

APPENDIX J

QUESTIONS & ANSWERS ON COPYRIGHT

FOR THE CAMPUS COMMUNITY

(This material comes from Questions and Answers on Copyright for the Campus Community, Copyright 1993 National Association of College Stores, Inc. and The Association of American Publishers)

INTRODUCTION

Reproduction of copyrighted material, without prior permission of the copyright owner, particularly in an educational setting, is an issue of concern for the academic community. Unfortunately, the impropriety of much unauthorized copying is all too often overlooked by users in an educational setting.

Although copying all or part of a work without obtaining permission may appear to be an easy and convenient solution to an immediate problem, such unauthorized copying can frequently violate the rights of the author or publisher of the copyrighted work, and be directly contrary to the academic mission to teach respect for ideas and for the intellectual property that expresses those ideas.

Without understanding the copyright law, including elements such as the doctrine of "Fair Use" and its application and limitations in the educational setting, Faculty members, copy centers, College stores, universities and Colleges themselves, and others will be at risk for engaging in illegal photocopying.

This booklet is intended to aid you in conforming to the requirements of U.S. copyright law by providing an easy-to-understand guide. This guide, in question and answer format, presents a current overview of relevant sections of the amended Copyright Act of 1976, including:

- The requirements for protection of copyrighted works from unrestricted copying;
- The doctrine of "Fair Use" and its limitations;
- The reasons for College stores to be indemnified against liability for copyright infringement, and the effects of such indemnities;

- And procedures on how to obtain permission to reproduce copyrighted material.

It is the goal of this booklet, cosponsored by the National Association of College Stores and the Association of American Publishers, and endorsed by the Association of American University Presses, to clarify the issues and present information and procedures that will result in greater understanding of the rules governing copyrighted works and facilitate the processing of photocopy requests.

QUESTIONS AND ANSWERS CONCERNING COPYRIGHT COMPLIANCE

1. What is a copyright?

The copyright law grants owners of copyright (authors and other creators and publishers) the sole right to do or allow others to do each of the following acts with regard to their copyrighted works: to reproduce all or part of the work; to distribute copies; to prepare new (derivative) versions based on the original work; and to perform and display the work publicly.

Copyright protection is available for "original works of authorship fixed in a tangible medium of expression." (See question 3.) U.S. copyright protection for works created on or after January 1, 1978, begins at creation and lasts until fifty years after the author's death.

Where the creator of a work is an employee or in certain cases where the work has been specially commissioned as an instructional text, as a test, as answer material for a test, or for other purposes, copyright protection lasts for 75 years from the date of first publication or 100 years from the date of creation of the work, whichever date expires first.

Works created prior to January 1, 1978, are also subject to copyright protection, although the duration of copyright may vary from the terms described above.

Copyright protection covers both published and unpublished works.

The fact that a previously published work is out of print does not affect its copyright.

2. How is a copyright obtained?

The Copyright Act of 1976 provides that copyright begins at the moment the work is created. Registration with the Copyright Office is **not** required in order for a work to be protected under U.S. copyright law. For works infringed prior to March 1, 1989, the copyright must generally be registered with the Copyright Office in Washington, D.C. before the copyright owner can sue an infringer. (Once the work is registered suit can be brought for infringements which occurred **prior** to registration.) For some (particularly foreign) works infringed after March 1, 1989, registration prior to suit is no longer required. In all cases, however, registration provides certain advantages, including the ability to qualify for an award of attorney's fees and substantial statutory damages.

3. What types of works can claim copyright protection?

As noted above, copyright exists in "original works of authorship" which are "fixed in a tangible medium of expression." Among the types of works which are subject to copyright protection are literary, dramatic, musical, choreographic and pictorial works, graphic works, pantomimes, sound recordings, sculptures, motion pictures and audio-visual works. These categories include reference works (including dictionaries), video cassettes, and computer programs and databases.

Copyright protection does not include facts, ideas, procedures, processes, systems, concepts, principles or discoveries, although these may be protectable under patent or trade secret laws.

However, the literary or other form of expression of these ideas and the like is covered by copyright.

