ESSAY

Copyright Law and the Academic Community: Issues Affecting Teachers, Researchers, Students, and Libraries

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Basic knowledge of copyright law is essential for all persons who write, perform research, or teach. Yet many students, teachers, and researchers know little about copyright law. Unless better informed they may infringe the rights of copyright holders and risk legal action, or they may fail to protect the copyright in their own work. This Article explains copyright basics in the educational context.

INTRODUCTION

Copyright is the legal protection given by federal statute for "original works of authorship" including literary, musical, dramatic, artistic, or other works.[1] Copyright acts as a limited monopoly, enabling its owner to prevent others from violating her exclusive rights in the protected work.[2] The academic community is the major user and creator of copy-

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[1] 17 U.S.C. § 102 (1982); *cf.* N. BOORSTYN, COPYRIGHT LAW §§ 2:6-2:18 (1981) (categories of copyrightable works).

[2] N. BOORSTYN, *supra* note 1, § 4:1. *But see* Miller v. Universal City Studios, 650 F.2d 1365, 1375 (5th Cir. 1981) (unlike patent, copyright does not confer absolute monopoly over work). A copyright is distinguishable from a patent which confers by statute legal protection to the functional or design aspects of an invention. The patent grants the inventor a monopoly: the absolute right to manufacture, sell, and use the patented object for a fixed term of years (usually 17 in the United States). *See* 35 U.S.C. § 154 (1982). *But cf.* 35 U.S.C. § 173 (1983) (term of design patents). *See*

righted material, yet most scholars and writers[3] know little about copyright. Many teachers, including law professors, can neither recite the three basic elements[4] of a valid copyright notice nor explain the "fair use"[5] doctrine, although they apply the doctrine daily in their work.

This Article contains basic information about copyright law for students, teachers, writers, and other consumers of the vast amount of copyrighted material used in teaching, research, and scholarship. The Article covers several areas. Part I analyzes basic copyright law for members of the academic community, examining copyright provisions that permit reproduction or quotation of protected material for educational purposes. Part II reviews current copyright problems of interpretation and application, discusses a survey of publishers, and proposes a conservative approach to fair use questions. Finally, Part III examines cases decided under the Copyright Act of 1976 and out-of-court settle-

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generally 1 NIMMER ON COPYRIGHT § 2.19 (1983) (copyrightability for patentable works) [hereafter 1 NIMMER].

Both copyright and patent differ from a trademark or a service-mark, which is a word, name, symbol, or a combination of any of these, used by a person to identify her goods and services and to distinguish them from those of another. *See* Lanham Trademark Act, 15 U.S.C. §§ 1051-1127 (1982).

Copyrights, patents, and trademarks, collectively referred to as "intellectual property," are frequently compared. *See* A. LATMAN, THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 1, 38-39, 57-58 (1979); *see also* S. LIEBERSTEIN, WHO OWNS WHAT IS IN YOUR HEAD: TRADE SECRETS AND THE MOBILE EMPLOYEE (1979); Frijouf, *Simultaneous Copyright and Patent Protection*, 23 COPYRIGHT L. SYMP. (ASCAP) 99 (1977); *cf.* R. BRINK, D. GIPPLE & H. HUGHESDON, AN OUTLINE OF UNITED STATES PATENT LAW 4-5 (1959). A useful work on patents for educators is Ollerenshaw, *How to Perform a Patent Search: A Step By Step Guide for the Inventor*, 73 L. LIBR. J. 1 (1980).

[3] *E.g.*, "[T]he writer knows almost nothing about copyright, and is probably incapable of learning anything about it; if, in the 3,000 years since Homer, he is still ignorant . . . even of HOW to copyright, it would seem indicated that he should admit he's not the type and flunk the test." Cain, *An American Authors' Authority*, SCREEN WRITER, July 1946, at 10 (emphasis in original); *accord* Holroyd & Jobson, *Copyrights and Wrongs: D.H. Lawrence*, THE TIMES (London) 943-44 (Literary Supp.) (weekly ed. 1982) (most writers have only "a rough-and-ready" knowledge of copyright law). This observation also applies to students. *See* Carpenter, *The Student Author and the Law of Copyright: A Consideration of Some Peculiar Problems*, 51 NOTRE DAME L. REV. 574, 574 (1976).

[4] These elements are the symbol ©, or the word "Copyright," or the abbreviation "Copr.," the year of the first publication, and the name of the copyright owner. 17 U.S.C. § 401(b) (1982). Variations on the symbol and name are allowed by the U.S. Copyright Office. U.S. COPYRIGHT OFFICE, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES §§ 4.2.2(I), (III), 4.5.3 (1979).

[5] 17 U.S.C. § 107 (1982). *See generally infra* text accompanying notes 36-47.

ments involving alleged infringements and addresses future trends.

I. BASIC COPYRIGHT LAW

The current copyright law of the United States consists of the Copyright Act of 1976,[6] court decisions construing it, and, in some instances, the 1909 Act.[7] Copyright law underwent a major revision with the 1976 adoption of a new philosophy favoring authors and creators. The current copyright statute includes provisions for library reproduction,[8] protection for separate contributions to collective works,[9] and a five year copyright term.[10]

A. The Subject Matter of Copyright

Certain categories of materials are not entitled to copyright protection under the 1976 Act. These include works in the public domain,[11] works of the United States Government,[12] works not "fixed in a tangi-

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[6] An Act for the General Revision of the Copyright Law, Title 17 of the United States Code, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810 (1982)), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659-823. Excerpts from the history appear in 17 U.S.C.A. *passim* (West 1977). *See generally* Marke, *United States Copyright Revision and Its Legislative History*, 70 LAW LIBR. J. 121 (1977). For a favorable review of the Act, see Patterson, *An Analysis of the 1976 Copyright Act*, 3 A.L.I.-A.B.A. COURSE MATERIALS J. 21-36 (1978). *Contra* Katz, *The 1976 Copyright Revision Act and Authors' Rights: A Negative Overview*, 4 PEPPERDINE L. REV. 171 (1977).

[7] All actions that arose under Title 17 before January 1, 1978, continue to be governed by Title 17 as it existed when the action arose. Pub. L. 94-553, § 112, 90 Stat. 2541, 2599 (1976); 17 U.S.C.A. § 501 note (1977); *see also* Nimmer, *Preface: The Old Copyright Act as a Part of the New Act*, 22 N.Y.L. SCH. L. REV. 471, 471 (1977) (1909 Act will "in many ways rule us from the grave"). The 1909 Act is reprinted at 17 U.S.C.A. app. (West Supp. 1984).

[8] 17 U.S.C. § 108 (1982); *see also* U.S. COPYRIGHT OFFICE, CIRCULAR R21, REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS (1978).

[9] 17 U.S.C. § 201(c) (1982); *see also infra* text accompanying notes 30-35.

[10] The five-year term is not expressly mentioned in the statute, but implied in 17 U.S.C. § 405(a)(2) (1982). The five-year term copyright is a unique, but perhaps inadvertent, feature of the 1976 Act. *See* Patton & Hogan, *The Copyright Notice Requirement — Deliberate Omission of Notice*, 5 COMM/ENT 225 (1983).

[11] This term refers to works that have been "dedicated to the public," either purposely or inadvertently, and therefore may be republished by anyone. Alexander v. Haley, 460 F. Supp. 40, 45 (S.D.N.Y. 1978). *See generally* Lange, *Recognizing the Public Domain*, 44 L. & CONTEMP. PROBS., Autumn 1981, at 147; Smith, *Government Documents: Their Copyright and Ownership*, 22 COPYRIGHT L. SYMP. (ASCAP) 147, 177-83 (1977).

