Poaching in the Groves of Academe

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Editor's Note: This article and the one that follows offer diametrically differing perspectives on a matter that might be said to pit users of information against creators. Those categories, of course, are not mutually exclusive. Burton and Illana Leiser's disagreement with Stanley W. Lindberg, however, rises above the din of our partisan battles in the culture wars to a rather purer dispute over the ownership of knowledge. On this, *Academic Questions* has taken no formal position.

"This is an excellent article," a colleague said recently. "Perhaps we ought to discuss it at a department colloquium. I'll have the departmental secretary make a copy for each of the members of the department so we can all be informed about it before the colloquium."

Another colleague thought the article was so good that she decided to distribute copies to her graduate seminar for a careful analysis. And yet another, seeing that it coincided exactly with a topic he was about to take up in one of his introductory undergraduate courses, headed over to the copying machine to run off a hundred copies or so.

None of these basically decent, socially conscious faculty members hesitated for a moment to employ that technological marvel, the photocopier, to reproduce multiple copies of a newly published work of scholarship in order to share it with colleagues and students. It seemed perfectly natural for them to do so. Why, after all, did the university provide such fine, high-speed photocopying equipment? Wasn't it to enable us to pursue our scholarly work more easily?

It's a far cry from the old days—not so very long ago, after all—when one would have had to spend many hours typing mimeograph stencils of such materials. So much labor went into stencil cutting that one would rarely copy a major portion of an article, to say nothing of an entire article or chapter. An original or two—all that were likely to be available on a given campus—would be circulated from one faculty member to another until everyone had had a chance to read the article in question. One or two copies would be placed on reserve in the library for the students, who would have been expected to

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spend no more than an hour or two perusing them before returning them to the reserve desk.

But today, scholars–faculty members and students alike–think nothing of copying selected portions of articles, entire articles and chapters of books, or even complete books in order to facilitate their scholarly pursuits in the most cost-effective way.

Such photocopying has become so common and is done with so little thought, much less hesitation, that many faculty members have come to believe that it is perfectly right and proper. This view has been ratified by a panel of judges of the Sixth Circuit Court of Appeals, which held last year that extensive copying by academics does not violate the laws of copyright. The case was brought by Princeton University Press, Macmillan, Inc., and St. Martin's Press against Michigan Document Services, Inc., a copy shop.[1] The case concerned "coursepacks," compilations of journal and newspaper articles, course notes, sample questions, and excerpts from books. The coursepacks were prepared by the professors in whose classes they were to be used, and were sold to the students at a price determined simply by the number of pages in each coursepack. Excerpts ranged from 5 to 30 percent of the total content of the books from which they were derived. Permission to reprint these materials was never requested either by the copy shop or by the faculty members who had ordered the printing to be done.

The federal district court had granted an injunction forbidding any future infringement of the publishers' copyrights, and awarded the publishers a total of $30,000 in damages, plus attorneys' fees. The appeals court heard the case *de novo* in order to determine whether the coursepacks constituted fair use of the copyrighted materials.

The copy shop argued that the copyright clause of the Constitution was not intended to enrich authors and inventors, but "to encourage the progress of science and the production of creative works for the public good." Therefore, the argument went, the public has a right to make "fair use" of such materials without requesting permission from or paying fees to the copyright holders. The defendants contended that where the professor compiling the coursepack had no intention of assigning the books from which the excerpts were taken, and derived no personal financial benefit from the sale of the coursepacks, his or her use of the materials was not unfair to the copyright holders. The court panel agreed, finding that even the 30 percent copied from one book did not amount to an unfair use since it was not "the heart of the work," but only those portions the professor deemed instructive for his limited classroom purposes.

The plaintiffs were unable to demonstrate to the court's satisfaction that they had suffered any economic harm other than the lost permission fees. Since the faculty members who created the coursepacks had no intention of assigning the books from which the excerpts were taken, the court concluded, the publishers suffered no real losses.

Most significant, however, was the court's finding that faculty members in general write for purely personal and professional reasons. They are eager to contribute to their disciplines. They want to provide colleagues an opportunity to evaluate and critique their ideas. Their publications are principally intended to improve their career opportunities and enhance their professional reputations. "Monetary compensation," the court concluded, "is a secondary consideration for authors in this field, and the permission fees...are likely to amount to a mere pittance for individual authors." Consequently, the copy shop and the faculty members who utilized its services, far from depriving academic writers of income to which they are entitled, were "advancing the progress of science and the arts."

