

March 1996


Unofficial Opinion of the Attorney General of the State of Georgia: The Scope of the Fair Use Doctrine

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Recommended Citation

Department of Law State of Georgia, Michael E. Hobbs & L. Ray Patterson, *Unofficial Opinion of the Attorney General of the State of Georgia: The Scope of the Fair Use Doctrine*, 3 J. INTEL. PROP. L. 317 (1996).

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EXECUTIVE ACTION

**DEPARTMENT OF LAW
STATE OF GEORGIA**

UNOFFICIAL OPINION

**Honorable Louise McBee
State Representative, District 88
Legislative Office Building, Room 509
Atlanta, GA 30334**

**Honorable Tom Campbell
State Representative, District 42
Legislative Office Building, Room 401
Atlanta, Georgia 30334**

**Re: The Scope of the Fair Use Doctrine, 17 USC § 107,
for making copies for classroom use, for teachers who
make copies for research and scholarship, and the
potential liability of teachers, librarians and employ-
ees of non-profit institutions for exceeding the
parameters of fair use.**

Dear Representative McBee and Representative Campbell:

This responds to your separate requests for an unofficial opinion concerning the scope of the Fair Use Doctrine as applicable to the educational environment of Georgia's schools, colleges and universities. Specifically, you have requested my opinion whether teachers may prepare and have reproduced excerpts from copyrighted works in the form of "course packs" for teaching purposes, and whether

teachers may reproduce copyrighted material for personal scholarship and research without infringing a copyright. Finally, you have requested my opinion concerning the potential liability of teachers, librarians, and employees of non-profit educational institutions where reproductions of copyrighted material have been made in the good faith belief that the copyright was fair use, but the copying is determined to be an infringement. I will respond to these issues seriatim.

I. Multiple Copies of Excerpts from Copyrighted Works for Classroom Teaching Made by or at the Request of a Teacher is Fair Use.

At the outset, it is important to understand that a basic policy of copyright law is that a copyright is primarily a mechanism for serving the public interest in the education of the citizenry and the exchange of ideas. See U.S. Const., Art. I, § 8, cl. 8. See also *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1985) (The monopoly of copyright is limited and “is a means by which an important public service may be achieved.”). The limitations of the grant are embodied, at least in part, in the judicially created fair use doctrine, which was codified for the first time in the 1976 Copyright Act, 17 USC § 107 (hereinafter section 107), 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—

- (1) the purpose and character of the use, including *whether such use is of a commercial nature or is for nonprofit educational purposes*;

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work. The 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.

(Emphasis added.)

A. Section 107 and its Application.

The application of section 107 requires an analysis of its two paragraphs. The introductory paragraph states that fair use includes use by copying and lists six exemplars of fair use: criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research. It also makes clear that fair use is not an infringement of copyright. “[F]air uses are affirmatively guaranteed to the public.” *Princeton Univ. Press v. Michigan Document Services*, No. 94-1778, ___ F.3d ___ (6th Cir. Feb. 12, 1996). And it is worthy of note that the Eleventh Circuit recently stated in dictum that fair use is a right, not merely a defense. *Bateman v. Mnemonics, Inc.*, ___ F.3d ___, 1995 WL 757786 n.22 (11th Cir., 1995). (“[S]ince the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right.”)

The second paragraph lists four *non-exclusive* factors for determining whether a use is fair. The following is an analysis of the four statutory factors:

1. [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.

The U.S. Supreme Court has said that “[t]he enquiry here may be guided by the examples given in the preamble of § 107” *Campbell v. Acuff-Rose*, 114 S. Ct. 1164, 1170 (1994). Since the preamble lists as an example “teaching (including multiple copies for classroom use),” and since whether or not the use is “for nonprofit educational purposes” is listed in factor 1, it is clear that this factor favors the teacher who makes, or has another make, copies only for classroom use.

2. [T]he nature of the copyrighted work.

