Unfortunately, the guidelines possess a certain degree of abstract quality which severely reduces their effectiveness.

47. *Sony*, *supra* note 10, at 477 (Blackmun, J., dissenting).

48. H.R. REP. No. 1476, 94th Cong., 2d Sess. 65, 68-70 (1976).

49. *Chronicle of Higher Education*, Nov. 15, 1976, p. 32.

50. *Id.*

51. Marcus v. Rowley, 695 F.2d 1171, 1178 (9th Cir. 1983).

52. *Id.* (citations omitted).

53. H.R. REP. No. 1476, 94th Cong., 2d Sess. 65, 68 (1976).

54. *Id.*

55. *Id.*

56. *Id.* at 68-69.

57. *Id.*

production of whole works if only a portion is to be utilized. By placing concrete parameters as to length limitations, hypothetically, the guidelines should succeed in replacing judicial guesswork with certainty. In reality, the paradox still remains, as the courts use the guidelines merely for guidance and not as binding legal precedent.[58]

B. Spontaneity

The spontaneity section attempts to allow for last minute preparation by the teacher. The statute and guidelines address a state of mind that may not be clearly determinable after the fact of an infringement. Additionally, they leave unanswered the question of what would constitute a reasonable time for reply to a request for permission to use the copyrighted material. The question thus becomes whether the teacher perceived that he or she had a reasonable amount of time to secure the copyright owner's permission to use the material.

A per se violation of the spontaneity requirement occurs if any copying is done at the suggestion or direction of a superior to the teacher.[59] Educators maintain that it is an anomoly to allow spontaneous copying while at the same time disallowing copying of the same material at the suggestion of a superior.[60] The arguments are that the spontaneity requirement places administrators in an awkward position in relation to teachers and that the provision makes infringement hinge upon timing, rather than upon the nature of the use.[61]

The countervailing argument, which supports the notion of a per se violation, indicates that the fair use provisions are not as arbitrary as educators would think.[62] Rebuttal arguments insist that the impact on a copyright owner's potential market must be accounted for equitably.[63] This is necessary to protect the owner from wholesale free appropriation of the work by educational users. Administrative positions cover a large numbers of teachers, thus geometrically increasing the number of copies involved. This situation is vastly different from the single teacher deciding to make a limited number of copies for a class.[64] The use of reproduced materials by

58. *Id.* at 68-70.
59. *Id.* at 69.
60. Note, *Education and Copyright Law, supra* note 29, at 670.
61. *Id.*
62. *Id.*
63. *Id.*
64. Were it not for the restrictions placed upon spontaneity, which limit the involvement of supervisors, the exception for spontaneity would lose meaning. In terms of economics, this seemingly slight shift in the allowance for copyright intrusion could be an extremely devastating blow to the market for such copied materials.

supervisory personnel tends toward a "general plan" concept[65] of the use. This is specifically proscribed, since it has a greater potential for intrusion on the copyright owner's rights than the spontaneous use that a teacher may employ.[66]

C. *Cumulative Effect*

Beyond the restrictions relative to brevity and spontaneity, the guidelines limit the cumulative effect of copying by restricting teachers to one reproduction per pupil.[67] Additionally, this is limited to a total of nine instances of such reproductions of the type and length of the original work prescribed during any one class term.[68] During one quarter or semester of school, an instructor could safely engage in nine moments of inspiration in which the instructor felt that it would be important for effective teaching to bring outside material into class. The more instances of copying that occur, the more it appears that the instructor is avoiding buying the appropriate materials from the publishers. This element, as well as the section covering brevity, is specific as to its terms and reasonably clear for the purposes of implementation.[69] Therefore, permissibility for any copying under the statute and guidelines requires not only spontaneity and brevity, but also an absence of an injurious cumulative effect on the proprietor's market.[70]

