

CALIFORNIA STATE COLLEGE, BAKERSFIELD
Office of the Vice President
FACULTY INFORMATION BULLETIN
1 September 1983

REPRODUCTION OF COPYRIGHTED MATERIAL

I. NYU POLICY STATEMENT ON PHOTOCOPYING OF COPYRIGHTED MATERIALS.

The Executive Committee of the CSB Academic Senate (memo dated 18 May 1983) has asked the Vice President to keep the faculty informed about copyright regulations.

As you are aware, the issue of photocopying has become increasingly sticky between publishers and faculty with faculty who are also authors frequently caught in between.

In December 1982, nine publishers brought a lawsuit against New York University in re copyright infringement. The matter was recently settled in such a way that NYU agreed to adopt and implement specific rules and procedures to govern the photocopying of copyrighted works by its faculty. Apparently there is an effort on the part of publishers and universities alike to develop the NYU agreement into a general policy statement.

In the interest of keeping the faculty informed on this matter, the NYU statement is Attachment A to this Bulletin.

II. BRIEF OF U.S. COPYRIGHT ACT.

Attachment B, Copyright Office, was furnished by Dr. Benton Scheide, Director of Libraries.

Attachment A was submitted both by Dr. Scheide (as it appeared in the Chronicle of Higher Education) and by the president of the Association of American Publishers. The version of Attachment B used herein actually came from the latter source.

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Attachments

**POLICY STATEMENT ON PHOTOCOPYING OF
COPYRIGHTED MATERIALS FOR CLASSROOM
AND RESEARCH USE**

In December, 1982, nine publishers commenced a lawsuit against the University and nine members of the faculty (as well as an off-campus copy shop) alleging that the photocopying and distribution of certain course materials, without the permission of the copyright owners of the materials, violated the Copyright Act (17 U.S.C. §§101 et. seq., 90 Stat. 2541, Pub. L. 94-553). It has become increasingly clear that the subject of photocopying for classroom and research purposes is of significant concern to the faculty, who have inquired about issues such as when photocopying may be done without the consent of the copyright owner; when and how permission to photocopy should be obtained; how exposure to liability may be reduced; and under what circumstances the University will defend them against claims of copyright infringement arising out of photocopying for classroom and research use. To assist the faculty in resolving these issues, to facilitate compliance with the copyright laws, and as part of the settlement of the publishers' lawsuit, the University is issuing this Policy Statement.*

1. The principles of the copyright law are designed to promote the creation, publication, and use of works of the intellect. These principles include both the exclusive rights of copyright owners to determine certain uses of their works (in not-for-profit as well as commercial contexts), and certain exceptions including the doctrine of "fair use". These precepts are in the mutual interest of the university, author, and publisher communities and of the public.

2. Under the copyright laws, certain photocopying of copyrighted works for educational purposes may take place without the permission of the copyright owner under the doctrine of "fair use" (presently set forth in Section 107 of the Copyright Act). This principle is subject to limitations, but neither the statute nor judicial decisions give specific practical guidance on what photocopying falls within fair use. To achieve for faculty greater certainty of procedure, to reduce risks of infringement or allegations thereof, and to maintain a desirable flexibility to accommodate specific needs, the following policies have been adopted by the University for use through December 31, 1985 (and thereafter, unless modified). On or before December 31, 1985 the University will review these policies to determine their effect and whether

*This Policy Statement supersedes the document entitled "Interim Guidelines Concerning Photocopying for Classroom Research and Library Use" which was distributed on January 18, 1983.

modifications, based on our experience, might be needed. If members of the faculty experience any problems or have suggestions, they are asked to communicate them to the Office of Legal Counsel.

A. The Guidelines set forth in Appendix I are to be used to determine whether or not the prior permission of the copyright owner is to be sought for photocopying for research and classroom use.* If the proposed photocopying is not permitted under the Guidelines in Appendix I, permission to copy is to be sought. An explanation of how permissions may be sought and a procedure for furnishing to the administration information concerning the responses by copyright owners to requests for permission is set forth in Appendix II. After permission has been sought, copying should be undertaken only if permission has been granted, and in accordance with the terms of the permission, except as provided in the next paragraph.

B. The doctrine of fair use may now or hereafter permit specific photocopying in certain situations, within limitations, beyond those specified in the Guidelines** or those that might be agreed to by the copyright owner. In order to preserve the ability of individual faculty members to utilize the doctrine of fair use in appropriate circumstances without incurring the risk of having personally to defend an action by a copyright owner who may disagree as to the limits of fair use, a faculty member who has sought permission to photocopy and has not received such permission (or has received

*To minimize intrusiveness and over-centralization, the responsibility for making this determination will continue to reside with the individual faculty member. In making this determination, the faculty member should carefully consider all sections of the attached Guidelines.