[12] 17 U.S.C. § 105 (1982). This is a "work prepared by an officer or employee of

ble form of expression,"[13] and titles, names, short phrases, and slogans.[14] The statute expressly declares that ideas are not protected.[15]

Original works of authorship[16] are entitled to copyright protection only if they are fixed in a tangible medium of expression.[17] The 1976 Act sets forth seven broad categories of subject matter protectable by copyright:[18] literary works,[19] musical works, including any accompanying words, dramatic works, including any accompanying music, pantomimes and choreographic works,[20] pictorial, graphic, and sculp-

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the United States Government as a part of that person's official duties." 17 U.S.C. § 101 (1982). *But cf.* Schnapper v. Foley, 667 F.2d 102 (D.C. Cir. 1981) (registration of copyright permitted for federally commissioned works), *cert. denied*, 455 U.S. 948 (1982). *See generally* 1 NIMMER, *supra* note 2, § 5.06; Smith, *supra* note 11, at 147; Stiefel, *Piracy in High Places — Government Publications and Copyright Law*, 8 COPYRIGHT L. SYMP. (ASCAP) 3 (1957); Tresansky, *Copyright in Government Employee Authored Works*, 30 CATH. U.L. REV. 605 (1981).

[13] 17 U.S.C. § 101 (1982). Original improvisational works are not entitled to protection under the statute because they are not fixed in a tangible medium of expression. Yet, as a derivative work, they need not be fixed to infringe the copyrighted work. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 62 (1976).

[14] *See* U.S. COPYRIGHT OFFICE, CIRCULAR R34, COPYRIGHT PROTECTION NOT AVAILABLE FOR NAMES, TITLES, OR SHORT PHRASES (1983). Titles may be protected under a trademark or unfair competition theory. *See* N. BOORSTYN, *supra* note 1, § 2:26; 1 NIMMER, *supra* note 2, § 2.16.

[15] 17 U.S.C. § 102(b) (1982); *see also* Hopkins, *Ideas, Their Time Has Come: An Argument and a Proposal for Copyrighting Ideas*, 46 ALB. L. REV. 443 (1982). In factual works the facts are not protected but an original form of expression may be protected even though it is based on fact. *See* 1 NIMMER, *supra* note 2, § 2.11; Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981).

[16] An author is any originator of a work. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884). Deciding whether a work has been authored can be problematic. *See* Note, *Can a Computer be an Author?: Copyright Aspects of Artificial Intelligence*, 4 COMM/ENT 707 (1982).

[17] 17 U.S.C. § 102 (1982); *see also* N. BOORSTYN, *supra* note 1, § 2:4 (discussing fixation).

[18] 17 U.S.C. § 102(a)(1)-(7) (1982).

[19] Computer software falls under the category of a literary work and may be protected as such. *See* 1 NIMMER, *supra* note 2, § 2.18[J] (copyrightability of computer programs); *see also* Davidson, *Protecting Computer Software: A Comprehensive Analysis*, 23 JURIMETRICS J. 337 (1983) (comprehensive survey of alternative software protection by copyright, patent, and trade secret laws); Lechter, *Protecting Software and Firmware Developments*, COMPUTER, Aug. 1983, at 80 Table 1 (discussing protection through patent, copyright, trade secret, and trademark); Miller, *Copyright Protection for Bibliographic, Numeric, Factual, and Textual Databases*, 32 LIBR. TRENDS 199 (1983); *cf.* 17 U.S.C. § 117 (1982) (copying computer programs authorized under certain limited conditions).

[20] *See generally* Traylor, *Choreography, Pantomime and the Copyright Revision Act*

tural works,[21] motion pictures and other audio visual works,[22] and sound recordings. These categories are not intended to be inclusive, and should be construed broadly.[23]

While the statutory list is expansive, it does not include all intellectual creations. As noted above, copyright protects the expression of ideas, not the ideas themselves.[24] Moreover, a professor's oral lecture is not protected by the statute until fixed in some permanent form, such as a written text or a recording.[25] The 1976 Act leaves open the definition of what constitutes fixation so that new mediums of expression can be brought within the law's protection.[26]

B. Exclusive Rights and Limitations

The Act gives some important exclusive rights to the copyright owner. The copyright owner has the exclusive right to reproduce the work,

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of 1976, 16 NEW ENG. L. REV. 227 (1980-81).

[21] *See* Kamar Int'l v. Russ Berrie & Co., 657 F.2d 1059, 1061 (9th Cir. 1981) (stuffed toy animals ruled copyrightable as "soft sculptures").

[22] *See* Iowa State Univ. Research Found. v. ABC, 621 F.2d 57, 61 (2d Cir. 1980) (infringement of championship wrestler's film biography).

[23] The Act states that "works of authorship include the [above] categories," 17 U.S.C. § 102(a) (1982), and further provides that the term "including" is "illustrative and not limitative." 17 U.S.C. § 101 (1982). The U.S. Copyright Office suggests that these categories be "viewed quite broadly so that, for example, computer programs and most 'compilations' are registrable as 'literary works'." U.S. COPYRIGHT OFFICE, CIRCULAR R1, COPYRIGHT BASICS 4 (1982).

[24] *See* 17 U.S.C. § 102(a) (1983); *see also* Warner Bros. v. ABC, 654 F.2d 204, 208 (2d Cir. 1981); Dr. Pepper Co. v. Sambo's Restaurants, 517 F. Supp. 1202, 1207 (N.D. Tex. 1981); McMahon v. Prentice-Hall, Inc., 486 F. Supp. 1296, 1303-04 (E.D. Mo. 1980) (college psychology textbook); Davidson, *supra* note 19, at 367 (in the case of software, copyright protects expression, not embodiment).

[25] 17 U.S.C. § 102(a) (1982). A work is fixed when it is embodied in a copy or phonorecord which is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (1982). Thus, a lecture that is entirely oral would not be covered by the statute. "Oral histories" when recorded would be protected by the statute. *See* N. BOORSTYN, *supra* note 1, § 2:3 (Supp. 1983); *see also* Annot., 38 A.L.R.3d 779 (1971) (literary property in lectures); Annot., 32 A.L.R.3d 618 (1970) (common law copyright in the spoken word); *cf.* Falwell v. Penthouse Int'l, 521 F. Supp. 1204, 1207-08 (W.D. Va. 1981) (oral expression of thought too general and abstract to rise to level of copyrightable work). *See generally* Matthews, *Copyright and the Duplication of Personal Papers in Archival Repositories*, 32 LIBR. TRENDS 223 (1983); Comment, *Copyrighting Conversations: Applying the 1976 Copyright Act to Interviews*, 31 AM. U.L. REV. 1071 (1982).

[26] 17 U.S.C. § 101 (1982).

to prepare "derivative" works[27] based on the work, to distribute the work to the public by sale, transfer of ownership, or lease, to perform the work publicly, and to display the work publicly.[28] Sections 107-112 of the Act limit exclusive rights. Two such limitations, fair use and reproduction by libraries, will be discussed below. The owner may exercise her exclusive rights and may authorize others to do so by licensing those rights.[29]

C. Contributions to Journals

Scientific and scholarly journals often insist upon the transfer of copyright before agreeing to publish an article.[30] Usually, the journal notifies an author that her article has been accepted for publication, but that, because of the new copyright law, a transfer of the copyright is required for publication. A printed form may even be enclosed for this purpose.

Under the 1976 Act, however, the author may retain the copyright in her contribution, while the entire journal and all the articles contained therein are separately protected.[31] There are actually two copyrights,

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[27] 17 U.S.C. § 101 (1982) (defining derivative works); *see* 1 NIMMER, *supra* note 2, at § 3.01; Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y 209, Item 442 (1983).

[28] 17 U.S.C. § 106 (1982).

[29] 17 U.S.C. § 201(d)(1), (2) (1982) (transfer of copyright). The professor who assigns the right to print and distribute her work to another has no right to print and sell it herself, even if she is dissatisfied with the publisher's marketing effort. Dodd, Mead & Co. v. Lilienthal, COPYRIGHT L. REP. (CCH) ¶ 25,251 (S.D.N.Y. 1981).

[30] *Cf.* Mayer, *The Transfer of Copyright Ownership to Periodicals*, 46 FORDHAM L. REV. 907, 922-23, 937 (1978).