4. How do I find out who owns the copyright for a particular work?

You should consult both the page containing the copyright notice as well as any acknowledgment pages in the work. If you have a photocopy or other reproduction that does not contain a notice of copyright or acknowledgments, you should consult an original copy of the work to determine if the original has the information you need.

Most works contain a notice of copyright. However, the information contained in such copyright notice may not always reflect accurately the identity of the current copyright owner of the material in question.

The absence of a copyright notice does **not** mean that the work in question may be freely copied.

The best method for determining copyright ownership is by contacting the publisher of the work that you wish to copy.

5. What are the penalties for copyright infringement?

Civil and criminal penalties may be imposed for copyright infringement. Civil remedies include an award of monetary damages (substantial statutory damages, which in cases of willfulness, may total up to \$100,000 per work infringed, or actual damages, including the infringer's profits), an award of attorney's fees, injunctive relief against future infringement and the impounding and destruction of infringing copies and the plates or other articles used in making such copies.

6. What is "fair use"? How does it affect copyrighted material?

The Doctrine of "Fair Use" under the U.S. copyright law in limited situations permits the use of a copyrighted work, including reproducing portions of that work without the copyright owner's permission. Section 107 of the Copyright Act establishes four basic factors to be examined in determining whether a use constitutes a "fair use" under the copyright law. These factors are:

A. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

B. The nature of the copyrighted work;

- C. The amount and substantiality of the portion of the work used in relation to the copyrighted work as a whole; and
- D. The effect of the use in question upon the potential market for or value of the copyrighted work.

No one factor is determinative of a person's right to use a copyrighted work without permission, **(Educational use alone is not sufficient to make a use in question a fair one.)**

In the legislative history of the 1976 Copyright Act, Congress endorsed certain guidelines relating to classroom copying for educational use. These guidelines are generally considered to establish minimum permissible conduct under the Fair Use Doctrine for unauthorized copying. Although some limited copying which does not fall within these guidelines (**and** which is not expressly prohibited under Prohibitions A through F described below) may still qualify as permissible conduct under the copyright law, copying which does comply with these guidelines generally constitutes permissible conduct under the current copyright law.

One thing is certain...when in doubt, request permission!

The guidelines for making multiple copies without permission for use in an academic setting contain the following **prohibitions**:

- A. Unauthorized copying may not be used to create, replace or substitute for anthologies, compilations or collective works, whether or not such unauthorized copies are collected and bound together or are provided separately.
- B. Unauthorized copies may not be made of “consumable” works, including workbooks; exercises; standardized tests; test booklets; answer sheets and the like.
- C. Unauthorized copying may not substitute for the purchase of books, publisher’s reprints or periodicals.
- D. Unauthorized copying may not be directed by higher authority, such as a dean or head of a department.
- E. The same teacher cannot copy the same item without permission from term to term.
- F. No charge shall be made to the student beyond the actual cost of the photocopying.

The guidelines further indicate that multiple copying **is allowed** in the following situations (unless falling within one of the above prohibitions):

- A. When an individual teacher is "inspired" to use a work, and the inspiration and

decision to use it and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

and

B. If the following limitations with regard to the amount of copying of a work are applied:

If a complete article, story or essay is copied, and the work copied is less than approximately 2,500 words. (There are particular rules for certain “special” works which consist of less than 2,500 words. For a full text of the guidelines, see Appendix A of this booklet.)

If a prose work is excerpted and copied, and the excerpt copied is no longer than approximately 1,000 words or 10% of the work, whichever is shorter.

If a chart, graph, diagram, drawing, cartoon or picture is copied, and not more than one such illustration is copied per book or per periodical issue.

If a short poem is copied, and the poem is less than 250 words and printed on not more than two pages; or if an excerpt from a longer poem is copied, and the excerpt is not longer than 250 words.

and

C. The copying is for only one course in the school in which the copies are made.

and

D. No more than one short poem, article, story or essay or two excerpts are copied from works by the same author. In addition, no more than three works or excerpts may be copied from the same collective work or periodical volume during one class term and no more than nine instances of such multiple copying may occur for one course during one class term. (These guideline limitations of Paragraph D do not apply to current news periodicals, newspapers, and current news sections of other periodicals.)

and

E. The original copyright notice must appear on all copies of the work.

For a full text of the guidelines, see Appendix A of this booklet.