**The Guidelines contained in Appendix I were negotiated by education, author, and publishing representatives in 1976 and were incorporated in the House of Representatives report accompanying the Copyright Act of 1976. The introductory explanation of the Guidelines in the House Report describes their relationship to the doctrine of fair use as follows:

**Agreement on Guidelines for Classroom Copying in
Not-For-Profit Educational Institutions**

With Respect to Books and Periodicals

The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining

permission contingent upon conditions that the faculty member considers inappropriate) may request a review of the matter by General Counsel of the University. If upon review the General Counsel determines that some or all of the proposed photocopying is permitted by the copyright law, the General Counsel will so advise the faculty member. In that event, should any such photocopying by the faculty member thereafter give rise to a claim of copyright infringement, the University will defend and indemnify the faculty member against any such claim in accordance with the provisions of the Board of Trustees policy on Legal Protection of Faculty (Faculty Handbook [1982 ed.] pp. 109-112).

C. In the absence of the determination and advice by the General Counsel referred to in paragraph B, or in the event that permission has not been first requested by the faculty member as provided in paragraph A, no defense or indemnification by the University shall be provided to a faculty member whose photocopying gives rise to a claim of copyright infringement.

the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

APPENDIX I

GUIDELINES

I. SINGLE COPYING FOR TEACHERS:

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

II. 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 "ii" 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.]

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. 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 of 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.

AGREED

March 19, 1976

AD HOC COMMITTEE ON
COPYRIGHT LAW REVISION

By Sheldon Elliott Steinbach

AUTHOR-PUBLISHER
GROUP

AUTHORS LEAGUE OF
AMERICA

By Irwin Karp, Counsel

ASSOCIATION OF
AMERICAN
PUBLISHERS, INC.

By Alexander C. Hoffman,
Chairman
Copyright Committee

APPENDIX II
PERMISSIONS

A. How To Obtain Permission

When a proposed use of photocopied material requires a faculty member to request permission, communication of complete and accurate information to the copyright owner will facilitate the request. The Association of American Publishers suggests that the following information be included to expedite the process.

1) Title, author and/or editor, and edition of materials to be duplicated; 2) Exact material to be used, giving amount, page numbers, chapters and, if possible, a photocopy of the material; 3) Number of copies to be made; 4) Use to be made of duplicated materials; 5) Form of distribution (classroom, newsletter, etc.); 6) Whether or not the material is to be sold; and 7) Type of reprint (ditto, photocopy, offset, typeset).

The request should be sent, together with a selfaddressed return envelope, to the permissions department of the publisher in question. If the address of the publisher does not appear at the front of the material, it may be obtained from

The Literary Marketplace (for books) or Ulrich's International Periodicals (for journals), both published by the R.R. Bowker Company. For purposes of proof, and to define the scope of the permission, it is important that the permission be in writing.

The process of considering permission requests requires time for the publisher to check the status and ownership of rights and related matters, and to evaluate the request. It is advisable, therefore, to allow sufficient lead time. In some instances the publisher may assess a fee for permission, which may be passed on to students who receive copies of the photocopied material.

B. Gathering Data On Responses To Requests
For Permission To Photocopy

In order to help assess the effect of this Policy Statement upon the faculty it will be useful for the administration to compile data on responses by copyright owners. Each member of the faculty is therefore requested to forward a dated copy of each request for permission and a dated copy of each response to the Office of Legal Counsel, Bobst Library, 11th Floor, 70 Washington Square South, New York, New York 10012.

*The following is a sample letter to a copyright owner (usually a publisher) requesting permission to copy:

Material Permissions Department
Hypothetical Book Company
500 East Avenue
Chicago, IL 60601

Dear Sir/Madam:

I would like permission to copy the following for use in my class next semester:

Title: Knowledge is Good, Second Edition
Copyright: Hypothetical Book Co., 1965, 1971.
Author: Frances Jones
Material to be duplicated: Chapter 10 (photocopy enclosed).

Number of copies: 50
Distribution: The material will be distributed to students in my class and they will pay only the cost of the photocopying.

Type of reprint: Photocopy
Use: The chapter will be used as supplementary teaching materials.

I have enclosed a self-addressed envelope for your convenience in replying to this request.

Sincerely,
Faculty Member

Copyright Office

Attachment B

The Copyright Act (Title 17 of the U.S. Code), which took full effect January 1, 1978, provides in section 108(i) that five years from that date, and at five-year intervals thereafter, the Register of Copyrights, "after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted material, and with representatives of library users and librarians," shall submit to the Congress a report setting forth the extent to which the provisions of the copyright law authorizing certain kinds of reproduction and distribution of copyrighted works by qualifying librarians have achieved "the intended statutory balancing of the rights of creators, and the needs of users."

Pursuant to this mandate, the Register submitted to Congress in January a report which deals with the copying practices of libraries and archives and their patrons, and which focuses upon the balance intended by the act. Steps taken by the Copyright Office leading to the report included a series of nationwide hearings; a survey by King Research, Inc., which looked at more than 500 libraries, and as many publishers, to see how they were faring under the new act, and adduced empirical data for the report; and consultation with an advisory committee made up of representatives of authors, publishers, librarians, and users of copyrighted works.

