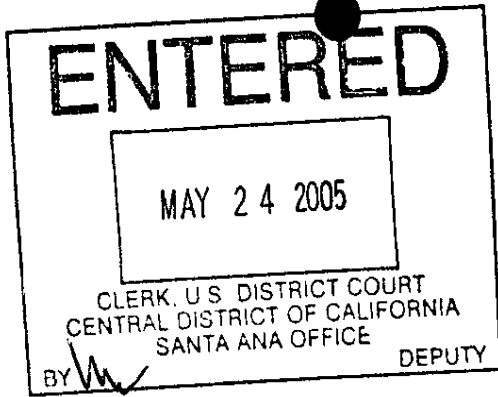
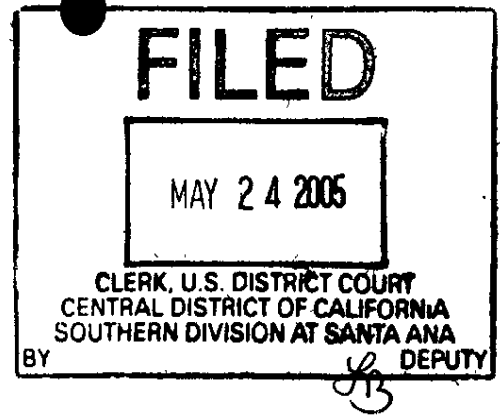




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FOR PUBLICATION

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 AS REQUIRED BY FRCP, RULE 77(d).**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

NEWPORT-MESA UNIFIED SCHOOL
 DISTRICT,

Plaintiff,

vs.

STATE OF CALIFORNIA DEPARTMENT
 OF EDUCATION ET AL.,

Defendants.

Case No. SACV 04-512-GLT [ES]

ORDER ON CROSS-MOTIONS FOR
 SUMMARY JUDGMENT

On apparent first impression, and contrary to the body of law on competitive admission testing, the Court holds a state statute requiring copies of test protocols to be provided to parents of special education students falls within acceptable "fair use" under federal copyright law, and the federal copyright law does not preempt the state statute.

I. BACKGROUND

California Education Code section 56504 provides parents of special education students may have copies of their child's test

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1 protocols.^{1/} Defendant Jack Anthony's son is a seven-year-old with
2 special education needs who lives in Plaintiff Newport-Mesa Unified
3 School District. Mr. Anthony requested copies of his son's test
4 protocols before a scheduled Individualized Education Program ("IEP")
5 meeting. The District declined to provide him with the copyrighted test
6 protocol for the Woodcock-Johnson Test of Achievement III.

7 Mr. Anthony filed a complaint with Defendant California Department
8 of Education, which found the District out of compliance with California
9 Education Code section 56504 by failing to provide Mr. Anthony with
10 records within five days of his request. The Department ordered the
11 District to revise its policies and procedures on student record
12 requests to comply with section 56504 and to send it a copy of the new
13 written policy within sixty days. The Department denied a request for
14 reconsideration of this compliance report. Plaintiff brought the matter
15 to this Court, contending United States copyright law prevents it from
16 providing copies of copyrighted test protocols.

17 The District requested a declaration of its rights under copyright
18 law and an injunction to prevent the Department from enforcing its
19 compliance report. At the Court's invitation, Harcourt Assessment,
20 Inc., the publisher and copyright owner of the Weschler Intelligence
21 Scale for Children-III, and Riverside Publishing Co., the publisher and
22 copyright owner of the Woodcock-Johnson III, intervened in the case to
23 assert the copyright interest.^{2/}

24 After an early hearing, the parties held lengthy conferences to
25

26 ^{1/} All statutory references are to the California Education
Code unless otherwise stated.

27 ^{2/} Plaintiff and Plaintiffs-Intervenors also assert a trade
28 secret interest in the test protocols under state law and common
law. That interest is not part of these cross-motions.

1 create a plan accommodating both interests: providing adequate
2 information to special education parents under the state's section
3 56504, while safeguarding protected works under federal copyright law.
4 Ultimately, the parties failed to work out a plan, and the Court now
5 rules on all parties' cross-motions for summary judgment.