The court seems to have been assuming that writers whose works might be deemed suitable for use in college and university classrooms must be different from those whose writings are useful in industry, for another federal appeals court had held that a corporation that subscribes to a single copy of a technical journal and copies articles from it for circulation to employees whose work might be enhanced by them is liable for copyright infringement. The Supreme Court, which did not grant certiorari, evidently did not disagree.[2]

Academic writers must be different, too, in the court's view, from song writers and performers. Establishments that play recorded music must pay fees to central bureaus that distribute the proceeds to the composers and performers whose music is played and to the producers of their recordings. Last summer, for the first time, the agencies that monitor the use of music informed the managements of summer camps that they would have to pay license fees if campers were to be permitted to sing copyrighted camp songs. Camps that refused to pay the license fees had to limit campfire singing to those songs that are in the public domain. Birthday celebrants could not sing the well-known "Happy Birthday" song, which is still under copyright, without violating the rights of the composer and subjecting the camp management to potentially heavy liability for the infringement. Following considerable adverse publicity and ridicule for having denied girl scouts and other campers the right to sing traditional camp songs, these agencies reversed themselves, agreeing not to enforce their licensing requirements against summer camps. However, they have not backed down on their claim that they are legally entitled to do so.

Similarly, playwrights are entitled to fees for the performance of their works, whether they are performed in commercial theaters or on college or university campuses. The mere fact that a public performance at a university or a high school might be culturally enriching for those who would attend is not sufficient justification for exempting those institutions from payment of license fees for their use of the copyrighted materials. Indeed, it is reasonable that they be required to do so.

Virtually everyone who creates a work of art, music, or literature is entitled to compensation—and *expects* to be compensated—for use of his or her artistic

or scientific contribution. The Constitution itself specifically provides for patents and copyrights in wording whose intent is unmistakable:

> The Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. (Article I, Section 8, Paragraph 8)

To suppose that academic writers were not included under this protection would be simply absurd. On the contrary, they are clearly among those whose protection was uppermost in the minds of the Constitution's framers, for academic writers and other scholars whose works might be useful in university courses often make significant contributions to "the Progress of Science and useful Arts."

To be sure, the Constitution is often twisted and bent to mean whatever latter-day judges want it to mean, and its words, however plain they might be, are no longer construed to mean what ordinary users of the English language think they mean. But it is nevertheless reasonable to assume, both from the long experience of mankind and by application of the elementary logical principle of *modus tollens* that, if the courts do not accord scholarly writers the protection of copyright, the progress of science and the useful arts will *not* be as great as it might otherwise have been.

It is true, of course, that academics write and publish because they enjoy increased prestige in their fields, because they want to expose their ideas to public scrutiny and criticism, because their careers are enhanced by publication, and for a host of other purely professional, beneficent, and philanthropic motives. But to suppose that they do not also hope to profit from their writings is utter nonsense, bearing no relation either to the facts of human nature or to the way academic writers earn their livelihoods. Many scholars are quite adept at negotiating advances and reasonably good royalty agreements with their publishers; they are not being crassly commercial and materialistic when they deposit their royalty checks in their bank accounts or in trust funds for their children.

It is no secret that the rewards of scholarly writing are generally quite meager. Few scholarly books reach the best-seller lists. Most journals pay their contributors in offprints rather than in cash. But like all other writings, scholarly writings are not only entitled to be protected by the copyright laws that Congress has enacted; they *are* so protected. However pure and worthy the purpose for which a professor copies a colleague's work, doing so without paying a license fee for the privilege, without bothering even to seek permission from the copyright owner, is theft, pure and simple. Intellectual property may be intangible, but it is property nevertheless, and it has financial value. The theft of a person's words and the manner in which he or she expresses his or her ideas and arguments is as morally repugnant as the theft of a necktie or a dress or a book from a department store. The fact that

copying technology has made it *easy* to steal a writer's words, and that it can be done surreptitiously and often without detection, does not reduce the moral opprobrium that ought to be attached to the theft.

Nor should our courts be sanctioning such behavior, whether it is committed by academic word hijackers or by shoplifters.

