

Questions and Answers Concerning Copying Print and Digital Works

1. *What is copyright?*

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

Copyright protection covers both published and unpublished works. The fact that a previously published work is out of print does not affect its copyright.

Copyright protection exists to foster and induce the creation of all forms of works of authorship. These include books, newspapers, magazines, computer software, multimedia works, sound recordings, audio visual works, and other works. The copyright law does so by providing fair returns to creators and copyright owners. To the extent copies are made without permission, authors and publishers—including faculty—are deprived of revenues in the very market for which they have written and published. Such unauthorized and uncompensated copying could severely reduce their incentive to create new materials in all formats.

Copyright protection in works created after January 1, 1978, generally lasts for 70 years after the death of the author. Copyright in works created by businesses, rather than individuals, or before 1978 can last for 95 years from publication. After a work is no longer protected, it falls into the public domain. A handy table summarizing information about duration of copyright is available at www.unc.edu/~unc1ng/public-d.htm. (See [question 17](#).)

2. *How is a copyright obtained?*

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

3. ***What types of works can claim copyright protection?***

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

Copyright protection does not include facts, ideas, procedures, processes, systems, concepts, principles, or discoveries, although these may be protectible under patent or trade secret laws. However, the literary or other form of expression and detailed organization of these ideas are covered by copyright.

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

You should consult the location on the work or packaging containing the copyright notice as well as any acknowledgments. If you have a photocopy or other reproduction that does not contain a notice of copyright or acknowledgments, consult an original copy of the work.

Most works contain a copyright notice. Because copyright ownership can be transferred after publication, your copy may not identify the current copyright owner. Consult the publisher of the work that you wish to copy as a first step. The publisher may be able to refer you to the current owner. For unpublished works, permission to copy should be obtained from the author of the work. The absence of a copyright notice does not mean that the work in question may be freely copied. Works published after March 1, 1989, are not required to carry a copyrighted notice in order to be protected under the law.

The U.S. Copyright Office maintains records of registered works by author and title, some of which may be searched online at www.loc.gov/copyright/search. For more information, ask the Copyright Office to send you Circular 22 - "How to Investigate the Copyright Status of a Work, " by phoning (202) 707-9100.

5. ***What are the penalties for copyright infringement?***

Civil and criminal penalties may be imposed for copyright infringement. Civil remedies can include an award of monetary damages (substantial statutory damages, which in cases of willful infringement, may total up to \$150,000 per work infringed, or actual damages, including the infringer's profits), an award of attorney's fees, injunctive relief against future infringement, and the impounding and destruction of infringing copies.

While under some circumstances educators are not required to pay statutory

damages, nonetheless, they may be responsible for paying the copyright owner actual damages caused by their infringement, as well as attorney's fees.

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

"Fair use" is a defense to an allegation of infringement under the U.S. copyright law that permits limited use of portions of a copyrighted work without the copyright owner's permission for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. Section 107 of the Copyright Act establishes four basic factors to be considered in deciding whether a use constitutes a fair use. These factors are:

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

(Note: The commercial or for-profit nature of custom course packets (anthologies) compiled and sold on college campuses weighs against the first factor of "fair use" even though such use lies within an educational setting. See questions 9, 11, and 13 for court cases and decisions on this type of copying.)

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

No one factor alone determines a person's right to use a copyrighted work without permission.

7. ***Is all copying by educational institutions fair use?***

No. Although Section 107 of the Copyright Act includes teaching, scholarship and research, along with making "multiple copies for classroom use," as among the uses of copyrighted works that may qualify as fair use, none of these uses automatically qualifies as a fair use. Both Congress and the Supreme Court have rejected the notion that all "educational uses" or all uses by educational institutions are fair uses. Whether copying for these or any other uses constitutes "fair use" must be determined, within the facts and circumstances of each particular use, by application of the four statutory criteria enumerated in Section 107. Section 110 of the Copyright Act contains limited exemptions for certain uses of copyrighted materials in "face-to-face" classroom situations or in "instructional broadcasting" programs conducted by nonprofit educational institutions, but there is no blanket exemption from copyright liability for educational uses or uses by educational institutions.

8. ***Are there guidelines for educators and students to decide what is a fair use?***

Yes. To help students and educators decide whether fair use permits them to copy a work without permission, representatives of educators, authors, and publishers have attempted to create several sets of negotiated guidelines.

Two sets of such guidelines, known as the "Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals" and the "Guidelines for Educational Uses of Music," were explicitly accepted "as part of their understanding of fair use" by the House and Senate conferees when Congress enacted the most recent comprehensive reform of U.S. copyright law in the Copyright Act of 1976. (See Appendix A - Guidelines for Classroom Copying.)

