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LEGAL ISSUES

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Legally Speaking — Drama in the Library: Always Seek Permission to Publicly Perform Scripts, Even when the Library Owns Them

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Agnes is the theater director at East Bun-
kis University. She wants to perform the play “Death of a Salesman” by Arthur Miller. She has not yet decided whether to charge admission to the play. Agnes calls George, the drama librarian, and asks him to make ten copies of the script for the cast and crew. What should George advise Agnes?

Librarians are often asked to help provide scripts or music to other departments on campus. They are also asked for guidance. Often librarians are the best copyright experts on their college campuses, so it is important for us to know how the copyright law affects scripts and music, and what to say when we are asked for advice.

The scenario above indicates two types of rights that are exclusively reserved for the copyright holder, namely the right of reproduction and the right of public performance. Section 106 of the Copyright Act provides the following rights for copyright owners (subject to exceptions such as Fair Use, education, and library use):

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

There is an exception for libraries to make copies listed in § 108 of the Copyright Act. However, this exception only releases librarians and library workers from liability under certain circumstances. (For more information on the library exceptions, please see chapter 5, “Copyright and Education,” of my book The Law of Libraries and Archives or my “Legally Speaking” column from April 2000, “What is Intellectual Property?”) The library exception in § 108 allows library clients or library workers to make or distribute one (and only one) copy of a work. The reproduction must be made for a non-commercial purpose such as research, learning, etc. In addition, the copy must include any notice of copyright that appears on the original. If there is no notice of copyright on the original, the reproduction must include a legend stating that the work may be protected by copyright.

In our scenario, the library would be prohibited from making multiple copies of a script for use by the whole cast. This would fall outside of the library exception and would constitute a violation of the right of reproduction, since the library may only make (or allow to be made) one copy of the script. The librarian should explain to the faculty member why she can’t make multiple copies.

The library would also be subject to liability if the worker had actual knowledge that the client intended to use the material in an infringing fashion or for commercial gain. If there is actual knowledge on the part of library workers, the library exception in § 108 does not apply, and the library would be liable for violation of copyright.

Suppose that George only made one copy, but he knew that Agnes was planning to make more copies for the cast. George’s actual knowledge that Agnes was planning to infringe copyright law would subject him and the library to liability along with Agnes for violating the right of reproduction.

Another requirement for the § 108 copyright exception is that the use of the item be non-commercial. Because Agnes was considering charging admission, her use would in fact be commercial. Therefore, if George knew that Agnes was considering charging admission, he would not be able to claim the protection of § 108. As a result, George should advise Agnes not to make a photocopy of the script.

The second right of the author that would be violated is the right of public performance. The copyright holder can control who performs his or her material publicly, and has the right to charge licensing fees. It does not matter whether or not the person who puts on the performance charges admission; either way, the public performance rights still need to be obtained. Therefore Agnes must obtain permission in order to publicly perform the play. The fee for the license will probably be higher if she charges admission than if she doesn’t.

Similar public performance rights also apply to films. If you show the film for non-educational use, you must obtain permission. Similarly, both recorded music and musical scores require permission in order to be performed publicly. There is a limited educational exception in § 110 of the copyright act; for more information, see my “Legally Speaking” column in the November 2003 issue of Against the Grain. However, this exception does not apply if the performance is open to the public.

Many small schools, community orchestras, and community theater groups mistakenly assume that no one will know if they put on a play without asking for permission. What they don’t realize is that the agencies that handle performance rights employ people whose job is to go through the local newspapers of every city in the United States and see if someone is putting on a play, concert, etc. In the old days, groups such as ASCAP, SESAC, and Samuel continued on page 67
French subscribed to every newspaper in the U.S. Their research has become even easier with the introduction of online databases, Web searching, and blogs. It is pretty hard to hide a public performance these days, so it is better to ask for permission than to be sued for copyright violation.

How to Obtain a License for Public Performance

Many libraries and bookstores are familiar with the Copyright Clearance Center (CCC) because of reserves and course packs. The CCC also deals with requests to include copyrighted material in other published works. However, the CCC does not deal with public performance rights. Their sole interest is the right of reproduction. If you are interested in public performance, however, you would need to contact one of the performance rights agencies that specialize in this area. Some of the major agencies include:

- The American Society of Composers, Authors, and Publishers (ASCAP). ASCAP handles the rights to music from over 200,000 U.S. composers, songwriters, lyricists, and music publishers. In addition, ASCAP can help obtain the rights to music from other countries through agreements with other agencies.

Social Dancing in America: a History and Reference consists of 2 volumes. Volume 1 covers developments during the 17th, 18th, and the 19th Centuries while Volume 2 focused on the 20th century. The volumes are arranged in chapters following a chronological order. There is no alphabetical arrangement of articles so a solid general index is a necessity and fortunately both volumes have their own useful index. In fact, each volume is self contained and can stand by itself, however for reference purposes they work best as a set. Written in a straightforward and reader friendly style, Giordano’s work is nonetheless based on serious scholarship. His bibliographies are rich and varied including both primary and secondary sources, and as with the indexes, each volume has its own list of resources. Volume 1 also has a bibliography of dance instruction manuals available from the Library of Congress and Volume 2 has a select list of Hollywood movies by type of dance.

This work is one of those reference titles that will be at home on the circulation shelf, as well as in a reference collection. Some readers will want to check it out for extended use while other will want to cherry pick for helpful facts. Either way, both academic and public libraries will want to give it serious consideration for addition to their collections.

Print and online publications serve different purposes. One does not necessarily obfuscate the need for the other. I worry about the zealous drive to think digital all the time.

Despite ergonomically sound equipment and furniture, I have some carpal tunnel problems and my eyes are strained after long times spent online. Isadore Rosenfeld, M.D., the renowned cardiologist, advised recently about the importance of getting up from one’s computer every half hour or so to stretch one’s legs and move about in order to prevent the formation of embolisms, which can be life threatening. When I sit before a computer screen, I may rarely move anything but my fingers for hours.

The quest for knowledge will best be served by both print and online publications. To believe that one will replace the other is unwise as well as unrealistic.

Academic librarians have to think more about balance over bias, take a deep breath, and step away from the Online-Only bully pulpit. Take some time away from the computer and pick up a good magazine. Maybe we’ll see one another at a Borders Café.
Questions & Answers — Copyright Column

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QUESTION: May a university library provide temporary access to the University’s online databases to individuals who are not enrolled students?

ANSWER: Only if the library’s licenses to those databases permit such access. The question does not indicate who these individuals might be. Are they faculty and staff, or are they totally unaffiliated with the institution? Most licenses provide access to faculty and staff of that university along with enrolled students.