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# NEW COPYRIGHT LAW AND ITS IMPLICATIONS

JOHN A. LIEKWEG

The subject of my address this morning, The Copyright Act of 1976, has serious and far reaching implications for the many institutions which you, as diocesan attorneys, represent. Churches, schools, colleges, hospitals, and other institutions are both producers and users of materials which are subject to the provisions of the new law. As such, these institutions need to have a working knowledge of their rights and limitations under the new law, and it is probable that you will be called upon to provide advice in this area.

Before discussing the provisions of the new law, it would be useful to take a brief look at the historical context in which the new law was enacted. The Copyright Act of 1976 is a complete revision of the Copyright Act of 1909, which governed copyright law until January 1, 1978, the effective date of the new law. A revision of the 1909 statute was made imperative because of the rapid growth in technology, which produced major changes in communications techniques, such as radio, television, and copying machines, which were unknown in 1909. The need for revision was most aptly expressed by Mr. Justice Fortas in his dissenting opinion in *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U.S. 390, 402-03 (1968):

This case calls not for the judgment of Solomon but for the dexterity of Houdini. We are here asked to consider whether and how a technical, complex and specific Act of Congress, the Copyright Law, which was drafted in 1909, applies to one of the recent products of scientific and promotional genius, CATV . . . Applying the normal jurisprudential tools—the words of the Act, legislative history, and precedent—to the facts of the case is like trying to repair a television set with a mallet.

Movement to revise the 1909 statute began in 1955 and, after more than two decades of reports, extensive hearings, and numerous legislative drafts, the Copyright Act of 1976 was signed by President Ford on October 19, 1976.

The new law is a detailed and complex statute embodied in over sixty pages of legislative language. It is best described as a compromise statute which reflects an attempt to balance the competing interests of proprietors and users of copyrighted works. My discussion today will provide you with a broad overview of the statute with emphasis on those sections which are of particular interest to you as diocesan attorneys.

### *Subject Matter of Copyright*

There are two fundamental criteria of copyright protection: originality and fixation in tangible form. These criteria are set out in section 102 of the new law, which affords copyright protection to original works of authorship which are fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

It is important to note that under the new law, statutory copyright protection subsists from the time the work is fixed in any tangible medium of expression, without regard to whether or not there has been a publication of the work. This contrasts with the 1909 Act, which generally only afforded protection to works published with the proper copyright notice. The new law protects both published and unpublished works.

With one exception, works of the United States Government are not granted copyright protection. The government can receive and hold copyrights transferred to it by assignment, bequest, or otherwise.

### *Exclusive Rights in Copyrighted Works*

The new law grants five fundamental rights to copyright owners. These rights, as set out in detail in section 106, are exclusive rights of reproduction, adaptation, distribution, performance, and display. These rights are subject to the limitations and exemptions found in sections 107 through 118.

### *Fair Use*

The judicial doctrine of fair use has been given express statutory recognition in section 107. The fair use of a copyrighted work 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 of a work is a fair use, the factors to be considered should include the following:

- 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 House Report, H. Rep. No. 94-1476, makes it clear that section 107 is intended only to restate the present judicial doctrine of fair use and is not intended to change, narrow, enlarge, or freeze the doctrine in the statute. The House Report recognizes that courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

The fair use limitation generated much controversy and discussion,

particularly in the area of classroom photocopying. The controversy was resolved when representatives from the publishing industry and educational institutions reached an agreement on guidelines for classroom copying in nonprofit educational institutions. This agreement was included in the House Report and accepted by the Senate conferees. It basically provides the following guidelines:

- 1) For purposes of research or preparation for or use in teaching a class, a teacher may make a *single copy* of
  - a) a chapter from a book, an article from a periodical or newspaper;
  - b) a short story, a short essay, a short poem;
  - c) a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.
- 2) *Multiple copies* (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion, provided that:
  - a) each copy includes a notice of copyright; and
  - b) the copying meets certain defined tests for brevity, spontaneity, and cumulative effect.
- 3) The following is prohibited:
  - a) copying cannot be used to create, replace, or substitute for anthologies, compilations, or collective works;
  - b) copying cannot be of or from "consumable" works such as work books, test booklets, and the like;
  - c) copying cannot:
    - i) substitute for the purchase of books, publishers' reprints, or periodicals;
    - ii) be directed by higher authority;
    - iii) be repeated with respect to the same item by the same teacher from term to term; and
    - iv) no charge shall be made to the student beyond the actual cost of the photocopying.