[31] Section 201(c) of the Act states:

> Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of the copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

17 U.S.C. § 201(c) (1982). The House has interpreted this language to mean that:

> a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

Copyright Law Revision, H.R. REP. NO. 1476, 94th Cong., 2d Sess. 122-23 (1976).

one in the issue of the journal as a whole and the other in the author's contribution.[32] Few educators and lawyers have heard of these provisions, and the journals are not informative about them. However, the language of the Act is clear:[33] the copyright notice on the journal's masthead or copyright page protects the entire issue, including the separate contributions which themselves are subject to the author's copyright ownership.[34]

The 1976 Act does not require an author to transfer the copyright in her article to the journal. Educators should be forewarned that, in some cases, the language used in the transfer document can extend far beyond copyright, and may include, for example, the right to exploit commercially the author's name and likeness in connection with her article.[35]

D. Fair Use

Fair use is one doctrine that courts use when called upon to balance the rights of the creator with the rights of the user of copyrighted material. The fair use doctrine was initially developed by the courts to "tilt the balance towards public access and away from private gain,"[36] but the doctrine has been misapplied. Court decisions instead have favored the copyright holder and tilted the balance towards her. This emphasis

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[32] While "[a] separate contribution to a collective work may bear its own notice of copyright," the Act states that "a single notice applicable to the collective work as a whole is sufficient to satisfy the [notice] requirements . . . with respect to the separate contributions it contains . . ., regardless of the ownership of copyright in the contributions and whether or not they have been previously published. 17 U.S.C. § 404(a) (1982).

[33] *See supra* note 32.

[34] *See* 17 U.S.C. § 404(a) (1982).

[35] For example, the American Educational Research Association's consent to publish form contains the following language:

> So that AERA may be protected from the consequences of unauthorized use of the contents of an AERA Publication, we consider it essential to secure the exclusive rights of copyright embodied in your Article. To this end and as a condition of publication, we ask you to grant us all the rights, including the exclusive rights of copyright and all subsidiary rights, for your Article . . . . [including the right] to license others to sell the commercial rights in and to the author's name . . .

Am. Educ. Research Ass'n, Consent to Publish Form (n.d.) (copy on file at U.C. Davis Law Review office).

[36] *See* Note, *Toward a Unified Theory of Copyright Infringement for an Advanced Technological Era*, 96 HARV. L. REV. 450, 454 (1982) [hereafter Note, *Unified Theory of Copyright*].

on the author's rights reflects the spirit of the new Copyright Act. Fair use permits certain limited uses of a copyrighted work even without the copyright holder's consent.[37] The doctrine is codified in section 107, which provides that copyright is not infringed if copies of a protected work are made for such purposes as *criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research.*[38] These purposes, except news reporting,[39] are essentially academic. Thus, most academic uses of copyrighted works come under the fair use umbrella.

If the law required only that these purposes be satisfied, a college professor, under the rubric of advanced research or scholarship, might copy the entire set of the *Encyclopaedia Britannica* to facilitate scholarly research at home. However, any of these purposes must be balanced with four limiting factors to determine whether use of copyrighted material for an academic purpose is a fair use:[40] (1) the purpose and character of the use,[41] (2) the nature of the copyrighted work,[42] (3)

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[37] 17 U.S.C. § 107 (1982). Without a copyright system which provides for fair use, the necessity for obtaining permission could become wasteful and applicable to those "activities [which] would have been objected to by no one." Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 30 J. COPYRIGHT SOC'Y 253, 290 n.162, Item 443 (1983); *see also* L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT (1978); Leavens, *In Defense of the Unauthorized Use: Recent Developments in Defending Copyright Infringement*, 44 LAW & CONTEMP. PROBS., Autumn 1981, at 3. Section 107 does "not precisely define the outer limits of the fair use doctrine." Freid, *Fair Use and the New Act*, 22 N.Y.L. SCH. L. REV. 497, 516 (1977).

It is said that Justice Joseph Story "laid down the basis for the judicially created doctrine of fair use, with no support from the statute at all." Patterson, *supra* note 6, at 35 (citing Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901)).

[38] 17 U.S.C. § 107 (1982).

[39] For a discussion of the copyrightability of news materials, see Campbell, *Copyright and News Values: An Accommodation*, 25 COPYRIGHT L. SYMP. (ASCAP) 121 (1980).

[40] 17 U.S.C. § 107(1)-(4) (1982). *See generally* Hayes, *Classroom "Fair Use": A Reevaluation*, 26 BULL. COPYRIGHT SOC'Y 101, Item 245 (1978); Rosenfield, *Customary Use as "Fair Use" in Copyright Law*, 25 BUFFALO L. REV. 119 (1975); Note, *Unified Theory of Copyright*, *supra* note 36, at 453-60; Annot., 23 A.L.R.3d 139 (1969) (extent of fair use doctrine under Federal Copyright Act).

[41] Although courts tend to be more receptive to unauthorized use of educational, scientific, and historical works, this does not "necessarily mean that a non-commercial or an educational motive will invariably sanction fair use." Encyclopaedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1174 (W.D.N.Y. 1982); *cf.* Universal City Studios v. Sony Corp., 659 F.2d 963, 972 n.9 (9th Cir. 1982) ("noncommercial motive does not mean fair use").

A finding that the alleged infringers copied the material to use it for the same intrin-

the relative amount and substantiality of the work copied,[43] and (4) the effect of the use upon the potential market for the copyrighted work.[44]

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sic purpose for which the copyright owner intended it to be used is strong indicia of no fair use. Jartech, Inc. v. Clancy, 666 F.2d 403, 406-07 (9th Cir. 1982); Universal City Studios v. Sony Corp., 659 F.2d 963, 969-70 (9th Cir. 1982); Iowa State Univ. Research Found. v. ABC, 621 F.2d 57, 61 (2d Cir. 1980). Thus, the scope of fair use is constricted when the original and the copy serve the same function.

The House has addressed the "same function" test as applied to classroom materials: "Textbooks and other material prepared primarily for the school market would be less susceptible to reproduction for classroom use than material prepared for general public distribution." H.R. REP. NO. 1476, 94th Cong. 2d Sess. 34 (1976); *see also* Marcus v. Rowley, 695 F.2d 1171, 1174-76 (9th Cir. 1983) (teacher prepared learning activity package using copyrighted cake decorating booklet; no fair use).

[42] This usually "refers to the type of material used and whether distribution of the material would serve the public interest." Encyclopaedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1177 (W.D.N.Y. 1982) (citing Rosemont Enterp. v. Random House, 366 F.2d 303, 307 (1966)). In Universal City Studios v. Sony Corp., 659 F.2d 963 (9th Cir. 1982), the court stated that analysis of this factor requires consideration of whether the work is "informational" or "creative," finding the scope of fair use greater in the former situation. *Id.* at 972. If the work involved has both informational and creative aspects, the analysis of this factor may not be of any real assistance in reaching a conclusion as to the applicability of fair use. *See* Marcus v. Rowley, 695 F.2d 1171, 1176 (9th Cir. 1983).

[43] This refers to the "quantity and quality" of the material used. "Generally, the more substantial the appropriation from the copyrighted work, the less likely fair use will be considered a defense." Encyclopaedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1179 (W.D.N.Y. 1982); *cf.* Universal City Studios v. Sony Corp., 480 F. Supp. 429, 454 (C.D. Cal. 1979).

With respect to this factor, the courts have long maintained the view that wholesale copying of copyrighted material precludes application of the fair use doctrine. *E.g.*, Universal City Studios v. Sony Corp., 659 F.2d 963, 973 (9th Cir. 1982); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 756-758 (9th Cir. 1978); Benny v. Loew's, Inc., 239 F.2d 532, 536-37 (9th Cir. 1956), *aff'd by an equally divided court sub nom.* CBS v. Loew's, Inc., 356 U.S. 43 (1958). Two courts have specifically addressed the issue in relation to copying for educational purposes. *See* Wihtol v. Crow, 309 F.2d 777, 780-81 (8th Cir. 1962); Encyclopaedia Britannica Educ. Corp. v. Crooks, 447 F. Supp. 243 (W.D.N.Y. 1978); *cf.* Quinto v. Legal Times, 506 F. Supp. 554, 560 (D.D.C. 1981) (use of copyrighted material in news story).

