Questions & Answers -- Copyright Column

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one for hire before it would be published the
first time.

The effect would be a repeat of the Fred
Fisher decision and once again blow away
Congressional intent.

“The parties to a grant may not agree that
a work shall be deemed one made ‘for hire’
in order to avoid the termination provisions
of a ‘for hire’ relationship ... does not in fact
exist between them. Such an avoidance de-
vice would be contrary to the statutory provi-
sion that ‘termination of the grant may be ef-
fected notwithstanding any agreement to the
contrary.’ It is the relationship that in fact
exists between the parties and not their de-
scription of that relationship, that is determi-
native.” 3 Melville B. Nimmer & David
Nimmer, Nimmer on Copyright § 11.02[A][2]
(2000 ed.).

In interpreting works “for hire,” courts fo-
cus on actual relationships between the par-
ties and not the language of their agreement.
See, e.g., Donaldson Pub. Co. v. Bregman,
Voceco & Conn. Inc., 375 F.2d 639, 640–42
(2d Cir. 1967).

Likewise, under agency law, one is not an
agent merely because the parties have used
the word “agent.” The designation does not
control facts that show something contrary. 3

Despite Marvel’s dire prediction, all
publishers would have to do is settle the
suit with the demands of collateral

estoppel and file detailed factual findings
on the employment status of the author with
the court.

Another of Those Estoppels
You’ve Always Wondered About
But Been Too Shy To Ask

The doctrine of equitable estoppel ap-
plies “where the enforcement of the rights of
one party would work an injustice upon the
other party due to the latter’s justifiable reli-
ance upon the former’s words or conduct.”
Kosakow v. New Rochelle Radiology Assocs.,
P.C., 274 F.3d 706, 725 (2d Cir. 2001).

Marvel’s final contention was they would
have gone on to trial had they known Simon
would later disavow the agreement. And they
would have called as witnesses Martin
Goodman and Jack Kirby. And both have
now died.

But there was full discovery with cross-
examination in the depositions. Aren’t those
admissible in evidence?

However the Second Circuit said Marvel
was overlooking the intent of § 304(c). Con-
gress intended for authors to be able take back
their promises. Otherwise, § 304(c) would al-
ways be trumped by equitable estoppel.

And further, Simon’s claim didn’t arise
until a decade after the agreement. There is
no detriment to Marvel which has reaped the
cash harvest for the twenty-eight year renewal
period. And even should Simon prove at trial he
was not working for hire, Marvel can continue to
profit from all Capt.

Ams. works prior to the termina-
tion date.

Questions & Answers —
Copyright Column

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QUESTION: A professor wants to photo-
copy several cases handed down by the
United States Supreme Court. Since U.S.
government documents are fair use, how
does this apply if he is copying the cases from
a textbook, not the Supreme Court Reporter.
Does that make any difference?

ANSWER: Actually, U.S. government
documents are public domain rather than fair use which means that the
works may be copied, edited, etc.,
without seeking permission from the
copyright owner or applying the
d four fair use factors. The offi-
cial U.S. Reports, available from GPO, is a government publication and therefore may be
freely reproduced, edited, translated, etc. The Supreme
Court Reporter, published by

West Publishing Company, is a commer-
cially published law reporter, and it contains
features that make the volume copyrightable
as a compilation such as the headnotes, the
editorial features, and the like. However, if
the faculty member copies only the case it-
self without the headnotes, the text of the court
opinion, even from the West
publication, is also public domain.

Taking a court opinion from a textbook
presents a different issue since most
text or casebooks contain edited
versions of cases. Has the editor
done enough work to qualify the
cases as derivatives work that
would be separately copyrightable?
Perhaps. The faculty member then
has several alternatives to stay
within the law: (1) reproduce the
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opinion from the U.S. Reports, (2) reproduce
the opinion minus the headnotes from the Su-
preme Court Reporter, (3) create a Webpage and
link to the full-text of the opinion online, (4)
download it from a Website that uses the offi-
cial version, or (5) seek permission from the
editor of the casebook to use her edited ver-
tion. It usually is not difficult to obtain free
permission when the use of the copies made
is for teaching purposes in a nonprofit edu-
cational institution.

QUESTION: The library has a CD sub-
scription which contains the following copy-
right note: “The information contained herein
may not be reproduced or transmitted in any
form or by any means, electronic or mechani-
cal, including photocopying and recording, or
translated into another language, without the
express written consent of the X Board. All
rights reserved.” My colleague believes that it
is okay to email, fax or mail sections of this
work, but that seems problematic since parts
of this work are actual copyrighted publica-
tions that the library receives in hard copy.

