

## Private Copy Center Guilty of Copyright Infringement

At the University of Michigan (UM), professors create coursepacks. These are a collection of readings, *i.e.* journal articles, excerpts from books, etc., designed by the professors for use by students in particular courses. The coursepack often contains copyrighted material. Professors at UM took a master copy of the coursepacks to a private, for profit copy center, Excel Test Preparation, Coursepacks and Copies. When a student came to the copy center, Excel first obtained written verification that the student was enrolled in a particular course. It then gave the student the master copy of the coursepack and allowed the student to make a copy using Excel's copy equipment. Excel charged the student a fee for this service.

Several owners of published copyrighted material sued Excel claiming that it was infringing their copyrights. Excel's primary defense to the copyright infringement claim was that it was making "fair use" of the copyrighted material. The fair use doctrine is codified at 17 U.S.C. 107, and provides in pertinent part:

The fair use of a copyrighted work, including such use by reproduction in copies ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include

- (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.... 17 U.S.C. § 107. (emphasis added)

The federal district court in this case entered a summary judgment against Excel, finding it guilty of copyright infringement. *Blackwell Publishing, Inc. v. Excel Research Group, LLC.*, \_\_\_ F.Supp.2d \_\_\_, 2009 WL 3287403 (E.D.Mich., Oct 14, 2009), Interestingly, the copyright owners did not file suit against the UM, the professors, or the students. The plaintiff copyright owners, in effect, conceded that UM and its professors and students were entitled to the fair use defense, on the theory that their use of the copyrighted material was for nonprofit educational purposes. The court commented, however, that though it did not have to decide the question in the present case, the fact that the copying was done by students or professors would not, *ipso facto*, establish an education use. All the factors of the fair use defense would have to be examined in such a case. With regard to the present defendant Excel, the Court held it was clear that Excel was not entitled to the fair use defense. The court characterized Excel's use as purely commercial, and the fact that Excel required the students themselves to actually make the copies was not regarded as of any significance.

The *Blackwell Publishing* case should serve as a cautionary reminder to UAHuntsville faculty and students that use of copyrighted material in a university environment does not *automatically* entitle the user to the fair use defense. For-profit commercial entities will probably not be entitled to the fair use defense, even if the copying is done by students at the behest of professors. Even more problematic is the court's comment that circumstances may exist where even copying by professors and students may not qualify for the fair use defense. The court will examine the totality of the circumstances, and if any commercial use is present the fair use defense will likely not be applicable.