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Hasmukh C. Shah, Ph.D.
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Washington, D.C. 20037

Re: Copyright and Photocopying

Dear Has:

Following-up on our recent discussions regarding the photocopying of copyrighted materials, we wanted to apprise you of a recent court decision which could significantly expand the rights of copyright holders. In *American Geophysical Union et al. v. Texaco*, Civ. No. 85-3446 (S.D.N.Y. July 22, 1992), the court held that the unauthorized photocopying of individual articles from a scientific journal for internal research purposes constitutes an infringement of the journal's copyright. (The court did not assess damages for the violations, and we suspect that they will be settled out of court as is typical in such infringement cases.)

The *Texaco* decision emphasizes the importance of complying with copyright laws in any instances where the use of the photocopied material could result in some commercial gain. The *Texaco* court expanded the scope of protection afforded to copyright holders significantly in ruling that copyright infringement can result from the unauthorized reproduction of a single article even if the copied material is used for purely internal purposes.

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I. THE DECISION

Although Texaco was charged with violating the copyrights of a number of publishers at various locations throughout the company, the court focused its analysis on the reproduction of a single scientific journal by one of Texaco's research centers. The publication which the court analyzed was *The Journal of Catalysis*. Although the Texaco research center held three subscriptions to *The Journal of Catalysis*, its publishers charged that Texaco's scientists had regularly and repeatedly, without authorization, reproduced specific, individual articles for use in their research. Texaco argued that the reproduction of these articles was for "personal" use and that it was a reasonable and customary practice, necessary to the conduct of scientific research which qualified as "fair use" under the federal copyright laws.^{1/} In support of its claim, Texaco cited *Williams & Wilkins v. National Institute of Health*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by equally divided court*, 420 U.S. 376 (1975), which involved photocopying by scientists at the National Institute of Health (NIH) for research purposes. The publisher alleged that this practice constituted infringement of its copyright since the research centers use of these articles was, at least in part, motivated by commercial gain.

The court rejected Texaco's fair use defense, distinguishing *Williams* in two important respects. First, the court held that in contrast to Texaco, research at the NIH is conducted exclusively for the purpose of advancing science, not for commercial gain. Second (and of greater relevance to CMA), the

^{1/} Copyrighted works may not be copied in whole or in part without the permission of the copyright holder, unless such copying constitutes "fair use." The factors to consider in assessing whether a particular use is "fair use" include:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. The nature of the copyrighted works;
3. The amount or 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 the value of the copyrighted work.

court pointed out that an efficient photocopy licensing system did not exist at the time the photocopying by the NIH scientists occurred. Furthermore, the court found that because the negotiation of individual licensing agreements to cover photocopying was basically unheard of at the time, entities usually photocopied without seeking authorization from the publisher. The court noted that this is no longer the case, citing the emergence of the Copyright Clearance Center, Inc. (CCC), and pointing out that since *Williams*, publishers and individual users have developed private annual licensing agreements covering publications not registered with the CCC.

The court in *Texaco* appears to have relied heavily upon the existence of the CCC as justification for further restricting the fair use protection applied to photocopying. Although *Texaco's* scientists had apparently only photocopied articles for use in research and in the preparation of scientific papers and presentations, the court rejected *Texaco's* claims that this was a "fair use." The court justified its decision to exclude such "internal" photocopying from "fair use" protection, in part, because of the availability of the CCC as an "efficient licensing system," and because the uses have an element of commercial gain.

The *Texaco* decision appears to prohibit virtually all uncompensated photocopying by commercial entities. Whether or not this rule would apply to non-profit entities such as CMA is unclear, but the court's broad interpretation of "commercial gain" certainly makes its application to non-profit organizations a viable possibility.

Texaco has not yet decided whether it will appeal this decision. If it does not, of course, the opinion will stand and could be quite influential if and when other courts grapple with the same issue.

II. NEED FOR PHOTOCOPYING POLICY

The *Texaco* case illustrates the willingness of publishers to aggressively pursue copyright infringers, even where the infringement involves the reproduction of individual articles as opposed to entire publications. Although publishers have not yet targeted trade associations for copyright infringement, it is possible that association photocopying practices will come under closer scrutiny in the future. Because CMA employees and CMA Panel members may, from time-to-time wish to photocopy articles from copyrighted publications, it would be wise for CMA to

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consider adopting some type of photocopy policy (if one does not already exist).

Because CMA is a not-for-profit trade association, the "fair use" exemption would probably be interpreted more broadly than in the *Texaco* case. However, tax status, is not dispositive of the question of whether the use of certain photocopied material may be characterized as "commercial" or "non-commercial." For example, the systematic photocopying of materials from copyrighted publications on a routine basis for internal distribution CMA members may not be "fair use," despite CMA's non-profit status.

In the wake of the *Texaco* decision, CMA may wish to consider obtaining a license from the CCC to cover the photocopying of copyrighted materials. Joining the CCC would obviate the need to seek permission to make copies for internal purposes from those publications included in the CCC directory. The distribution of photocopied materials to CMA members (and others) may not be covered, however, since that practice probably does not constitute "internal use."

Determining whether copying constitutes "fair use," and is therefore permitted without the permission of the copyright holder, is a difficult and highly subjective area of the law. Based on the decision in *Texaco*, however, photocopying even occasional articles from a scientific journal, or other limited circulation publications may not constitute a "fair use" if there is an element of commercial gain in their use. While we disagree with the outcome of the *Texaco* decision, we did want to bring this important case to your attention. If you have any questions or comments on this issue, please do not hesitate to call.

Cordially yours,



S. Craig Tautfest

cc: Robert Ondocsin, Esq.

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