Copyright -- Electronic (and other) Coursepacks

February 2004

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The copyright statutes do not have a provision specific to coursepacks. Case law establishes that even non-profit educational use of coursepacks can be copyright infringement. The common ways to avoid infringement are permission and fair use. Additional strategies include use of library reserves in lieu of coursepacks, and creation of coursepacks with material in the public domain\(^1\) or with material for which the instructor or university holds the copyright.

I. **“Fair use” copying for coursepacks**

A. **Coursepack cases**

Two major cases from the 1990’s dealt with coursepacks sold by commercial entities. In *Basic Books v. Kinko’s*, 758 F.Supp 1522 (S.D.N.Y. 1991), several publishers sued Kinko’s for making coursepacks and selling them to college students. The court ruled for the publishers, awarding statutory damages and attorneys fees of close to $2 million. Kinko’s had used 12 books excerpts in five coursepacks. One of the excerpts was only 14 pages long; another was only 5% of the source book.

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\(^1\) Public domain works include those created by the federal government (see 17 U.S.C. 105), and works for which copyright has expired (see [http://cidc.library.cornell.edu/copyright/](http://cidc.library.cornell.edu/copyright/)). In addition, there is a growing trend to post electronic works under licenses that allow free use with minimal restrictions (e.g., [http://creativecommons.org/](http://creativecommons.org/)).
Kinko’s claimed “fair use” under 17 U.S.C. 107\(^2\) as one of its defenses. In applying the “fair use” test, the court first looked at the purpose and character of Kinko’s copying. It rejected the argument that a commercial entity’s copying for student use was an educational purpose: Kinko’s intention was to make a profit, not to educate. The court further noted that Kinko’s did not add critical commentary or other “transformative” value to the excerpts it copied. This analysis leaves open the possibility that the first part of the fair use test might favor universities where the coursepacks are created directly by a nonprofit educational institution, especially if sold at no more than cost, and especially where critical commentary is added.

The second factor -- the nature of the work -- weighed in favor of Kinko’s because the works were factual rather than fictional. Fiction is deemed to be worthy of greater legal protection, in the world of copyright, on the theory that it has a higher degree of creativity. Factual works also get less protection because of the public interest in dissemination of facts. This analysis is ripe for re-examination in future cases with different facts: some fictional works may be such slavish imitations of other works, with little independent creativity. Conversely, some great literary and art works may contribute more value to the public interest than a simple factual work. Perhaps the

\(^2\) This 1976 statutory provision codified earlier case law. It provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, 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. …. 
complications inherent in this second factor are why it appears to have received relatively little weight in the court’s fair use analysis.

On the third factor, the court found the amount and substantiality of the excerpts weighed in favor of plaintiffs. It found the amount of the copied excerpts to be quantitatively significant, even for excerpts 14 pages long or just 5% of the original work. The court also found the copied excerpts to be qualitatively significant “since that is the likely reason the college professors used them in their classes.” Kinko’s at 1533. This circular reasoning means that every copy made for a coursepack would automatically fail this part of the fair use test. It is quite possible that some courts would reach a different conclusion.

The fourth factor is the effect of coursepack copying on potential markets for the copyrighted work. The court noted that this factor should receive greater weight than the other factors, and that the plaintiffs need only show a potential market would be adversely affected. Id. at 1534. The potential market includes fees for permission to make copies of excerpts, as well as sale of the entire books. In determining market effect, the court did not focus on the fact that one coursepack, for example, was sold to just three students. Instead, the court looked to the fact that Kinko’s had 200 stores nationwide, mainly located near university campuses, so the potential market impact of nationwide coursepack copying by Kinko’s would be significant. Consequently, the court counted this factor heavily against Kinko’s.

One question is whether the analysis would be different if a single university, or a single faculty member, was engaged in the copying (as opposed to a nationwide business). However, the answer may still be “no” if the copyright owner persuades the court to focus on the effect on the permissions market where there is widespread coursepack copying by universities across the country.