ANSWER: The first issue is whether the
library signed a contract agreeing to those terms.
If so, clearly the terms of the license agreement
control. The second issue is whether the CD
was protected by a shrinkwrap license. Al-
though not all jurisdictions recognize shrinkwrap
as a legitimate form of licensing, more and more
are doing so. In fact, in the cir-
cuit from which this question arose, shrink
wrap licensing has been upheld, and the library likely
is bound by the terms of that statement.

QUESTION: Recently a hospital library
received a gift of CD players and CDs for
patient use. The library wants to lend CDs
and CD players to patients in their rooms so
they may enjoy listening to them. This is
not a not-for-profit hospital and the library
does not charge for this service. Even
though almost all of the rooms in the hospi-
tal are private rooms, the administration
is concerned that this activity will not comply
with copyright law. Is there any way to
design this service to ensure that it is copyright
compliant?

ANSWER: Assuming that the donor pur-
chased the CDs and that they are not music
downloaded via the Internet without permi-
sion of the copyright holder, there is no prob-
lem at all with lending these copyrighted
works to patients along with the necessary
equipment. The first sale doctrine permits
libraries to lend copies of legitimately ac-
quired materials in their collections. The
service as described does not entail repro-
cucing the CDs but merely lending the
original CD to a patient, and it creates no
copyright problems.

QUESTION: In order to save space, each
year a corporate library that has a CCC an-
ual license for photocopying has its journals
microfilmed by a library microfilming house,
which either uses the hard copy the library
provides or provides film from its collection.
It does not seem to be a problem when the mi-
crofilm is received and the hard copies are
destroyed. The library considers the microfilm
version to be a different format of information
that has already been purchased, and the mi-
crofilm is used in place of hard copy by docu-
ment delivery staff and scientists.

ANSWER: Actually, this is a problem. The
library is reproducing the journals cover to cover.
Such reproduction requires permission of the
copyright holder. If the publisher offers a mi-
crofilm edition of the journal, it is unlikely it
will grant permission for a particular library to
make its own microfilm version, but the library
certainly may ask. It is possible that the “li-
brarymicrofilming house” has a license for such
reproduction and is paying royalties, but the li-
brary should inquire.

QUESTION: A more complex issue is
whether to store the journals on CDs instead
of microfilm. Aside from the issue of whether
CD technology will be around in 10 years, there
is interest in exploring this idea of replacing
the older microfilm by having it converted to
CDs by a jobber. The library would then load
the CDs on a server or network them for ac-
cess from the desktops by users. Would net-
working the CDs and having them accessible
by one person at a time at a workstation change
anything?

ANSWER: It does change things con-
siderably! While microfilming as described
above may be infringement, at least only one
analog copy is made by such activity. Digi-
tizing a journal and burning it onto CD in
order to network it without a license to do
so, either through the CCC digital repor-
ty service or by a license directly from the
publisher, is multiple copying in digital form
which is infringement. Moreover, it is not
covered under the current photocopy license.
The library should contact publishers and
seek permission before making a user-created
digital version (CD) of a copyrighted journal
available throughout the company.

Biz of Acq — EDI in DRA and SIRSI: Current Status
of Electronic Data Interchange in Both DRA and
SIRSI, and Areas for Future Enhancements

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Abstract

Use of EDI (Electronic Data Interchange)
can enhance library operations. Beta testing of
EDI with the DRA Classic system at Jackson
Library, University of North Carolina at
Greensboro, is described: the testing process,
problems discovered and solved, and ongoing
concerns. EDI is currently in operation at Jack-
son Library. Workflow advantages and disad-
vantages are presented. The authors discuss the
role of the ILS vendor in setting up EDI opera-
tions and highlight current EDI capabilities of
selected book and serials vendors.

Keywords

EDI, Electronic Data Interchange, ILS, in-
tegrated library system, HISAC, vendor

What is EDI?

EDI (Electronic Data Interchange) is a stand-
ard that provides for direct transmission
of business data from one computer to another.
When used between libraries and vendors, or
vendors and publishers, EDI transmits orders,
bibliographic records and invoices in a struc-
tured electronic format. It allows libraries and
vendors to transfer data quickly and easily —
when it works the way it ought to work. Two
standards are currently used for EDI: the X12
standard, developed by the American National
Standards Institute, and the UN/EDIFACT
standard developed in Europe. Each standard
has mandatory and optional elements. Certain
data elements called “match points” instruct
the computer where to place data, linking messages
sent by one communication partner to another.
Possible match points are ISSN or ISBN, pur-
chase order number, invoice number, or price.
Match points are generated by the integrated
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