[44] Judge Curtin defined this as the harm done by the alleged misuse of the copyrighted work, and says several courts have suggested that it should be considered first. Encyclopaedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1179; *see also* Universal City Studios v. Sony Corp., 659 F.2d 963, 973-74 (9th Cir. 1982) (central question not actual damage to copyright owner, but whether infringement tends to diminish or prejudice potential sale of copyright owner's work).

The 1976 House Report acknowledges that the harm factor is often seen as the most important criterion of fair use, but warned that it "must almost always be judged in conjunction with the other three criteria." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 35 (1976). The Report explains that "a use which supplants any part of the normal

The purpose of all four factors is to strike a balance between the author's right to the product of her intellect and imagination and the right of the public in dissemination of knowledge.[45]

Arguably, fair use applies only to the copying of limited parts from a work.[46] It does not permit the reproduction of an entire copyrighted work, such as a book, monograph, encyclopedia volume, or an entire article from a periodical, even for scholarship, research, or teaching purposes. Any permission for such copying must be found elsewhere in the statute.[47]

1. Guidelines for Classroom Copying

The main provisions for educational uses of copyrighted material, known as the *Guidelines for Classroom Copying*,[48] are not found in the 1976 Act. The Guidelines resulted from an agreement between the Association of American Publishers, the Authors League of America, and the Ad Hoc Committee on the Copyright Law Revision. These rules are followed by some publishers and apply only to activities of nonprofit educational institutions. They do not apply to the nonclassroom research and writing activities of noneducators or, by definition, to teachers in proprietary schools. If the educator or writer desires to duplicate material in excess of that permitted under section 107, she may

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market for a copyrighted work would ordinarily be considered an infringement." The mere absence of measurable pecuniary damage does not require a finding of fair use. *Universal City Studios*, 659 F.2d at 974.

[45] Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203, 213-214 (1954).

[46] *See* Marcus v. Rowley, 695 F.2d 1171, 1176 (9th Cir. 1983) ("wholesale" copying precluded from fair use); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 756-58 (9th Cir. 1978) (fair use doctrine not applicable to copying that is virtually complete or almost verbatim). Some librarians and others are mistaken when they argue that § 107 allows reproduction of an entire work; they are confusing it with § 108 (reproduction by libraries and archives).

[47] For example, 17 U.S.C. § 108 (1982) permits reproduction under some circumstances of a single copy of a work by libraries and archives.

[48] *Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions*, H.R. REP. NO. 1476, 94th Cong., 2d Sess. 68 (1976) (reproduced *infra* Appendix A) [hereafter *Guidelines*]. It is stated therein that the purpose of the guidelines is to "state the *minimum standards of educational fair use*" under § 107. It was agreed that "the conditions determining the extent of *permissible copying for educational purposes* may change in the future" and that the "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." *Id.* (emphasis added); *see also* J. HOGAN & S. COHEN, AN AUTHOR'S GUIDE TO SCHOLARLY PUBLISHING AND THE LAW app. E (1965) (scholar can rely on university presses' "resolution on permissions" in quoting one of signatory presses).

consult these guidelines for copying if the use is for classroom teaching. The introductory paragraphs to the guidelines indicate that there may be instances in which copying not permitted by the guidelines may nonetheless be permitted under the fair use doctrine.

According to the guidelines, only scholarly research, teaching, or preparation for teaching justify copying without permission. The quantity and kind of copying are severely restricted. Generally, a single copy is authorized for permissible purposes. The kinds of material which may be copied are limited to one chapter from a book, one article from a periodical, one chart, graph, or picture from a newspaper. Multiple copies for student use are permitted, but may not exceed one per student per class. Copies must be for classroom use or discussion only.[49]

Before the copies can be made, tests of brevity and spontaneity must be applied. As the guidelines specify, "inspiration" to copy must come from the teacher, not from some higher authority, and the "decision to use the work and the moment of its use for maximum teaching effectiveness [must occur] so close in time that it would be unreasonable to expect a timely reply to a request for permission."[50] Another limitation found in the guidelines is "cumulative effect": copies must not be a substitute for the purchase of the item copied, the same item may not be copied from term to term by the same teacher, copying shall not be used to create anthologies, and no copying is permitted from consumable items, such as workbooks, texts, and answer sheets.[51]

2. Reproduction by Libraries

An educator or writer may also duplicate material in excess of that permitted under section 107 through the library, which has reproduction rights of its own under section 108 of the Act.[52] Libraries provide much of the raw material of academic scholarship. Educators often make or request photocopies from library materials. Section 108 of the 1976 Act governs photocopying practices for libraries.[53] Under certain circumstances, libraries may photocopy protected works in excess of the amount permitted under section 107. For example, a library may reproduce for a user no more than one complete copy of an article or other contribution to a copyrighted collection or periodical, or a "small

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[49] *See Guidelines*, *supra* note 48, at 68.

[50] *Id.* at 69.

[51] *Id.*

[52] 17 U.S.C. § 108 (1982); *see also* Young, *Copyright and the New Technologies — The Case of Library Photocopying*, 28 COPYRIGHT L. SYMP. (ASCAP) 51 (1982).

[53] 17 U.S.C. § 108 (1982).

part" of any other copyrighted work,[54] provided it is for "private study, scholarship, or research."[55]

A library may reproduce one copy of an entire or a substantial part of a book if it has determined, on the basis of a reasonable investigation, that a copy of the copyrighted book cannot be obtained at a fair price.[56] Again, the Act requires that the copy be used only for "private study, scholarship, or research."[57]

However, systematic reproduction and distribution of copyrighted material is not permitted by either individuals or libraries.[58] For example, regular reproduction of the monthly issues of a periodical would not be permitted under section 108. Further, the reproduction of copyrighted material on a library self-service photocopying machine in excess of statutory fair use is a copyright infringement. The "warning notice" displayed on library photocopying equipment has a dual purpose: it notifies the user of the copyright law restrictions, and it exempts the library and its employees from liability for unsupervised use of such equipment by library patrons.[59]

3. The Copyright Clearance Center

The Copyright Clearance Center (CCC) offers a mechanism established by publishers to facilitate copying beyond that permitted under sections 107 and 108. A library or research group may register with the CCC and thus obtain instant permission to photocopy journal articles and other works owned by participating publishers for the payment of a fee. Organizations and individuals who frequently reproduce copyrighted works may register with the CCC without charge. Payments for copying are made to the CCC, which remits a portion of the fee to the proper publisher.[60] The person or organization making the copy

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[54] *Id.* § 108(d).

[55] *Id.* § 108(d)(1).

[56] *Id.* § 108(e).

[57] *Id.* § 108 (e)(1).

[58] *Id.* § 108(g)(2). To define "systematic reproduction," the National Commission on New Technological Uses of Copyrighted Works (CONTU) developed guidelines setting a limit of five copies per work per year made without permission from the copyright owner for periodicals and other works less than five years old. *See* FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 54-55 (1978).

[59] 17 U.S.C. § 108(f)(1) (1982).

[60] Fees are listed in CCC's catalog. *See also* Oboler, *Watch the Shells, Watch the Pea: Paying for Copyright Rights to Articles*, 4 THE SERIALS LIBR. 65 (1979). The CCC has instituted a new system, the "Annual Authorizations Service," under which

voluntarily reports each item copied to the Center. The educator who must duplicate copyrighted material in a manner which exceeds fair use under section 107 and who does not qualify for library reproduction under section 108 may make copies immediately, without permission, and remit the appropriate fee to the Center to avoid infringement.[61]

The Center's usefulness is limited. Generally, only periodical publishers have registered their works with the Center; many other publishers do not yet participate.[62] In 1982, the publishers noted that "there has been relatively little recognition of the Copyright Clearance Center."[63]

Copyrighted material duplicated under this arrangement must be for personal or internal use and not for public distribution, advertising, promotional purposes, or for "creating new collective works, or for resale."[64] This is a publisher-created limitation which seems to fly in the face of fair use as found in the Copyright Act of 1976.[65]

II. Problems in Interpretation and Application of the 1976 Act

A. Publishers, Librarians, and Users of Copyrighted Works

Librarians and publishers disagree on certain issues involving photocopying copyrighted works, particularly whether section 108 of the 1976 Act has achieved its goal to balance the creator's rights and the

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the user sends a single annual payment to the CCC for a license to make all the copies needed for internal use during the year. "This new service will replace unproductive confrontation with a cooperative effort to make the law work . . . ." *CCC Launches New Authorizations Service*, Publishers Weekly, Aug. 12, 1983, at 18 (quoting A.C. Hoffman, chairman of the board of CCC and group vice-president of Doubleday & Co.); *see also* Copyright Clearance Center, CCC's New Annualized Authorizations Service (n.d.).