The court’s focus on the potential national effect of copying by Kinko’s, instead of focusing on the market for the particular copies in the case, presents a great hurdle for
fair use. However, Kinko’s made the situation worse by its failure to introduce evidence to rebut the idea that permissions could have been readily obtained. Id. at 1535. One lesson from this case is that to prevail on the fourth factor in the fair use test, it would help if universities could document that the permissions process is ineffective for a particular coursepack excerpt. This may be possible if the permission fee is exorbitant, or if a major service like the Copyright Clearance Center states that it is unable to assist in finding the copyright holder and efforts to contact the publisher and author fail. Realistically, not many faculty can be expected to go to such lengths.

One reason Kinko’s had to pay such high damages was the fact that it was not acting as an agent of the universities it served. The court emphasized the difference between copying for commercial purposes versus non-profit educational purposes. Copying for non-profit educational purposes may enhance a fair use defense for universities and faculty who prepare their own coursepacks. The university has a much better chance of prevailing on fair use than does a commercial copyshop, where it does its own copying and charges the students no more than actual cost.\(^3\)

Even if the university does not prevail on fair use, it may avoid paying substantial damages if it can show it had a reasonable belief that the copying was fair use. The copyright law says there are no statutory damages when the infringer is an employee or agent of a non-profit educational institution, and the infringer had a reasonable belief that his copying was fair use.\(^4\) Liability for actual damages (lost profits) would still exist.

\(^3\) Note that the court expressly recognized there were circumstances where course packs (which it called “anthologies”) could qualify as fair use. The court also stated the “Classroom Guidelines” cited in the legislative history of the fair use statute were not automatically determinative of fair use. Copying in excess of the Classroom Guidelines” could be fair use, and conversely, copying within the Guidelines may not always be fair use. Kinko’s at 1536. This is important since the Classroom Guidelines don’t allow copying for coursepacks.

\(^4\) The relevant part of 17 U.S.C. 504(c)(2) states:

The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of
The key to remission of statutory damages is a “reasonable” belief that fair use applied. Faculty should be encouraged to use a fair use worksheet (see Attachment 1), or consult with counsel, prior to making the coursepack. This will go a long ways toward establishing the requisite reasonableness.

The second major case on coursepacks is *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996). The district court had found infringement without fair use where a commercial copyshop created coursepacks without copyright permission. A three-judge panel of the Court of Appeals reversed. But then the full Court of Appeals sitting *en banc* ruled 8-5 that the district court was correct with regard to its ruling on fair use. In other words, the abstract and subjective nature of fair use leads to much disagreement among judges. Universities are left with a high degree of uncertainty when conducting a fair use analysis.

The *Michigan Document Services* case (hereafter, “MDS”) involved excerpts of six different works. The shortest excerpt was 17 pages, comprising 5% of the original work. *Id.* at 1384-85. The owner of MDS asserted the *Kinko’s* case had been wrongly decided, so he would not obtain permissions. This gave him a competitive advantage over other copyshops that obtained permissions.

The court noted that the fourth factor in the fair use test -- the impact of copying on the market of the copyright holder, should copying become widespread -- weighed in favor of the plaintiffs. The three plaintiffs collected permission fees of about $500,000 per year. The court thus looked at the actual market, not potential market, that would be the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords….
affected by widespread copying without permission. This fact alone was enough to defeat the fair use claim in this case. *Id.* at 1387.

Echoing the *Kinko’s* decision, the court in *MDS* stated:

As to the proposition that it would be fair use for the students or professors to make their own copies, the issue is by no means free from doubt. We need not decide this question, however, for the fact is that the copying complained of here was performed on a profit-making basis by a commercial enterprise.

*Id.* at 1389. Furthermore, the court observed the MDS had performed mechanical copying instead any creative transformation.

This language gives universities at least a reasonable good faith argument of fair use where:

- there is coursepack copying by faculty or other university employees;
- the copying is solely for educational purpose;
- the copied excerpts are fairly short;
- the excerpts are modified with critical commentary, annotations, or other transformative acts;
- the copyright notice is included;
- the price of the coursepack is no more than the copying cost.

The first three elements are essential, and the last three are optional but helpful. Even if all six elements exist, a finding of fair use is not guaranteed. The outcome will depend somewhat on which court hears the case. But even if infringement is found, there should be a good case for remission of statutory damages. The court in *MDS* remarked, “Fair use is one of the most unsettled areas of the law.” *Id.* at 1392. Accordingly, coursepack copying that satisfies the elements above should qualify either for fair use under 17 U.S.C. 107 or at least remission of damages under 17 U.S.C. 504(c)(2).

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5 The court also noted that the availability of “potential” markets was not an unlimited concept. The concept of potential markets arises only for markets that are “traditional, reasonable, or likely to be developed.” The lack of an existing market for permissions weighs in favor of fair use. *Id.* Thus, an inability to find or get a response from the copyright holder would go a long way toward proving fair use.
B. Fair Use Guidelines

Both the *Kinko’s* and *MDS* cases refer to the “Classroom Guidelines” that were created as part of the negotiation among interest groups when fair use was being codified in the drafting of the 1976 revision to the Copyright Act. The *MDS* court notes that the Classroom Guidelines are referenced in the legislative history. They are viewed by courts as a source of guidance for what may be fair use, even though the hard and fast rules in the Classroom Guidelines are not legally binding. Unfortunately, the Classroom Guidelines provide no help for coursepacks. They limit most excerpts to 1,000 words (or about two pages), require “spontaneity” in the decision to copy, and expressly prohibit anthologies. *Id.* at 1390-91. If the Classroom Guidelines are cited against coursepack copying, one can argue that they are intended as a minimum, or safe harbor, and do not purport to be the maximum allowable fair use.

From 1994 to 1997 the Clinton administration called together over 100 organizations representing copyright stakeholders, including publishers, libraries, and academia, to establish fair use guidelines for distance learning, multimedia, electronic reserves, interlibrary loans, and image collections. This was called the Conference on Fair Use, or CONFU. Many hours of negotiation took place, and various drafts were produced, but ultimately the groups could not reach consensus. The draft guidelines

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7 Background information is available at [http://www.utsystem.edu/ogc/intellectualproperty/confu2.htm](http://www.utsystem.edu/ogc/intellectualproperty/confu2.htm)

produced by CONFU may be helpful as a reference point for fair use discussions, but they are not legally binding.

C. Electronic coursepacks

The use of electronic coursepacks would not appear to alter the fair use analysis very much. On the one hand, digital copies are easier to reproduce and distribute, thereby presenting a greater threat to the copyright holders. On the other hand, a coursepack is so specific to a particular university course that for many courses there is not likely to be much interest for anyone beyond the students in the class. That is, in terms of the fourth factor in the fair use test, digitization by itself probably may not further erode a permissions market.

To provide greater assurance against unauthorized copying and distribution, the faculty can borrow some of the TEACH Act protections. The electronic coursepack could be posted on a website that allows access only by students officially enrolled in the course, and then only for the duration of the course. This should be accompanied by a prominent warning such as: “This material is protected by copyright. You may not download or otherwise copy it. You may not electronically transmit or otherwise distribute it.” If technological controls against copying are feasible, they could be implemented as well. Likewise, if compact disks or other media are used instead of a website, it would be worth exploring copy-prevention technology. Judges will be more likely to find fair use for electronic coursepacks if there are electronic limits on access and some warning or limit on further copying.

If the electronic version of the coursepack draws from sources under license, it will be necessary to establish that the coursepack use does not violate the license agreement. Most hard copies will be owned outright -- no license agreement to worry about. Many electronic sources, however, will be subject to license agreements in addition to copyright law. The license agreements may contractually prohibit the copying or distribution used to make electronic coursepacks.
Whether or not license restrictions exist, some electronic sources may be protected by anti-copying technology. Faculty who are knowledgeable enough to defeat the anti-copying technology should resist the temptation. Hacking into electronic sources for purposes of making a copy to use in coursepacks would violate the anti-circumvention provisions of the Digital Millennium Copyright Act.

