

A Symposium . . .

Don't Touch! This Is Copyrighted!

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"DON'T TOUCH! This Is Copyrighted!" The title of this roundtable describes precisely the dilemma teachers and students face in the revision of the copyright law. Teachers are exhorted on every hand by supervisors, principals, and parents to use a rich bombardment of resources for learning in their classrooms in order to meet differentiated needs of learners and make teaching and learning more relevant and meaningful to students.

Yet, under the proposed copyright laws before the Congress, teachers will be confronted with additional "off-limits" signs which will make them stop and think twice before using the new instructional technology as well as the older instructional materials with boys and girls. The proposed laws are likely to foster a "hands-off" policy which will narrow, rather than broaden, availability and accessibility of materials and media. This is unfortunate because education in the 1970's needs a "hands-on" policy, not a "hands-off" one!

Inhibiting Provisions

The provisions in the proposed legislation which are most vexing to teachers and which will foster a hands-off policy are these:

1. Elimination of the not-for-profit provision which has been in the law since 1909 and which presently provides double-barreled protection (when combined with judicial "fair use") for education's use of copyrighted materials

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

3. Extension and expansion of the duration of copyright—the acceptance by the Copyright Office of "life of the author plus 50 years" as the term of copyright to replace the current "28 plus 28 years" which will automatically remove use of 85 percent of the works which now pass into the public domain after 28 years

4. The inclusion in the bill of Section 110(2)D which virtually eliminates the use of the new technology, including remote access information retrieval systems and instructional uses of computers by individual learners

5. The right of libraries to copy copy-

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righted works in whole or in part—especially those which are out of print—has been seriously restricted.

In short, education is confronted with a possible law which will not be responsive to the present and future predictable needs and requirements of education. It needs instead a law which can grow with the times and is not outmoded or outdated as soon as it is passed, as was the case of the present law enacted in 1909.

Provisions

To give a balanced assessment as to how education will likely fare under proposed legislation now before the Congress, it must be pointed out that despite the foregoing, the proposed new bills are in one important respect more palatable to education than previous revision drafts. The new bills provide for the first time statutory recognition of the doctrine of fair use. And the House Report accompanying the bill makes it clear that "assuming the applicable criteria are met, fair use can extend to the reproduction of copyrighted material for purposes of classroom teaching." If these bills are passed, the doctrine of fair use will be written into law and will not depend merely on judicial interpretation of the courts. This, in itself, will be a great help to teachers and learners.

Likewise, the House Report mentions certain key words which will be helpful to teachers in determining in certain instances whether a given use is a fair use. Such key words and phrases as "nonprofit," "spontaneity," "on the teacher's own volition," "limited to one class only," "temporary or ephemeral use," "one copy per user"—help to set limited parameters of the problem although they do not give absolute certainty as to whether a given use of copyrighted material is legitimate. Unfortunately these key words are open to various interpretations.

This means that just as we have had to rely on judicial interpretations on a case-by-case basis in the past, we will have to continue this involved and highly inefficient process in the future. Teachers will have no way of knowing whether they have infringed

until *after* they have done so! What good is a law that does not tell you what is right and what is wrong! The fact remains that teachers need reasonable certainty that a given use of copyrighted work is permissible. Teachers need a law which can easily pass from paper to practice without consulting an attorney at each turn.

The proposed bills are helpful to teachers in two other ways. First, a waiver of statutory damages against innocent educational infringers will be at long last established into law. The court at its discretion will be able to remit statutory damages in whole or in part in cases where an instructor infringes by reproducing a copyrighted work for use in class when he had reasonable grounds for believing that the reproduction was a "fair use." Present law sets the minimum damage for such infringement at \$250 per use. (Librarians and television teachers have curiously been omitted from inclusion in this waiver!)

Second, pending legislation, while not being as liberal for instructional television and radio as existing law, nonetheless has a built-in improvement over previous proposed drafts. The House-passed bill grants a wide-ranging exemption for instructional television. The Senate bill (which has not yet been reported out of committee) provides that such materials may be used as a part of a systematic instructional program within a 100-mile radius, where the materials are limited to two video tapes only, one for archival purposes and one for distribution.

The 100-mile limitation is but another example of an attempt to extend copyright protection beyond reasonable limits. This assumes that the pattern of the immediate past in the use of ITV will be the pattern of the future. In fact, it all but guarantees this! Also, this assumes that ITV includes only locally produced programs over ETV stations, CCTV, and ITFS systems and fails to include state, regional, and national networks. All this comes at the very time when network growth is evident, when there are two major instructional television libraries in existence and when satellites and networks for knowl-

edge are being proposed. This is very limiting for instructional broadcasting purposes and creates a myriad of clearance problems.

The Most Serious Problem

Even as limited as they may be, the provisions for instructional broadcasting are much more liberal than those for other electronic media, notably dial access information retrieval systems and computers. Section 110(2)(C) in the House bill and Section 110(2)(D) in the Senate version paralyze education's uses of remote access information systems and make the use of copyrighted materials on such systems illegal because the transmission is controlled by *students*, rather than by the *teacher*.