The report concludes that the statutory provisions have established a workable framework for obtaining a balance between creators' rights and users' needs, but that, in certain instances, a balance has not been achieved in practice, either because the intent of Congress has not been carried out fully or because that intent is not clear to those whose activities come within the scope of the law. According to the report, the existence of the intended statutory balance can be supported by evidence showing that, between 1976 and 1980, library acquisition expenditures increased faster than the rate of inflation, that, during the same period, the ratio of serial "births" to "deaths" was 3.4 to 1, that some types of photocopying in certain classes of libraries have increased very slowly or even decreased, and that serial publishers' revenues increased.

The Copyright Office, however, also pointed to other information showing that there might be an imbalance in that "substantial quantities of the photocopies prepared by and for library patrons are made for job-related reasons, rather than for the type of private scholarship, study, or research most favored by the law." The report noted empirical evidence that in approximately one-quarter of the library photocopying transactions, two or more copies are made, even though section 108 of the Copyright Act only permits the making of a single copy.

According to the report, there appears to be confusion among many librarians about how the copyright law works and why its enforcement is frequently their responsibility. Furthermore, publishers contend that the present system is seriously imbalanced, and some of them have asserted their views in print and by bringing lawsuits.

The office made recommendations to rectify what it perceived to be shortcomings in present practices and in the present law. The report states that these recommendations, both statutory and nonstatutory, should aid in achieving understandings which would permit legitimate photocopying while protecting copyright interests. These include:

Nonstatutory Recommendations

Collective licensing arrangements encouraged. All parties affected by library reproduction of copyrighted works are encouraged to participate in existing collective licensing arrangements and to develop new collective arrangements in order to facilitate compensated copying of copyrighted works.

Voluntary guidelines encouraged. Representatives of authors, publishers, librarians, and users should engage in serious discussions with a view to the clarification of terms and the development of guidelines, with respect to both present photocopying practices and the impact of new technological developments on library use of copyrighted works. The Copyright Office recommends that the respective congressional copyright committees or subcommittees again urge the parties to engage in serious negotiations and report back to them by a certain date.

Study of surcharge on equipment. In the next five-year review, a copyright compensation scheme based upon a surcharge on photocopying equipment used at certain locations and in certain types of institutions or organizations should be studied, taking into account experience with such systems in other countries.

Study of compensation systems based on sampling techniques. In the next five-year review, various systems for copyright compensation based on a percentage of the photocopying impressions made on machines located at certain places in certain types of institutions or organizations, as determined by sampling techniques, should be studied.

Further study of new technology issues. In the next five-year review, issues relating to the impact of new technological developments on library use of copyrighted works should be studied.

Archival preservation. Representatives of authors, publishers, users, and librarians should meet to review fully new preservation techniques and their copyright implications and should seek to develop a common position for legislative action by Congress, taking into account the respective interests of libraries and their patrons and of authors and publishers.

Adequate funding for library services. Proper recognition of the cost of creating and disseminating protected works in our society requires concomitant understanding, at all levels of government, of the need for adequate funding of publicly owned libraries in order to enable them to pay their share of creation-dissemination costs.

Recommendations to Amend the Copyright Act

Reproduction of out-of-print musical works. The Copyright Office recommends enactment of the proposal submitted by the Music Library Association and the Music Publishers' Association, either by amendment of section 108(e) or by addition of a new paragraph (j) to section 108, with consequential amendment of paragraph (h). The amendment would permit library reproduction of an entire musical work (or substantial parts thereof) for private study, scholarship, or research following an unsuccessful, diligent search for the name and address of the copyright proprietor of the musical work.

Umbrella statute. The Copyright Office recommends favorable action by Congress on legislation that would embody the principle of the so-called umbrella statute, a proposal developed by an ad hoc task force of librarians and publishers and submitted by the Association of American Publishers. The proposal would add a new section 511 to the Copyright Act, limiting copyright owners to a single remedy in the form of a reasonable copying fee, for copyright infringement of their scientific, technical, medical, or business periodicals or proceedings, if certain conditions are met by the user of the work, including membership in a collective licensing arrangement, unless the work was entered in a qualified licensing system or qualified licensing program. The purpose of the umbrella statute is to encourage publisher and user participation in collective licensing arrangements. The Copyright Office further recommends that Congress require recordation with the office of a document setting forth the basic terms and conditions of any qualified licensing program or qualified licensing system.

Clarification of the "108(a)(3) notice." The Copyright Office recommends enactment of a clarifying amendment to section 108(a)(3) as follows:

"(3) the reproduction or distribution of the work includes the notice of copyright as provided in sections 401 and 402 of this title, if such notice appears on the copy or phonorecord in a position authorized by sections 401(c) and 402(c), respectively, of this title."

Clarification that unpublished works are excluded from paragraphs (d) and (e) of section 108. The Copyright Office recommends an amendment to paragraphs (d) and (e) of section 108 to make clear that unpublished works are not within the copying privileges granted therein.

Copies of the report may be purchased from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Rd., Springfield, Va. 22161 (NTIS Sales Desk: 703-487-4650). Copies are available for public inspection and copying in the Public Information Office of the Copyright Office, Madison Building, L.M. 401.

During this reporting period, the Copyright Office registered 232,909 claims to copyright. This represents 5,253 more registrations than during the same period last fiscal year and thus an increase of two percent.