II. Obtaining copyright permissions for coursepacks

With conventional hard copy coursepacks, the usual procedure is for the professor to submit a list of excerpts from published works to the university bookstore or to a local copyshop. The copyshop or other entity who sells the coursepacks to students will typically get copyright permission and add the cost of permission fees into the coursepack price. The faculty member spends does not have to spend time dealing with copyright legalities, yet has assurance there will be no legal problem.

One potential drawback is if the copyright holder cannot be located. This is not likely for published works, and in any event it would enhance the possibility for fair use. Another potential drawback occurs if the permission fee is too expensive. NC State’s in-house copyshop experienced that several times back when it handled permissions for coursepacks. Normally the professor would withdraw any selection where the permission fee exceeded a reasonable amount. In one case a local copyshop obtained the permissions, which were quite costly, and the students did not buy any copies of the coursepack. These experiences suggests that faculty may want to set a limit on coursepack cost when they arrange with someone to obtain permissions and create and sell the coursepacks.

A. Getting permissions

The creator of a coursepack may get copyright permissions on her own, or by enlisting the services of an on-campus copyright coordinator (if the university provides
one) or a copyshop. Enlisting someone else to do the work is easiest. But sometimes the faculty member may prefer to handle coursepack production, or the extra cost of a copyshop may be a burden, or the local copyshop may not create electronic coursepacks. In those cases, the faculty member will need advice on how comply with copyright law while creating a coursepack.9

To seek permission on one’s own, either use a copyright clearance service or find the copyright holder (usually it’s the publisher) and contact them directly. If you contact the copyright holder directly, send a simple form, identifying the work, stating the nature of the proposed use, and asking for written permission. Identification of the work usually requires the following information for text documents:

- The name of the publisher for each article or book to be copied
- Book or journal title
- Author/editor of the book or journal article
- Copyright year
- The pages that will be used
- Number of course packets needed
- ISBN/ISSN (optional but helpful)

Attachment 2 contains a sample permissions form. Several weeks -- preferably 4-6 weeks -- of lead time is required. The faculty member should have a backup plan if affordable permission is not forthcoming. The copyright holder may ask for a permission or license agreement as well (see Attachment 2 for references to agreement forms).

Using a copyright clearance service increases the cost of the coursepack. It may require adherence to university purchasing rules. And clearance services may not work well with copyright holders who have not registered with them. But they can be a convenience to the faculty, and are often the first choice for obtaining permission.

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9 In addition to the discussion here, see the Stanford University Libraries website at http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/index.html for general copyright information, and http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter7/7-a.html for information specific to academic coursepacks.
B. Sources for copyright clearance

A list of web links to organizations that represent copyright owners appears under the heading “Related Resources” on the University of Minnesota’s webpage at http://dmc.umn.edu/IP/permissions.shtml. Another list is at the University of Texas webpage at http://www.utsystem.edu/ogc/intellectualproperty/permissn.htm. Perhaps the largest permissions service for books and articles is the Copyright Clearance Center (hereafter, “CCC”) at http://www.copyright.com/. The CCC has a convenient web-based order service with a section specifically for electronic course content. See https://www.copyright.com/Help/HelpEccsFAQ.asp for a description.

CCC currently charges 15 cents per page per student, plus the copyright holder’s royalty fee. The Stanford University Libraries indicate permission fees from publishers are often around 8 cents per copied page, but there is a wide range. Some may be dramatically higher. Many permissions can be granted instantly, but CCC recommends the faculty contact them 4-6 weeks before the coursepack is needed in case they have to search out the copyright holder for permission. The permissions typically last only for one term and must be renewed for subsequent terms. It may be difficult to get a permission through CCC for more than 25% of a work.

Another online copyright permissions service that provides digital coursepacks is XanEdu at http://www.xanedu.com/products/cp_learn.shtml. There are undoubtedly other services available, and just this past year Kinko’s has gotten back into the business. Their “Coursepack Complete” service obtains copyright clearance through the University of Southern California’s University Custom Publishing in addition to providing the coursepack on electronic media or hard copy.

