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Book Review [Copyright, Fair Use and the Challenge for Universities]

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BOOK REVIEW

FAIR USE

COPYRIGHT, FAIR USE AND THE CHALLENGE FOR UNIVERSITIES.
By Kenneth D. Crews. Chicago, Ill., London, England, The
University of Chicago Press, 1993. Pp. 247. Hard Cover.
\$22.50.

*Reviewed by Vince Tortolano**

The doctrine of fair use is a product of the tension in copyright law which encourages the creation and dissemination of intellectual works, while concurrently restricting their availability. The doctrine permits courts to avoid rigid interpretations of copyright law in order to prevent stifling the very creativity it was designed to foster. However, in practice, the doctrine is often difficult to apply. In the educational realm, the problem is particularly evident. As one authority on copyright law has stated: "The unauthorized reproduction for scholarly or educational purposes of limited numbers of copies of copyrighted works has come to present one of the major problems of fair use."¹

Kenneth Crews addresses this timely issue in his book entitled *Copyright, Fair Use and the Challenge for Universities*. Crews' stated objective is to "identify and define a role for universities in the copyright equation." His study focuses on the interrelationship between copyright law and the university's mission. The emerging thesis is that universities need to reevaluate the connection between copyright and higher education. The challenge is balancing the right of

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1. MELVILLE B. MILLER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[E][1], at 13-245 (1994).

ownership with the importance of public use of copyrighted materials. Central to the equation is the concept of fair use.

The notion of fair use, as developed by Congress, is an attempt to define an acceptable limit to the reproduction or other use of copyrighted materials. In Chapter One, Crews explores the impact of fair use on the pressing issues surrounding copyright at American universities. Authors are typically given exclusive rights to the use of their creative works, while the public is allowed to make limited use of protected work, especially when used for "research, education or scholarship." Unfortunately, the absence of exact standards leaves scholastic administrators to evaluate particular circumstances and to conclude for themselves whether their specific use is within legally allowed boundaries.

Crews highlights this dichotomy of interests by evaluating the differing objectives and environmental outlooks of certain interest groups within academia. His discussion covers the diverse and conflicting goals of administrators (legal mandates, budgets, public perception), faculty (teaching, conducting research, service to the public), librarians (providing information resources to the university), and legal counsel (avoiding legal risks, serving the interests of the university as an entity). Ultimately, as Crews correctly indicates, a university copyright policy must be responsive to competing internal and external institutional obligations. The eventual goal is to meet the information needs of higher education while respecting the legal rights of copyright owners, as well as avoiding copyright infringement and liabilities.

Chapter Two is a review of copyright law and the foundation of university policies. Crews outlines the statutory underpinnings of copyright law, describing, in turn, sections 107 (Fair Use), 108 (Library Rights) and 110 (rights of educators) of the Copyright Act of 1976.² The emphasis is on sections 107 and 108, particularly the exact activities covered by the Act, remedies for infringement, and legislative history.

The concept of fair use and how it operates to reduce the scope of exclusive rights granted to copyright owners is also examined. In the university context, as Crews explains, fair use is "intrinsically aligned with the notion that education

2. Copyright Act of 1976, 17 U.S.C. §§ 107, 108, 110 (1988).

deserves preferential treatment and should not be unduly inhibited.”

Next, Crews details the historical development of the Copyright Act. Initially, the quest for greater specificity and assurance of educator's rights led to the promotion, by the Association of American Publishers (AAP) and other leading professional organizations, of the Classroom Guidelines (hereinafter "Guidelines"). The Guidelines, set forth in the legislative history to the 1976 Act, were only intended to be suggestions of proper educational fair use policies. The Guidelines allow single copies of articles and parts of larger works to be used for research or classroom preparation. In addition, the Guidelines also permit multiple copies for classroom distribution, if the copying meets certain defined standards (i.e., "brevity," "spontaneity," and "cumulative effect").

The last section of Chapter Two discusses how the statutory provision on library copying, section 108, often serves as a foundation for university policies. The elaborate standards contained in section 108 are far more detailed than the general fair use standards evinced in section 107. In addition, the National Commission of New Technological Uses of Copyrighted Works (CONTU), formed by Congress in 1976, recommends standards on photocopying for interlibrary lending. Taken together, Crews concludes that section 108 and the CONTU standards establish practical guidance for libraries.

Chapter Three explores the effect of litigation on the formation of university copyright policies. In *Addison-Wesley v. New York University*,³ NYU adopted the Classroom Guidelines as part of a settlement. The case, supported and organized by the AAP, charged NYU with violation of copyrights held by certain publishers, based on the University's photocopying of book chapters which were sold for classroom use. This acceptance of the Guidelines represented a retrenching of university policy. In Crews' words, "[t]he flexibility of fair use was replaced at NYU by the rigidity of qualitative evaluations entrenched in the Classroom Guidelines." As evidenced by the *Addison-Wesley* case, Crews contends that many provisions of the 1976 Copyright Act favoring educators and librarians, such as fair use, have been lost or restricted due to litigation.

3. *Addison-Wesley Publishing v. New York Univ.*, 1983 Copyright Law Decisions Paragraph 25,544 (S.D.N.Y. 1983).

However, a number of other universities and interest groups have resisted using the Classroom Guidelines. In 1978, the University of Wisconsin developed an influential copyright policy (Wisconsin Policy), later adopted by other universities, that contains less restrictive standards than the Classroom Guidelines. Subsequently, the American Library Association (ALA) utilized the Wisconsin Policy to create a modified and expanded "Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use." Whereas the Classroom Guidelines are intended to be a "safe harbor" for avoiding liability, the ALA Model Policy has the "express purpose of interpreting the law to serve the university's academic mission."