6 II. DISCUSSION

7 A. School District's Standing

8 Defendants challenge the District's standing to sue for a claimed
9 copyright violation. The District sues in its own right as a party
10 that fears violating the copyright law by distributing another party's
11 copyrighted material. The Court is satisfied the District has standing
12 to assert its own interest in avoiding civil liability for copyright
13 infringement.^{3/}

14 To have standing to bring a declaratory relief action, the
15 plaintiff must show "under all the circumstances of the case, there is a
16 substantial controversy between parties having adverse legal interests,
17 and the controversy is of sufficient immediacy and reality to warrant
18 declaratory relief." Hal Roach Studios, Inc. v. Richard Feiner & Co.,
19 896 F.2d 1542, 1555 (9th Cir. 1990). For copyright matters, this
20 requirement is satisfied if the plaintiff has a "'real and reasonable
21 apprehension'" it will be subject to liability if it continues to engage
22 in allegedly infringing conduct. Id. at 1555-56 (quoting a patent case,
23 Societe de Conditionnement v. Hunter Eng'g Co., 655 F.2d 938, 944 (9th
24 Cir. 1981), and applying it in the copyright context). The District has
25 made this showing here.

26
27 ^{3/} The Court would be concerned about deciding copyright
28 issues unless the copyright owner was also a party to the case.
Here, the owner has intervened.

1 The threat to the District of future injury is both "'real and
2 immediate.'" Am.-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d
3 501, 507 (9th Cir. 1991) (quoting City of Los Angeles v. Lyons, 461
4 U.S. 95, 102 (1983)). If the Department enforces its compliance report,
5 the District will have to give a copy of the test protocol to Mr.
6 Anthony or lose state funding. If it distributes a copy, it risks
7 being a copyright infringer, liable to the copyright owner for actual or
8 statutory damages. 17 U.S.C. §§ 501, 504 (1996 & Supp. 2005).

9 The damage threat is real and immediate, not merely hypothetical
10 or conjectural. See Thornburgh, 970 F.2d at 507 (quoting O'Shea v.
11 Littleton, 414 U.S. 488, 494 (1974)). The test publishers have
12 intervened in this action and have asserted that giving a copy of test
13 protocols to parents of special education students is not fair use.
14 They have sent a letter to the District stating they would consider any
15 failure to maintain confidentiality of their test materials as a
16 contractual violation subjecting the District to liability. By
17 intervening, the publishers have shown their willingness to litigate to
18 protect their interests. See Virginia v. Am. Booksellers Ass'n, 484
19 U.S. 383, 392 (1988) (plaintiffs identified a sufficient threatened or
20 actual injury when the challenged law was "aimed directly at plaintiffs,
21 who, if their interpretation of the statute is correct, will have to
22 take significant and costly compliance measures or risk criminal
23 prosecution").

24 To have standing, the District need not first copy and distribute
25 the test protocols and wait for the publishers to sue. Thornburgh, 970
26 F.2d at 508 ("It is not necessary that [it] currently be subject to the
27 challenged provisions in order to have standing; nor need [it] actually
28 commit the forbidden provisions" to establish standing). The District

1 has standing now.

2 B. Fair Use

3 California Education Code section 56504 states, in the context of
4 special education, "[t]he parent shall have the right and opportunity to
5 examine all school records of the child and to receive copies pursuant
6 to this section . . . within five days after such request is made by
7 the parent, either orally or in writing."^{4/} At the same time, federal
8 copyright law grants copyright owners the exclusive right to copy and
9 distribute copies of copyrighted works. 17 U.S.C. § 106(1), (3) (1996).
10 This case presents a clash of those two valid but competing interests.
11 The central issue is whether the doctrine of "fair use" avoids
12 preemption of California Education Code section 56504 by the federal
13 copyright law.

14 The parties agree the test protocols sought by Mr. Anthony are
15 "school records" under section 56504 because, after students write
16 answers on the test protocols, they are identifiable with the
17 students.^{5/} The parties do not dispute the test protocols, other than
18 the students' answers, are copyrighted works.

19 The small body of law on the topic of fair use of tests has
20

21 ^{4/} Federal regulations implementing the Individuals with
22 Disabilities Education Act have a similar provision. Parents are
23 permitted "to inspect and review any education records relating
24 to their children." 34 C.F.R. § 300.562(a) (2004). The federal
25 right to inspect and review includes "[t]he right to request that
26 the agency provide copies of the records containing the
27 information if failure to provide those copies would effectively
28 prevent the parent from exercising the right to inspect and
review the records." Id. § 300.562(b) (2).

26 ^{5/} Test protocols generally include score sheets on which
27 students mark their answers and tables on which examiners
28 calculate the students' scores. Test protocols also can include
the "prompts" of the test questions and instructions for the test
administrators.