7. What is "the Kinko's case"?

"The Kinko's case" refers to a lawsuit filed against Kinko's Graphics Corporation in 1989 by eight book publishers for copyright infringement. The Court held that Kinko's practice of photocopying, without authorization, multiple page excerpts (including chapters of books and articles from periodicals) from copyrighted works to create anthologies and of selling those anthologies to students for a profit violated the publishers' copyrights. The copyrighted works Kinko's infringed included hardback and paperback editions of works, both in print and out-of-print works, and trade, professional and text books. The copied materials ranged in length from 14 to 110 pages and from 5% to 24% of the works.

The Court found Kinko's guilty of copyright infringement and, in addition to enjoining Kinko's from photocopying works to create anthologies without the permission of the copyright owners, awarded the plaintiffs damages, court costs and attorneys' fees resulting in Kinko's paying almost \$2 million.

8. Why did the publishers bring this suit?

Publishers typically sell both complete books and the permission to copy smaller portions of books. As copyright owners, publishers have the right to refuse permission. Kinko's practice of copying without permission infringed publishers' rights to sell permission to copy or, at their discretion, to object to copying, and deprived both publishers and authors of royalty income.

9. Why does the law require people to obtain permission and pay fees for photocopying?

Copyright exists to foster and induce the creation of all forms of intellectual property, including books. The copyright law does so by providing fair returns to creators and copyright owners. To the extent that any organization unlawfully makes and sells (portions of) copyrighted works without permission, authors and publishers are deprived of revenues in the very market for which they have written and published. This could severely reduce the incentive to write and publish books and, in the long run, harm education because investments of time and money in new books will not be made if such books are copied by others without compensation to the copyright owners.

10. Does the Kinko's case change the "Fair Use" Doctrine?

No. The Kinko's case clearly reaffirms, as stated in Question 6, that use of materials for an educational purpose does not itself constitute fair use. Indeed, on April 1, 1992, another federal court issued a preliminary injunction on behalf of three publishers in Princeton University Press, et al. v. Michigan Document Services, Inc. and James M. Smith, prohibiting the defendant copyshop and its owner-operator from making coursepacks of excerpts of plaintiffs' copyrighted works without permission. The Judge in so-doing again confirmed that use of materials for an educational purpose does not itself constitute fair use.

11. Does the Kinko's case preclude the making and selling of customized course

anthologies?

No. The Court's decision in the Kinko's case did not prohibit the reproduction and sale of anthologies. It only prohibited the unlawful reproduction and sale of anthologies, i.e., those made without proper copyright permission.

12. What effect will the Kinko's case have on College bookstores and copy shops other than Kinko's that make or sell customized course anthologies?

The Court's decision clearly indicates that the making and selling of customized anthologies or course packs without the copyright owners' permission infringes those owners' rights in the reproduced materials. Although the Court did not specifically address the issue of whether a College store, particularly one which is owned and operated by the College or its students, would be held to the same standard, there is little in the Court's decision to indicate that any different standard would apply.

The trial record in the Kinko's case shows that many College stores are already operating legitimate custom publishing operations where they obtain permission and produce anthologies authorized by the copyright owners of the included excerpts. The Kinko's decision supports the efforts of these stores.

13. Will it take longer or be harder to get course packs?

The Court in the Kinko's case recognized that publishers have typically granted permission to copy portions of their books, even though they retain the right, in particular instances, to refuse that permission at their sole discretion. The record shows that Kinko's, in those instances when it sought permission, was generally granted permission on the same terms offered to others. Presumably, publishers will continue to grant permission as they have previously.

If Faculty request course materials when they place their book orders, permission should easily be cleared in time for the start of classes. However, this is dependent upon the particular publisher's permissions process and, obviously, on the timing of the Faculty request.

14. Will Faculty members who assign customized course anthologies, or the Colleges at which they teach, be liable for copyright infringement?