Similar guidelines relating to the copying of music for educational uses have also been developed. With respect to these guidelines, the House Report states that the Judiciary Committee believes the guidelines are a reasonable interpretation of the minimum standards of fair use. Teachers will know that copying within the guidelines is fair use. The guidelines, therefore, serve the purpose of fulfilling the need for greater certainty and protection for teachers. It should be cautioned, however, that fair use is a judicial doctrine, and, like other judicial doctrines, it is subject to change and modification.

#### *Reproduction by Libraries and Archives*

Section 108 allows libraries to copy works in a variety of situations. Section 108 is a complex provision and time does not permit a full discussion of its details. However, those of you who represent institutions which maintain libraries should familiarize yourselves with this section.

One aspect of library photocopying is worth mentioning at this time. Section 108(g)(1) provides that nothing in the section shall be construed to impose liability for copyright infringement upon a library for the unsupervised use of copying equipment located on its premises, provided that such equipment displays a notice that the making of a copy may be subject to the copyright law. This exemption protects the library but does not extend to the person using the copying equipment if the use exceeds fair use.

#### *Exemption of Certain Performances and Displays*

Section 110 lists nine types of performances or displays which are not infringements of copyright. Four of these are of particular interest to church-related institutions.

Paragraph (1) exempts performances or displays in the course of face-to-face teaching activities. To qualify for this exemption, the performance or display must be by an instructor or pupil and take place in a classroom or similar place in a nonprofit educational institution. The House Report states that the teaching activities exempted encompass systematic instruction on a very wide variety of subjects. The exemption is not without limitations, however, and does not apply to broadcasts or transmissions received from an outside location (covered in paragraph (2)). Nor does this exemption include performances or displays that are given for the recreation or entertainment of any part of their audience.

Paragraph (2) exempts performances of nondramatic literary and musical works, and displays of all types of works during instructional broadcasts, provided certain conditions are met. These conditions are as follows:

- a) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution;
- b) the performance or display is directly related and of material assistance to the teaching content of the transmission; and
- c) the transmission is made primarily for reception in classrooms, for disabled persons, . . . ; and
- d) religious broadcasts to the public at large, even though the broadcasts are sent from a place of worship.

Paragraph (4) exempts certain nonprofit performances of nondramatic literary or musical works. The exemption applies only in situations where no payment of any fee or other compensation for the performance is made to any of its performers, promoters, or organizers. There is no admission charge, or, if there is an admission charge, the proceeds are used exclusively for educational, religious, or charitable purposes. In the latter situation, copyright owners can prevent performances of their works by serving notice of objection in writing at least seven days in advance. This provision was included to permit copyright owners to prevent performances of their works in the fund-raising activities of causes to which they are opposed.

Section 112 contains four exemptions relating to the recording of broadcast transmissions, two of which impact our institutions.

Section 112(c) generally permits a nonprofit organization that is free to transmit a performance or display of a work under section 110(2), the instructional broadcast exemption, to make not more than thirty copies of a particular transmission program and to use the copies for transmitting purposes for not more than seven years after the initial transmission, at which time all but one copy must be destroyed. Motion pictures, other audio-visual works, and works of a general cultural nature are not exempted under section 112(b).

Section 112(c) contains an exemption pertaining to the mechanical reproduction of certain religious broadcasts. The exemption provides that it is not an infringement of copyright for certain nonprofit organizations to make more than one copy for each transmitting organization of a broadcast program embodying a performance of a nondramatic musical work of a religious nature or of a sound recording of such musical work. In order for this exemption to apply, there can be no charge for the distribution, the distributed copies can only be used in one transmission, and all but one of the copies must be destroyed within one year of the first transmission.