The wording of the bills is predicated on the basis that use by individual students substitutes for purchase of copies. By so doing, the bill in effect freezes teaching at the 1960 level. Teaching and learning practices, as they now are, and as they will increasingly become in the 1970's and 1980's, have been largely ignored. In short, the pending legislation makes no provision for the new technology in education. Individualized and independent uses of learning resources have been virtually eliminated.

At the very moment when education is moving more and more toward individualized uses of resources by students, with the focus on *learning* rather than *teaching*, education is seriously handicapped. At the very moment, also, when the Congress, on the one hand, is enacting legislation making it possible for schools to purchase new technological teaching and learning tools, it, on the other hand, would pass inhibiting copyright legislation which would freeze the *uses* of these tools. Truly, the left hand does not know what the right hand is doing!

The key problem from the educator's point of view is the design of a copyright law which will not be outdated as soon as it is passed, a law which is relevant to teaching and learning in our time, and which does not depend on a multiplicity of court cases for specific interpretation under the law.

The Public Interest

The central issue in the copyright situation is the public interest. Former Attorney General Katzenbach wrote in 1962, "Copyrights are forms of monopolies." "Even at its best," wrote the Assistant Librarian of the U.S. Supreme Court in 1963, "copyright necessarily involves the right to restrict as well as to monopolize the diffusion of knowledge."

The problem then becomes simply this: When Congress gives a monopoly to authors and publishers, what protection should it write into the law for education's use of materials? How does it protect against misuse of this monopoly? What limitations should be placed on this monopoly for the protection of children in nonprofit schools? Because copyright is a statutory monopoly—and not a fundamental inherent property right—anyone who seeks to extend this monopoly beyond its limits should lose its protection.

On June 17, 1968, Justice Potter Stewart, in delivering the opinion of the Supreme Court of the United States on the community antenna television case (*Fortnightly Corporation v. United Artists Television, Inc.*) held:

The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, Section I of the Act enumerates several "rights" that are made "exclusive" to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these "exclusive rights," he infringes the copyright. *If he puts the work to a use not enumerated in Section I, he does not infringe.* [Emphasis added]

This latter point is one which the title of this roundtable—"Don't Touch! This Is Copyrighted!"—seems to overlook. The title implies that teachers and students can use nothing or copy nothing, no matter how minimal, without running afoul of the copyright law. Nothing can be further from the legal realities of the situation, as Justice Stewart points out. To accept the premise that nothing can be copied without permission or payment of royalties flies in the face

of even the present statute and the rule of fair use. Many in the publishing industry through the years have attempted to leave this impression and in so doing have tightened their reins over the educational community, shortening the rope and enlarging their monopoly inch by inch by restricting the rights of the teacher and scholar to use materials for nonprofit purposes in libraries, classrooms, and in their homes.

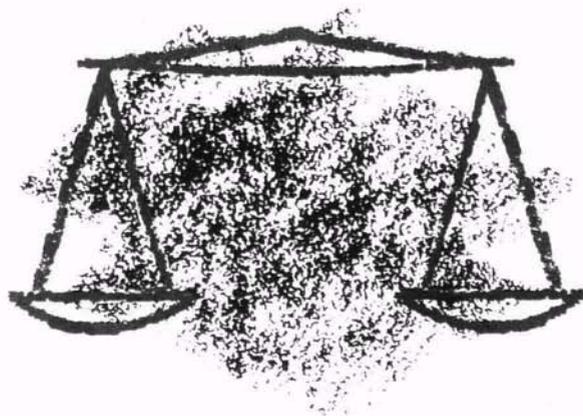
In this regard it is important to note that the very first copyright law, enacted in 1790, gave protection only to maps, charts, and books, and *that* only for a 14-year period, plus renewal of 14 years. The 1790 law did not cover periodicals, drawings, works of art, musical compositions, dramatic compositions—to name but a few. In our present law, adopted in 1909, the protection was extended from 14 years plus 14 years, to 28 plus 28 years, and now publishers in the new bills before Congress have succeeded in getting the law extended still further to read “life of the author plus 50 years.” Where is the end of this?

In interpreting the copyright law, the House Report on the present copyright law states that such rights as are given to the author and publisher are given “not primarily for the benefit of the author, but primarily for the benefit of the public.” Former Chief Justice Charles Evans Hughes put it this way: “The sole interest of the United States and the primary object in conferring the monop-

oly lie in the general benefit derived by the public from the labors of authors.” Justice Douglas, for the Court, said: “The copyright law makes a reward to the owner of secondary consideration.” The Register of Copyrights, in his Report to the Congress on the present 1909 law, asserted: “Within limits, the author’s interests coincide with those of the public. Where they conflict the public interest must prevail. . . . And the interests of authors must yield to the public welfare where they conflict.” I submit that education is the most universal expression of the public interest in the United States.

As educators, we speak to the public interest in revision of the law. In so doing, we seek a fair balance between the rights of authors and the rights of users of copyrighted materials. Each needs the other. The teacher creates markets for the author’s works and gives them visibility. The author and publisher must have incentives to keep them creating. Despite—and some even say *because of*—the alleged amount of copying which teachers and pupils engage in, the publishing industry has flourished, and education is happy indeed that such is the fact.

In my judgment, the public interest requires a proper balance between public and private concerns. And herein lies the problem in the present revision effort. The scale has been weighted heavily on the side of the private sector, to the detriment of the public. □



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