The parallel assurances provided by the guidelines will allow a teacher to make a single copy for educational purposes without fear of infringement problems.[71] However, the issue of multiple copies creates problems to be judicially resolved.[72] Within the section requiring spontaneity, meaning must be attached to particular terms and phrases such as "inspiration,"[73] "moment of its use for maximum teaching effectiveness,"[74] and "timely reply"[75] (regarding requests for permission to duplicate material), before this section can have measurable impact. Vagueness in terms is mitigated by the fact that these are merely guidelines, which speak to the minimum

65. H.R. REP. NO. 1476, *supra* note 53, at 65-67.
66. *See supra* note 51 and accompanying text.
67. H.R. REP. NO. 1476, *supra* note 53, at 65-67.
68. *Id.*
69. M. NIMMER, NIMMER ON COPYRIGHT, § 13-76.10 (1982).
70. *Id.*
71. *See supra* note 53 and accompanying text.
72. And, unfortunately, precedent favors educators over authors. *See supra* note 34.
73. H.R. REP. NO. 1476, *supra* note 53, at 69.
74. *Id.*
75. *Id.* This lack of clarity in the guidelines allows the courts to supply definitions. They are in a better position to interpret the definitions Congress *should* have incorporated into the guidelines.

standards of fair use in education, and *not* the definitive law.[76] An alleged infringer not clearly within the guidelines may still assert a defense based upon the terms of section 107, and the courts may re-establish the common law fair use doctrine.[77]

D. Potential Market

Educators are concerned with the fourth factor set forth in the guidelines, which looks to " 'the effect of the use upon the potential market for or value of the copyrighted work.' "[78] The legislative history indicates that where copying displaces a sale, the interests of the copyright owner are to be protected.[79] The educational community is apprehensive that this provision undermines the protection afforded by other articulated fair use criteria.[80]

Proponents of a liberal interpretation of the guidelines argue that the teacher's use of the excerpts, realistically, could not be said to replace a sale. Specifically, they contend that students could not be asked to buy, nor could the teacher afford to purchase, every volume from which material might be used.[81] Nevertheless, the factor of diminution of the market is one standard to be considered, and, since the legislature has seen fit to codify fair use for educators, it would be grossly unfair of the copyright law to abandon at least minimal protection for the copyright owner in the educational use context. The social value in making materials more available for classroom use should not completely override the copyright owner's incentive.[82]

Thus, fair use, in its application to educational photocopying, is a doctrinal recognition that there are "situations in which the copyright holder's interest in a maximum financial return must occasionally be subordinated to the greater public interest in the development of art, science and industry."[83] Even more significant than accepting fair use as historically applied, section 107 suggests the possibility of a more generous user-oriented approach to fair use than might otherwise be taken. However, in relationship to the

76. *See supra* note 3.

77. In Lawrence v. Dana, 15 Fed. Cas. 26 (C.C.D. Mass. 1869) (No. 8136), the court first recognized the concept by allowing free use of a copyrighted work in a literary criticism.

78. H.R. REP. NO. 1476, *supra* note 53, at 65.

79. *Id.* at 65-69.

80. *Id.* at 65-68.

81. Note, *Education and Copyright Law*, *supra* note 29, at 672.

82. Brennan, *Some Observations on the Revision of the Copyright Law from the Legislative Point of View*, 24 BULL. COPYRIGHT SOC'Y U.S.A. 151, 156 (1976).

83. Meeropol v. Nizer, 417 F. Supp. 1201, 1206 (S.D.N.Y. 1976) (citations omitted).

guidelines, the scope of fair use remains, in large part, a legal question to be determined by the courts.

IV. XEROGRAPHY SUITS

In an attempt to curb the rampant photocopying of copyrighted materials, the American Association of Publishers [hereinafter referred to as AAP], has orchestrated an enforcement campaign to curb xerographic copying. AAP investigates claims of infringement and, in certain situations, institutes legal proceedings against infringers.[84] Additionally, the AAP sponsors the Copyright Clearance Center, which provides a royalty payment program allowing access to copyrighted material without the user having to fear infringement.[85] The basic problem that arises is that educators become bold in their photocopying habits because they feel "fair use" is on their side.[86] Even though semi-specific guidelines[87] have been established, teachers, to the frustration of the AAP, use the doctrine of fair use as a bullet-proof shield.

