

N.D.A.G. Letter to Sanstead (Oct. 1, 1985)

October 1, 1985

Dr. Wayne G. Sanstead
Superintendent
Department of Public Instruction
State Capitol
Bismarck, ND 58505

Dear Dr. Sanstead:

Thank you for your letter of September 5, 1985, regarding the reprinting of the Department of Public Instruction's Handbook of Literature for the Elementary Schools of North Dakota.

According to your letter, the Handbook of Literature is a compilation of children's literature and it may contain copyrighted material. The question that has arisen is whether the doctrine of fair use would permit the Department of Public Instruction to use the copyrighted literature without the copyright holder's permission.

The fair use doctrine as codified in 17 U.S.C. § 107 (1976) provides as follows:

§107. LIMITATIONS ON EXCLUSIVE RIGHTS: FAIR USE.

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phono-records 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.

This provision of federal law appears to permit the broad use of copyrighted materials for classroom education. However Section III(A) of the "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions" as found in the historical note to 17 U.S.C. § 107 provides, in part, as follows:

III. PROHIBITIONS AS TO I AND II ABOVE

Notwithstanding any of the above, the following shall be prohibited:

- (a) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works . . .

Clearly, the fair use doctrine does not permit the unauthorized use of copyrighted material to create anthologies, compilations or collective works. Therefore, it is my opinion that the fair use doctrine does not permit the unauthorized use of copyrighted material for the Handbook of Literature for the Elementary Schools of North Dakota.

Sincerely,

Nicholas J. Spaeth

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