They may be liable. In the Kinko's suit, the publishers sued a commercial copying chain that had profited from selling publishers' copyrighted works without obtaining permission. The copy shop in this case had solicited Faculty business and, according to the trial record, falsely assured the Faculty that copyright compliance was being handled.

In 1983, a number of publishers coordinated a suit against New York University and nine professors for creating similar course packs. The action was settled with the adoption of certain procedures by NYU. Since that time, Faculty and school administrations have generally been sensitive to the copyright law and have widely followed the Classroom Guidelines (see Appendix A) which the Court confirmed in the Kinko's case to be relevant.

15. Am I infringing on someone's copyright if I make multiple copies and either distribute those copies for free or require their return after use?

You may be infringing. You do not have to sell the copies (or permanently dispose of them) in order to infringe the copyright owner's rights.

16. Can I make a copy of an entire work or a substantial part of a work for my personal use without getting permission from the copyright holder?

There is no automatic exemption for making even one unauthorized personal copy of a copyrighted work. Nevertheless, the fair use guidelines discussed above (see question 6 and Appendix A) provide that a teacher may make a single copy, for scholarly research or for use in teaching or preparing to teach a class, of the following works:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical or newspaper.

17. Can I legally copy a work I bought without infringing the copyright?

The purchaser of a work owns only that particular copy of the work. The purchaser does not own any rights in the copyright covering the contents of the purchased copy. Consequently, a purchaser cannot copy the purchased work, in whole or in part, without the copyright owner's permission unless such copying constitutes "fair use."

18. What should I do if I want to use materials that contain a photograph or illustration with a copyright owner different from that of the book itself?

You should note that many times photographs or illustrations are covered by copyrights owned by a different party from the copyright owner of the material in which they are published. The author or publisher of that material has received permission from the photographer or illustrator to include it in the work but may or may not have the right to grant permission to others to reproduce the photograph or illustration. Consequently, you may need to make a separate request for permission to copy the photograph or illustration.

The photograph or illustration owner's name can usually be obtained from the credit line beneath the material or on the page containing the acknowledgments or notice of copyright. If the information is not available, the book publisher's copyright permissions department can usually supply this information and can also tell you whether separate permission is required.

19. Other than under the Fair Use Doctrine discussed in question 6, can I ever copy material freely without worrying about infringing someone's copyright?

Works in the public domain may be freely copied; however, collections and edited versions of works in the public domain may be protected by copyright. Works which are in the public domain include works that have never been the subject of copyright protection and works whose term of copyright protection has expired.

For copies of works distributed prior to March 1, 1989, absence of a notice of copyright does not necessarily indicate that the work is in the public domain and therefore freely copyable since a copyright owner may take steps to correct publication of his/ or her work without notice before the absence of notice results in loss of copyright protection for the work. (Other grounds may also excuse the omission of notice.) For works distributed on or after March 1, 1989, notice is not required. Consequently, the absence of notice cannot be relied upon to indicate that a work is in the public domain.

Similarly, the fact that the author is deceased or the book is out of print does not mean that the work may be copied.

When in doubt about the status of a work, it is best to contact the publisher's copyright permission department whether the work is still under copyright or in the public domain.

Certain works created by the U.S. government, including documents prepared by an officer or employee of the federal government as part of that person's official duties, may also be freely copied. The right to copy U.S. government-created works without permission, however, does not extend to documents published by others with the support of U.S. government funds, grants or contracts, to portions of government documents which contain copyrighted material from other non-government sources, or fully to publishers' edited, annotated or compiled versions of such documents.

20. Can I copy a work and sell it to students through the campus bookstore if the material doesn't have a copyright notice?

As noted above, the absence of a copyright notice cannot be relied upon to indicate that the work may be freely copied without infringing anyone's copyright.

21. What if I request permission and I don't get a response?

If you don't receive a response to your request for permission, you cannot assume that you have been granted the necessary permission.

22. What can I do if a text has been ordered for a class but is late in arriving at the bookstore?

You may be able to obtain permission from the copyright owner to photocopy a portion of the text until the book arrives. Each publisher has different procedures regarding such matters. You should contact the publisher to determine what procedures the publisher follows.