In May of 1980, the AAP brought suit against Gnomon Copy Centers, which were located throughout the New England area. Gnomon had advertised as a "micro-publisher."[88] Professors at Harvard University selected diverse articles and encouraged Gnomon to make anthologies for purposes of their courses. AAP sued Gnomon, Harvard, and the professors involved, in United States District Court. The case was settled out of court as to defendants Harvard University and its professors and a consent decree injunction was obtained against Gnomon.[89] The claim against Harvard was dropped when the University agreed to become a member of AAP's Copyright Clearance Center and also agreed that the school's administration would enforce more stringent policies concerning photocopying procedures while staying within the established guidelines.[90]

In December, 1982, AAP sued New York University [hereinafter referred to as NYU],[91] and some of its faculty to stop self-help an-

84. *See* articles cited *supra* notes 6 and 8. In the interest of judicial economy, the American Association of Publishers [hereinafter referred to as AAP], in most cases, settles its claims against alleged infringers through agreement and/or membership with its clearinghouse.

85. Cohen, *Xerography Suits: The Long Shadow of Gnomon*, 5:12 COPYRIGHT MGMT. 1 (1982).

86. *See* articles cited *supra* note 6 and 8.

87. *See supra* note 5 and accompanying text.

88. *See supra* note 85.

89. *See supra* note 85; N.Y. Times, Mar. 21, 1980, at C19, col. 1.

90. *Id.*

91. *See supra* notes 8 and 85.

thology practices similar to those attacked in Gnomon.[92] The NYU educators' response to the suit was that their photocopying was a "fair use" in terms of its scholarly purpose. The AAP-backed publishers dropped their suit after the parties agreed to guidelines governing the photocopying of copyrighted works.[93] NYU agreed to monitor compliance by the faculty thru more rigid control over photocopying practices.[94] NYU also agreed to join the Copyright Clearance Center.

One case that did get to trial concerning educational photocopying was *Marcus v. Rowley*,[95] a decision of the United States Court of Appeals for the Ninth Circuit, in which the court held that blatant photocopying of copyrighted material for educational purposes will not always be a protected "fair use."[96] *Marcus* involved a public school teacher who held a copyright on a cake decorating book. Another teacher, working for the San Diego Unified School District, incorporated the book into her own "learning activity package."[97] The court analyzed the four factors found in section 107 and concluded that even though the use was characterized as educational and did not displace a sale, a teacher will not be allowed to infringe under the guise of fair use.[98] It also stated that the congressional guidelines,[99] although intended to represent minimum standards of fair use, were established to eliminate doubt in this area of copyright law and, thus, should be followed.[100]

Through the xerography cases and the *Marcus* case, the free rein of educators in their photocopying practices began to be more heavily scrutinized. Then, on January 17, 1984,[101] the Supreme Court reversed the *Sony* Betamax case, thus interpreting a broad scope to the fair use doctrine.[102]

V. *SONY* REVISITED

Although *Sony* did not deal with the educational context, the

92. *See supra* note 6.
93. *See supra* note 8. The suit was against Unique Copy Centers, New York University and ten members of its faculty. The AAP-plaintiffs in the New York University suit were Little, Brown, Knopf, Houghton-Mifflin, Simon & Schuster, MacMillan, and the National Association of Social Workers.
94. *Id.*
95. 695 F.2d 1171 (9th Cir. 1983).
96. *Id.* at 1175.
97. *Id.* at 1173.
98. *Id.* at 1177.
99. *See supra* note 53.
100. *See supra* note 95, at 1177-78.
101. This date is emphasized to point out the court's incongruity with *Marcus*, which was decided only one year before *Sony*. *Sony* served to damage the *Marcus* attempt to narrow the scope of "fair use."
102. *Sony*, 464 U.S. at 417.

