



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION No. 81-202

David W. Kester  
Kansas State Department of Education  
120 East Tenth Street  
Topeka, Kansas 66612

Re: Schools -- State Music Festivals -- Duplication  
of Copyrighted Works

Synopsis: Duplication of copyrighted musical scores for the use of judges at state music festivals constitutes an infringement of the United States copyright laws. It does not represent a "fair use" of such copyrighted material within the meaning of 17 U.S.C.A. §107, even though it is for a nonprofit, educational purpose, because: (1) It does not constitute duplication for the purpose of criticizing or commenting on the copyrighted works themselves; (2) even if regarded as being for the purpose of comment or criticism, duplication of an entire score exceeds the permissible amount which may fairly be reproduced as legitimately necessary for critical review; and (3) such duplication is intended primarily as a substitute for purchasing the original works. Cited herein: 17 U.S.C.A. §§106, 107.

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Dear Mr. Kester:

You have inquired whether music educators may duplicate music scores for distribution to judges in music competitions without infringing copyright laws. You indicate such request is prompted by conflicting interpretations of these laws by the Education Program Specialist for the State Department of Education and the music director for Unified School District No. 451, with the latter contending that the copyright laws allow such duplication of copyrighted works.

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The provisions of the copyright laws pertinent to your inquiry are found in 17 U.S.C.A. §107, which states:

"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."

It is our understanding that the music director for U.S.D. No. 451 contends that the foregoing statutory provisions permit providing judges at state music festivals with duplicated copies of musical scores to be performed by the various students and student groups, because such performances are for the purpose of criticism and comment in furtherance of a nonprofit, educational purpose. For the reasons presented in the following discussion, we must respectfully disagree.

Generally, the owner of a copyright has the exclusive right to reproduce the copyrighted work in copies. 17 U.S.C.A. §106 (1), (4). However, the judicial doctrine of fair use, as codified in the above-quoted statutory provisions, is an important limitation on the exclusive rights of owners of copyright. While there is ample case law on the application of the doctrine, there is only one federal court of appeals case involving duplication of musical scores in limited quantities for educational purposes. Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962).

Although Wihtol was not decided under current copyright laws (which went into effect in 1976), it provides guidance as to

what constitutes a fair use of a copyrighted song within the context of your inquiry. In that case, the defendant, a teacher, made an arrangement of plaintiff's copyrighted song and duplicated copies which were distributed to students free of charge. The court of appeals reversed a district court finding that such activity constituted a fair use. The appellate court stated that "[w]hatever may be the breadth of the doctrine of 'fair use' it is not conceivable to us that the copying of all, or substantially all of a copyrighted song can be held to be a fair use 'merely because the infringer had no intent to infringe.'" Wihtol, supra at 780. According to one recognized authority on copyright laws, the case has continuing vitality. "The teacher reproduction for classroom use in Wihtol would violate the fair use guidelines under the current act." 3 M. Nimmer, On Copyright 13-89 (1981) [hereinafter cited as Nimmer].

We believe the notes of the committees of the 94th Congress which considered the revision of the copyright laws represent an expression of congressional intent which supports Nimmer's conclusion that the principles enunciated in Wihtol have continuing applicability. These notes are reproduced in the "Historical Note" following §107 in 17 U.S.C.A. In particular, the comments of the House Committee on Judiciary contained therein are of assistance in addressing the various aspects of your inquiry.

Included in the House Judiciary Committee's notes are "Guidelines for Educational Uses of Music," which were developed jointly and submitted to the committee by the Music Publishers' Association of the United States, Inc., the National Music Publishers Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music and the Ad Hoc Committee on Copyright Law Revision. These guidelines, as included in "Notes of Committee on the Judiciary, House Report No. 94-1476," are as follows:

"A. Permissible Uses

"1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.

"2. (a) For academic purposes other than performance, multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section,

movement or aria, but in no case more than 10% of the whole work. The number of copies shall not exceed one copy per pupil.

"(b) For academic purposes other than performance, a single copy of an entire performable unit (section, movement, aria, etc.) that is, (1) confirmed by the copyright proprietor to be out of print or (2) unavailable except in a larger work, may be made by or for a teacher solely for the purpose of his or her scholarly research or in preparation to teach a class.

"3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.

"4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.

"5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

"B. Prohibitions

"1. Copying to create or replace or substitute for anthologies, compilations or collective works.

"2. Copying of or from works intended to be 'consumable' in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.

"3. Copying for the purpose of performance, except as in A(1) above.

"4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.

"5. Copying without inclusion of the copy-right notice which appears on the printed copy." (Emphasis added.) 17 U.S.C.A., Historical Note following §107, at 115.

In passing, we note that all of the groups which developed the foregoing guidelines, except the Ad Hoc Committee on Copyright Law Revision, have jointly prepared an uncopyrighted booklet entitled The United States Copyright Laws, A Guide for Music Educators, in which substantially the same guidelines have been included in its Appendix B.

The guidelines quoted above were approved by the House Judiciary Committee as "a reasonable interpretation of the minimum standards of fair use." *Id.* at 116. Having compared these guidelines with the respective provisions of section 107 which they interpret, we concur in this conclusion. While these guidelines are not conclusive upon judicial construction of section 107, we believe the courts are constrained to give considerable weight to the House Judiciary Committee's approval of these guidelines as an expression of congressional intent. Accordingly, we have relied, in part, on these guidelines in concluding that music scores may not be duplicated for the use of judges at state music competitions.