23. If there is some question regarding whether permission to copy the work has been

secured by someone asking a College store to sell material or to have materials duplicated for sale, can a College store be protected from suit?

Not if the store makes, sells, or distributes the copy. If a store makes, distributes or sells copyrighted materials that have been illegally or improperly copied, it can be subject to suit, found liable for copyright infringement and subjected to all penalties and remedies for the infringement.

An indemnification agreement, signed by the provider of materials to be sold through the store, does **not** absolve the store of liability or shield it from payment of such penalties and remedies. Such an agreement, however, gives the store the right to recover damages or losses arising from a suit for copyright infringement from the signer of the indemnification agreement.

PROCEDURES FOR OBTAINING PERMISSION TO COPY

Whether you request permissions yourself, or through a College store or copy service, these suggestions will speed the process by assuring the provision of the necessary information to permit the publisher to respond to copying requests:

1. Request permission before or at the same time you order textbooks.

The earlier your request is received, the better, in case it cannot be granted and you need to substitute other materials. Publishers do not always control the rights and need time to research the extent to which permission may be granted. Each request requires the publisher to conduct a careful check of the status of the copyright, a determination of the exact materials to be duplicated (which sometimes involves ordering a copy of the material from a warehouse), and assignment of author's royalties, if fees are involved. In other words, the greater the lead time you give the copyright owner to respond to your request, the better.

2. Direct your request to the publisher's Copyrights and Permissions Department, not the author.

The page containing the copyright notice shows who owns the copyright, the year of publication and the publisher's name. The acknowledgment page may also contain information regarding copyright ownership. If the address of the publisher does not appear with the material, it may be obtained in such publications as the National Association of College Stores' Book Buyers' Manual, the American

Booksellers Association's Publisher's Directory, the Association of American University Presses Directory (available from the University of Chicago Press), Books in Print, The Literary Marketplace (for books), the International Literary Marketplace (for international listings), or Ulrich's International Periodicals Directory (for journals), published by R.R. Bowker Co., and available in any library. Your College store also has access to a few of these and similar resources.

3. Include all of the following information in your request:

- A. Author's, editor's, translator's full name(s);
- B. Title, edition and volume number of book or journal;
- C. Copyright date;
- D. ISBN for books, ISSN for magazines and journals;
- E. Numbers of the exact pages, figures and illustrations;
- F. If you are requesting a chapter or more: both exact chapter(s) and exact page numbers;
- G. Number of copies to be made;
- H. Whether material will be used alone or combined with other photocopied materials;
- I. Name of College or university;
- J. Course name and number;
- K. Semester and year in which material will be used;
- L. Instructor's full name.

4. Request permission whether or not works are in print.

5. Provide your complete address and the name of a contact person and telephone number in case there are any questions.

In many cases your College store or other service can assist you and/or provide appropriate forms. The publisher's response form will provide information about payment and fees which are determined by the individual publisher.

APPENDIX A

Agreement On Guidelines For Classroom Copying In Not-For-Profit Educational Institutions With Respect To Books And Periodicals.

MULTIPLE COPIES FOR CLASSROOM USE:

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion, provided that:

- A The copying meets the tests of brevity and spontaneity as defined below; and,
- B. Meets the cumulative effect test as defined below; and,
- C. Each copy includes a notice of copyright.

DEFINITIONS:

Brevity:

i. Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or (b) from a longer poem, an excerpt of not more than 250 words.

ii. Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

{Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.)

iii. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

iv. "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "i" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof may be reproduced.

Spontaneity:

- i. The copying is at the instance and inspiration of the individual teacher; and
- ii. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect:

- i. The copying of the material is for only one course in the school in which the copies are made.

ii. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

iii. There shall not be more than nine instances of such multiple copying for one course during one class term.

(The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.)

PROHIBITIONS:

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. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or are reproduced and used separately.
- B. There shall be no copying of or from works intended to be "consumable" in the course of study or teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.
- C. Copying shall not:
 - a. substitute for the purchase of books, publisher's reprints or periodicals;
 - b. be directed by higher authority;
 - c. be repeated with respect to the same item by the same teacher from term to term.
- D. No charge shall be made to the student beyond the actual cost of the photocopying.