1 uniformly indicated copying or distribution of copyrighted standardized
2 tests is not "fair use" under federal copyright law. See Chicago Bd.
3 of Educ. v. Substance, Inc., 354 F.3d 624 (7th Cir. 2003) (six Chicago
4 Academic Standards Exams published in newspaper); Ass'n of Am. Med.
5 Colls. v. Cuomo, 928 F.2d 519 (2d Cir. 1991) (state statute required
6 providing copy of standardized Medical College Admission Test ("MCAT"),
7 a competitive admission test); Educ. Testing Servs. v. Katzman, 793 F.2d
8 533 (3d Cir. 1986) (test preparation company copied tests to prepare
9 students); Educ. Testing Serv. v. Simon, 95 F. Supp. 2d 1081 (C.D. Cal.
10 1999) (test preparation company copied tests to prepare students); Coll.
11 Entrance Examination Bd. v. Pataki, 889 F. Supp. 554 (N.D.N.Y. 1995)
12 (state statute required providing copy of standardized competitive
13 admissions tests); Ass'n of Am. Med. Colls. v. Mikaelian, 571 F. Supp.
14 144 (E.D. Pa. 1983) (test preparation company copied tests to prepare
15 students).

16 However, these cases involved standardized competitive admission
17 testing where future test-takers were given access to the tests before
18 taking them. For this and other reasons, the situation presented in
19 this case is quite different, and this line of cases is not applicable
20 here.

21 The Court finds giving a copy of the test protocols to parents of
22 special education students falls within 17 U.S.C. § 107, commonly
23 referred to as the "fair use doctrine."

24 Fair use is a mixed question of law and fact that may be decided
25 on summary judgment. Worldwide Church of God v. Phila. Church of God,
26 Inc., 227 F.3d 1110, 1115 (9th Cir. 2000).

27 If there are no genuine issues of material fact, or if, even
28 after resolving all issues in favor of the opposing party, a

1 reasonable trier of fact can reach only one conclusion, a court
2 may conclude as a matter of law whether the challenged use
3 qualifies as a fair use of the copyrighted work.

4 Id. (citing Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d
5 1148, 1150-51 (9th Cir. 1986)).

6 Under the fair use doctrine, copying a copyrighted work "for
7 purposes such as criticism, comment, news reporting, teaching (including
8 multiple copies for classroom use), scholarship, or research," is a fair
9 use of the copyrighted work and is not a copyright infringement. 17
10 U.S.C. § 107 (1996). The doctrine is necessary "to fulfill copyright's
11 very purpose, '[t]o promote the Progress of Science and useful Arts . .
12 . .'" Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994)
13 (alterations in original) (quoting U.S. Const. art. I, § 8, cl. 8); see
14 also Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545
15 (1985) (stating "copyright is intended to increase and not to impede the
16 harvest of knowledge").

17 The fair use doctrine "'is an equitable rule of reason.'" Harper
18 & Row, 471 U.S. at 560 (quoting House Report, at 65, U.S. Code Cong. &
19 Admin. News 1976, p. 5678). It "'permits [and requires] courts to avoid
20 rigid application of the copyright statute when, on occasion, it would
21 stifle the very creativity which that law is designed to foster.'" Campbell,
22 510 U.S. at 577 (alteration in original) (quoting Stewart v.
23 Abend, 495 U.S. 207, 236 (1990)). Factors to be considered include, but
24 are not limited to:

25 (1) the purpose and character of the use, including whether such
26 use is of a commercial nature or is for nonprofit educational
27 purposes;

28 (2) the nature of the copyrighted work;

1 (3) the amount and substantiality of the portion used in
2 relation to the copyrighted work as a whole; and

3 (4) the effect of the use upon the potential market for or value
4 of the copyrighted work.

5 17 U.S.C. § 107. These and other elements are not considered in
6 isolation from each other, but are weighed together in light of the
7 purposes of copyright. Campbell, 510 U.S. at 577-78. The fair use
8 analysis "is not to be simplified with bright-line rules" and requires a
9 case-by-case analysis. Id. at 577.

10 1. Purpose and Character of Use

11 Mr. Anthony's purpose is an independent educational evaluation of
12 his son's special education needs and abilities to place him in an
13 appropriate educational program. This is a nonprofit educational use
14 not for commercial gain. Unlike commercial use of copyrighted
15 standardized test questions, Mr. Anthony's purpose weighs in favor of
16 finding fair use. See Katzman, 793 F.2d at 543 (finding Princeton
17 Review's use of copyrighted Scholastic Aptitude Test ("SAT") questions
18 to prepare students for the test in exchange for a fee was "highly
19 commercial" and weighed against fair use).