There are several other limitations to the exclusive rights granted to copyright owners in section 106 which I have not discussed. Although important, these limitations do not appear to be of particular significance to our institutions. Because of time limitations, I will only enumerate these limitations by the general subject matter involved. They are:

- 1) rights extended to owners of copies of works lawfully made (§ 109);
- 2) secondary transmissions, i.e., cable TV (§ 111);
- 3) pictorial, graphic, and sculptural works (§ 113);
- 4) sound recordings (does not include display or performance rights) (§ 114);
- 5) compulsory licensing in the area of nondramatic musical works (§ 115);
- 6) jukeboxes (§ 116);
- 7) computers (§ 117); and
- 8) noncommercial broadcasting (§ 118).

### *Remedies*

Chapter 5 of the new copyright law sets out the remedies available to copyright owners in proceeding against copyright infringers. This chapter is very important and is worth reviewing in some detail.

Section 501(a) defines copyright infringer as one who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phono-records into the United States in violation of section 602. Section 501(b) entitles the legal or beneficial owner of an exclusive right under a copyright to institute an action for any infringement of that particular right committed while he or she is the owner of it. The remedies available to copyright owners include in-

injunctive relief (§ 502), impoundment during the time an action is pending (§ 503(a)), destruction or other reasonable disposition of infringing copies (§ 503(b)), damages (§ 504), and costs and attorney's fees (§ 505).

The damage provisions of section 504 are described as the cornerstone of the remedies sections in both the House and Senate Reports. Section 504 provides two standards of measure for awarding damages:

- 1) the copyright owner's actual damages and additional profits of the infringer, or
- 2) statutory damages.

The decision as to which standard is used is left to the copyright owner, who may elect, at any time before final judgment is rendered, to recover statutory damages instead of actual damages and profits.

Statutory damages for the infringement of a single work for which an infringer is liable individually can be awarded in an amount not less than \$250 and not more than \$10,000, as the court considers just. Where a suit involves infringement of more than one separate and independent work, minimum statutory damages for each work must be awarded. For example, if a school has infringed four separate copyrights, the copyright owner would be entitled to statutory damages of at least \$1,000 and could be awarded as much as \$40,000 (§ 504(c)(1)).

Section 504(c)(2) places some modifications on awards of statutory damages in the following situations:

- 1) In cases where the copyright owner proves willful infringement the court in its discretion may increase the award of statutory damages to as much as \$50,000;
- 2) In cases where the infringer proves that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement, the court may reduce the award of statutory damages to a sum of not less than \$100;
- 3) The court is required to 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 is 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 phono-records. The House Report states that it is intended, in cases involving this provision, that the burden of proof with respect to the defendant's good faith should rest on the plaintiff.

### *Duration of Copyright*

Chapter 3 contains one of the most important provisions of the new law, that is, a definitive statement as to the preemptive effect of the new law. Section 301 establishes a single federal system of copyright which preempts all equivalent rights under state law in copyrightable works that have been fixed in tangible form. Prior to the effective date of the new law, there had existed a dual system of copyright. The federal copyright statute

applied to published works, while state common or statutory law applied to unpublished works. The new law, which applies to both published and unpublished works, preempts state action in this area.

Section 302, with certain exceptions, provides that copyright in a work created on or after January 1, 1978 endures for the life of the author and fifty years after the author's death. In most cases, the effect of this provision will be a longer term of copyright protection than was granted under the prior law, which provided for an original term of twenty-eight years with a renewal term of twenty-eight years.

My comments this morning have been directed toward those parts of the law which most directly impact our institutions. In doing this, I have neglected other parts of the law, particularly the administrative sections, which are very important. The administrative sections you want to take a look at are the ones having to do with notice, position of notice, registration, deposit, and the like. Second, while the new law is a vast improvement of the 1909 statute, it is still a complex statute. It is vague in some areas and has left many questions unanswered. For these reasons, I urge all of you to take a close look at the statute.