Copyright at a Turning Point: Corporate Responses to the Changing Environment

Kenneth D. Crews
Indiana University School of Law-Indianapolis

March 1996

Follow this and additional works at: https://digitalcommons.law.uga.edu/jipl
Part of the Intellectual Property Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uga.edu/jipl/vol3/iss2/2
ARTICLE

COPYRIGHT AT A TURNING POINT: CORPORATE RESPONSES TO THE CHANGING ENVIRONMENT

Kenneth D. Crews*

I. INTRODUCTION

Recent court rulings on copyright underscore that the law can make even the most ordinary photocopy habits the object of legal threats and lawsuits.¹ Corporations, educational institutions, and

* Associate Professor of Law and of Library and Information Science; Director, Copyright Management Center; Indiana University School of Law-Indianapolis, 735 West New York Street, Indianapolis, Indiana 46202-5194, (317) 274-4400 (kcrews@iupui.edu). The author is grateful for the assistance of many individuals who supported this project and who helped improve the content and style. Two students in the Indiana University School of Law-Indianapolis provided valuable research: Kari Bowie, class of 1995, and Jeffrey Fugal, class of 1996. Mr. Fugal made especially important editorial suggestions. My secretary, Judy Homer, forged through multiple revisions, complex notes, and several drafts to make the final work comprehensible. The legal counsel for the Copyright Clearance Center provided essential insight about the CCC and its policies and services. Finally, the interviewees gave generously of their time and knowledge to make this study meaningful and even possible. My thanks to all of these individuals.

government agencies may be the targets of copyright infringement actions if their copying reaches beyond the vague and uncertain limits of fair use. In *American Geophysical Union v. Texaco Inc.*, the giant petroleum company, Texaco, found itself in such a position. After years of procedural maneuvering and litigation, the company failed to persuade either a U.S. district court or the Second Circuit Court of Appeals that even isolated instances of photocopying in pursuit of corporate research were within lawful limits. The company not only faced adverse publicity and the prospect of a sizable judgment, but it no doubt incurred millions of dollars of legal fees, both for its own attorneys and possibly for the successful plaintiffs. The *Texaco* decision has been a high-profile alarm; for-profit companies in many industries throughout the country may now be compelled to reexamine their habits, practices, assumptions, and policies in light of that decision.

A common response to *Texaco* and other recent developments has been fear. News reports of copyright litigation leave employees and executives wondering if their activities will draw attention from copyright owners and if their company will be the subject of the next legal action. This widespread re-evaluation, however,
proceeds with little guidance and little sense of the exact limits of user rights under copyright law. Corporate officials could probe and test the complex limits of fair use more thoroughly, but they do not want to cross the invisible line and become the law's next victim. Given the risk, they choose to avoid the dilemma and exercise caution. Most companies have information needs that simple duplication and other fair-use possibilities can often satisfy. Executives and employees in nearly all industries rely from time to time on copies of articles, downloaded data from electronic sources, and other materials that may or may not be reproduced appropriately within the limits of copyright law.

This Article will examine how five for-profit companies have responded to the environment of heightened copyright sensitivity. The study is based on interviews with one key official at each of the five companies. These companies represent five different industries, and the interviews were often far-ranging in scope and content. This study will show some important patterns in corporate responses to the changing obligations of copyright law. More important, the interviews reveal issues of frequent difficulty, and they identify possible solutions for troublesome legal tangles. Often the focus will be on isolated actions that individual firms may address alone. Other situations, however, suggest the need for restructuring the relationship between copyright owners and the users of their works. New proposals for reforming the copyright equation may emerge from these observations. Changes may arise in local policy measures, in new alliances between copyright owners and users, and in revisions of the federal copyright statutes.

II. METHODOLOGY

The five firms were selected for this study specifically to achieve diversity of industry and size. They range from a major oil


6 The author invited seven firms to participate in the interviews. All seven originally accepted, but two interviewees canceled their participation, citing confidentiality as the reason. In both cases, the cancellation occurred only after each interviewee consulted with a supervisor or superior at her company. The individuals wanted to participate, but their
company to a sophisticated but unassuming document delivery service. The companies include a sole proprietorship and a publicly held corporation on the "Fortune 100" list. The five firms are located in five different cities. The author has no affiliation with any of the companies beyond the interviews. The author had previously met two of the five interviewees at professional conferences, and later contacted them to participate in the interviews. Two other interviewees were referrals from individuals who knew that the interviewees were involved in copyright matters at their companies. The fifth interviewee was chosen due to her firm's prominence in an industry affected by copyright concerns.

The five firms will be identified throughout this study as follows:

**The Law Firm:** a firm of more than 100 lawyers with a diverse corporate and litigation practice, including the representation of high-technology companies. The lawyers specialize in many fields of law, including intellectual property. The interviewee is the director of the law library.

**The Oil Company:** a major company active in all aspects of oil exploration, transportation, and refining. The interviewee is a senior in-house attorney.

**The Public Utility:** a large concern serving a major metropolitan area and the surrounding region, with offices located throughout the area. The interviewee is the director of the law library.

**The Document Service:** a modest but busy enterprise that retrieves and delivers printed materials for clients who need technical information for research and manufacturing. The company maintains a large collection of documents—mostly technical "specifications and standards" developed by diverse professional associations—and ships them directly to the users who need the information. The company operates out of one low-profile location, but serves clients throughout the United States. The interviewee is the owner of the company.

---

supervisors barred all communication. One interview was fully scheduled, but was canceled the day before it would have occurred. Both firms are in the computer industry. One produces hardware and software; the other manufactures semiconductor chips. A possible but unstated reason for not participating could be disclosure of attorney-client confidences. For example, if the company retained legal counsel to provide advice on copyright matters, the advice might be privileged information, and disclosure to the researcher could jeopardize that protection.
The Photocopy Service: a multi-state chain of photocopy shops open to the public to serve customer needs for reproductions, telefacsimile transmissions, and other services. The interviewee is a paralegal who handles copyright inquiries.

Confidentiality was a major issue from the outset of this study. The author took fundamental steps toward alleviating concerns and improving the candor of communication. The author informed each participant before her interview that neither she nor her company would be identified by name in this article. The author also supplied each participant with a draft of this article prior to publication and invited each participant to express concern or satisfaction with the identification of the individual and the company as they appeared in the draft. At no time, however, were the interviewees allowed to control either the substantive content of this article or the author's observations and conclusions. The commitment to confidentiality was essential for some participants, while others seemed relatively unconcerned. Nevertheless, the same commitment and procedures were extended to all.

Confidentiality is also a limitation on this study. Due to the need to protect identities, many specific points cannot be confirmed from other sources. For example, descriptions of dealings with the Copyright Clearance Center (the "CCC") are potentially one-sided. If a participant made an observation about dealing with the CCC, the researcher could not verify those specific transactions without disclosing the interviewee's identity. Nevertheless, because the CCC was prominent in the interviews, the author submitted an early draft of this article to it and received extensive written comments from the in-house legal counsel. This Article will reflect those comments by adding the CCC's perspective on the details raised by the interviewees and by bringing the discussion current with the CCC's latest practices. At no time, however, did the author share the identity of any interviewee or her company.

All interviews were conducted in a similar manner. Four interviews occurred in private face-to-face meetings between the

---

7 As an additional gesture of confidentiality, all interviewees are identified in this article by the feminine pronoun, even though males and females were interviewed. The selection of the feminine pronoun is unrelated to the gender of the interviewees. The author simply flipped a coin.
author and the interviewee. One of those four began as a lengthy telephone interview, but expanded into a subsequent meeting encompassing many of the same issues. Only one interview was confined exclusively to the telephone. No other person was present during any interview. The author did not record the interviews on audio or video tape, but did openly take notes at all times. All initial interviews took place during August 1993. The interviews, therefore, occurred slightly more than one year after the district court's ruling in Texaco. Several months after the Second Circuit's ruling in the Texaco case, and immediately after its settlement in May 1995, the author engaged each interviewee in follow-up discussions and correspondence to reflect more recent developments at each firm.