20 Noncommercial uses to broaden a person's understanding of an issue
21 can be fair use. See Sony Corp. of Am. v. Universal City Studios,
22 Inc., 464 U.S. 417, 455 n.40 (1984) (stating "a teacher who copies for
23 the sake of broadening his personal understanding of his specialty[; o]r
24 a legislator who copies for the sake of broadening her understanding of
25 what her constituents are watching; or a constituent who copies a news
26 program to help make a decision on how to vote" are examples of fair
27 use). Here, Mr. Anthony seeks to broaden his understanding, and the
28 understanding of experts he may consult, of his son's special

1 educational needs.

2 "[C]ommercial or nonprofit educational purpose of a work is only
3 one element of the first factor enquiry into its purpose and character."
4 Campbell, 510 U.S. at 584. The Court also considers whether use of the
5 work is transformative. Id. at 578-79. A work is transformative if it
6 "adds something new, with a further purpose or different character,
7 altering the first with new expression, meaning, or message." Id. at
8 579. Transformative works "lie at the heart of the fair use doctrine's
9 guarantee of breathing space within the confines of copyright, and the
10 more transformative the new work, the less will be the significance of
11 other factors, like commercialism, that may weigh against a finding of
12 fair use." Id.

13 Here, copies of test protocols with answers are transformative.
14 Section 56504 does not permit parents to have copies of the test
15 protocols before the children have taken the tests. Such copies would
16 not be transformative because they would be identical reproductions of
17 the copyrighted test material. See Pataki, 889 F. Supp. at 568
18 (finding disclosure of standardized admissions test questions was non-
19 transformative). The only copies implicated by section 56504, and the
20 only copies at issue in this case, are those identifiable with a student
21 after the student has taken the test. The copies, containing the
22 students' answers, have a different character than the copyrighted
23 material standing alone.

24 Even if not transformative, copying can be fair use when it is in
25 the public interest. See, e.g., Sony, 464 U.S. at 454, 455 n.40
26 (holding time-shifting by taping a television broadcast for later
27 viewing was fair use, in part because it "yields societal benefits," and
28 stating "[m]aking a copy of a copyrighted work for the convenience of a

blind person is . . . an example of fair use"); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d Cir. 1994) ("[C]ourts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest."); Key Maps, Inc. v. Pruitt, 470 F. Supp. 33, 37-38 (S.D. Tex. 1978) (ruling a county fire marshal's copying of fire zone maps was fair use in light of the public interest in fire prevention). Here, there is a legislated public interest in the appropriate education of special education students. This interest is advanced by providing copies of completed test protocols to parents to ensure their effective involvement in their children's education.^{6/}

2. Nature of Copyrighted Work

Under the second fair use factor, the nature of the copyrighted work is creative rather than informational. "[D]evelopment of the test questions as well as their compilation in a particular test form is a 'creative, imaginative, and original' process." Pataki, 889 F. Supp. at 569 (quoting Cuomo, 928 F.2d at 524). This ordinarily would weigh against finding fair use. See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001). But, with the addition of a student's answers, the questions and answers are informational in nature, which weighs in favor of fair use.

The distinction between published and unpublished works, often analyzed under the second fair use factor, see Harper & Row, 471 U.S. at 564, is not particularly useful here. The test protocols are "published" in the sense that the public has access to them. Students

^{6/} Under section 56504, parents also may examine the original test protocols. The federal Family Educational Rights and Privacy Act of 1974 similarly allows parents to inspect and review education records "directly related to a student," including test protocols. 20 U.S.C. § 1232g(a)(1)(A), (a)(4)(A) (2000).

1 use them to take the tests, and parents are allowed to examine the
2 original completed test protocols. But, they are "unpublished" in the
3 sense that the test publishers take steps to ensure their secrecy. Test
4 protocols do not fit the "published/unpublished" framework. Cf. Robert
5 A. Kreiss, Copyright Fair Use of Standardized Tests, 48 Rutgers L. Rev.
6 1043, 1071-72 (1996) (arguing for standardized tests, "the appropriate
7 issue is whether the copyright owner is commercializing the work, not
8 whether the work is published").