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10 The CCC is also active in helping publishers sue coursepack producers who don’t get permissions. See the article at: http://www.copyright.com/Services/RightsholderNewsOnline/RightsholderNewsSpring03.html#recentLitigation.
III. Conclusion

Fair use can be a viable option for using copyrighted material in coursepacks. However, it requires careful analysis of each selection, preferably in consultation with legal counsel. This effort will be enough to deter many faculty from trying it. Other faculty may assume that an educational purpose automatically qualifies coursepack copying for fair use. This myth needs to be punctured with an ongoing copyright education program on campuses. The positive story is that non-profit educational copying by university employees, especially with the restrictions noted above at the end of part I. A., may well result in a finding of fair use or at least a remission of statutory damages. In contrast, copyshops will have a difficult time proving fair use.

Copyright permission is the main option for making coursepacks lawfully. For paper coursepacks, local copyshops will usually procure the permissions along with printing and selling the coursepacks. For paper or electronic coursepacks, copyright clearance providers can provide a quick response on the availability and cost of permissions, for works registered with them. Finally, faculty (and other university employees) have the choice of contacting the copyright holders directly for permission to create paper or electronic coursepacks.
ATTACHMENT 1

Peggy Hoon at NC State University has developed a fair use worksheet, accessible at http://www.lib.ncsu.edu/scc/copyright/worksheet.pdf and reproduced below. In addition, Kenneth Crews at Indiana University – Purdue University has a fair use checklist at http://www.copyright.iupui.edu/checklist.htm. Another source is the section entitled “Using the Four Factor Fair Use Test” within the webpage at http://www.utsystem.edu/OGC/IntellectualProperty/copypol2.htm#test by Georgia Harper at the University of Texas.

FAIR USE WORKSHEET

In determining whether people may use portions of copyrighted works in their teaching and scholarship, the law permits some uses for nonprofit educational purposes, including fair uses. The following worksheet is to guide faculty in making fair use determinations. A fair use analysis should be done each time a fair use of a work is contemplated. The fair use doctrine, as codified in §17 U.S.C. 107, sets forth four general factors to be considered when evaluating whether a proposed use of a copyrighted work is a fair use and thus, does not require permission from the copyright holder. The legislative history of this section and court decisions have provided further insight into the application of these factors to particular situations. The following areas should be carefully considered and balanced in making a reasonable, good faith fair use determination, whether for teaching, research, or other purposes. Reliance upon fair use should be limited to those cases that meet the fair use balancing test in favor of the intended use, and are carefully documented to support that conclusion.

This document should be read in conjunction with the Copyright Primer [http://www.lib.ncsu.edu/scc/copyright/primer.pdf] and any questions should be addressed to your legal counsel and/or campus copyright resource.

General Information
Name: ____________________________
Course, if applicable: __________________________ # of students: __________
Semester: Fall_____ Spring______ Summer_____ Year: ________
Other Use: ________________________________________________
_______________________________________________________________________

Description of Material(s)
1. Author/Editor/Translator: ________________________
The Four Factors

1. What is the purpose of the proposed use?

- Nonprofit
- Teaching
- Scholarship/Research
- Personal
- Criticism
- Commentary
- Parody
- Restricted Access
- News Reporting
- Otherwise “Transformative” Use
- Commercial
- Entertainment
- Bad Faith Behavior
- Profit
- Lack Of Attribution

Uses on the left tend to tip the balance in favor of fair use. Uses on the right tend to tip the balance in favor of seeking permission from the copyright holder. The uses in the middle, if they apply, are favorable to fair use: they add weight to the tipping force of uses on the left.