The use of interviews as a methodology has both a beneficial and a detrimental effect on the reliability of the study. The interviewees spoke almost entirely from memory. They recounted past events and described current practices and policies, often without immediate reference to documentation. On a few occasions they directed attention to tangible evidence of corporate action, such as a statement in an employment manual, a sign posted on a photocopy machine, or a formal copyright policy document. Every effort was made in this study to select interviewees with broad oversight of copyright issues, particularly librarians and senior officers. As will be shown repeatedly, librarians are frequently the crucial link in copyright compliance, while senior officials are well-positioned to establish or oversee formal copyright standards.8

Although interviews are undoubtedly affected by the usual human limits of memory and perception, interviews are also the only means for reaching certain information. Copyright practices are often a set of habits or generally accepted routines within an organization, rather than formal codes of conduct by which behavior may be strictly measured. The chronology of events leading to a current policy and the reactions of colleagues to the implementation of a new standard are rarely documented. Thus,

---

8 The researcher has found, in other studies, that no one individual will be familiar with all copyright practices within a large organization, even if that person has duties explicitly embracing intellectual property concerns. See KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES 60-61 (1993).
interviews are essential for revealing some of the most significant aspects of copyright's effects. Whenever possible, the researcher obtained copies of the relevant documentation to support the interviews.

The interviews are necessarily anecdotal. They are not meant to convey valid generalizations about all for-profit entities. While they do reveal some common experiences, the interviews primarily demonstrate the diverse reactions and the lack of meaningful direction available to companies as they struggle with difficult legal and practical challenges. While the common observations and difficulties do not necessarily apply to all companies, they manifest that certain issues recur throughout the marketplace where the players attempt to understand and apply copyright.

III. BACKGROUND: COPYRIGHT LAW AND FAIR USE

A. FUNDAMENTALS OF COPYRIGHT LAW

The law of copyright and fair use has been analyzed extensively, and perhaps exhaustively, in a variety of publications. In its most fundamental form, copyright is a set of federal statutes that grants to the creators of original works—including writings, motion pictures, and artwork—the exclusive rights to make many uses of their creative products. Those exclusive rights include rights of reproduction and distribution. Many of the interviews for this article focused on the common practices of photocopying and sharing the copies with colleagues. These simple behaviors implicate possible infringements of at least the reproduction and distribution rights of the copyright owner.


10 Congress has the exclusive power to enact copyright legislation. U.S. Const. art. I, § 8, cl. 8.

11 Other original works of authorship include: musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; sound recordings; and architectural works. 17 U.S.C. § 102(a) (1996).

12 Additional exclusive rights include the right to: prepare derivative works; perform the copyrighted work publicly; and display the copyrighted work publicly. Id.
If the law were limited simply to the set of exclusive rights for the copyright owner, infringements would be rampant. However, the Copyright Act establishes a series of widely ranging exceptions to, or "limitations" on, the owner's rights.\(^\text{14}\) The best known and most applied exception is "fair use." Fair use originated in judicial decisions, excusing some otherwise infringing behavior that might benefit society or cause little harm.\(^\text{15}\) Today the doctrine of fair use is embodied in §107 of the Copyright Act of 1976. Fair use depends on four factors which should be applied to determine whether some activity is or is not an infringement.

The four factors are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.\(^\text{16}\)

These factors are particularly fact sensitive. The circumstances in each case shape the outcome of the fair-use application. Courts struggle to apply the fair-use law to diverse situations, often giving a different weight to each of the relevant factors. Courts have belabored the task of defining fair use in the familiar circumstances of quotations and photocopying, as well as under the emerging and highly uncertain conditions of electronic text and computer software.\(^\text{17}\) In addition, fair use is the principal doctrine that


\(^{15}\) For a study of the history and purposes of fair use, see WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1985).


users of copyrighted works must struggle to apply, as they seek to resolve whether their activities are permissible without the intervention or authority of the courts. Bringing meaning to fair use is exactly the objective of the interviewees for this project as they question their own practices.

B. RECENT FAIR-USE CASES

Recent developments in copyright law have put many companies into a state of fear, frustration, and change. In July 1992, the U.S. District Court for the Southern District of New York ruled in *Texaco* that a scientist at Texaco went beyond the limits of fair use when he made individual copies of journal articles for his personal research needs. In October 1994, in a long-awaited decision, the Second Circuit affirmed that conclusion. The case was a "warning bell" for many private companies. It signaled that common photocopies—even under the most favorable and isolated conditions—can be the foundation of a copyright infringement case. Many of the practices that researchers, librarians, and others within a company may previously have taken for granted were subjected to heightened scrutiny. When an intellectual property attorney at the Public Utility read the district court decision, she became alarmed and immediately sought to prohibit all copying throughout the organization.

The *Texaco* rulings make clear that fair use within many private firms is extremely narrow. The scientist at Texaco was engaged in exactly the activities that are no doubt common throughout the country. He spotted articles of interest for his work and copied them for his research files. The company subscribed to the journal in question, so the copying was not intended to avoid a purchase. Nonetheless, when the court tested the facts against the four factors of fair use, it concluded that the copies were not within the

---

software program by independent service organization loaded from computer's hard drive to RAM not fair use).

19 60 F.3d at 914.
20 *Id.* at 934 (Jacobs, J., dissenting).
District Judge Leval noted in his lengthy analysis that the scientist was employed by a for-profit company, so his research objectives were ultimately for a commercial purpose. The judge also found that even though Texaco purchased multiple subscriptions to the journal, the photocopying evidenced a need for more. Consequently, Texaco should have ordered additional subscriptions or paid a royalty fee for the copies. Either way, the photocopying deprived the copyright owner of revenue, a factor that weighed against finding any fair use.

The Second Circuit Court of Appeals was hardly more generous than the district court, although nearly nine months after handing down its original opinion in the case, the Second Circuit did narrow its application to "institutional, systematic copying." The court's amendment to the opinion explicitly moved the case away from "the question of copying by an individual, for personal use in research or otherwise ...." Nevertheless, under the facts presented, the court ruled that photocopying which increased the availability of articles in a non-transformative and commercial context did not pass the fair-use test. This ruling generated an aggressive dissent from one appellate judge who argued that the majority erred in not recognizing that photocopying of articles was an essential and customary part of modern research and that the availability of permission from the Copyright Clearance Center should not define a new market which would be adversely affected.

21 802 F. Supp. at 28, aff'd, 60 F.3d at 931.
22 The summary of the Texaco decision in this article is of course an oversimplification of the analyses of fair use that the courts provided. More elaborate discussion is not essential here and may be found elsewhere. See, e.g., Laura G. Lape, Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine, 58 ALB. L. REV. 677, 716-17 (1995); Karen S. Frank & Michael J. Higgins, Fair Use: In the Courts and Out of Control?, in ADVANCED SEMINAR ON COPYRIGHT LAW: 1995 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3941, 1995); Katherine C. Spelman, The Copyright Defense of Fair Use, C989 A.L.I.-A.B.A. 1, 4-6 (1995); Steven D. Smit, "Make a Copy for the File...": Copyright Infringement by Attorneys, 46 BAYLOR L. REV. 1, 8-13 (1994).
23 802 F. Supp. at 18.
24 Id. at 19. The Second Circuit applied an equally rigorous standard. 60 F.3d at 931.
25 Id. at 916.
26 Id. at 921-24.
27 Id. at 933-35.
by customary photocopying. As the parties prepared the case for an appeal to the United States Supreme Court, they announced that they had reached a settlement agreement, which as of this writing appears to have brought this case to a conclusion and has left on the books two rulings which sharply limit fair use in the corporate context.  

If the isolated research copying at issue in Texaco is not fair use, little other copying—in the corporate setting—may survive legal scrutiny. Most of the companies within this study were well

---

29 Id. at 936-39.  
31 The court decisions made valiant efforts to identify some possible photocopying that might be judged as fair use, but only under the narrowest of circumstances. In 60 F.3d at 916, its July 1995 amendment to the original October 1994 decision, the majority opinion from the Second Circuit attempted to narrow the decision in order to address “systematic” copying by a large organization, rather than isolated copying by one scientist:  

Rather, we consider whether Texaco’s photocopying by 400 or 500 scientists, as represented by Chickering’s example, is a fair use. This includes the question whether such institutional, systematic copying increases the number of copies available to scientists while avoiding the necessity of paying for license fees or for additional subscriptions. We do not deal with the question of copying by an individual, for personal use in research or otherwise (not for resale), recognizing that under the fair use doctrine or the de minimis doctrine, such a practice by an individual might well not constitute an infringement. In other words, our opinion does not decide the case that would arise if Chickering were a professor or an independent scientist engaged in copying and creating files for independent research, as opposed to being employed by an institution in the pursuit of his research on the institution’s behalf.  