9 3. Amount Used

10 Only part of the entire copyrighted test -- portions identifiable
11 with a student -- is copied for parents under section 56504. This
12 weighs in favor of fair use. The test publishers argue the copies
13 include a large portion of, or all of, the copyrighted test material
14 because test answers are integrated with the questions on test
15 protocols. Even so, the copying of an entire work would not necessarily
16 preclude fair use. Hustler Magazine, Inc. v. Moral Majority, Inc., 796
17 F.2d 1148, 1155 (9th Cir. 1986); see also Sony, 464 U.S. at 456
18 (finding copying entire television broadcasts for later viewing is fair
19 use). The amount copied of the copyrighted test material is no more
20 than necessary to see the students' answers and determine whether they
21 were evaluated properly. The amount copied is "reasonable in relation
22 to the purpose of the copying," to assess the students' educational
23 needs. Campbell, 510 U.S. at 586.

24 4. Market Effect

25 It is important to consider whether the potential market for the
26 tests will be substantially affected if parents of special education
27 students receive copies of their child's test protocol. Campbell, 510
28 U.S. at 590 (considering "whether unrestricted and widespread conduct

1 of the sort engaged in by the defendant . . . would result in a
2 substantially adverse impact on the potential market' for the original")
3 (omission in original) (quoting 3 M. Nimmer & D. Nimmer, Nimmer on
4 Copyright § 13.05[A] [4], at 13-102.61 (1993)). The parties agree
5 widespread public access to the test protocols, if it existed, could
6 have a detrimental effect on the tests' market value.

7 No evidence has been presented indicating there is a substantial
8 risk of widespread public access or an adverse market effect. In fact,
9 the showing is to the contrary. Section 56504 does not provide
10 widespread public access, or access by future test-taking students, but
11 only authorizes receipt of copies by parents of special education
12 students. Since at least 1983 it has been the Department's policy that
13 parents may receive copies of their student's test protocols as fair use
14 under 17 U.S.C. § 107. There is no indication that, during that time,
15 parents have taken improper advantage of the protocols' availability or
16 a publisher has had to re-standardize the protocols because of public
17 access.

18 Concerns of a compromised market, or potential distribution to
19 competitors or parents of children who have not yet taken the tests, are
20 conclusory and not supported by evidence. The Court concludes there is
21 a showing of no "meaningful likelihood" of an adverse market effect if
22 parents continue to receive test protocols under section 56504. Sony,
23 464 U.S. at 451 (test is meaningful likelihood of future harm). If, in
24 the future, an adverse market effect materializes, the fair use analysis
25 can be reviewed.

26 5. Other Factors

27 Consideration of other fair use factors further supports a finding
28 of fair use. Parents such as Mr. Anthony already may examine the test

1 protocols in the presence of a school official. Providing a copy is
2 more like the time-shifting found permissible in Sony than the
3 disclosure of secure test information found impermissible in Pataki.
4 Compare Sony, 464 U.S. at 449 (stating time-shifting enables a viewer to
5 see a work "he had been invited to witness in its entirety free of
6 charge"), with Pataki, 889 F. Supp. at 571 (comparing Sony to a case in
7 which the test publishers "have done everything they can to ensure that
8 the test-taking public not gain access to . . . copyrighted materials").

9 6. Conclusion

10 The Court concludes a school giving parents of special education
11 students copies of their children's test protocols when requested under
12 California Education Code section 56504 is a fair use under 17 U.S.C. §
13 107. In order to minimize the risk of improper use, the District may
14 choose to use appropriate safeguards, such as requiring a review by
15 parents of the original test protocols before obtaining a copy, a
16 written request for a copy, a nondisclosure or confidentiality
17 agreement, or other reasonable measures.

18 The more appropriate outcome of this case is apparent to all. In
19 order to avoid a "fair use" analysis whenever a district releases
20 documents, and to protect California's school districts from fear of
21 violating federal law, the California legislature should update section
22 56504 with appropriate standards to protect legitimate copyright
23 concerns, while affording the important disclosure protections for
24 parents of special education students the legislature intended. This
25 should not be a difficult task.

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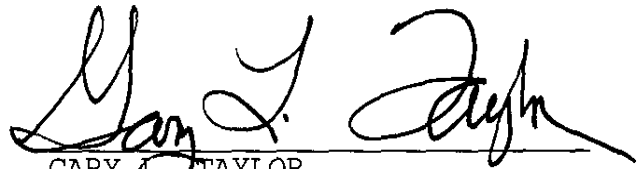
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III. DISPOSITION

Plaintiff's and Plaintiffs-Interveners' motion for summary judgment is DENIED. Defendants' motion for summary judgment is GRANTED.

DATED: May 23, 2005.



GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE