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United States District Court; S.D. New York.
Addison-Wesley Publishing Co., Inc.; Alfred A. Knopf, Inc.; Basic Books, Inc.; Houghton Mifflin Co.; Little, Brown and Company, Inc.; MacMillan Publishing Co., Inc.; National Association of Social Workers, Inc.; Random House, Inc.; and Simon and Schuster, a division of Gulf & Western Corp.

v.

New York University; Unique Copy Center, Inc.; Martin Hamburger; Phyllis Mervis; Thelma B. Chesney; Terri Schultz; Robert Sklar; Stuart Johnson; Robert Sharp; Sherman Barr; and William G. Simon.

82 CIV 8333 (ADS)

82 CIV 8333 (ADS)

Dated May 31, 1983

SOFAER, *District Judge.*

Order and Final Judgment

*1 The remaining parties in this action having agreed and consented to the entry of an Order and Final Judgment terminating this action and all claims and counterclaims asserted herein with prejudice; and it being:

STIPULATED AND AGREED by and between the parties that defendant, Unique Copy Center, Inc., 252A Greene Street, New York, New York 10003, (hereinafter "Unique") is engaged in the business of photocopying; and it being further

STIPULATED AND AGREED that the works published by plaintiffs as set forth in claims 1 through 13 of the Complaint in this action are copyrightable and that plaintiffs have in each case complied with the copyright laws of the United States and are the owners of subsisting exclusive rights of copyright therein, including the right to reproduce such works and to distribute such reproductions to the public; and it being further

STIPULATED AND AGREED that Unique has made multiple copies of portions of the aforesaid works at the request of the individual faculty mem-

bers named as defendants in this action and has sold and offered for sale such copies both alone and in conjunction with copies of other works; and it being further

STIPULATED AND AGREED that Unique has engaged in the foregoing activities without the consent of plaintiffs or other legal authorization.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, on consent of the parties, that:

1. As used in this Order and Final Judgment:

a. The term "work" includes any work presently existing and any work created after the date of this judgment; and

b. "Multiple copies" shall mean more than one copy of the same material: (i) made at the same time or in the same or immediately related transaction for or on behalf of the same person; (ii) made for or on behalf of the same person at different times under any circumstances which should reasonably give Unique grounds for belief that it is engaging in the making of more than one copy of the same material for the same person; (iii) made at the same or different time or times for or on behalf of different persons under any circumstances which should reasonably give Unique grounds for belief that such persons are members of a single group or are otherwise engaging in a related or concerted reproduction of the same material; or (iv) made at any time or times under any circumstances from a copy retained by or in the custody of Unique. The term "person" as used in this definition shall include Unique.

2. Except as provided in Paragraph 4 hereof, Unique shall be and is permanently enjoined and restrained from making multiple copies of any copyrighted work of any plaintiff or any part or portion of any such work, whether alone or in combination or conjunction with other works or materials.

3. Except as provided in Paragraph 4 hereof, Unique shall be and is permanently enjoined and restrained

from selling or in any manner distributing, or offering for sale or distribution, any multiple copies or any one copy from among multiple copies, of any copyrighted work of any plaintiff or any part or portion of any such work, whether alone or in combination or conjunction with other works or materials.

*2 4. Nothing in this judgment shall be deemed to enjoin or restrain Unique from making or distributing copies of any copyrighted work of any plaintiff or portions thereof where:

a. When accepting such work or portion for production of multiple copies, Unique shall require all customers to submit a certification in the form annexed hereto as Exhibit A which certifies that:

i. written permission or authorization to make and distribute such copies has been obtained from the owner of the appropriate copyright, *provided* Unique has no reasonable grounds for doubting the authenticity of the permission or its applicability to the work or portion; or

ii. the copies are made at the request of a faculty member of a non-profit institution and are in full compliance with the conditions of Paragraph II and III of the March 19, 1976 "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals," [H.R. Rep. No. 94-1476](#), 94th Cong., 2nd Sess. 68-70, *reprinted* in (1976) U.S. Code Cong. & Ad. News 5659, 5682-83, annexed hereto as Exhibit B, with which the faculty member is familiar, *provided* Unique has no reasonable grounds for doubting the position of the requestor or such compliance; or

iii. the copies are made at the request of a New York University faculty member and copying has been approved by the General Counsel of the University in compliance with the University's "Policy Statement on Photocopying of Copyrighted Materials for Classroom and Research Use," annexed hereto as Exhibit C, with which the faculty member is familiar, *provided* Unique has no reasonable grounds for doubting the position of the requestor, or that such approval has been given.

b. Unique shall require the customer to supply the original of the written permission described in Paragraph 4(a)(i), and such permission shall be attached

to the Exhibit "A" certification.

c. If the written permission described in Paragraph 4(a)(i) requires the use of a copyright notice on such copies, Unique shall take reasonable steps to ensure that such notice is provided by the customer and appears on all copies which are made by Unique.

d. Unique shall keep all certifications and attachments as described in Paragraph 4(a) for a period of one year.

5. Unique shall pay to the plaintiffs an amount equal to its profits from the distribution of the works identified in claims 1-13 of the complaint and materials distributed together therewith, such amount to be determined by agreement of the parties or by inquest.

6. Upon request, Unique shall provide access to its business premises once during every three (3) month period to an authorized representative of the plaintiffs for the purpose of ascertaining compliance with the terms of this judgment. Access shall be afforded at reasonable times during Unique's business hours. The representative shall, upon reasonable advance notice, be given the right to inspect and make copies, at the plaintiffs' expense, of the certifications and attachments referred to above.

*3 7. Unique shall prominently post on its business premises a notice substantially as set forth in Exhibit D, and a copy of Exhibit B.

8. Unless otherwise agreed to by the parties or ordered by the court, any copying done on Unique's business premises, whether by Unique or by any other person, shall be attributable to and be considered done by Unique and shall be subject to the prescriptions herein and to the provisions of the copyright laws.

9. If any violations or possible violations of the terms of this Order and Final Judgment are brought to Unique's attention by or on behalf of any of the plaintiffs, or by or on behalf of the Association of American Publishers, Inc., Unique will promptly inquire into any violations and advise such plaintiffs or Association in writing of the results of its inquiry and of any action which has been or will be taken with respect thereto. This paragraph does not impose any

obligation upon the plaintiffs or said Association, and does not in any way restrain or otherwise affect the right of any plaintiff to proceed against any violation of the terms of this Order and Final Judgment in such manner as it may deem fit.

10. Each plaintiff agrees that prior to instituting any future action for copyright infringement against Unique that is based upon claims of photocopying other than those claims specifically identified in claims 1-13 of the Complaint, it will notify Unique in writing and accord reasonable opportunity for amicable discussion; but nothing in this paragraph shall preclude any plaintiff from then proceeding with such claims in such manner as it may in its sole discretion determine.

11. Unique agrees that this judgment shall be binding on its agents, servants, employees and all other persons acting under its direction, control or supervision.

12. There shall be no relief granted on any of the claims and counterclaims in this action other than that specified herein, all such claims and counterclaims being merged herein.

13. Each of the parties to this decree shall bear its own costs incurred in this action, subject to Paragraph 5.

14. Forthwith upon the entry of this judgment or prior thereto, Unique shall destroy all materials within its possession or control distribution of which would infringe the terms of this judgment.

15. The parties hereto shall have the right to apply to this Court for such further relief as may be necessary to effectuate this Order and Final Judgment.

Exhibit A

I hereby certify that, with respect to the work or portion(s) thereof described below:

Written permission or authorization to make and distribute such copies has been obtained from the owner of the appropriate copyright, the original of which is attached.

The copies are made at the request of a faculty

member of a nonprofit institution and are in full compliance with the conditions of Paragraphs II and III of the March 19, 1976 "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals," a copy of which is posted on the premises, with which I am familiar.

*4 The copies are made at the request of a New York University faculty member and the copying has been approved by the General Counsel of the University in compliance with the University's "Policy Statement on Photocopying of Copyrighted Materials for Classroom and Research Use," with which I am familiar.

Title and Author of Work (if a contribution to a periodical, anthology or other collective work, set forth both the title, volume and number, and author or editor of the collective work and the title and author of the contribution):

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE
TABLE

Exhibit B

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that:*

A. The copying meets the tests of brevity and spontaneity as defined below; *and,*

B. Meets the cumulative effect test as defined below; *and,*

C. Each copy includes a notice of copyright

Definitions

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or,

(b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in “i” and “ii” above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) “Special” works: Certain works in poetry, prose or in “poetic prose” which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph “ii” above notwithstanding such “special works” may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use of maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

*5 [The limitations stated in “ii” and “iii” above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. *Prohibitions as to I and II Above*

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

(b) There shall be no copying of or from works intended to be “consumable” in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(a) substitute for the purchase of books, publishers' reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.

Exhibit C

Policy Statement on Photocopying of Copyrighted

Materials for Classroom and Research Use

In December, 1982, nine publishers commenced a lawsuit against the University and nine members of the faculty (as well as an off-campus copy shop) alleging that the photocopying and distribution of cer-

tain course materials, without the permission of the copyright owners of the materials, violated the Copyright Act (17 U.S.C. §§ 101 et seq., 90 Stat. 2541, Pub. L. 94-553). It has become increasingly clear that the subject of photocopying for classroom and research purposes is of significant concern to the faculty, who have inquired about issues such as when photocopying may be done without the consent of the copyright owner; when and how permission to photocopy should be obtained; how exposure to liability may be reduced; and under what circumstances the University will defend them against claims of copyright infringement arising out of photocopying for classroom and research use. To assist the faculty in resolving these issues, to facilitate compliance with the copyright laws, and as part of the settlement of the publishers' lawsuit, the University is issuing this Policy Statement.^{FN1}

^{FN1} This Policy Statement supersedes the document entitled "Interim Guidelines Concerning Photocopying for Classroom Research and Library Use" which was distributed on January 18, 1983.

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

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

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

*6 A. The Guidelines set forth in Appendix I are to be used to determine whether or not the prior permission of the copyright owner is to be sought for photocopying for research and classroom use.^{FN2} If the proposed photocopying is not permitted under the Guidelines in Appendix I, permission to copy is to be sought. An explanation of how permissions may be sought and a procedure for furnishing to the administration information concerning the responses by copyright owners to requests for permission is set forth in Appendix II. After permission has been sought, copying should be undertaken only if permission has been granted, and in accordance with the terms of the permission, except as provided in the next paragraph.

^{FN2} To minimize intrusiveness and over-centralization, the responsibility for making this determination will continue to reside with the individual faculty member. In making this determination, the faculty member should carefully consider all sections of the attached Guidelines.

B. The doctrine of fair use may now or hereafter permit specific photocopying in certain situations, within limitations, beyond those specified in the Guidelines^{FN3} or those that might be agreed to by the copyright owner. In order to preserve the ability of individual faculty members to utilize the doctrine of fair use in appropriate circumstances without incurring the risk of having personally to defend an action by a copyright owner who may disagree as to the limits of fair use, a faculty member who has sought permission to photocopy and has not received such permission (or has received permission contingent upon conditions that the faculty member considers inappropriate) may request a review of the matter by General Counsel of the University. If upon review the General Counsel determines that some or all of the proposed photocopying is permitted by the copyright law, the General Counsel will so advise the faculty member. In that event, should any such photocopying by the faculty member thereafter give rise to a claim of copyright infringement, the University will defend and indemnify the faculty member against any such

claim in accordance with the provisions of the Board of Trustees policy on Legal Protection of Faculty (Faculty Handbook [1982 ed.] pp. 109-112).

photocopying gives rise to a claim of copyright infringement.

Exhibit D

Notice

FN3 The Guidelines contained in Appendix I were negotiated by education, author, and publishing representatives in 1976 and were incorporated in the House of Representatives report accompanying the Copyright Act of 1976. The introductory explanation of the Guidelines in the House Report describes their relationship to the doctrine of fair use as follows:

Photocopying of copyrighted materials by or for New York University faculty is subject to specific rules and procedures set forth in the University's "Policy Statement on Photocopying of Copyrighted Materials for Classroom and Research Use." Copies of this statement are available in The Faculty Handbook (supplement) and through the Deans' offices and the office of the Secretary of New York University.

Agreement on Guidelines for Classroom Copying in

S.D.N.Y. 1983.
Addison-Wesley Pub. Co., Inc. v. New York University
Not Reported in F.Supp., 1983 WL 1134 (S.D.N.Y.),
1983 Copr.L.Dec. P 25,544

Not-For-Profit Educational Institutions

With Respect to Books and Periodicals

END OF DOCUMENT

The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

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

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