In the Michigan case, the full thirteen-judge appellate court reheard the case and reversed the three-judge panel's 1995 decision. The court noted that the objectionable use of copyrighted materials was *not* the students' reading of them. It was, rather, the "duplication of copyrighted materials for sale by a for-profit corporation that has decided to maximize its profits—and give itself a competitive edge over other copyshops—by declining to pay the royalties requested by the holders of the copyrights."[3] The court noted that fair use accommodates transformative uses of a copyrighted work. The Supreme Court considers parodies, for example, to be transformative, and thus not violative of the fair use doctrine. A perfect example is 2 Live Crew's rap version of Roy Orbison's ballad, "Oh, Pretty Woman," which used some of the same lyrics and "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones...[that] derisively demonstrate how bland and banal the Orbison song seems to them."[4] There is a great difference, the Court noted, between Orbison's original and the rap group's parody, which "was clearly intended to ridicule the white-bread original...[and] remind us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences."[5]

The genuine transformation that is worked by an original artist who uses satire and ridicule to mock the original, or one who takes a theme or an idea from one work and elaborates upon it and creates an entirely new work, is vastly different from the phony "transformation" that is brought about by one who merely copies the works of others and compiles them for sale to students. We must not be deceived: Whether an anthology is compiled by the faculty member who assigns it or by someone else, the work assigned is intended to benefit the faculty member and his or her institution by providing students useful materials for study in the course that is being offered. The publishers of such anthologies may also benefit financially from their sale, and the print shops that copy, print, and bind such materials do so for a profit which, in itself, has little or nothing to do with the scientific or educational benefits that may flow to the ultimate consumers. At the same time, however, they deprive the original authors and their publishers of royalties to which they are lawfully entitled. Such uses of materials that are the intellectual property of those who have created them cannot, by any stretch of the imagination, be considered to be fair or legally or ethically legitimate.

A venerable sage of our acquaintance once told us of one Stavros Poulakos, a renowned gardener whose magnificent garden had been open to all. Stavros

had been seeking to develop a perfect white rose. One day, after years of patient hybridizing, brushing the pollen of one flower onto the stamen of another, waiting for the seeds to ripen, planting them, and cultivating them, he discovered a magnificent white bloom, perfect in form, wafting its fragrance throughout the garden. In his delight, he named the new flower *Rosa Angelina*, after his late wife.

The next morning, he opened the simple wooden gates to his garden, once again graciously admitting all who cared to enter. While he was at lunch, a stranger entered his garden. A rose lover, the stranger followed the fragrance of *Rosa Angelina* to its source. He was so enchanted by the dazzling white rose that he returned later that day with shovel and pail, dug up the only specimen of Stravros's years of labor, and planted it in his own garden with the intention of propagating it for the enjoyment of all.

Crushed by this wanton violation of his hospitality and creative efforts, Stavros closed his garden gate forever.

The gates to the groves of academe are not likely to be slammed shut by angry writers and publishers. But the urge to expend years of effort on creative, artistic, and useful works of scholarship and intellect is likely to be quashed by decisions like that of the Sixth Circuit's panel and the well-intentioned but larcenous behavior of far too many college and university professors.

The time has come for publishers and scholarly writers to form an organization similar to the American Society of Composers, Authors, and Publishers, which monitors the use of copyrighted music and enforces licensing restrictions against those who might otherwise be tempted to violate them. No one wants spies lurking around office and library photocopiers and university bookstores to enforce copyright laws against students and their mentors. But as long as members of the academy presume that they have a right to use the work of others without paying for it, such outside enforcement may be the only way to keep the thieves out of the groves of academe.

Notes

1. *Princeton University Press v. Michigan Document Services, Inc.*, 74 F.3d 1512, 64 U.S.L.W. 2515 (6th Cir. 1996, withdrawn). The full court vacated the panel's judgment last spring, and in November, 1996, it reversed it, holding that the extensive use of copyrighted materials went far beyond the copyright law's fair use standard. 99 F.3d 1381 (6th Cir. 1996).
2. *Texaco v. American Geophysical Union*, 116 S.Ct. 592 (1995), denying cert. in 60 F.3d 913 (2d Cir. 1994, amended 1995). The courts held that by purchasing one or two copies of scientific journals and circulating them to its research scientists, who were encouraged to copy articles they might find useful in their work, Texaco violated the fair use doctrine.
3. *Princeton University Press v. Michigan Document Services*, Inc., 99 F.3d 1381, at 1386 (6th Cir. 1996).
4. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S.Ct. 1164, 1173 (1994).
5. Ibid., quoting a dissenting opinion in the Second Circuit.