court made a valiant effort to ease a strict monopoly over use of an author's work, which inhibits the "progress of science and the useful arts"[103] that a copyright is intended to promote. For example, in the educational context, teachers would be severely restrained if not allowed to build on the work of authors who came before them.[104] The external benefits produced from a scholar's work have enabled everyone to profit. Specifically, the fair use doctrine acts as a subsidy to permit second authors to make limited use of first authors' work for the public good.[105]

Situations in which fair use is most commonly recognized are listed in section 107 of the Copyright Act. All of the uses reflect a common theme: Each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work.[106] The fair use doctrine permits works to be used for "socially laudable purposes."[107] While benefits to society are considered, a finding of fair use is dependent upon the individual facts of each case and upon whether it is reasonable under the circumstances to expect the user to obtain permission from the copyright holder.[108] Still, the fair use doctrine must be developed so as to strike a balance between the dual risks created by the copyright system: (1) the risk that depriving authors of their monopoly will reduce their incentive to create, and (2) the risk that granting authors a complete monopoly over use of their work will reduce the creative ability of others.[109]

A problem arises in the educational context when a teacher uses his or her subjective intent in determining the right to use copyrighted material. If one copy is made for personal research or preparation, then a productive use is being accommodated.[110] On the other hand, when large numbers of copies are made far in advance, there is clearly infringement. Teachers circumvent this argument by claiming the need for the use of the copyrighted material without time to obtain the author's permission.

The guidelines[111] that have been established attempt to regulate this "fair use v. infringement" grey area, but the crux of the problem still rests upon the discretion of the educator. Clearly, if the

103. *See supra* note 21 and accompanying text.
104. *Sony, supra* note 10, at 477 (Blackmun, J., dissenting).
105. *Id.* at 478 (Blackmun, J., dissenting).
106. Use of a work either necessarily or usually involves its use in a derivative work. NIMMER, *supra* note 69, at § 13.05.
107. *Sony*, 464 U.S. at 478-479 (Blackmun, J., dissenting).
108. *Id.* at 479 (Blackmun, J., dissenting).
109. *Id.*
110. This idea has never been contested in the courts, but it is the abuse of this privilege that has stirred litigation.
111. *See supra* note 5.

possibility exists to obtain from the owner the right to copy his work, then his permission should be obtained. However, in *Sony*, the Supreme Court allowed a commercial, non-productive use to be declared a fair use. This results in a strengthening of the educator's argument, albeit in another context, that there is a benefit to be derived from his or her photocopying[112] and, therefore, that a fair use distinction can be drawn.

VI. DISCUSSION

Sony should be reconsidered because it permits exact duplication without developing that duplication into a productive use for the benefit of society. When copyrighted materials are photocopied in large quantities and distributed in a classroom, to be used for the author's purpose, the author is being cheated out of his right to copy. Congress enacts *statutes*, not legislative history, and the latter does not have any force of law. Legislative history is merely a context for the law. Nonetheless, because fair use is a nebulous concept, in order for the judiciary to interpret section 107 properly, it must give credence to the legislative history personified by the guidelines. There is no need to provide the user with a fair use subsidy at the author's expense.[113] The tragic flaw of the guidelines makes for a tragedy in the application of the fair use doctrine in copyright law. A paradox arises with the courts' search for black letter law in guidelines which have no binding impact.