Factor two is a recognition of the fact that there are three types of copyrightable works: creative or predominantly original works, 17 U.S.C. § 102(a) and compilations and derivative works. 17 U.S.C. § 103. Thus the Supreme Court has recently ruled that factor two “calls for recognition that some works are closer to the core of copyright protection than others” *Campbell*, 114 S. Ct. at 1174. Examples are fiction (more protection) and factual works (less protection); motion pictures (more protection) and news broadcasts (less protection); creative works (more protection) and compilations (less protection). *Id.*

3. [T]he amount and substantiality of the portion used in relation to the copyrighted work as a whole.

The amount that can be copied as a matter of fair use is a logical function of the first two factors, the purpose of the use and the nature of the work. Since use for the classroom is a preferred fair use, the basic issue for teachers relates more to the nature of the work. Clearly it is permissible to copy more from a work that has only a compilation copyright (§ 103) than from a work that has a creative copyright (§ 102(a)). For private or personal use there may be occasions when the entire work maybe copied. *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984).

It should also be noted that in determining the amount copied for fair use purposes, it is appropriate to subtract any unoriginal or uncopyrightable materials. This conclusion follows from three rulings of the U.S. Supreme Court in *Feist Publications v. Rural Telephone Co.*, 499 U.S. 340 (1991). These rulings are:

- a. "To qualify for copyright protection, a work must be original to the author." 499 U.S. at 345. (emphasis added) (This is because, as *Feist* repeatedly stated, originality is a constitutional requirement; "accordingly, copyright protection may extend only to those components of a work that are original to the author." 499 U.S. at 348.)
 - b. There is a constitutional right to use uncopyrightable material contained in a copyrighted work. 499 U.S. at 349.
 - c. To establish infringement, a copyright owner must prove "copying of constituent elements of the work that are original." 499 U.S. 361.
4. [T]he effect of the use upon the potential market for or value of the copyrighted work.

Prior to the U.S. Supreme Court's decision in *Campbell v. Acuff-Rose*, *supra*, lower courts deemed this to be the most important of the four factors. The Supreme Court in *Campbell* made clear, however, that it is only one of four factors to be considered, and it is to receive no greater weight than the others. The application of this factor in the context of your request requires consideration of these points: 1) the user is a student; 2) the determination of fair use requires a case by case analysis (a point that the four factors make obvious), *Harper & Row v. Nation Enterprises*, 471 U.S. 589 (1985); 3) the student would not normally be considered a potential purchaser of the work absent his enrollment in the course; and 4) since the student uses the excerpts as a member of the class, the use probably has very little, if any, effect on the market or potential market for the work.

5. Other Relevant Factors

The four factors are not exclusive and other relevant factors may be considered. Such factors include whether or not the work is

available. The work may be unavailable, for example, because it is out of print or because of excessive price. Under 17 U.S.C. § 108, Limitation on exclusive rights: Reproduction by libraries and archives, the rights of reproduction apply to the entire work if it is determined “on the basis of reasonable investigation, that a copy or phonorecord of the copyrighted work *cannot be obtained at a fair price . . .*” 17 U.S.C. § 108(e) (emphasis added). One hard and fast rule for the teacher who wishes to make copies for the classroom, however, is this: There should be no copying of an entire work to substitute for its purchase by class members.

It is important to note that the Court of Appeals for the Sixth Circuit has recently held that teachers may have others make copies for classroom use. Said the court:

We hold that the Copyright Act does not prohibit professors and students who may make copies themselves from using the photoreproduction services of a third party in order to obtain those same copies at less cost.

Princeton Univ. Press v. Michigan Document Services,
No. 94-1778, ___ F.3d ___ (6th Cir. Feb. 12, 1996).

II. Teachers May Reproduce Copies of Copyrighted Materials for Scholarship and Research Purposes.

Section 107 makes clear that teachers may make personal copies for scholarship and research purposes. Thus, scholarship and research are two of the six exemplars of fair use and may be considered preferred fair uses. While the four factors are to be applied to copying for this purpose, the first factor—“the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”—supports the conclusion that this is a preferred fair use.

It should be noted also that the Court of Appeals for the Second Circuit in holding a for-profit corporation liable because its research scientists made copies of articles from learned journals for research

purposes made it clear that the holding was not applicable to research carried on by non-profit institutions. *American Geophysical Union v. Texaco*, 60 F.3d 913, 916 (2d Cir. 1994, as amended, July 17, 1995) (“We do not deal with the question of copying by an individual, for personal use in research or otherwise (not for resale), . . . our opinion does not decide the case that would arise if . . . a professor or an independent scientist engaged in copying and creating files for independent research,”)

III. Teachers, Librarians and Other Employees of Non-Profit Institutions are Entitled to a Good Faith Fair Use Defense.

There is always the possibility that in copying copyrighted materials one may exceed the limits of fair use and thus infringe the copyright of the copied work. Congress recognized this danger and provided special protection for teachers, librarians, and other employees of non-profit institutions in the form of a good faith defense. If such a person believes in good faith that the copying is a fair use, neither the copier nor his or her institution is liable for statutory damages. The Copyright Act provides:

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, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords;

1 U.S.C. § 504(c)(2).

Since statutory damages may range from \$500 to \$10,000 and in the case of willful infringement up to \$100,000, 17 U.S.C. § 504(c), the good faith defense is meaningful protection for teachers and non-profit institutions. Therefore, it is appropriate to discuss briefly the factors of good faith.

First, the individual teacher (or librarian) must exercise good faith in determining whether the copying is fair use. The following factors should prove helpful in this endeavor.

1. The Classroom Guidelines

The House Report on the 1976 Copyright Act contains classroom guidelines on copying for classroom use. These guidelines are specific in nature and it is important to understand that they are best viewed as safe harbor provisions. Thus, as the Court of Appeals for the Sixth Circuit has said:

Congress could easily have enacted the Classroom Guidelines into law by including the Guidelines in the language of section 107; it chose instead to establish four broad factors to be considered in a case-by-case analysis of *all* alleged fair uses, even classroom uses, of copyrighted materials. We are bound by Congress' decision [W]e may not permit the statutory text enacted by both Houses of Congress 'to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.' [citation omitted]

Princeton Univ. Press v. Michigan Document Services,
No. 94-1778, ___ F.3d ___ (6th Cir. Feb. 12, 1996).

Thus if a teacher does not exceed the guidelines, there is no issue of infringement, no question of fair use and good faith exists as a matter of law. H. Abrams, 2 *The Law of Copyright*, § 15.06[A][4]. If, however, the copying exceeds the guidelines, the teacher or librarian must rely on fair use for the right to copy the material.

2. The Constitutional Right to Use Uncopyrightable Materials in a Copyrighted Work

As noted above, the Supreme Court in *Feist* held that there is a constitutional right to use uncopyrightable material in a copyright-

ed work. For example, a copyrighted text of historical documents may include the Declaration of Independence, the Articles of Confederation, and the U.S. Constitution. None of these documents can be protected by copyright. It should be noted also that U.S. Government works are not subject to copyright, 17 U.S.C. § 105, that facts are not subject to copyright, 17 U.S.C. § 102(b), and that law is not subject to copyright. *Wheaton v. Peters*, 33 U.S. (8 pet.) 531 (1834).

3. The Subtraction of Uncopyrightable Material

The above rules, as does the earlier discussion as to amount used, make it clear that in determining the amount copied for fair use purposes, it is appropriate to subtract uncopyrightable material from the portion that is copied.

Teachers should always act in good faith in copying excerpts for classroom use; and his or her conduct in copying must be such that an objective observer would conclude that the teacher acted in good faith. Therefore, it would be appropriate for teachers to comply with the following factors:

1. Limit the size of the excerpt copied to pedagogical needs.
2. Limit the sale of the copies to members of the class.
3. Limit the student's cost to the cost of reproducing the materials.

In summary, notwithstanding broad copyright notices that may purport to prohibit any copying without written permission, copying for classroom use is a legitimate activity and a legal right under the fair use doctrine of 17 U.S.C. § 107.

Moreover, where a teacher or librarian or other employee of a non-profit institution infringes a copyright with a good faith belief that the copying was a fair use, the Copyright Act requires courts to remit statutory damages if there is an infringement action.

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Issued this 14th day of February, 1996.

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