More recently, a large number of representatives of these communities participating in a two-year long "Conference on Fair Use" (CONFU) attempted to reach agreement on several different sets of "educational fair use" guidelines regarding digital images, distance learning, educational multimedia, electronic reserve systems, interlibrary loan and document delivery, and use of computer software in libraries. Although none of these proposed guidelines received the full endorsement of the CONFU participants, the proposed guidelines on digital images, distance learning, educational multimedia, and use of computer software in libraries were deemed sufficiently advanced in consideration to be published as the work-product of CONFU in the final report on the Conference that was made to the Commissioner of Patents and Trademarks in November 1998.

For more information about fair use and guidelines, ask the U.S. Copyright Office to send you Circular 21 - "Reproduction of Copyrighted Works by Educators and Librarians". The Copyright Office can be reached at (202) 707-9100, and at www.loc.gov/copyright/circs. The Final Report on the Conference on Fair Use is available on the web site of the Patent & Trademarks office at www.uspto.gov/web/offices/dcom/olia/confu/index.html.

9. ***What is "the Kinko's case"?***

"The Kinko's case" refers to a lawsuit for copyright infringement filed against Kinko's Graphics Corporation in 1989 by eight book publishers. The Court in *Basic Books, Inc. v. Kinko's Graphics Corporation*, 758 F. Supp. 1522 (SDNY 1991) held that Kinko's' practice of unauthorized photocopying of multiple-page excerpts from copyrighted works (including chapters of books and articles from periodicals) to create anthologies (coursepacks) for sale to students for a profit violated the publishers' copyrights. The copyrighted works infringed by Kinko's included hardback and paperback editions of in-print and out-of-print trade and professional works as well as text- books. The copied materials ranged in length

from 14 to 110 pages and from 5% to 24% of the works.

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

The Court's decision in the Kinko's case did not prohibit the reproduction and sale of anthologies. It only prohibited the unlawful reproduction and sale of anthologies made without obtaining proper copyright permission or meeting the criteria of either the Classroom Guidelines or the statutory "fair use" provision in Section 107 of the Copyright Act.

10. ***Why did the publishers bring this suit?***

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

11. ***What is "the Michigan Document Services case"?***

"The Michigan Document Services (MDS) case" refers to a lawsuit for copyright infringement brought by Princeton University Press and two other publishers against Michigan Document Services, Inc., and James M. Smith. The publishers challenged MDS's and its owner-operator's practice of making coursepacks containing excerpts of plaintiffs' copyrighted works without obtaining permission. The copied materials ranged in length from 17 to 95 pages and from 5% to 30% of the original works. Ultimately, a majority of all of the judges on the U.S. Court of Appeals for the Sixth Circuit upheld a lower-court ruling that use of the copyrighted materials for an educational purpose does not itself constitute fair use and held MDS and Smith to be infringers. After the U.S. Supreme Court declined to review the decision, MDS and Smith settled the case. The settlement provides that MDS may not use more than one page of copyrighted material belonging to one of the plaintiffs or any member publisher of the Association of American Publishers to create coursepacks without obtaining the necessary copyright permission.

Thus, the decisions in Kinko's and the MDS provide the most relevant judicial guidance about copyright law as it pertains to coursepacks. Those who compile and sell coursepacks should not change their practice of obtaining permissions from copyright owners when using excerpts of copyrighted works. [Both the

Kinko's and the MDS court decisions may be found online at Stanford University's "Copyright & Fair Use" web site at <http://fairuse.stanford.edu>.]

12. ***What effect does the application of the Kinko's and MDS decisions have on college bookstores and copy shops that make or sell customized course anthologies?***

The Courts' decisions indicate that the making and selling of customized anthologies or coursepacks without the copyright owners' permission is likely to be infringing unless the statutory "fair use" criteria of section 107 of the Copyright Act are met. The record in both cases showed that many college stores are already operating legitimate custom publishing operations where they obtain permission and produce anthologies authorized by the copyright owners of the included excerpts. The decisions support the practices of these stores.

13. ***Will faculty members who assign customized course anthologies, or the colleges at which they teach, be liable for copyright infringement?***

Anyone who violates any of the exclusive rights of the copyright owner is an infringer. In 1983, a number of publishers coordinated a suit against New York University and nine professors for creating similar coursepacks. The action was settled with the adoption of certain procedures by NYU. Since that time, faculty and school administrations have generally been sensitive to the copyright law and have widely followed the Classroom Guidelines (see Appendix A).

It is important to understand that faculty and the colleges may be liable for the infringement of customized anthologies, or "coursepacks," if the amount and natures of the portions of the copyrighted works that are put together to create such coursepacks exceeds what is permissible under the "fair use" Guidelines (which generally disfavors such compilations within its terms).