VII. A PROPOSAL

Fair use, as conceived by the courts[114] and extended by their interpretation, intrudes upon potential profits of copyright owners. This constitutes a partial contradiction of the constitutional underpinnings of the copyright law.[115] With the vast amount of materials adaptable to educational uses, untold thousands, if not millions, of dollars in royalties remain unpaid under the fair use doctrine. Nevertheless, compliance with copyright law beyond the boundaries of fair use involves protracted correspondence by educators to obtain the copyright owner's permission to use material. When this requirement is multiplied by the number of selections desired by educators, the magnitude of the problem becomes apparent. This burdensome procedure could result in a stifling effect on educational use. This is particularly true in light of the formidable penal-

112. *Sony*, *supra* note 10, at 462-63 (Blackmun, J., dissenting).
113. *Id.*
114. From the holding in *Lawrence v. Dana*, *supra* note 77, to the holding in *Sony*, *supra* note 10.
115. *See supra* note 21 and accompanying text.

ties for infringement imposed by the copyright law,[116] which could amount to $10,000 per infringement.[117] For the publisher, however, it is often easier and possibly less costly to forgo enforcement of the copyright owners' rights when abuse has occurred in the highly regarded educational context.[118]

To remedy these problems, extra-judicial means must be employed so that the economic incentives may more appropriately be preserved.[119] The best approach to confront this issue lies in eliminating the need for a fair use distinction. Educational institutions should be granted compulsory licenses to use any copyrighted material in whatever manner they wish, with royalty payments determined in proportion to use and distributed to copyright holders through a central clearinghouse.[120] For a fixed fee, any use of copyrighted materials would be allowed. This would remove the discretion to deny permission for use, but preserve the right to payment for use.

The compulsory licensing approach relies upon private contract and the ability to enforce. Since groups of publishers would have to band together,[121] competitive organizations would develop separate clearinghouses. Lack of uniformity and lack of a central decision-making body would add complexity to what should be a simple mechanism to properly compensate copyright owners for their work. Just as publishers may file for copyright protection, those who intend to use the copyright material without purchasing it should file for a license to copy. This would provide governmental control via the copyright office[122] by virtue of that office issuing licenses.

By legislative enactment, obtaining a license would entail a filing with the register of copyrights, wherein the educational institution would give its identity and address and state its intention for acquiring a license to copy.[123] Securing such a license would become the

116. 17 U.S.C. § 504 (1976).

117. For educators who attempt good faith compliance, the copyright law contains a specific provision which provides in pertinent part: "The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107. . . ." *Id.* at § 504(c)(2).

118. *See supra* note 84.

119. *See supra* note 5.

120. Note, *Education and Copyright Law*, *supra* note 29, at 681. This system of distribution of copyrighted material provides a structure within which to sell reproduction permissions.

121. As illustrated by AAP-backed xerography cases, *see supra* note 93.

122. *See supra* note 29.

123. Brennan, *Revision of the Copyright Law*, *supra* note 82, at 151-57. This procedure parallels that required of cable television, public broadcast of sound recordings, and juke boxes.

only legitimate avenue by which an educational institution or educator could reproduce copyrighted material.

As such, one would either have a permit to copy or he would not. Thus, the judiciary would no longer be forced to agonize over what constitutes fair use. Rather, the only fair use would be a licensed use.

CONCLUSION

The application of the fair use doctrine remains the subject of controversy in the educational context. The Copyright Act of 1976 and its judicial interpretation in *Sony* have left unresolved the key issue which both the publishers and educators have found so perplexing. That is, the manner in which the doctrine can be applied so as to equitably compensate the publisher of the journals so frequently reproduced, while preserving for educators broad access to current articles of interest in their fields. Perhaps this is an issue that fair use cannot adequately resolve. Authors are left with little recourse when their rights are infringed in the name of education. The *Sony* decision has served to bolster this position. It becomes necessary to compensate the interests concerned with a statutory system of compulsory licensing. This approach allows for each interest at stake to be dealt with more equitably and with greater efficiency. However, until such a system is adopted, publishers will continue to resent what they view as an unfair appropriation of their publications. Educators, in turn, will continue to photocopy and, at times, infringe the copyrights of those upon whose efforts they so heavily rely.

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