Id. at 916. The dissent was not impressed:  

The majority emphasizes passim that the photocopying condemned here is “systematic” and “institutional”. These terms furnish a ground for distinguishing this case from the case that the majority expressly does not reach: the copying of journal articles by an individual researcher outside an institutional framework. For all the reasons adduced above, I conclude that the institutional environment in which Dr. Chickering works does not alter the character of the copying done by him or at his instance, and that the selection by an individual scientist of the articles useful to that scientist’s own inquiries is not systematic copying, and does not become systematic because some number of other scientists in the same institution—four hundred or four—are doing the same thing.  

...  

The majority’s limitation of its holding to institutional environments may give comfort to inventors in bicycle shops, scientists in garage laboratories, freelance book reviewers, and solo conspiracy theorists, but it is not otherwise meaningful.
aware of the *Texaco* decision and its potentially restrictive application to their businesses. Officers at the Oil Company had watched the case closely, particularly since Texaco and the Oil Company are competitors in the same industry. In light of *Texaco*, the Public Utility took immediate action to restrict the possibility of infringements, while the Law Firm began fully revising its copying policy. The general level of copyright awareness among the interviewees was high.

Like the Oil Company closely following the fate of its competitor in *Texaco*, the Photocopy Service was well versed in the implications of *Basic Books, Inc. v. Kinko's Graphics Corp.* The same district court that decided *Texaco* also ruled in *Kinko's* that the defendant exceeded fair use by making and selling photocopied collections of book chapters for use in local university classes. Kinko's argued that its purpose was to support the nonprofit educational objectives of the nearby universities. Rejecting this contention, the Court discerned that the copies may have had some educational purposes, but Kinko's purpose was strictly profit oriented. Hence, the fair-use quantum did not benefit from an educational "purpose." The fair-use defense eroded quickly. The court ruled that Kinko's went far beyond the photocopying rights that federal copyright law allows. Although *Kinko's* attracted wide attention in the college and university communities, it actually was more instructive of fair use in the corporate world. The *Kinko's* analysis is informative on the amount of fair use available in a context where multiple copies may be made and

---

32 758 F. Supp. at 1522 (S.D.N.Y. 1991). More recently, but long after the interviews for this study, the Sixth Circuit Court of Appeals ruled that photocopying for coursepacks is fair use under facts that are remarkably similar to those of the *Kinko's* case. In April 1996, however, the Sixth Circuit vacated that decision and announced it would hear the case *en banc*. See Princeton Univ. Press v. Michigan Document Servs., Inc., 74 F.3d 1512, 37 U.S.P.Q.2d (BNA) 1673 (6th Cir.), *reh'g en banc granted and opinion vacated*, 74 F.3d 1528 (6th Cir. 1996). For this author's analysis of that ruling, written before the decision was vacated, see Kenneth D. Crews, *The MDS Decision and Fair Use for Coursepacks* (1996), available at http://srl.cni.org/scomm/copyright/mds.crews.html.

33 The Southern District Court of New York.

34 758 F. Supp. at 1526.

35 *Id.* at 1536.

36 *Id.*

37 *Id.* at 1547.
distributed in furtherance of the entity's profit goals.Officials at the Photocopy Service were acutely aware of the Kinko's decision and of the circumstances leading to the court's ruling. As a result, the Photocopy Service adopted an elaborate system for clearing all coursepacks prepared for college and university courses at any of the company's numerous service outlets. The elaborate analysis of fair use in the Kinko's case does allow for some fair use to survive even in the context of coursepacks sold by a commercial enterprise. Moreover, the settlement of the case provided that Kinko's Graphics Corporation itself could include not more than one page from any single work in a coursepack without permission. Despite these remaining opportunities for copying without permission and without payment of royalties, the Photocopy Service chose to make no claim of fair use for any materials included in any of its coursepacks. All items submitted for copying must be cleared, and royalties must be paid if requested by the owner. Rather than struggle with the nuances of fair use, the company simply made a business decision to err on the side of safety and to scrutinize and clear everything as if fair use had no applicability.

Two other recent cases captured the attention of corporate managers, and both involved the duplication and distribution of specialized newsletters. Pasha Publications, Inc. v. Enmark Gas Corp. produced a brief ruling on the fair-use issue, and a separate action brought against a Washington, D.C. law firm resulted in a settlement that was widely reported in the press. In Pasha, a federal district court summarily concluded that fair use did not

39 Id.
sanction the reproduction of newsletter copies made for distribution
to employees within a natural gas company. Not surprisingly,
the interviewee at the Public Utility took particular notice of this
case. The action brought against the Washington, D.C. law firm
resulted in a relatively fast settlement and no court ruling; the
reported cost to the D.C. firm of over one million dollars captured
the attention of librarians and lawyers alike at the Law Firm
within this study. As a direct result of these two cases, the
Public Utility and the Law Firm attempted to reduce the risks of
copyright infringements, especially with newsletters.

An individual firm’s awareness of, and responses to, these cases
have been reinforced through participation in professional associa-
tions, where members may witness strong fervor about copyright,
but see little clear guidance. The interviewee at the Public Utility
participates in a regional group of law library directors, where
copyright is a common topic of discussion. By her observation, few
companies in her urban area exhibited much concern or interest in
copyright, even in the wake of Texaco. At most, she saw some
“stirring,” but generally the companies were waiting for clearer
signals from the business community and were perhaps studying
any existing policies.

---

43 22 U.S.P.Q.2d (BNA) at 1076.
44 For eighteen years the law firm of Collier, Shannon & Scott, located in Washington
D.C. and specializing in, among other areas, products liability, had a subscription to the
Product Safety Letter, a journal that deals with the latest in product recalls, lawsuits and
technology. Costing $657 a year (plus $295 for each additional subscription) the firm decided
to reproduce and distribute copies to its attorneys, rather than pay for additional
subscriptions. Washington Business Information Inc., the publisher of the journal, brought
legal action against the firm. The dispute was ultimately settled for an unconfirmed amount.
Margolick, supra note 42.
45 Id.
46 Publishers have taken strident steps to encourage such behavior by subscribers. For
example, a recent issue of The Energy Report, from Pasha Publications, includes a “Reward
offered for copyright information.” The statement, appearing on the front page of the
January 9, 1995 issue, offers a $2,000 reward for reporting “illegal photocopying or faxing.”
The statement continues:

It is illegal under federal copyright law (17 USC 101 et seq.) to reproduce
by any means this newsletter—in its printed, fax or electronic ver-
sions—for any purpose without the publisher’s permission. Not for
routing. Not for “internal purposes.” Not for FYI memos. Not for
corporate summaries. Not for anything.

Reward Offered for Copyright Information, ENERGY REPORT, Jan. 9, 1995, at 1.
The interviewee at the Law Firm attends annual meetings of the American Association of Law Libraries, where copyright has been a major issue in recent years. The meetings heighten awareness, but they do not necessarily provide direct guidance. The president of the Document Service was generally aware of copyright issues, often through discussions and programs sponsored by the Special Libraries Association. Yet she confessed little knowledge of the specifics of the law, or of how it might apply to her business. She had nonetheless implemented various careful steps to prevent copyright violations.

IV. THE ISSUES

A wide range of issues arose during the interviews, often revealing a pattern of concerns and solutions across the several industries represented. Most interviewees were well aware of copyright, some of its basic principles, and the relevant cases that had been in the news or the subject of professional conference proceedings. Many of the interviewees seemed to recognize that certain matters are the appropriate subject for formal policy-making, while other procedures or activities are better left informal. Sometimes the unexpressed activities are too transitory to define in a formal statement; sometimes they are too incidental or infrequent to bother addressing. Other times they are simply too sensitive or too risky to bring out front in a corporate statement and are better kept in the inner confines of the company “back-room.”

---


A. OFFICIAL POLICIES AND PRACTICES

Official, written policy statements concerning the use of copyrighted works inside for-profit companies are seldom more than self-serving declarations. Policies are carefully drafted with a view toward avoiding any appearance that the companies tolerate behavior that might remotely skirt the line between fair use and copyright infringement. Rarely are such statements instructive about that fine distinction. Rather, they conservatively discourage all activities that might possibly involve copyright infringement. This position is natural and understandable for a commercial enterprise. Unlike nonprofits, for-profit businesses, as demonstrated by the *Kinko's* and *Texaco* decisions, seldom have an extensive claim to fair use.\(^4\) Also, unlike nonprofits, private businesses, as prospective defendants, are less likely to gain sympathy since they may have substantial revenue or possibly even an insurance policy to pay infringement claims.\(^5\) Consequently, motivation to avoid lawsuits overwhelms the policymaking process. Companies may well be prepared to identify and acknowledge some fair use that can survive within the firm; however, the possibilities are hardly ever recognized in formal statements.

*The Oil Company.* The Oil Company's official written policy is a simple and direct example of a standard that is devised to discourage even the risk of an infringement:

The Company respects the copyrights of others. Employees shall not make photocopies or otherwise reproduce or incorporate into Company publications copyrighted works of others absent a license or permission to do so from the copyright owner or as otherwise permitted by law. Company librarians shall assist in obtaining permissions to copy copyrighted works of others. [A designated office]

---

\(^4\) The preamble to § 107 generally limits fair use to teaching, scholarship, and other activities that are seldom the pursuit of private enterprise. The first of the four factors in the statute also favors nonprofit educational uses and does not favor commercial purposes. 17 U.S.C. § 107 (1996).

\(^5\) When a Washington, D.C. law firm settled an infringement case, the firm's insurer reportedly paid much of the claim.
will provide legal advice in regard to statutory library photocopy privileges and obtaining [licenses] or permissions to copy copyrighted works of others as the reasonable business needs of the Company require.

Typical of almost any institutional policy, this statement bars nearly all copying, unless allowed by the law or the copyright owner. The policy fails to indicate any possible types of copying that may be permitted; company librarians are designated to assist employees with such determinations. The policy makes no specific claim of fair use, nor does it give any guidance for understanding it. Taken literally, the policy requires all employees to seek counsel before putting a single page in the copy machine, downloading a paragraph, or even quoting an article in an in-house memorandum. This posture may eliminate risks of litigation, but it also burdens employees and requires an extensive team of experts to address the inevitable questions—from the routine to the complex.

The Law Firm. The Law Firm's personnel manual includes similar generalized language: the firm "does not condone the unauthorized reproduction" of materials, and every employee is responsible for copyright compliance. Exactly what reproduction is "authorized" is never explained, nor is the scope of responsibility detailed. The firm has decided to defer any internal study of fair use until a final decision in the Texaco case is resolved. The firm generally seeks permission for most copying and places a standard warning notice about copyright on all photocopies, on photocopy request forms, and at supervised and unsupervised copy machines. Notices on the unsupervised machines refer users to the personnel manual or to the librarians for further assistance.

---

51 As of this writing, the Law Firm reported no further action in light of the Texaco settlement. See supra note 30.
52 For example, the notice on the copies themselves states "Notice: This material may be protected by copyright law (Title 17 U.S. Code)."
53 The firm might also receive some benefit from the statute that exonerates the library from liability for infringements committed by the user of an unsupervised machine, if the library posts a warning notice. 17 U.S.C. § 108(f)(1) (1996). Whether the library can qualify for the benefits of § 108 is discussed in the text accompanying note 57, infra. Ultimately, that exoneration may be of little consequence. Liability only shifts from the library to the patron. If the patron is an employee, liability returns to the employer under a doctrine of
Although the Law Firm has not pursued significant opportunities under fair use, the librarians believe that § 108 of the Copyright Act offers rights that apply to their firm.\textsuperscript{54} Section 108 sets limitations on the exclusive rights of copyright owners, by granting to libraries the right to make copies under specific circumstances. Of particular applicability to the Law Firm might be the rights under § 108 to make single copies of articles or other short works,\textsuperscript{55} or to engage in photocopying of articles for interlibrary lending.\textsuperscript{56} These opportunities extend only to libraries that meet certain qualifications: the library must be open to the public or to users not affiliated with the parent company, and the reproductions must be made "without any purpose of direct or indirect commercial advantage."\textsuperscript{57} These are demanding thresholds for many private companies. Some organizations will bar all outside users—whether for security purposes or simply for convenience. Corporate libraries will also be hard-pressed to show that their copying had no commercial purpose, especially when a member of the firm requests the material in order to complete a company assignment.\textsuperscript{58}

Despite this broad awareness of copyright within the Law Firm, the \textit{Texaco} case served as a "warning bell" for copyright issues. The firm's copyright lawyers understood how "ridiculous" or "inappropriate" the firm would appear if an infringement allegation were ever waged against this particular firm—which represents many clients seeking to protect their own copyrights. Ironically, despite the presence of copyright lawyers, the librarians, not the lawyers, usually identify and bring copyright issues to the firm's management. Together with the firm's intellectual property lawyers, the librarians are contributing to the development of a new policy memorandum that will cite specific rules and situations

\textsuperscript{55} \textit{Id.} at § 108(d).
\textsuperscript{56} \textit{Id.} at § 108(g)(2).
\textsuperscript{57} \textit{Id.} at § 108(a)(1).
\textsuperscript{58} The legislative history to the 1976 Act indicates some opportunity for § 108 to apply to for-profit entities. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 75 (1976), \textit{reprinted in} 1976 U.S.C.C.A.N. 5659, 5689 ("Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by section 108, even though the copies are furnished to the employees of the organization for use in their work.").
CHANGING ENVIRONMENT

affected by copyright law.

As usual, librarians are in the trenches of copyright warfare. When attorneys request that material be photocopied, the librarians must successfully obtain permission from the publishers before proceeding. For example, a partner in the Law Firm once wanted to photocopy one book chapter. The librarian sought written permission from the publisher and obtained a signed permission form by fax within two days—sufficient time to satisfy the partner’s needs.59

The Public Utility. The Public Utility fully revised its formal copyright policy manual, issuing a new version in early 1993, in direct response to the first Texaco decision. When that ruling was handed down by the district court in July 1992,60 the interviewee sent a copy to the in-house intellectual property attorney, who promptly panicked. The company assembled a committee to begin formulating a new policy, focusing especially on photocopying. Members of the committee included the intellectual property attorney, an attorney in charge of copyright compliance, a legal assistant, and the law librarian—who was also the interviewee for this study.

Having pushed the copyright issues at the Public Utility for several years, the interviewee was particularly eager to serve on the committee, and the Texaco decision was the final impetus to capture attention. The interviewee portrayed the company as on the “cutting edge of [copyright] compliance and concern.” The resulting policy is vastly more explanatory and specific than the Oil Company’s cursory statement, but it is no less draconian in its strict confinement of rights for utilizing information resources. The essential policy position is that the company and its employees must “comply fully” with the law. The four-page document

59 If the librarians truly believed that § 108 applied within the Law Firm, they might have been free to make the copy of the chapter pursuant to § 108(d). The problem with that provision, however, is that it stipulates a variety of requirements: the copy must remain the property of the patron, and the librarians must have no reason to believe that the copy will be used for any reason other than private research or study. Neither of these conditions may be true. The copy will become an important part of the firm’s records, and the partner would most certainly be using it in connection with a particular client matter.

proceeds with a powerful explanation of the penalties that may befall a copyright infringer, including monetary fines and prison sentences. The document also summarizes the sweeping prohibitions against all photocopying and software duplication "without the express permission of the copyright owner." The policy statement refers employees to the librarians or to the computer department to determine whether the company has permission or a license to make the desired copies. Unlike the Oil Company's terse statement which alluded to rights of copying granted by law, the Public Utility's statement does not even hint of fair use or other statutory rights. The policy committee at the Public Utility apparently concluded, after reading the Texaco case, that either fair use no longer applies, or its application may be too complex, uncertain, risky, or valueless to justify.

According to the interviewee, the Public Utility has demonstrated little interest in testing or exploring the application of fair use. In fact, some lawyers at the company are wary of even photocopying court decisions that are probably in the public domain, because the copied pages might include headnotes or other supplemental materials copyrighted by the editors. The librarians recently decided to circulate copies of just the tables of contents from new journals, but only after a panel of experts at a national meeting of the American Association of Law Librarians concluded that copies of just the article names would be justifiable fair use. In reality, however, some isolated individual copying still continues within the company, as the interviewee admitted. Often it is the practical necessity for making a new work available to several readers; sometimes a copy is necessary to safeguard against losing the original; sometimes alternative sources take too much time, and the

---

62 This concern has limited merit. See West Publishing Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 230 U.S.P.Q.2d (BNA) 801 (8th Cir. 1986) (stating that wholesale appropriation of West's pagination and particular arrangement of legal decisions would be copyright infringement), cert. denied, 479 U.S. 1070 (1987).
63 Factual data themselves are not protectible by copyright at all. Thus, fair use may not be necessary to justify copying and distributing only select names, titles, and pages for article citations. See Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 18 U.S.P.Q.2d 1275 (1991) (finding no copyright protection for white pages in telephone directories).
item is needed without delay.