In the Kinko's and MDS suites, the publishers sued commercial copy shops that had profited from selling publishers' copyrighted works without obtaining permission. The copy shops in these cases had solicited faculty business and given assurances to faculty that the copyright law would be observed. In both of these cases the decisions demonstrate that such anthologies or "coursepacks" are even less likely to fall within the "safe harbor" requirements of the Classroom Guidelines or the statutory "fair use" criteria when they are created and reproduced by commercial copy shops which charge for producing these compilations while failing to obtain permissions from the holders of the copyright in the works that are excerpted to create them.

14. ***Would I infringe someone's copyright if I were to make multiple copies and either distribute those copies for free or require their return after use?***

You may be infringing. You do not have to sell the copies (or permanently dispose of them) in order to infringe the copyright owner's rights. However, making and distributing multiple copies of portions of copyrighted works may be permissible under the [Classroom Guidelines](#). (See guidelines for Classroom Copying.)

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

The purchaser of a work owns only that particular copy of the work. The purchaser does **not** own any rights in the copyright covering the contents of the purchased copy. A purchaser cannot copy the purchased work, in whole or in part, without the copyright owner's permission unless such copying constitutes "fair use." For information about copying software, see questions 23 to 30.

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

Many times photographs or illustrations are covered by copyrights owned by a different party from the copyright owner of the material in which they are published. The author or publisher of that material has received permission from the photographer or illustrator to include it in the work but may or may not have the right to grant permission to others to reproduce the photograph or illustration. In some cases, licensing organizations act for the photographer or illustrator. You may need to make a separate request for permission to copy the photograph or illustration. (See [Procedures for Obtaining Permission to Copy](#).)

17. ***Other than under the fair use doctrine discussed in questions 6 through 8, can I ever copy material without infringing someone's copyright?***

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

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

nongovernment sources; or to publishers' edited, annotated, or compiled versions of such documents.

Absence of a copyright notice does not necessarily indicate that the work is in the public domain. Similarly, the fact that the author is deceased or the book is out-of-print does not mean that the work may be copied.

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

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

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

19. ***What can I do if course material has been ordered for a class but is late in arriving at the bookstore?***

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

20. ***Can a college store be liable for infringement if it unknowingly copies or sells works where permission has not been obtained?***

Yes. A store can be liable for unknowingly copying or selling works where permission is required. An indemnification agreement obtained from the provider of the materials to be copied or sold by the store will not absolve the store from liability to the copyright owner.

21. ***When can copyrighted works be uploaded to or downloaded from the Internet?***

You may upload or download copyrighted works when you are the copyright owner of the works, when you have permission from the copyright owner, or when uploading or downloading could be considered to be a fair use. While some materials available on the Internet are not protected by copyright, there are also many copyrighted works such as web pages and computer software that are protected just as much as works in other media such as books and CD-ROMs. Many copyright owners permit Internet users to make some use of the work, but the works are not in the public domain, even if they do not display a copyright

notice.

Because uploading and downloading works involves copying the work and other exclusive rights, educators and students should apply the rules discussed in this booklet to using copyrighted works on the Internet. They should also be cautious because some copyrighted works are unauthorized copies posted without the knowledge of the copyright owner.

This type of activity can occur when the university hosts a web site that makes copyrighted work(s) available to the campus community and/or the general public. For example, a professor uploads a required graphics software application for her class to download from her class web site, but does not obtain the licensing rights from the software creator.

Another example of unauthorized uploading and downloading can occur when a university uses a device to scan the entire print version of a textbook into digital format and uploads the digital copy to the university's web site for students to download without the copyright owner's permission.

For more information, consult the copyright information on the web site or request permission from the webmaster.

22. *What is the Digital Millennium Copyright Act (DMCA)?*

The DMCA was enacted in October 1998 primarily to bring U.S. copyright law into conformity with provisions of two World Intellectual Property Organization treaties to which the U.S. is a signatory. This Act facilitates the creation of a secure digital environment for use of copyrighted materials by encouraging the deployment of, and respect for, encryption and other technological protection systems. Accordingly, the DMCA prohibits (with certain limited exceptions): (1) manufacturing, importing, distributing, and providing products or services whose main purpose is to circumvent these systems; (2) taking action to engage in circumvention so as to gain unauthorized access to copyrighted works; and (3) removing, falsifying, or tampering with "copyright management information" (that is conveyed electronically with copyrighted works to identify them and their owners and provide other pertinent data about them.) Beyond satisfying treaty obligations, the Act also seeks to clarify the rules for operating digital networks by (1) defining the circumstances that limit the liability of those entities that provide network services and (2) establishing procedures to facilitate the identification and correction of infringing activities engaged by users through such networks.