Tally: Favors Fair Use:__________ Does Not Favor Fair Use:__________

2. What is the nature of the copyright work to be used?

- Factual
- Published
- A Mixture Of Factual And Imaginative
- Unpublished (Right Of 1st Publication)
- Creative
- Entertainment
- Consumable Materials (Workbooks, Answer Sheets)

Again, uses on the left tend to tip the balance in favor of fair use while uses on the right favor seeking permission. In this case, uses in the middle have little effect on the balance.
Tally: Favors Fair Use:__________      Does Not Favor Fair Use:__________

3. How much of the copyrighted work will be used?

<table>
<thead>
<tr>
<th>Small Amount</th>
<th>Large Portion Or Whole Work</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Amount Is Appropriate For A Favored Educational Use</td>
<td>• Portion Used Is Qualitatively Substantial</td>
</tr>
</tbody>
</table>

The amount of material should be measured both quantitatively and qualitatively. Quantity should be evaluated relative to the length of the entire work and the amount needed. The reproduction of an entire work weighs against fair use. A reproduction that is relatively small, but still uses the “heart” of the work will weigh against fair use.

Tally: Favors Fair Use:__________      Does Not Favor Fair Use:__________

4. What is the effect on the market or potential market for the copyrighted work?

<table>
<thead>
<tr>
<th>After An Evaluation Of First Three Factors, Proposed Use Is Tipping Towards Fair Use</th>
<th>Replaces Sale Of Copyrighted Work</th>
</tr>
</thead>
<tbody>
<tr>
<td>• User Owes Lawfully Acquired Copy</td>
<td>• Significantly Impairs Market Or Potential Market For The Work</td>
</tr>
<tr>
<td>• No Significant Effect On The Market Or Potential Market For The Work</td>
<td>• Numerous Copies Made</td>
</tr>
<tr>
<td>• No Similar Product Marketed By The Copyright Holder</td>
<td>• Use Made Publicly Accessible On The Web</td>
</tr>
<tr>
<td>• Copyright Holder Unidentifiable</td>
<td></td>
</tr>
</tbody>
</table>

Reproduction that substitutes for purchase of the original weighs heavily against fair use. This factor is closely linked to the other factors.

Tally Favors Fair Use__________      Does Not Favor Fair Use__________

**Determination**

Based on the fair use analysis completed above, I have determined that my use of the above, I have determined that my use of the materials numbered _____________________ materials numbered either _____________________ falls within the fair use exception or _____________________ does not fit within the fair use exception (in which case I will obtain permission before using the material).

Signature _______________________________________________________________

Date ____________________________________
ATTACHMENT 2

Wake Forest University has a sample permission letter at http://www.wfu.edu/Library/copyright/Sample_Copyright_Request.doc which is reproduced below with slight alteration. Several forms and a permissions guide are posted by the NC State University Libraries at http://www.lib.ncsu.edu/scc/contents.html. A licensing or permission agreement may be necessary in addition to the permission request. The copyright holder may provide an agreement form in response to the request. Sample agreements are at the NC State website noted above. A sample permission request form and agreement form are also posted at the bottom of http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter7/7-a.html.

Your Name
Department
_________ University
[ mailing address]

Permissions Department
Company Name
Address
City, ST ZIP

Dear Sir or Madam,

I am writing to request permission to copy the following work for use in a course I am teaching. If you do not have the ability to grant these rights, I would appreciate any information on who could.

Item Information

- author's, editor's, translator's full name(s)
- title, edition and volume number of book or journal
- copyright date
- ISBN for books, ISSN for magazines and journals
- numbers of the exact pages, figures and illustrations

Reproduction Information
• whether material will be used alone or combined with other photocopied material
• number of copies to be produced
• method of reproduction (photocopying, scanning, etc.)
• method of distribution (eReserves system, Blackboard, etc.)

[ this is an appropriate place to indicate if the material is to be included in a coursepack, and what access and copying controls will be used if the coursepack is electronic]

Course Information

• instructor's full name and contact information including email and phone
• name of college or university
• course name and number
• semester and year in which material will be used (indicate if you would like permission for more than a single semester)

Thank you for your attention to this matter, I have enclosed a self-address stamped envelope for your convenience.

Sincerely,