Chapter Four, which is the centerpiece of Crews' book, describes his study of 98 research universities, focusing on the written standards, if any, created by each university. The universities were selected for the study based on their participation in either the Association of American Universities (AAU), or the Association of Research Libraries (ARL). Crews provides a detailed analysis of the varying university policies, arriving at the conclusion that, inter alia, copyright responsibilities are diffused and poorly coordinated at many universities.

The sundry policies included in Crews' study cover a myriad of subjects, including classroom photocopying, research photocopying, reserve room uses, library copying and interlibrary lending. In addition, policies associated with music, video tapes and software are also examined. Crews discusses the scope and application of particular policies, as well as identifies the principal policy makers within the university. Lastly, he compares the stated purposes of various policies, such as "compliance with the law" and "avoiding infringement."

In Chapters Five and Six, Crews turns his attention to the influence of congressional recommendations on university policies. Citing the legislative history surrounding the enactment of the 1976 Copyright Act, Crews describes the effect of the Act on university policies, particularly the Act's interpretation in the Classroom Guidelines. Crews observes that the Guidelines are the "single most significant influence on the content of university copyright policies," and discusses their influence on the developing areas of video and music.

Crews makes an intriguing observation in Chapter Five concerning the relationship between policy content and the university officials responsible for developing those policies. Contrary to expectations, administrators and legal counsel have often been responsible for adopting the more lenient aspects of copyright policy. Crews cites his finding that, of the eleven instances where the lenient ALA standards became university policy, librarians were the leading developers of only one.

Chapter Six looks further into the issue of Congress as a policy source, especially as it relates to library copying. Crews discusses library copying in the context of section 108 of the Copyright Act, reporting his study findings that most university policies are based, at least in some part, on the congressional guidelines set forth in this section of the Act.

In the same chapter, Crews also looks at a type of library copying, reserve room copying. Reserve rooms, by their very nature, raise a number of important copying issues, since frequent photocopying is a necessity to meet the immediate and short-term demands of students. In fact, reserve room copying is the single most prevalent issue addressed in university copyright policies.

Crews illustrates differing treatments of reserve room copying by comparing several university policies, including the Wisconsin and ALA policies. One ambitious approach to resolving reserve room copying issues is the use of "blanket license" programs, whereby the university obtains general permission from publishers allowing for reserve room copying.

The debate surrounding interlibrary lending is also broached in Chapter Six. Interlibrary lending has been criticized by publishers, who assert that such lending is a substitute for subscriptions. Crews suggests a copyright standard that not only permits interlibrary operations, but also sets reasonable limits and procedures as to when libraries should purchase, rather than borrow, original works.

In Chapter Seven, Crews tackles the copyright frontier of new technology, particularly the problems unique to software copying. With the growth of software technology and the uncertainty of its treatment under the law, Crews' finding that only one-third of university policies have software use guidelines comes as no surprise.

In examining the attempts by some universities to formulate policy in the software area, Crews finds that rarely is established precedent followed. Instead, most university policy makers attempt to formulate their own standards. The trend, Crews warily reports, is toward restriction of all copying. Ultimately, Crews suggests the need for "creative insight" and the formulation of a "legally sound position that reclaims fair use privileges" in developing university software use policies.

In his final chapter, Crews summarizes his views on the state of copyright policy at American universities. Simply put, Crews believes that such policies are in "disarray." He describes a tendency toward conventionalism, believing that often the primary motivation of policy makers is to deter litigation and demonstrate a university's good faith, even if the policies are not always obeyed.

Among the best copyright policies, Crews cites the University of Georgia's policy as "extraordinary" and "worthy of close study" due to its flexibility, comprehensive nature, and deference to the needs of higher education. Crews reiterates his call for review and revision of current guidelines and policies and, in fact, an abandonment of the Classroom Guidelines. Alternatively, Crews suggests a cohesive strategy planning effort. Examples of what Crews has in mind are demonstrated by certain alternative systems, such as the Copyright Clearance Center, and other "collective administrative" schemes.

Crews also calls upon Congress to take action. Specifically, he suggests sponsoring a series of meetings among diverse interest groups to review guidelines and propose amendments or revisions. Ultimately, Crews believes the future of copyright at American universities will be best served by the collective and cohesive efforts of educators working with professional associations, Congress and the U.S. Copyright Office.

The Appendices of *Copyright* include an extensive collection of ancillary materials, including complete renditions of university and model copyright policies and a detailed exploration of the surveys conducted at the universities studied.

Crews' book is an essential source for any educational institution attempting to formulate copyright policy. Especially useful is the comparison of existing university policies, which

provides insight into the range of thought surrounding this subject. The delineation of liberal to conservative approaches provides an effective foundation upon which to devise an enlightened policy for the modern university. Similarly helpful is the understanding gained from Crews' explanation of the differing agendas and perspectives of the various campus interest groups who will have input into any new policy. Recognition of these diverse philosophies could smooth the way for the construction of an extensive policy which provides the maximum benefit to all concerned.

Building on Crews' conclusions represents an illuminating, and advisable, approach to developing the future of copyright law at American universities. I would highly recommend this work to any faculty member, librarian, administrator or legal counsel responsible for creating and maintaining university copyright policy.