Despite these traces of flexibility, an apocryphal story at the Public Utility has demonstrated the strength of the official strict stance against all copying. During a meeting of senior officers and the board of directors, one officer asked for multiple copies of an important article for immediate distribution to the board members. The librarian who was assigned this task refused, citing the unequivocal company policy against multiple copies. The General Counsel was present and interceded on behalf of the librarian, affirming that the company's position prohibited unpermitted copying. The librarian risked insubordination, but was instead vested with the aura of dutifully adhering to the company's best interests. Such a confrontation in the board room may have dramatic appeal—the staff librarian versus the senior officer—but the story has another purpose as it is diffused by word-of-mouth among the ranks of corporate employees. It spreads awareness of copyright in general, and it bolsters support for, and endorses, the Public Utility's new prohibition against nearly all copying.

In application, the Public Utility has found the new policy reasonably workable. Librarians handle most requests for permission; they require either written permission or send a follow-up letter to confirm oral permission. Publishers generally give consent, especially for single copies. The interviewee singled out only the *New York Times* as "picky," but did not elaborate. Newspapers, in general, have had a wide range of reactions to the in-house "clipping service" of articles about the company. Some papers charge a fee for the copying; some gladly allow the reproductions; others have no policy and no established means for responding to requests for permission.

The Photocopy Service. The Photocopy Service overhauled its position on fair use and its procedure for handling college and university coursepacks following the *Kinko's* decision. Individual stores from around the country must now submit all proposed coursepacks to the company's national headquarters, where the

---

64 Oral permission for such uses is valid, although written documentation has practical advantages. By contrast, any granting of exclusive rights by the copyright owner must be in a signed writing. 17 U.S.C. § 204(a) (1996).

65 *See supra* note 32.
coursepacks are checked for clearances by two full-time paralegals who review the contents and obtain all permissions. The company makes no claim of fair use for any materials included in coursepacks. This procedure has added enormous expense to company operations, but that expense has not motivated the firm to claim fair use. Instead, the new responsibilities have motivated the Photocopy Service to consider abandonment of its college coursepack service. In fact, the burden of checking clearances has forced Kinko's Graphics Corporation itself to drop its practice of making coursepacks, even though the settlement of its case allowed coursepacks to continue and allowed some modicum of fair use.

Another consequence of tightened scrutiny of copyright at the Photocopy Service has been increased involvement of upper-level management in the oversight of common photocopying activities at the many local stores. The company headquarters now sponsors training programs for local employees and managers. Officials from company headquarters visit local stores to train employees, and with increasing frequency the company has declined to accept projects which involve duplicating copyrighted works. Many of the needed permissions are secured directly from publishers or from the Copyright Clearance Center. If more complex issues arise, the company refers questions to an outside law firm.

This restructuring of procedures and tightening of copyright standards arose as a direct result of the Kinko's decision, according to the interviewee at the Photocopy Service. The interviewee knew of no claim or threat of copyright infringement brought against her company. She attributed the new position not only to the specter of legal action raised in Kinko's, but also to a newly expressed philosophy that the company is not only a "user" of copyrighted works from other sources, but it is also the creator of original copyrighted works. The company therefore has chosen to demonstrate a level of respect for other works that it hopes others will give to its legally protected materials.

66 See supra note 39 and accompanying text.
67 See supra note 40 and accompanying text.
68 The Copyright Clearance Center and its services are described more fully at infra notes 76-82 and accompanying text.
B. FITTING INTO FAIR USE

Given the collapsing scope of fair-use opportunities available to private companies in light of § 107 and recent court rulings, it is not surprising that the interviews for this study revealed few occasions in which companies are asserting—and are willing to admit—a legal right to make copies or to engage in other actions without the need for permission from the copyright owner. One of the few companies to systematically employ an innovative exercise of fair use was the Document Service. The Document Service has established a specialty in obtaining and delivering documents issued by certain associations, and has fostered a strong national reputation for reliability and expediency with respect to those resources in particular. One of the company’s strategies is to warehouse at least one original of each such document. Its goal is to assemble a comprehensive collection of all such documents at its one central facility. The company can then deliver a photocopy of the work immediately upon each client’s request. Purchasing originals and delivering copies in accordance with a license from the copyright owner will create no violations, and the company ordinarily obtains permission before making and delivering the copy.69 The firm also receives requests for works not yet in the collection. Its common response to those orders is to locate and make a copy from another collection, contact the publisher to obtain copyright clearance, and send the copy to the client.

The scramble for copies and permission can often be an enormous burden. The pattern of activity at the Document Service shows that interest in a particular item is often predictable: once a document is initially requested, a second request soon follows from yet another client. Because publishers often fill orders for originals too slowly for client needs, the Document Service will make and keep a photocopy of the first original it locates. The original is duly delivered to the first requestor, but the copy becomes part of the Document Service’s warehouse collection. Upon receipt of a second request, the Document Service is immediately able to fill the order

69 The Document Service also distributes a significant number of documents that are in the public domain, especially works of the U.S. Government. No copyright permission is necessary to duplicate and disseminate those publications. 17 U.S.C. § 105 (1996).
with a second photocopy of the copy on its shelves. It meanwhile submits an order to purchase another original from the publisher. When the original finally arrives, the company forwards it to the client. The second photocopy only temporarily fulfills a need until the original arrives. The client is instructed to discard the copy once it has an original; the customer is expected to have only one version of the work at any time. The first photocopy, however, remains on the Document Service’s shelf waiting to be called into action for the third, fourth, and ensuing clients. Each time, the Document Service uses the copy as a temporary measure while awaiting the arrival of the original.

Any photocopy that the Document Service sends to the client is typically the object of copyright clearance. However, the photocopy held in the company collections is not cleared at all.\(^7^0\) Is it fair use? Is it an infringement? One could argue that three of the fair use factors weigh against the Document Service: the purpose is commercial and for profit; the amount of photocopying encompasses the entire publication; and any photocopy theoretically deprives the publisher of one more sale.\(^7^1\) That final factor, however, may arguably favor the firm: the effect on the market is probably not negative, but positive.\(^7^2\) By retaining a photocopy, the Document Service facilitates efficient delivery to the client and efficient payment of any royalty fee to the publisher. Clients are often willing to buy the document only if they can have the rapid delivery that the Document Service provides.

Some analysts might nevertheless argue that a copy is a copy, and a copy is an infringement.\(^7^3\) That this practice could be an infringement generates modest concern among the Document Service’s officers. Yet the practice continues, largely because it is

\(^7^0\) The Texaco decision addressed similar copying as having an “archival” purpose and being, therefore, in direct competition with the publishers’ purpose. American Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 14 (S.D.N.Y. 1992), aff’d, 60 F.3d 913 (2d Cir. 1994), cert. dismissed, 116 S. Ct. 592 (1995).

\(^7^1\) See 17 U.S.C. § 107 (1996) (stating factors to consider in determining whether use of work is fair).

\(^7^2\) The “nature of the work” factor might also be in the Document Service’s favor, because the publications it distributes are fact-based. See Texaco, 802 F. Supp. at 16 (adhering to notion that scope of fair use is greater with respect to factual than non-factual works).

a practical means to address the situation, and the firm consistently orders an original. Simple uncertainty about whether the activity is fair use also discourages firms like the Document Service from openly questioning their own practices. If the photocopying is fair use, the firm can continue without change. If it is not fair use, then the Document Service must not only alter future practices, but also purge its collection of all infringing copies.

Short of a court ruling on the issue, who could give a definitive answer to the fair-use question? The copyright owners would most certainly discourage any photocopying without royalties. Professional associations seldom have either the authority or the expertise to analyze legal issues. Even an independent lawyer hired by the Document Service might be biased against finding fair use. If the Document Service were ever sued, and an infringement is found, the lawyer's opinion might have costly consequences for the client and for the attorney. Hence, the company's lawyer might be among the least objective sources—the prospect of malpractice claims could well shape the copyright analysis.

Thus, the fair-use analysis is relegated to the dumping ground of unasked questions. No one at the Document Service admitted that the questions were deliberately unasked, but fair-use inquiries are often suitable fodder for an unsettling adage: if you do not want the answer, do not ask the question. Rather than advance fair use as a planned pursuit, the Document Service somewhat passively allows practical and reasonable demands to test its meaning.

C. LICENSES AND PERMISSIONS FOR USE

If the activity in question implicates a potential infringement of copyright, and fair use or another exception does not apply, the user is left with little alternative other than seeking permission from the copyright owner before he or she may lawfully proceed. That permission is called a "license." As a general principle, the copyright owner has the privilege of granting or denying a license. If granted, the owner may set the required fee. Obtaining licenses can be expensive and involve burdensome paperwork. It can also be easily overlooked by the individual ready to press the button on

---

the photocopy machine or enter key strokes on the computer.

The Oil Company has struggled to obtain various types of licenses. The company frequently circulates copies of articles from the *Harvard Business Review*. The publisher encourages copyright compliance by providing detailed instructions for obtaining and paying for reprints. The interviewee at the Oil Company suggested that many other publishers should carefully examine the potential market for similar sales of copies and provide an easy and affordable method for securing them.

The same company has grappled with licenses for computer software. Computer software poses formidable problems of copyright infringement. While photocopying often involves the reproduction of only small portions of a larger work, computer software is utterly useless to most people unless it is available in full and without alterations. The process of photocopying may be clumsy, time-consuming, and costly, but software can be duplicated in full at little or no cost and with little effort. The high price and practical value of software make it a tempting object for infringement.

Early on, the Oil Company recognized the problems and risks posed by software duplication. Hence, a central computer department was assigned to monitor all computers and software. This department facilitated access to programs and kept employees current with upgrades. To discourage unlawful duplications, the company circulated an advisory memorandum about restrictions and access to new programs. The company also serviced each computer each year and audited the installed programs to watch for improper copies. The administrative problems became legion as the company, and software use, grew. The task of keeping records became voluminous, and the company was purchasing enormous quantities of original software. Managing the original disks and manuals was itself a staggering job. In the early years of software use, publishers offered few alternatives. Today, many producers offer generous licenses that remove impediments to common uses of the products, thus allowing employees at the Oil Company and elsewhere to install programs on their home and office machines.

The Public Utility was especially sensitive to the duplication of newsletters, following the decision in *Pasha Publications v. Enmark*
involving reproductions of a technical and expensive newsletter. The interviewee described a need for multiple copies of a particular newsletter, but the publisher has been unwilling to sell copies at discount or to authorize photocopying at any price. Hence, two separate copies of each issue arrive by fax, and the Public Utility pays the full price for each. More copies would be useful, but the compounding price is prohibitive. The interviewee expressed hope that the company might be able to negotiate site licenses for electronic forms of technical newsletters in the future.

The Document Service has successfully entered into agreements with a few key associations, enabling it to make and distribute copies of technical reports in exchange for payment of a royalty fee. The associations set a cost for the sale of their “specifications and standards” documents, and the fee paid by the Document Service is usually some percentage of the full price charged to the public. The fee charged to the client includes the royalty, plus the cost of the company’s service. The total charge will almost invariably exceed the publisher’s advertised cost of the document, but the Document Service is able to supply a copy much more efficiently than the publisher can, and clients are willing to pay for the expedited service.

The Document Service’s agreements with publishers typically require either a copyright statement on each copy with a notation that the copy was made pursuant to a license agreement, or a statement that further copying is prohibited. The Document Service maintains rubber stamps with the required messages. For example, the text of one rubber stamp states:

Copyright [name and address of copyright owner/professional society]. This copy has been made by [name of the Document Service] under license with [name of copyright owner].

Licenses that accommodate practical needs can easily address legal and managerial concerns. They can also greatly improve relations between copyright owners and their customers as well as improve the financial condition of both parties.

D. THE COPYRIGHT CLEARANCE CENTER

In anticipation of the widespread need for copyright permission following passage of the 1976 Copyright Act, publishers, corporate users, and other interested parties established the Copyright Clearance Center ("CCC") to serve as a licensing intermediary between users and copyright owners. A fundamental objective of the CCC is to simplify the permissions process by making widely known the fee and the cost for securing the right to photocopy a journal article. Anyone may then submit the stated payment, with the requisite information identifying the copyrighted work, and the CCC in exchange grants permission to make a single photocopy. Multiple copies require multiple payments. Users are spared the need to locate copyright owners and negotiate fees. The participating copyright owners set the fees for these individual transactions in a process now called the "Transactional Reporting Service" ("TRS"). The CCC has expanded the TRS to provide various prices, depending on the user and the intended use.

For large-scale corporate users, the CCC simplified the process even further, beginning in 1983, by offering an annual license to cover all photocopying for one set fee determined in part by the number of company employees. This arrangement is the "Annual Authorizations Service" ("AAS"), and the price depends on many factors, including the number and functional duties of the employees, the statistical evidence of actual copying, and the price for those copies as set by the individual owners. The evidence of actual copying is based on surveys and sampling conducted at the

76 Most of the CCC's licensing is for photocopies of textual works, but the CCC is making concerted efforts to expand into other media and to license digital versions of printed text. Fred M. Greguras et al., Multimedia Content and the Super Highway: Rapid Acceleration or Foot on the Brake?, 28 BEVERLY HILLS B.A.J. 130, 131 (Summer 1994); CCC to Collectively License Digital Uses of Full Text, 15 ONLINE NEWSL., April 1, 1994 (1994 WL 2658804).


licensee's place of business and on any other available evidence of actual use.  

The CCC system has some drawbacks. For any user, the system can be burdensome and the costs can be prohibitive. Further, the CCC may act only on behalf of copyright owners who have authorized it to collect royalties and grant licenses. If a work is not on the CCC's list, the agency must seek permission for the user without any assurance that it will obtain the necessary rights. For these and other reasons, participation in the CCC has been discouraging for some companies. The Document Service, for example, established an account with the CCC some years ago. The company president claims never to have used it. According to the interviewee, the CCC simply does not represent the publishers of materials most often copied and delivered by this particular firm, even though the CCC now boasts 1.7 million titles available in its "TRS repertory."  

Many of the other options facing a user such as the Document Service are hardly less burdensome and are just as potentially unfruitful as using the CCC. The user may simply ignore copyright altogether and risk disclosure and liability. The firm may instead seek permission directly from individual copyright owners, which is undoubtedly more burdensome and which still offers no guarantee that permission will be forthcoming or will be offered at an acceptable price. The user might also rely on fair use to cover some copying, but a thorough fair use analysis is difficult and uncertain at best. At worst, it could be wrong and expose the user to infringement liabilities.

For companies seeking to avoid individual transactions and

---

60 The CCC has received clearance from the U.S. Department of Justice to pursue a license that would replace the AAS program and allow the CCC to negotiate fees with the users, rather than allowing the rightsholders to set the fee. Copyright Center Gets New License OK, FTC Watch, Sept. 7, 1993 (1993 WL 2651346); Division Doesn't Plan to Challenge Copyright Clearance Center Proposal, 65 Antitrust & Trade Reg. Rep., Aug. 5, 1993, at 200.


decisions and prepared to accept the cost of an annual license for all copying, the CCC offers valuable peace of mind and some protection from threats of copyright infringement. The substantial costs of litigation and concomitant bad publicity alone motivate some companies to seek a blanket license. The CCC counts large and small companies among its AAS licensees, with the price of the license naturally reduced if the company is small and its photocopying proportionately little. Nevertheless, accepting an AAS license must be a major decision for any company, because it obligates the enterprise to a new cost, forces the company to identify a legal duty, and requires the user to acknowledge the limits of fair use in a way that management and employees might previously have been able to avoid or simply to accept as risk.83

The CCC points to several factors which it believes will significantly diminish the risk of a copyright infringement action brought against an AAS licensee. First, while the CCC does not represent all copyright owners, its own statistical surveys indicate that the license does encompass 50% to 85% of the copyrighted works reproduced by licensees. The “coverage rate” varies depending upon the licensee’s industry. The lower percentages are found among the youngest firms and the newest licensees, while the highest percentages are found among firms that have strong research and development functions. Second, the CCC points out that many of its participating rightsholders include those copyright owners who are most concerned about their rights and are most likely to bring an infringement action. Therefore, a small percentage of all publishers may be a large percentage of the litigious owners. Third, the license agreement itself includes a waiver of relevant copyright claims.84 The existence of a license also creates a strong appearance of good-faith intentions by the licensee to

83 For many companies, the decision not to use the CCC also creates an extensive responsibility to find other means to meet copyright duties: “Raytheon Co., however, does not use the clearance center. It says it complies with the law by buying multiple subscriptions of journals, posting warnings about the copyright law on photocopiers, buying reprints from publishers and including the issue in an ethics program for employees.” Kennedy, supra note 5, at 53.

84 The license form offered by the CCC to the Public Utility provided that all participating publishers during the initial one-year term would not pursue any “unasserted claims of copyright infringement” for prior photocopying. All such claims are waived if the licensee elects to renew the agreement.
comply with the law. Fourth, the CCC has an understanding with the Association of American Publishers ("AAP"), the major trade association for publishing companies, that the AAP will not support litigation against a CCC licensee, perhaps even if the copying in question is from materials not covered by the license agreement.\(^6\) This point is of major significance. Copyright litigation is extremely expensive, and many of the major infringement cases in recent years have been supported and coordinated by the AAP.\(^8\)

Although the Oil Company had an early interest, its decision to obtain a CCC license was the result of several years of internal study and extensive negotiations. Under pre-1976 law and photocopy technology, the Oil Company concluded that single copies of short articles, if used by the individual making them, were fair use.\(^7\) This standard was "stringently enforced," with notices describing the policy placed on all copy machines and flyers distributed to all employees. Librarians handled any requests for multiple copies. This system had a "cooling effect on rampant photocopying," according to the interviewee.

With the growth of the firm and of duplication technology in the 1970s, the company instituted centralized copy centers to handle most in-house copying. Employees using the centers had to complete a service request form that included copyright information and, if necessary, a place for advance approval from the corporate legal counsel. By centralizing copy requests, attorneys for the Oil Company saw patterns emerge in their copying needs and in the responses from copyright owners to requests for permission to make multiple copies. Company officials found that permission to copy was "almost never denied" and "rarely were fees charged." In fact, many publishers of most newspapers and journals granted blanket

---

\(^6\) Michael F. Clayton, Photocopies and Fair Use: How to Avoid Copyright Liability, 40 PRAC. LAW. 81, 87 (June 1994).


\(^7\) At least one court ruled that single copies of journal articles for research purposes could be fair use, at least under the circumstances of a library copying the articles for a patron, in accordance with the 1909 Copyright Act. Williams & Wilkins Co. v. United States, 487 F.2d 1345, 180 U.S.P.Q.2d (BNA) 49 (Cl. Ct. 1973), aff’d per curiam by an equally divided court, 420 U.S. 376, 184 U.S.P.Q. (BNA) 705 (1974).
permissions covering all in-house copying. Hence, the company operated a "clipping service" to circulate copies of news articles about the company itself. Most publishers readily allowed such copies. Only the *New York Times* asked for a fee, and the *Wall Street Journal* only sought assurances that the copies would not replace subscriptions.\(^{68}\)

In this context, the CCC approached the Oil Company around 1983 in a manner that the interviewee described as "hard line." The CCC made allegations of possible infringements and sent a letter directly to the corporate chairman, a strategy that left legal counsel with the burden of describing the company's compliance measures to the chairman.\(^{69}\) CCC officials expressed concern that the "transactional fees"\(^{70}\) paid by the Oil Company seemed inordinately small for a company of its size. The interviewee generally regarded the transactional method as an ordeal of massive paperwork. The library was normally responsible for handling the process, but within a large and scattered company this detailed process was easy to neglect and inevitably diffused. Unless the company could truly centralize all copying, incidental copying would invariably occur without permission, thus failing to meet CCC expectations.

The Oil Company and the CCC were willing to cooperate with one another, but they had several key practical and financial differences to resolve. The CCC proposed to the company an annual license—one fee to cover all photocopying conducted by employees throughout the company for the year. The company, however, expressed concern that the price was too high, and that the CCC did not acknowledge any fair use for some copying inside

---

\(^{68}\) The *Wall Street Journal* was willing to allow copies without a royalty, even though its articles are available for a fee from the CCC. The *Journal* also pays royalties to the CCC for its own copying needs. Junda Woo, *Case Reveals Flaws in Royalty System*, WALL ST. J., Jan. 3, 1995, at 15.

\(^{69}\) Sending the letter directly to the corporate chairman clearly put the legal counsel in a defensive position and tainted counsel's perspective of future dealings with the CCC. Nevertheless, the CCC defends its practice of contacting chief executive officers in order that the task of pursuing a license may be delegated to the proper corporate department. Moreover, the cost of a CCC license usually represents a new expense to any company, so the license must ordinarily be approved and budgeted at the highest level.

\(^{70}\) The transactional fee service requires a user to account for each photocopy made and to submit a stated fee to the CCC.
the company. Although the interviewee found no fair use identified in the license agreement, the CCC contends that its AAS practices always have allowed a price discount to be established by each copyright owner as an accommodation for fair use and other rights of use allowed under the Copyright Act. The CCC may be able to reduce the price to reflect some fair use, but it still will not explicitly define fair use or identify specific copying practices that may qualify as fair use.

The CCC, therefore, proposed to set a price according to a sample survey of actual copying practices within the Oil Company. The Oil Company had serious concerns about the prospect of the CCC sampling the reading habits of company employees and the potential disclosure of confidential research. Hence, the Oil Company took the initiative by hiring an independent contractor to conduct its own survey according to “standard research methodologies.” In sum, the company’s findings were that a “vast majority” of copying was covered by existing licenses and other permissions, but that a “fairly significant” amount of copying was not the subject of any license and “could benefit from the CCC.” Meanwhile, the CCC proposed a fee model based on the number of employees, without requiring any further survey.

Earlier annual license fees that the CCC discussed with the Oil Company ranged from approximately $280,000 to as high as $600,000. The CCC’s new price structure reduced the price to $125,000. Although the reduction was a deep cut, the cost was still about three times the price that the company’s internal survey recommended. When the company delivered its study to the CCC, the price was further reduced to $65,000. Only at that price did the legal counsel seriously consider an annual license and justify the proposed agreement to management. The CCC and the Oil

81 The CCC insists that its AAS licensing program provides strong confidentiality in the license document itself and in the CCC practices of not disclosing any information to third parties. Moreover, the CCC points out that it collects copying data referring to the title of the journal or book and not referring to the specific article copied. These safeguards may nonetheless be inadequate for some licensees. A subpoena may still require disclosures, and even disclosure of the journal titles may reveal trends in current research. The CCC license offered to the Public Utility promised confidentiality “except pursuant to court process or order.” See generally Clayton, supra note 85, at 87 (describing CCC’s guarantee of “confidentiality to its subscribers, wanting not to divulge information to publishers”).
Company entered into an annual license in the late 1980s—five years after the two parties began negotiations.

The Oil Company’s experience bears many lessons. The price of a blanket license can vary. In general, copyright owners and their agents have the right to state a price and hold firm. If the price is too high for the user, the owner has no obligation to cut the cost or negotiate other terms. No “compulsory license” exists for printed works. A savvy copyright owner, however, may find room for flexibility in order to retain a potentially lucrative licensee, such as the Oil Company. The company saw that flexibility as a wise business practice by the CCC. From the CCC’s perspective, no negotiation of price took place; indeed, none was possible. The CCC is a licensing agent with no authority to vary the price of each item. Its annual licenses are based in part on statistical projections of actual copying, and the annual payment comprises a product of that copying and the prices set by the rightsholders. The price variations that the Oil Company found were not the result of bargaining, according to the CCC, but were instead recalculation based on more precise information.

The CCC may have no price discretion, but it does have various licensing programs, and it is willing to base the price on alternative data sources, ranging from internal self studies by the licensee to “pooled” data from several existing licensees in similar industries. Other companies within this study also have discussed a license with the CCC. For some, the offered price is based on a survey of copying practices; for others the price is measured by the number of employees. The CCC has shown a willingness to switch systems for a single customer, and it also appears to have looked closely at the independent survey commissioned by the Oil Company. The CCC’s flexibility is commendable. The Oil Comp-

---


93 Cooperative pricing, managed or administered by the CCC, could also be construed as “price fixing,” which is an antitrust violation. Paul Goldstein, Commentary on “An Economic Analysis of Copyright Collectives,” 78 VA. L. REV. 413, 414 (1992).

94 See supra notes 78-80 and accompanying text.

95 The CCC offered the Law Firm an annual license priced at just over $30 per full-time employee. The Public Utility’s proposed license was based on a statistical analysis of actual copying.
ny properly took the initiative to assert its view, and the CCC engaged in good business practices by responding to the customer's needs and circumstances.

For the CCC, the protracted "discussions" yielded an important contract with a high-profile, large-scale user of printed works. For the Oil Company, the resulting annual license is "insurance." Although an official policy statement generally bans copying without permission, the Oil Company "unofficially" continues to allow single copies of short articles, just as it had before passage of the 1976 Copyright Act. The CCC license is the "insurance" to tolerate some unregulated reproduction. The company also continues to rely on separate licenses and blanket licenses with individual publishers for multiple copies—even some copying that may be allowed under the terms of the CCC agreement. When multiple reprints are easily available directly from the publisher, the company will still buy them, rather than make photocopies.

The Oil Company does not advertise the CCC license widely within the company, and employees are not instructed to rely exclusively on the license for the right to make copies. From the view of the attorney who handled much of the original negotiation on the Oil Company's behalf, the strategy of downplaying the license and seeking separate permission for multiple copies minimizes dependence on the CCC license and keeps the amount of copying that it covers—and hence the annual cost—at the lowest possible level. As a result, the general pattern of copying within the company has changed little since 1988, and so has the price paid to the CCC.

The Oil Company's experience apparently has fostered urban folk tales among officials at other companies who are exploring the prospect of a CCC license. The interviewee at the Public Utility mentioned hearing of one company that does not depend on its CCC license, but instead uses it as "insurance." Later in the interview, she also mentioned a company that took five years to negotiate its annual license. Some of these comments arose while expressing serious reservations about the merits of a CCC contract. The interviewee asserted that a license proposed by the CCC for the Public Utility lacked both an indemnification clause and a warranty that the listed publishers have the authority to give the copying
permissions stated in the agreement. Despite these difficult negotiating points, the interviewee made clear that she would like the company to reach an agreement with the CCC for a reliable source of copyright permissions.

The CCC also has approached the Law Firm seeking an annual license. The firm thus far has declined for a variety of reasons, in addition to the overall cost. Another important concern is that the CCC does not represent many publishers which are of interest to the Law Firm. Nevertheless, the firm is still investigating the prospect of signing up with the CCC. That interviewee observed that signing with the CCC apparently reflects a "follow-the-leader" principle: once one major company in a region or within an industry enters into an annual license, others will follow. Despite the growing list of CCC licensees, the Law Firm is still waiting for an influential leader.

The expense of copyright compliance is a new and increasing responsibility and challenge for all companies. The Public Utility, for example, has no specific budget for copyright permission fees and licenses. The single, large cost of an annual CCC license presents a major financial challenge to any company, and it must be attributed to some department. The Public Utility probably would not charge it as a library expense, but more likely as a computer or information services expense. The interviewee at the Law Firm believed that the cost of any license should not be charged to the library, but to risk management. Where the costs

96 Not all publishers hold the copyright to the articles in their own journals. At least one author has found that the CCC is licensing her articles with the consent of the publisher, but the publishers never obtained the copyright or the photocopy reproduction rights from the author. Kenneth Frazier, The Meaning of Fair Use, 21 COMPUTERS IN LIBR., May 1994, at 21.

97 Faye Couture et al., Questions & Answers, 85 LAW LIBR. J. 959, 961 (1993); Will, supra note 5, at 49.

98 "By June 30, 1993, there were more than 600 TRS users and 350 AAS licenses. Among the 100 largest U.S. companies, 68 have signed up with the center." Jill D. Singer, Line between legal photocopy, infringement is often obscure, KAN. CITY STAR, Oct. 12, 1993, at D22. Another publication sets the number of companies paying fees to the CCC at 5,000. Jonathan A. Levy, Risky Business: Office photocopying, fair use and copyright infringement, 55 OR. ST. B. BULL. 8 (May 1995). According to one writer, law libraries are not attracted to CCC licenses: "A law firm library recently became an AAS licensee (and may be the only law library licensee)." Couture, supra note 97, at 961 n.14.

99 The fee offered to the Public Utility for the first year of its license exceeded $35,000.
are placed within a company is an issue of perceptions and internal politics. No department wants to take on the enormous new charge of a copyright license fee—a cost that will recur and grow, and perhaps, need to be justified anew each year. The department that bears the large cost also risks the need to reduce costs elsewhere when the need to slash budgets inevitably arises.

E. ELECTRONIC DATA AND DELIVERY

Most activities that the interviewees addressed relate to the common technology of photocopying, but the information delivery industry is rapidly transforming to electronic formats. End users and intermediaries will be able to locate and transmit volumes of text instantly to and from remote sites around the world. Consequently, copyright will not center on the making of single photocopies. Instead, it will focus on the development of computer databases of information compiled from various sources, the search for and retrieval of documents by the database service or by clients, and the dissemination of documents in electronic form with the simple entry of a few commands. Users will be able to download and store copyrighted works and deliver them simultaneously to a nearly limitless number of readers throughout the world. For researchers and readers, the prospect of digital delivery is rewarding, with rapid and thorough fulfillment of information needs. For copyright owners, the prospect is frightening. Uncontrolled dissemination of their works is unsettling at best and destructive at worst. Without control and compensation, many publishers and authors argue that they will not be able to invest in creating or publishing new materials.¹⁰⁰

At the Document Service, the evolution toward an online system is arriving in moderate steps. The company expects to make its catalog of available documents accessible through the Internet, a

¹⁰⁰ Copyright law is slowly, but steadily, advancing into the digital era. The most significant effort to adapt the law to new technologies is the so-called "White Paper" from a federal commission. See INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995). That report analyzes the law and recommends some statutory changes, but their fate in Congress is undetermined as of this writing.
development that should increase demand for the works and portend the potential demand for full-text delivery in the online environment. That transition toward full-text retrieval will generate complex copyright controversies and many unanswered questions—often those questions will be deliberately left unasked with the hope that they may never surface in controversy or that other parties will resolve the issue through litigation or legislation.

The isolated storage, and even transmittal, of single copies via digital systems generally poses no greater copyright challenges than the delivery of single photocopies of printed works. Photocopies and electronic transmissions alike may be evaluated in light of the fair-use factors. Nevertheless, the electronic environment raises justifiable fears about rapid duplications, multiple transmittals, and permanent storage and further transmission by the recipient of a work. For publishers and authors, the electronic world presents a pattern of uncontrolled duplication and dissemination. One “copy” may be transmitted with the owner’s permission, but once in digital form it may be stored on the recipient’s computer and further disseminated, or even loaded into a network for multiple access with little trouble and even less accountability.

By the late 1980s the Oil Company had conducted successful negotiations with database providers, such as Dialog, for licenses that allow downloading and some further use of materials obtained from the database system. That interviewee found that in recent years, providers have been increasingly willing to meet customer needs and show some flexibility instead of adhering to an arbitrary rule against all copying. Thus, the company is able to construct in-house databases and electronic bulletin boards with cooperation from the copyright owners.

From the view of the Document Service, the evolving copyright dilemmas are in the publishers’ hands. That interviewee has concluded that the technology will inevitably grow, and the document delivery industry will gradually adopt digital systems for transmitting information. Although each firm, such as the Document Service, will struggle with copyright compliance, the technological change will press publishers to adjust and to devise standards for allowing works to be licensed for electronic delivery. Many publishers today are reluctant to enter the networked environment; indeed, many are still resisting any license for “old”
technology, such as photocopying. Nevertheless, pressure for change will eventually prevail, requiring publishers to offer license terms that incorporate the new technologies. So believes the president of the Document Service. She can adopt compliance measures, but otherwise she has resolved: "copyright is a publisher's issue." From her view, copyright is about the need to assure a stream of revenue from each work. She is ready to comply, but she is not going to make the rules.

V. CONCLUSIONS

Recent judicial rulings and the patterns of practice in private companies reveal little room for fair use to sanction many of the common uses of copyrighted materials. A few companies exhibit some innovative attempts to establish a fair-use privilege, but most of the individuals interviewed for this study have emphasized their concern about the growing threats of liability and the perceived need to adopt some of the most restrictive standards on photocopying and other activities. The interviews also revealed a general lack of external support or guidance available for any company seeking to establish a copyright standard of behavior. Professional associations may underscore the issues, but they rarely provide any specific direction. Indeed, the structure of the fair-use and copyright laws themselves create a system built on uncertainty and doubt.

Within this atmosphere of scattered litigation and unsettled law, the need for licensing has been indisputable. Most licensing is unquestionably an individual pursuit, with individual requests submitted to copyright owners for permission to make specific uses of materials. As companies grow, as needs change, and as technologies evolve, many companies make increasingly frequent copies and distributions of protected materials. Individual licensing programs can become impractical at best. The relationship between the law and practical needs increasingly has compelled users and owners alike to rely more frequently on collective licensing, such as the annual licensing programs offered by the Copyright Clearance Center. In the final analysis, licensing can become the expedient method for assuring the lawful access of materials, while not necessarily relinquishing fair use and other rights provided under
the law. The success of licensing programs will depend upon creative and flexible terms and on well informed negotiators who must critically appraise the risks, the financial obligations, the rights of copyright owners, and the survival of fair use.