[61] *See* Copyright Clearance Center, Three Ways to Play it Safe When Making or Requesting Photocopies of Copyrighted Works 1 (n.d.).

[62] In fact, only four of the twenty-one publishers polled in our survey, *see infra* text accompanying notes 88-93 and Appendix C, reported that they participated in the CCC.

[63] Ass'n of Am. Book Publishers, Final Comments by the Association of American Publishers for the Register's Report to Congress in Accordance with 17 U.S.C. § 108(i) as Requested May 26, 1982, at 14 (1982) [hereafter Final Comments].

[64] *See supra* note 61.

[65] *See* 17 U.S.C. § 107 (1982); *see also supra* notes 36-47 and accompanying text.

needs of the users of copyrighted works.[66] The Association of American Publishers maintains that the new copyright law does not work, that stricter penalties for infringement are needed, and that libraries and librarians do not follow the law. However, according to the American Library Association, libraries heed the law but are asked to bear "an unfair burden of proof and control."[67]

In the summer of 1980, to gain a comprehensive perspective on the photocopying problem, as well as to fulfill its statutory obligation under section 108, the Copyright Office commissioned King Research, Inc. of Rockville, Maryland to conduct surveys of library photocopying practices and to prepare an analytical report of its findings. This report, popularly referred to as the King Report, was widely circulated and evoked critical responses from the various sides.[68]

1. The Publishers' Position on Library Photocopying

On July 28, 1982, a report was submitted by the Association of American Publishers in accordance with section 108(i). The report[69] criticizes libraries' treatment of copyrighted materials and recommends revision of section 108 to achieve the intended balancing of creators' and users' rights. Noting that there is widespread noncompliance with the law in the library community, the report charges that mechanized document delivery by libraries is an unanticipated problem that should be addressed, and that the publishers' library guidelines are not working and should be changed.[70]

Section 108(a)(3) permits duplication if the reproduction or distribution of the work includes a notice of copyright.[71] According to the li-

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[66] FINAL COMMENTS, *supra* note 63, at i-ii. Congress itself appears to question the Act's efficacy in achieving its goals. *See* 17 U.S.C. § 108(i) (1982) (mandatory report to Congress, at five-year intervals, on effectiveness of § 108).

[67] *See Libraries and Publishers at Odds on Copyright*, 107 LIBR. J. 1921 (1982) (summarizing the AAP's position and the ALA point of view).

[68] *See* D. MCDONALD & C. BUSH, LIBRARIES, PUBLISHERS, AND PHOTOCOPYING: FINAL REPORT OF SURVEYS CONDUCTED FOR THE UNITED STATES COPYRIGHT OFFICE (1982) [hereafter FINAL REPORT OF SURVEYS]. The report contains findings of six surveys which cover many aspects of library photocopying, including user operation of self-service machines. For response to the report, see *infra* note 76.

[69] *See* FINAL COMMENTS, *supra* note 63, at 1; *cf.* Annot., 21 A.L.R. FED. 212 (1974) (unauthorized photocopying by library as infringement of copyright).

[70] FINAL COMMENTS, *supra* note 63, at 32; *see also* LIBRARY OF CONGRESS, FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGY USES OF COPYRIGHTED WORKS (1978).

[71] 17 U.S.C. § 108(a)(3) (1982).

brarians, this statutory requirement is satisfied by stamping the duplicated material, "This May Be Copyrighted," and the American Library Association has so instructed its membership.[72]

Publishers claim that the librarians have misread the law, and that the full statutory notice of copyright must appear on any copies made or distributed under section 108. They assert that the librarians' notice, "This May Be Copyrighted," implies that the article may *not* be in copyright. Nothing in this statement, say the publishers, causes users to refrain from making subsequent copies.[73] The crucial issue is whether librarians are responsible for checking, verifying, and affixing copyright notices to materials photocopied in the library. Interestingly, the Register of Copyrights has recently sided with the publishers in this matter.[74] The publishers recommend stronger remedies for infringement, adoption of an "umbrella statute" as a new section of the law,[75] and developing stricter guidelines for library photocopying.

2. Response to the Publishers and the King Report

The American Library Association stated the librarians' position on section 108 in its response to the King Report.[76] The Association expressed its disappointment with the Report, criticized the sometimes subjective nature of the data and lack of attention to "the experience of creators themselves," and lamented the fact that the data does not quantify the amount of photocopying from foreign and public domain sources.[77] Finally, the Association condemned the failure to focus equally on publishing and library practices. It asserted that publishers

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[72] *See* FINAL COMMENTS, *supra* note 63, at 21; *see also* ALA'S LIBRARIAN'S COPYRIGHT KIT (1982).

[73] FINAL COMMENTS, *supra* note 63, at 22.

[74] *See infra* note 81.

[75] *See* FINAL COMMENTS, *supra* note 63, at 24-28. The proposed "umbrella statute" would allow users to copy upon payment of a fee, but would otherwise exempt users from paying attorney's fees or damages for copyright violation if certain requirements are met.

[76] R. WEDGWORTH, E. COOKE & N. MARSHALL, RESPONSE OF THE AM. LIBR. ASS'N TO THE 1982 KING RESEARCH REPORT ON PHOTOCOPYING IN LIBRARIES (1982) [hereafter AM. LIBR. ASS'N RESPONSE]. Comparable responses by law librarians include Heller, *Report to the Copyright Office by the American Association of Law Libraries - July 30, 1982*, 75 L. LIBR. J. 438 (1982); Hunter, *Library Reproduction of Musical Works: A Review of Revision*, 32 LIBR. TRENDS 241 (1983) (critical of King Report because it ignores library reproduction of music materials); Marshall, *Register of Copyrights' Five-Year Review Report: A View from the Field*, 32 LIBR. TRENDS 165 (1983).

[77] AM. LIBR. ASS'N RESPONSE, *supra* note 76, at 3.

can deal meaningfully with the copyright problem and called upon them to do so.[78]

The Association claims that, contrary to the publishers' report, the King Report provides "a solid statistical basis" for the conclusion that the 1976 Copyright Act achieves the intended balance between the rights of creators and users, and demonstrates the overwhelming compliance of librarians with the 1976 Act.[79] In evaluating this dispute with the publishers over section 108, it is important to note that librarians are neither copyright "police" nor school teachers for the photocopying public, nor should they be recast by the law into those roles.[80] The recent recommendations of the Register of Copyrights for changes in section 108 may provide an impartial resolution to this dispute.

3. The Position of the Register of Copyrights

In January 1983, the *Report of the Register of Copyrights: Library Reproduction of Copyrighted Works* was published.[81] This comprehensive study and analysis of library photocopying provides a wealth of information on the subject.[82] According to the Register's Report, it is perhaps still possible that the librarians and the publishers could agree so that the issues involved will not have to be resolved by the courts.[83]

The Register recommends adoption of the "umbrella statute" pro-

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[78] *Id.* at 5.

[79] *Id.* at 6. The Association cites the King Reports of 1977 and 1982 as clear support for its belief that "it is time to lay to rest unsubstantiated allegations and baseless assumptions that librarians are abusing or violating the copyright law . . . ." FINAL COMMENTS, *supra* note 63, at 6.

[80] One potential outcome in this dispute might be the decision of librarians to remove photocopying equipment from the library premises. While this might make some publishers happy, its adverse effect on research and scholarship would be enormous.