Nothing in the DMCA would prevent an alleged infringer of a digital work from claiming that his or her use of the work was fair use under Section 107 of the Copyright Act. The same four factors would be considered in determining

whether the use of the material was fair. However, the anti-circumvention provisions of the DMCA, referred to above, may have the practical effect of limiting access to, and therefore limiting use of, digitized works that are protected by encryption or other technological devices that physically prevent unlicensed copying, distribution, display or performance of any portion of the works.

Questions and Answers Concerning Copying and Networking Software

23. *What special relevance does the DMCA have for the campus community?*

By sanctioning the deployment of technological systems, the DMCA recognizes the rights that copyright owners (including university presses) have to protect their works against unauthorized access and copying that can be especially damaging in the open environment of higher education where the "free" exchange of information and ideas is encouraged.

However, the DMCA provides certain categories of immunity, or "safe harbors," for online service providers ("a provider of online services or network access, or the operator of facilities therefore"). Because most colleges, universities, and college bookstores fall within the definition of a "service providers," it is believed that they may take advantage of the DMCA "safe harbor" limitations regardless of whether such institutions are nonprofit. In order to take advantage of these "safe harbors," a service provider must register with the U.S. Copyright Office at www.loc.gov/copyright/ as a copyright agent, adopt and implement copyright policies, educate the campus community about the copyright law, and implement a "notice and takedown" procedure for addressing receipt of infringement notices.

The statute creates four categories of infringement for which a service provider may be eligible for protection, including (1) transitory communications, such as transmitting digital information from one point on a network to another at a third party's request; (2) system caching which is the practice of retaining copies of third party material only for a limited time period; (3) information location tools, such as search engines and hyperlinks; and (4) storage of information on systems or networks including the posting of infringing material by a student, professor, or other third party on a college or university web site. (The fourth category is probably the most important in terms of relevance to an institution of higher education.)

For more information on the Digital Millennium Copyright Act of 1998, go to www.loc.gov/copyright/legislation/dmca.pdf.

24. ***What are the laws with regard to copying software?***

Generally, copyright law applies to computer software the same as it does to most other forms of works. However, the copyright law permits the owner of a particular copy of a program to make a copy for archival purposes so long as the copy is destroyed once the original software is transferred or sold. In limited circumstances, a copy or adaptation may be made as an essential step in using the program in a computer. It is important to note that, in most cases, when buying the software, you are actually acquiring only a license to use the software. The license governs the permitted uses of the software and you should consult the license for the terms and conditions of the software's use.

25. ***What is a software license agreement, and how does it relate to copyright?***

A software license agreement allows the purchaser to use the software subject to the terms of the license. The purchaser has not bought the software but only licensed it. The purchaser does not have the right to copy or transfer the software to another party unless provided for in the license agreement.

26. ***Does fair use apply to computer programs?***

Yes, but because most copying involves the entire computer program, rather than a portion of it, the unauthorized copying will rarely be considered fair use.

27. ***What if a school owns an old version of a software program and wants to purchase additional copies but the program is now unavailable? Can the old software package be copied in such a case?***

The software program cannot be copied without first obtaining the permission of the publisher or copyright owner. Some software publishers permit copies to be made in such cases if additional licenses of the new version are purchased. Other publishers allow copies of the old program to be made if upgrades are purchased. Many publishers offer educational discounts that may make it economical to upgrade all older versions.

28. ***Is there any way to manage networks to ensure that software is not copied?***

Yes. A school can purchase "metering" software which tallies the number of license agreements that the school owns and the number of copies made and accessed. Also, software auditing programs are available for purchase. These programs keep a log of existing license agreements and tell users what software is installed on their hard drive or server. These programs help to manage software ownership and reduce the possibility of accidentally pirating software.

Information about these programs is available from the [Software & Information Industry Association home page](#).

29. ***What does the expression "pirating software" mean?***

It means making an impermissible copy of software.

30. ***Can computer software be resold?***

If a copy of a computer software program is purchased instead of obtained through a license, the purchaser has the right to transfer that one copy of the material. The "First Sale Doctrine" allows the copyright owner to control the initial sale or distribution of the material to the public, but once title to the material changes hands, the copyright owner has no right to control the subsequent resale or transfer of that one copy.

The First Sale Doctrine applies only to copies of the material that were lawfully made or obtained. Thus, if the computer software was a pirated copy, the purchaser does not have the right to subsequently transfer or sell that copy.

If the computer software is obtained through a license, the user should consult the license agreement to determine whether the copy may be resold.