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Copyright Questions and Answers

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Questions and Answers — Copyright Column

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QUESTION: *The university library has been approached by a department chair to supply free photocopies to faculty for research purposes. Free in this case means paid for by the library. How does the copyright law apply to this? Is the library responsible for any possible violation of the law if it pays royalties for the copies, but does NOT do the copying? One of the reasons the faculty member is requesting this service is the short loan period for ILL books. A photocopy would permit permanent access to needed research material as well as permit annotations in margins, etc.*

ANSWER: Your library clearly meets the requirements under Section 108(a) so that it qualifies for the library exemption. Under Section 108(d), a library that meets 108(a) definition of library is permitted to make single copies of works such as a book chapter, one article from a journal issue, etc., for a user if certain conditions are met. These conditions are: (1) the copy must contain a notice of copyright, (2) the library must have no notice that the copy is going to be used for other than fair use purposes, and (3) the library must post prominently and place on the request form a warning in accordance with the Register of Copyright's regulations.

Even copying an entire book is permitted under Section 108(e), but in addition to meeting the three conditions above, the library also has to first make a reasonable determination that a copy cannot be obtained at a fair price. This would require even consulting used book dealers to try to purchase the work for the patron to use first. Few libraries have the staff time to do such searches, so typically libraries limit the copying they do for users to that permitted under subsection (d). Just making a copy of an entire work because of the short interlibrary loan period is not permitted under the library exemption.

Any liability for non-fair use copying that is not done by the library would be incurred by the university and perhaps the individual faculty member who does the copying. The library is responsible only for the photocopying it does.

QUESTION: *How can an author modify copyright transfer agreements with journal publishers to reserve some individual rights? What sorts of changes are most often needed?*

ANSWER: It depends on the exact language of the publisher's transfer agreement, of course. Certainly the publisher will need at a minimum a reproduction and distribution right to publish the work in its journal. Other rights depend on what you actually envision doing with the work. In general look for: (1) the right to reuse the article in a later work (such as a chapter in book you will write later), (2) the right to reproduce copies of the work for distribution to your classes, (3) the

right to reproduce and distribute a limited number of copies to professional colleagues, (4) the right to post the article on your homepage after the article appears in the print publication, and (5) the general electronic rights—do you want to grant all other electronic rights to the publisher or retain them. What you want also may depend on the work itself as well as any uses you may be contemplating.

The "how to" is easy. Just mark out terms that you do not like and write in new ones. The publisher may or may not be willing to negotiate terms, but it is certainly worth a try!

QUESTION: *A professor requires that his/her students purchase a certain textbook for a class. Because students are required to have the book, is it fair use for the professor to use figures or charts from that text in course materials to supplement teaching? For example, students are required to read a chapter, and the instructor uses a chart or table from the chapter in some PowerPoint slides for further class discussion or explanation purposes. Would making this slide material available electronically in a password-protected electronic reserves system be fair use since the students have purchased the text, or is permission still needed?*

ANSWER: The display of the materials to the class is permitted—even if the class has not purchased the textbook. Section 110(1) of the Act allows teachers to display works to students in face-to-face teaching, regardless of whether that material is from the assigned textbook or not. In my opinion, it would also be fair use to put the same charts and graphs on a password protected e-reserves system for the students in that class. This time, the fact that the students have purchased the text is important. That means no permission is needed even after the first semester or term use.

QUESTION: *In a non-profit library, if library staff is making a presentation to staff, and spontaneously come across a cartoon or other graphic that fits, may we use it without seeking permission as long as the source is attributed? What about if the staff makes a routine monthly presentation and wants to use that same item repeatedly?*

ANSWER: There certainly is a strong argument that displaying a work one-time for in-house use is fair use. A display is different than copying the work and distributing it to everyone who attends the presentation. When one looks at the fair use factors, a one-time display to an in-house audience has little market effect where multiply copying may have considerable market effect. Repeated use changes the dynamic. Now it is not a one-time use but rather is being used for different audiences over time. If that display is to be repeated, seeking permission is likely required.

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whether librarian, publisher, or distributor, needs to be aware of copyright law, and of our organization's policies. Knowing the policy is useful knowledge, since it always pays to be safe.

Endnotes

1. *West's Encyclopedia of American Law* "Intellectual property" 183 (Eagan, MN: West Group, 1998).
2. "Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, films, tapes, disks, or cards, in which they are embodied." 17 U.S.C. §101.
3. 17 U.S.C. §201(b).
4. "A 'derivative work' is based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other format in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which as a whole represents an original work of authorship, is a 'derivative work.'" 17 U.S.C. §101.
5. Nimmer, Melville B., *Nimmer on Copyright* §5.03[B][1][f] (New York: M. Bender) (Rel. 42, June 1997).
6. *id.*
7. Indiana University Office of Research and University Graduate School, *Intellectual Property Policy* (adopted May 9, 1997) <<http://www.indiana.edu/~rugs/respol/intprop.html>>.
8. Northern Kentucky University, *Intellectual Property Policy* p.3 (adopted December 20, 1999) <<http://www.nku.edu/~senate/itellec.pdf>>.