[81] U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS, REPORT OF THE REGISTER OF COPYRIGHTS: LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (1983) [hereafter REPORT OF THE REGISTER]. The American Library Association has published its response to the Register's Report. *See Comments of the American Library Association on the Report of the Register of Copyrights to Congress* (1983).

[82] For example, the Report includes discussion of copyright practices under the 1909 Act, the 1976 Act and the balance that it seeks between the rights of users and copyright owners, the rights of the copyright owners, library practices and copying, modes of compliance with the Act, the King Report and its findings, new technology and copyright law, computerization and libraries, changes in publishing, video cassettes and disks, data bases, educational software, electronic journal publishing, changing library operations, library reproduction abroad, and many more topics. Only some of the main topics and recommendations contained in this massive study can be discussed in this Article.

[83] REPORT OF THE REGISTER, *supra* note 81, at 11.

posed by the publishers. Under this statute, a periodical's publisher would have a single remedy, a "reasonable fee," for infringements. The section would protect members of a collective licensing arrangement.[84] The copier would not have to worry about securing permission before making a copy, but would have to pay a fee. In this respect, the "umbrella" concept is similar to the CCC.[85]

The Register also recommends that section 108 be amended explicitly to require actual notice of copyright to appear on library photocopies, rather than the more general notice now used.[86] Finally, the Register has urged the development of voluntary guidelines for library photocopying under section 108.[87] Anyone engaged in library photocopying should adopt a conservative reading of section 108 until this controversy is resolved.

B. Survey of Publishers' Copyright Policies and Practices

Although copyright infringement does not turn on a fixed number of words,[88] fair use has frequently been described as 50 to 100 words, or possibly even 500. With this in mind, some major American publishers were asked about their policies and practices respecting fair use and other related subjects. Our questionnaire to a random sample of commercial publishers, university presses, scholarly and scientific journals asked about using word count to determine fair use, the use of copyrighted material quoted in a dissertation or thesis, fees for reprinting, if any and when levied, recognition of the guidelines for classroom copying, and participation in the Copyright Clearance Center.[89] The results of this survey are summarized in Appendix C.

Copyright infringement requires that there be "substantial similarity" in the ideas and the expression between the two works.[90] Thus, no

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[84] *Id.* at 361.

[85] *See supra* text accompanying notes 60-65.

[86] *See* REPORT OF THE REGISTER, *supra* note 81, at 361-62. In this respect, the Register agrees with the publishers. *See supra* note 81.

[87] REPORT OF THE REGISTER, *supra* note 81, at 359.

[88] *Cf.* 3 NIMMER ON COPYRIGHT § 13.03(A)(2) (1983) [hereafter 3 NIMMER].

[89] A well-known New York publisher refused to comment on the survey, saying that "we have a policy of not disclosing our publishing practices." Others wrote freely, often expressing their frustrations and hopes for a wider public understanding of copyright, especially fair use. The responses came from vice-presidents, permissions editors, copyright administrators, and one publisher's lawyer.

[90] *Id.* § 13.03. The "idea-expression" dichotomy is that copyright does not protect ideas but protects the expression of ideas. *See supra* note 15; *see also* Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1163-64, 1170-71 (9th

word count can be stated as the minimum quantum permitted without violating substantial similarity.[91]

The responses indicate that no consensus exists among the publishers surveyed about fair use.[92] In most instances, a word count was not used. Many of those responding did not seem to fully understand the meaning of fair use under section 107; in fact, one publisher even reported that fair use was not part of copyright law. We also found that there are interesting variations in publishers' policies respecting photocopying and granting permission to quote from their works.[93]

As a practical matter, fair use is sometimes incorrectly used by publishers to refer to the *de facto* amount of copying they will allow before they become alarmed and bring an infringement action. Fair use is a technical, legal term. Thus, if an educator is uneasy about the use of material, direct contact with the publisher may be the most expedient method to resolve the problem.

Cir. 1977) (if ideas substantially similar, trier of fact must look to substantial similarity in expression of ideas).

> Where the literal similarity is as much as *three or four hundred words* it is clear that the trier may properly conclude that such similarity is substantial. But what if the similarity is only as to a single sentence? Ordinarily, the importance of but one line in plaintiff's work would not justify a finding of substantial similarity. . . . it is most unusual for infringement to be found on the basis of similarity of *a single line*, ...

3 NIMMER, *supra* note 88, § 13.03(A)(2), at 13-36 to 13-37 (emphasis added); *cf.* Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (three sentences copied from book on human voice and used for advertising held infringement). *Contra* Jackson v. Washington Monthly Co., 481 F. Supp. 647, 650 (D.D.C. 1979) (two sentences copied held not an infringement). For other such cases on what constitutes infringement, see 3 NIMMER, *supra* note 87, § 13.03(A), at 13-34 nn.56 & 58; *see also* Miller Brewing Co. v. Carling O'Keefe Breweries, 452 F. Supp. 429, 439 (W.D.N.Y. 1978) (paraphrasing as infringement).

[91] 3 NIMMER, *supra* note 88, § 13.03(A)(2), at 13-33.

[92] *See infra* Appendix C.

[93] Twelve of the 16 publishers surveyed responded that they were not participants in the Copyright Clearance Center, three belong, and one did not respond to this question. *Id.*

Others who have sampled publisher fair use practices caution that there is a general policy of "requiring permission for everything quoted . . . to be on the safe side, ask permission in writing for anything you want to reprint." 80 EDITORIAL EYE 2 (Oct. 1982). The editor of this publication says, "Fair use [is] . . . whatever the copyright owner decides is a fair quotation. . . ." *Id.*; *see also* White, *Results of a Survey of Publisher Practices and Attitudes Toward the Authorization and Licensing of Library Copying under the Terms of the New Copyright Law*, 15 AM. SOC'Y FOR INFORMATION SCI. PROC. 349 (1978).

III. COPYRIGHT LITIGATION

Recent copyright infringement suits have taken two directions, and both appear to favor the plaintiff publishers. One direction is for the defendant, a nonprofit university, to vehemently deny to the press any wrongdoing and to declare that the "university will fight the charges in court."[94] The other direction is for the lawsuits to have gone directly into trial, and thus far, the nonprofit infringers have lost.

A. Case Law Prior to General Revision of the Copyright Act of 1976

The case law on infringement immediately before 1976 included *Williams & Wilkins Co. v. United States*,[95] in which the Court of Claims held that the United States Government Library's unauthorized photocopying of articles from medical periodicals for and at the request of medical researchers and practitioners was a fair use and not a copyright infringement. The court stated that it was "convinced that medicine and medical research will be injured by holding these particular practices to be an infringement."[96] On appeal, the case was affirmed by an equally divided United States Supreme Court,[97] and therefore is not authority. However, the decision probably has contributed to the widely held belief among educators and others that their work was likewise entitled to exemption from the new copyright restrictions.

B. The Post-1976 Cases and the Pre-Trial Compromises

1. Cases Relevant to Educators

Basic Books, Inc. v. Gnomon Corp.[98] was an action against a chain of copy shops serving various university campuses. The publishers complained about the company's "Micro Printing" service, which created anthologies of copyrighted materials supplied by the professors and

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[94] *Cf.* Chron. of Higher Educ., Apr. 27, 1982, at 20 ("The American Society of Composers, Authors, and Publishers sued Texas Tech University last week for copyright infringement . . . A lawyer for the university denied the charges of copyright infringement.").

[95] 487 F.2d 1345 (Ct. Cl. 1973), *rev'd* 172 U.S.P.Q. 670 (1973).

[96] *Williams & Wilkins*, 487 F.2d at 1354.

[97] 420 U.S. 376 (1975).