Specifically, we believe that such duplication of musical scores contravenes the prohibition in these guidelines as to copying as a substitute for purchasing music. Arguably, such duplication also contravenes the prohibition in these guidelines as to copying for the purpose of performance, but we recognize the contrary argument that copying music to be used by judges in a music competition is not copying for the purpose of performance as was the case in Wihtol, supra. However, we find it unnecessary to address that question here, since the prohibition against copying to avoid purchasing music is inescapable. In fact, we note from the correspondence submitted with your request that such is the underlying motive of the music director of U.S.D. No. 451, who questions the necessity of burdening the public school system "by adding the cost of multiple-score purchase(s) to the greater burden of inflated musical works." From that statement it seems clear that the purpose of the copying is to avoid purchase of the musical works. In our judgment, and as suggested by the pertinent prohibition in the guidelines, duplicating copyrighted works for such purpose contravenes 17 U.S.C.A. §107.

The problem presented here is not unique, and we agree with Nimmer's observations in this regard: "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." Nimmer, supra at 13-73. Such photocopying commands a "certain sympathy since they generally involve no commercial exploitation and more particularly in view of their socially useful objectives." (Footnote omitted.) Id. However, some thought must be given the potential for reduction in the value of the copyrighted work if a "consistent and pervasive application of this practice" is allowed. Id.

It could be argued that the copying is for the purpose of comment and criticism, which is permissible under 17 U.S.C.A. §107. However, in our judgment, to so classify the copying would expand the concept beyond that which its framers intended. As noted earlier, section 107 is merely a statutory recognition of the judicial doctrine of fair use and is not meant to change it. "[C]ase law compels the conclusion that the 'criticism' exception was developed to encompass those writings commonly regarded as literary or cinematic review." Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875, 880 (S.D. Fla. 1978).

While the Triangle Publications case quoted above did not involve the duplication of musical scores, we believe it reflects judicial recognition of the fact that the "criticism" and "comment" contemplated by section 107 apply to the copyrighted work itself, not to the performance thereof. Copying for the purpose of criticism allows a person writing a review to quote from a copyrighted work. This is completely different from copying the entire work so that the performance of the work, rather than the work itself, may be judged or criticized. Clearly, in the situation at hand, the duplication of the copyrighted music is intended for the purpose of judging the performers thereof. It is not in furtherance of scholarly comment or criticism regarding the scores themselves.

Moreover, even assuming arguendo that the judging of performances at state music festivals can somehow be construed as being comment or criticism for educational purposes within the meaning of section 107, only the amount "legitimately necessary to review" the work is permissible. Yankwish, What Is Fair Use?, 22 U. Chi. L. Rev. 203 (1954). As the author of one treatise has observed, the privilege does not allow the commentator to reproduce so much of the work that the review becomes a substitute for the original work. 23 A.L.R. 3d 139 (1969). Here, the teachers wishing to make copies, instead of purchasing multiple copies of the original,

clearly intend to use them as substitutes for the original. Therefore, even if we should agree that the purpose of the copying is for criticism, we believe it exceeds the permissible amount that may fairly be reproduced.

Similarly, the contention that the copying is a fair use, because it is for nonprofit, educational purposes, must be rejected. The character of the use is but one factor to be considered in determining fair use under section 107. Here the notes of the House Judiciary Committee are instructive.

"The Committee has amended the first of the criteria to be considered -- 'the purpose and character of the use' -- to state explicitly that this factor includes a consideration of 'whether such use is of a commercial nature or is for non-profit educational purposes.' This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions." 17 U.S.C.A., Historical Note following §107, at 112.

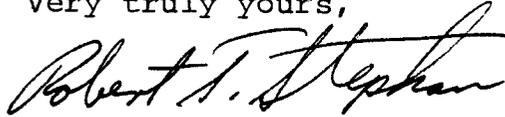
Although the copying of the music in this instance is not for commercial purposes, and purchasing extra copies for judges in the music competition is an added expense to the public schools, we believe such copying would infringe on the copyright owner's exclusive right to copy the work. In our judgment, it is not a fair use. Certainly the demand for the original work would be decreased if all teachers could make copies for all judges in all music competitions. Because music teachers are obviously a major part of the potential market for certain works of music, it is likely that the market for those works would decrease if unauthorized copies could be made indiscriminately. This potential loss of value to the copyright owner must weigh heavily in our consideration of "fair use."

Accordingly, for all of the reasons stated herein, it is our opinion that duplication of copyrighted musical scores for the use of judges at state music festivals constitutes an infringement of the United States copyright laws. It does not represent a "fair use" of such copyrighted material within the meaning of 17 U.S.C.A. §107, even though it is for a nonprofit, educational purpose, because: (1) It does not constitute duplication for the purpose of criticizing or commenting on the copyrighted works themselves; (2) even if regarded

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as being for the purpose of comment or criticism, duplication of an entire score exceeds the permissible amount which may fairly be reproduced as legitimately necessary for critical review; and (3) such duplication is intended primarily as a substitute for purchasing the original works.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



W. Robert Alderson  
First Deputy Attorney General

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