[98] 1978-81 COPYRIGHT L. REP. (CCH) ¶ 25,145, at 15,847 (D. Conn. 1980); *see also* Harper & Row Publishers v. Tycocopy Serv., COPYRIGHT L. REP. (CCH) ¶ 25,230, at 16,361 (D. Conn. 1981).

then sold to students. Shortly after the suit was filed, Gnomon agreed to an out-of-court settlement.[99]

In *Oxford University Press v. The Visitors of Longwood College*,[100] the chairperson of the Longwood College music department had photocopied sheet music from five copyrighted Christmas carols for student use in a performance. The United States District Court found that the chairperson had infringed the publishers' copyrights and awarded the publishers statutory damages of $500 for each infringed musical composition and reimbursement of $17,500 in attorney fees.[101]

In *Marcus v. Rowley*,[102] the court of appeals carefully examined the fair use provisions of section 107 and found a violation of the statute by a teacher, although the publication was used for an educational purpose. In *Addison-Wesley Publishing Co. v. New York University*,[103] a copy shop and nine faculty members were sued by the publishers, who complained that the University and its faculty used the Copy Center to compile anthologies of copyrighted materials. An out-of-court settlement was reached with the University and the professors but not immediately with the Copy Center.[104] The University agreed to include material about its photocopying policies and procedures in the faculty handbook to encourage compliance with the copyright law, and agreed that faculty members who violated such policies would be subject to discipline and not provided with indemnification or defense if sued.[105]

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[99] *Quick Printers Mull Copyright Options*, Publishers Weekly, Sept. 23, 1983, at 16. Gnomon agreed to the settlement only because it could not afford a costly court fight, saying "We object to the publishers' strategy of ganging up on Gnomon, a small business which obviously could not afford the high costs of mounting a full defense." *Id.* The copyshops allege that they are being caught in the middle between two warring factions — the owners and the users of copyrighted materials. The National Association of Quick Printers (NAQP) may "attempt to secure an exemption from the 1976 Copyright Act" for its members. Customers are being asked to sign forms which "indemnify the photocopiers from any responsibility for infringement." *Id.*

[100] No. 81-0337-R (E.D. Va. filed Oct. 23, 1981) (consent judgment).

[101] The Consent Judgment further provided, "All other claims and counterclaims are hereby dismissed with prejudice and all parties waive their right to appeal from any aspect of this Consent Judgment." *Id.*

[102] 695 F.2d 1171 (9th Cir. 1983).

[103] Unpublished decision (S.D.N.Y. filed Dec. 14, 1982); *see also* Palmer, *Publishers Sue 9 Professors*, Chron. Higher Educ., Jan. 5, 1983, at 1.

[104] *See Publishers and NYU Settle Photocopy Suit*, Publishers Weekly, Apr. 22, 1983, at 20; *see also* Palmer, *Settlement of Copyright Suit Fails to End Dispute over Photocopying*, Chron. Higher Educ., Apr. 27, 1983, at 1; *Unique Settles Copyright Suit with Nine Publishers*, Publishers Weekly, June 10, 1983, at 27.

[105] *Publisher and NYU Settle Photocopy Suit*, Publishers Weekly, Apr. 22, 1983, at 20. The American Association of University Professors (AAUP) has expressed interest

While none of the above cases has been tested at the highest appellate level, they suggest caution for the educator who engages in extensive photocopying without permission, thinking that it constitutes fair use. The cases illustrate that the publishers, previously inactive, are now pressing legal actions to discourage unauthorized copying in educational contexts. There is a clearly discernible trend demonstrating publishers' willingness to prosecute university groups and individual faculty members who infringe copyrights through unauthorized reproduction.

2. Cases Relevant to Library Photocopying

Two recent cases, both concerning videotaping of copyrighted programs, one for classroom educational purposes and the other for home entertainment, could have provided guidance on the issue of library photocopying. However, *Sony Corp. v. Universal City Studios*[106] did not fulfill that expectation. *Encyclopaedia Britannica Educational Corp. v. Crooks*[107] is worth noting because the defense of fair use was rejected when the defendant made videotapes for classroom use of some educational television programs. Analyzing the videotaping under section 107, the court found that harm done, even for the salutary purpose of teaching school children, is not fair use.[108] *Encyclopaedia Britannica* did not decide that all copying for educational purposes would constitute an infringement; rather that the extensiveness of copying involved was unreasonable and therefore not protected by the statute's fair use provisions.[109] This case thus differs from that of a single university professor duplicating materials for use by her students, but is similar to a commercial operation undertaken by a nonprofit organization.

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in the copyright controversy and AAUP Director of Government Relations Alfred Stumberg has stated that college teachers may have been "unduly frightened" by the publishers' lawsuits. Chron. Higher Educ., Apr. 27, 1983, at 1. The New York University policy is reprinted *infra* Appendix B.

[106] 104 S. Ct. 774 (1984); *see also* Note, *Every Home Should Have One: The Betamax as a Staple Article of Commerce in* Universal City Studios, Inc. v. Sony Corp. of America, 16 U.C. DAVIS L. REV 211 (1982).

[107] 542 F. Supp. 1156 (W.D.N.Y. 1982) (injunction ordered).

[108] *Id.* at 1175.

[109] *Id.* at 1174-77. Plaintiffs sought $93,000 statutory damages, while defendants argued they were entitled to only $265. *Id.* at 1185. Costs of $78,515 were awarded on March 29, 1983. *See* Washington Newsletter, July 7, 1983, at 1.

CONCLUSION

The controversy over the copyright implications of photocopying has just begun. Although publishers have proposed several practical solutions, none answer the threshold question of the extent to which a copyrighted work may be duplicated without the copyright owner's permission.

Likewise, many teachers, students, and researchers have failed to recognize the existence of the copyright law or their obligation to respect the rights of copyright holders. Until court decisions or legislation clearly establish the bounds of fair use and the scope of section 108, a conservative approach to copying, even for educational purposes, is warranted. Otherwise, the educator and her institution are likely to be sued.

Until now, publishers have been reasonable in their actions, attempting to resolve the problem through "cooperation" and "voluntarism" on the part of the users of copyrighted materials. The Copyright Clearance Center is an example of this approach. Even when the publishers have brought infringement actions, the remedies they have requested appear fair and reasonable — usually no more than a requirement to cease the illegal practice and join the Copyright Clearance Center and pay royalties in the future. There is no indication that this will change.

The copyright problem has many dimensions.[110] One of these involves the practices engaged in by the academic community; another involves the practices of the community at large. Solutions that are appropriate for the academic community may not be appropriate for the community at large. Commercial copy stores may eventually be treated

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[110] The 1976 Act preempted equivalent rights in any work under the common law after January 1, 1978. 17 U.S.C. § 301 (1982). In the case of letters, oral histories, and other such unpublished scholarly works, this presents interesting copyright problems: unpublished works created before January 1, 1978 are subject to the divesting provision of § 303 of the 1976 Act; after the year 2002, such works are no longer protectable by copyright, common law, statute, or otherwise. *See* 17 U.S.C. § 303 (1982); 1 NIMMER, *supra* note 2, § 5.04 (letters); 2 NIMMER ON COPYRIGHT § 9.01(B) (1983). The great treasures in our libraries, ancient manuscripts and works of art, which under the 1909 Act were secure by their common law copyright until published, will then be vulnerable. Curators of museums and librarians after the year 2002 will be obligated to rely on contracts and agreements with their patrons to maintain secrecy whenever these works are shown or displayed. We can picture the hypothetical museum or research library of the year 2002 requiring scholars and even visitors to sign "pledges of confidentiality" whenever they use or view these unprotected treasures. There is no such problem with oral histories and other such works created after January 1, 1978 provided they are fixed. 17 U.S.C. § 302 (1982); *see also supra* note 25 (discussing fixation).

more harshly than schools and libraries by the publishers seeking to enforce the copyright law.

In the course of this study, we detected no evidence that the academic community is making any substantial modifications in its behavior towards the use and misuse of copyrighted materials. Although the New York University suit and settlement brought the problem to the attention of administrators, faculty, and other personnel at that institution,[111] the practices complained of continue around the country at thousands of colleges and universities and in public and private libraries. Since this study originated, public copy shops have continued to proliferate and expand their services, so that now it is possible to copy anything and in almost any number of copies at these street corner businesses where questions about copyright are not always raised.[112]

Not only the academic community, but the community at large, needs to be educated about the significance of copyright. It may be that the publishers alone cannot solve this problem even when they try.[113]

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[111] *See* Palmer, *Photocopying in Academe: Has Lawsuit Curbed It?*, Chron. Higher Educ., Mar. 16, 1983, at 21 (discussing impact of N.Y.U. suit on day-to-day operations of some universities). The *Wall Street Journal* subsequently reported that the N.Y.U. law school placement office had distributed a quantity of unauthorized copies of an article from *The American Lawyer* magazine. Rather than face another copyright suit, the law school paid *American Lawyer* one dollar for each distributed copy, an amount described as "substantially more than it would have cost to have done the whole thing legally." *Law School Copies University's Error*, Wall Street J., Mar. 22, 1984, at 31, col. 3.

[112] *But see* Fields, *Quick Printers Mull Copyright Options*, Publishers Weekly, Sept. 23, 1983, at 16-17. The National Association of Quick Printers has sent its members a form for customers to sign when there is a possibility that the material to be duplicated is copyrighted. Such indemnification forms may be worthless, however, since the customer will generally be ignorant of the copyright law and will sign the form without leaving his correct address and telephone number in case someone objects and wants to sue him.

[113] Recently, Springer-Verlag, a publisher of scientific and technical periodicals, notified college and university librarians that they would be permitted to make up to six copies of Springer publications free of charge for reserve book room use if the librarians would sign a "reserve permission letter" describing restrictions that the librarians would be expected to place on the use of the photocopied material. Reproduction would otherwise be prohibited except for arrangements through the CCC. The letter apparently was a company conceived generalized response to requests from some librarians for blanket permission to make copies for reserve book room use of Springer publications, and was intended to decrease the need for continued correspondence. However, the ALA cautioned its members to consult legal counsel before signing, and said that the Springer letter misstated the law regarding photocopying, especially the fair use provisions of § 107. Springer responded that "When photocopied material is put into reserve-room use it is 'systematic copying and not 'fair use' copying." Chron. of Higher

One helpful solution may be that the more the subject and law of copyright is kept before the attention of the academic community, the more likely that professors, students, and researchers will develop an appreciation of the subject and will develop the habit of following the law. The same might be said of the community at large.[114]

Educ., May 23, 1984, at 11, col. 1.

[114] Ezra Pound, translating from Stendhal, once pointed out that it generally takes about 80 years for any new idea or invention to reach the attention of the public and become widely known by it. E. POUND, HOW TO READ 9 (1931). If this is true, perhaps one should not expect that the copyright problem will be solved until we are well into the year 2014. *Cf.* Petre, *Statutory Copyright Protection for Books and Magazines Against Machine Copying*, 14 COPYRIGHT L. SYMP. (ASCAP) 180, 200-02 (1966) (discussing "custom" in scholarly copying). About 40 years ago, Professor Chafee stated:

> Copyright is the Cinderella of the law. Her rich older sisters, Franchises and Patents, long crowded her into the chimney-corner. Suddenly the fairy godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of a glamorous ball.

Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 503 (1945).

APPENDIX A

CLASSROOM GUIDELINES*

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 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.

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.

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* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 68, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5681-83.

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*) "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 sub-

stitution may occur whether copies of various works or excerpts therefrom are accumulated or 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, publishers' 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 B

NYU's New Policy*

The following is the text of the policy statement adopted by New York University as part of its out-of-court settlement of the lawsuit by nine publishers who charged copyright infringement:

In December, 1982, several 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 per-

* Source: *Copyright Infringement and Photocopying*, Chron. of Higher Educ., Apr. 20, 1983, at 22, col. 2.

mission 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 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 A; see immediately above] 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 A], permission to copy is to be sought. An explanation of how permission may be sought and a procedure for furnishing to the administration information concerning the responses by copying 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 does not receive such permission (or has received 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.

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.

APPENDIX C

Fair Use

Question (A)

1. "Fair use is not specified by us (nor in the law, I believe)."
2. "No number of words is considered fair use."
3. ". . . there are no exact rules which measure fair use, only the guidelines set down in section 107 of the 1976 Copyright Act. Our company, therefore, has no specific number of words which it considers fair use . . . the use of a limited number of short passages in a scholarly work, as clarification or illustration, would certainly be considered fair use . . . provided that the material is not poetry or music."
4. "We are aware that the use of a certain number of words

may be considered 'fair use.' We prefer that anyone wishing to reprint any material from our books, apply to us for permission."

5. ". . .we review and evaluate each request on its own merits. There are many variables . . . ."

6. "We do not consider a set number of words to be an appropriate way to measure fair use, although it is a factor which contributes to the final evaluation of the request. We would have to see different kinds of works since there are relatively few words in a children's book or short poem when compared to a novel or college textbook."

7. "This society considers 200 words, or less than 1% of a full article 'fair use.' Such material may be reproduced royalty free."

8. ". . . we allow direct quotes of 500 words of prose and two lines of verse as fair use, but written permission must be obtained for more than two lines of verse, illustrations, quotations complete in themselves (e.g., brief stories, essays, and letters) or when used as primary material for its own sake (as in anthologies or books of readings)."

9. "We are unable to give you many firm rules about our handling of 'fair use' inquiries since the whole subject is so confusing. It is our feeling that 'fair use' depends far more on the actual use than on the number of words."

10. "Brief quotation — a few sentences — I consider 'fair use.' "

11. "We consider one page or less to be fair use."

Question (B)

Dissertations and Theses

1. "There is no objection to the use of brief excerpts in a thesis or dissertation without written permission, provided the thesis will have the usual limited distribution and the full credit is given to the source. However, should the thesis be published commercially, formal permission should be sought."

2. "We would not generally charge a fee if the material is to be used in a dissertation . . . ."

3. "There is never a fee for this use, although written permission should be obtained."

4. "For a doctoral dissertation or thesis, we permit 1,000/2,000 words without charge, with the restriction that further

permission must be obtained if commercial publication is planned."
5. "In nine years' time, I cannot recall one instance of receiving a permission request for quotation in either doctoral dissertations or master's theses. Were I to receive any, I would grant them without distinction, free of charge."
6. "We make no distinction since dissertations are possibly published commercially."

Question (C)
Fee Charged, If Any

1. "Our fees are sometimes negotiable."
2. "The fees vary based on the nature and amount of material to be used and on the intended use and user."
3. ". . . a fee is based on the type of book in which our material will appear, the number of copies to be printed, and the rights requested (U.S., world rights, etc.)."
4. "There are several factors . . . whether the material will appear in a competing publication; whether the request is from a nonprofit organization . . . whether our material is currently available for sale, etc."
5. "We charge fees varying with the newness of the book being quoted . . ."
6. "There is no fixed fee, nor is there a standard sliding scale."
7. ". . . if the material is quoted verbatim, we have a fixed amount per page or chapter. Where the text is abridged drastically (i.e., the 'meat' of the books is taken) the charge is quite high, as is where the material has been adapted."
8. "The fee is set on a sliding scale."

Question (D)
Classroom Copying: The Guidelines

1. "We do not consciously abide by the Guidelines. A quick survey of some of my colleagues at other institutions showed that none of us knew what that was!"
2. "While permission for classroom use is almost always granted, a modest fee is charged in some cases."
3. ". . . while we really have no control over this [photocopying for classroom use], we would prefer that we receive a written request for such duplication."
4. ". . . we may charge a fee depending upon the amount of material to be reprinted and the number of copies to be

made."
5. "We ordinarily grant permission . . . unless doing so would entail loss of sales that would otherwise occur."
6. "When colleges want to photocopy 25/50 copies of a chapter as a handout to their students, we ask a token sum. We charge more, though, when our material goes into a collection or readings for distribution to students."
7. "I am not familiar with the specifics of the 'Agreement'; however, section 107 of the law does deal with classroom copying."
8. "We do not recognize the guidelines for classroom use."

Question (E)
Copyright Clearance Center

1. "The Copyright Clearance Center was originally set up to deal primarily with duplication of articles from journals and periodicals. While it does include some, book materials are not yet included to any major extent . . . ."
2. "We belong to the Center; however, we also handle many requests directly through our Permissions Department."
3. "We do not participate in the C.C.C."