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Questions & Answers -- Copyright Column

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**Questions & Answers — Copyright Column**

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**QUESTION:** An interlibrary loan librarian in an academic library has received requests to photocopy a chapter instead of sending the book. Is it just a chapter from a book that the library owns, does the library own the copyright? Must the library pay copyright fees in order to supply the requested copy?

**ANSWER:** The library does not own the copyright just because it purchased a copy of the book; the author or publisher owns the copyright. However, Section 108(d) of the Copyright Act permits libraries to make single copies of articles, book chapters, etc., at the request of a user if the copy becomes the property of the user, and the library displays prominently where the orders are placed and on the order form a notice about copyright. Further, libraries may provide copies of the same to borrowing libraries through interlibrary loan if the borrowing library makes the appropriate CONTU guidelines certifications. So, under these conditions, there is no problem with reproducing book chapters for interlibrary lending.

**QUESTION:** In a public library, if discarded books are sold at a nominal fee, is this not making a profit so that it would make the library ineligible for the library exceptions?

**ANSWER:** Section 108(a) of the Act establishes the criteria that a library must satisfy in order to qualify for the section 108 exceptions. Section 108(a)(1) says that the reproduction and distribution must not be for direct or indirect commercial advantage. A public library is not organized as a for-profit entity under the tax code of the United States. A public library is non-profit even though it may charge for some services such as selling discarded books if the income from these activities goes back to support the library.

**QUESTION:** May a library circulate software, i.e., Microsoft Office products, with a copyright warning?

**ANSWER:** Yes, nonprofit libraries may do so. Section 109(b) of the Copyright Act permits nonprofit libraries to lend copies of software for nonprofit purposes. In order to do this, however, the library must include a copyright warning on the software package specified by the Register of Copyrights and published in the Code of Federal Regulations, see http://www.law.cornell.edu/copyright/regulations/201_24.html.

**QUESTION:** Is a home school class in a public library the same as a traditional classroom for fair use purposes?

**ANSWER:** Typically a nonprofit educational institution is a school that is organized as a school under the tax codes of the country. In the copyright sense, the problem with home schooling is that the exceptions that apply for nonprofit educational institutions apply to schools themselves. Home schooling is not a school in the traditional sense. The exceptions recognize the public good of nonprofit educational institutions, and there is no institution in a home schooling situation.

On the other hand, a public library is also a nonprofit institution and there is an argument that they have become an educational institution for home-schooled students. If public libraries so claim, then only their activities for home-schooled students count, and they will have to satisfy the same restrictions as do nonprofit educational institutions when taking advantage of the exceptions. For example, Section 110(1) permits these institutions to display or perform copyrighted works, such as motion pictures, in a classroom to students and teachers as a part of instruction. But the exception requires that no one else may be present for the performance. Most public libraries would be conflicted about excluding other members of the public from such performances, but in order to qualify for the nonprofit educational institution exception for home-schooled students, the library would have to do so.

**QUESTION:** Is there sufficient creative content in cataloging records to make them eligible for copyright protection?

**ANSWER:** Unfortunately, no. This is not to say that catalogers are not incredibly creative in what they do! But for copyright law purposes, a work must be original; originality requires that the work originate with creator (i.e., not be copied from someone else), and have a least a bit of creativity. Some works are simply excluded from copyright protection according to Section 102(b) of the Copyright Act: ineligible works include concepts, systems, procedures, principles, or discoveries no matter how they are explained, illustrated, or embodied in a work. Cataloging records consist almost entirely of facts, and facts are not copyrightable. So, cataloging records are not copyrightable.

**QUESTION:** A librarian runs a community library in the virtual metaverse of Second Life, located on a charity sim, the West of Ireland, and the charity it supports is Project Children, a 501(c)(3) organization. A free client program called the Second Life Viewer enables its users, called Residents, to interact with each other through avatars. Residents can explore, meet other residents, socialize, participate in individual and group activities, and engage in activities from the purely social, to diverse role-play, advocacy, continuing education, as well as in the creation of music, art and literature. Storytellers read stories in the West of Ireland and sometimes at other locations as volunteers. They receive no currency or gain, and no admission is charged to the simulation in which stories are read. Readings are done live in voice rather than streamed. Must the librarian obtain permission for these readings?

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**Cases of Note — Trademark from page 49**

If Boston Duck got exclusive rights to the term, it would create barriers to entry for other companies and limit competition. See Devan R. Desai & Sandra L. Rierson, Confronting the Genericism Comandrum, 28 Cardozo L. Rev. 1789, 1851 (2007).

**So What About the Composite Mark?**

The generic “duck tours” has been shoved together with “Boston” which is a weak descriptive term worthy of only minimal protection. Its strength comes from long years of operating in the area during which the company grew from four boats to twenty-four and served over 585,000 customers. So that makes it “reasonably strong” as an identifier of the source of the service.

But can consumers be confused with Super Duck? In the analysis, you drop the generic parts out – duck tours. “Boston” and “Super” both have two syllables, but they look and sound different. Consumer confusion has largely come out of Boston Duck being the sole provider in the market for so long.

And then there’s the two logos – ducks splashing in the water. Nearly every company in the world uses some version of a cartoon duck with water. This again is describing a service and not a source. See Lawrence v. P.E. Sharpless Co., 203 F. 762 (E.D. Pa. 1913) (finding the image of a cow descriptive for dairy products).

With logo as in word marks, “similarity is determined on the basis of the total effect of the designation, rather than a comparison of individual features.” Pignons, 657 F.2d at 487; See also McNeil Nutritionals, LLC v. Heartland Sweepers, LLC, 511 F.3d 350, 359 (“[F]orceful and distinctive design features should be weighed more heavily because they are more likely to impact the overall impression.”). Boston had a purple background, yellow cartoon duck, camouflage hat, duck flapping wings making water splash. Super had blue background, white cartoon duck shaped like an actual vehicle with passengers on it; duck in orange cape with powerful arms holding orange flag. 🦆 continue...
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**ANSWER:** To some extent, these storytellers do what is being done in every library, school, and daycare center on a daily basis. It is important that the readings are done live to a small group of people (usually about 20) and are not recorded or streamed for later playback. Section 110(4), the so-called nonprofit performance section, permits public performances of nondramatic literary and musical works without permission of the copyright holder if those performances are not transmitted, provided certain conditions are met. For example, there may be no payment to performers, promoters, etc., and there may be no admission charge, or if there is one, the proceeds must go back to charitable, educational, or religious purposes.

The real question here is whether Second Life counts as a transmission. There are arguments that support both views. Typically, anything done over a computer network is transmitted. But one could argue that a live reading in Second Life is more like a live performance than it is a transmission. But, at this point, the law likely supports the fact that it is a transmission. If so, then permission would be required for the reading of the stories.

The librarian could approach a few publishers and make the argument that the readings are equivalent to a live performance. If she can get them to agree, then she could use this agreement to convince other publishers to agree.

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Biz of Acq — Constant Change in Acquisitions

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Change is the one constant in the Acquisitions department at the Texas Tech University Health Sciences Center (TTUHSC) Libraries of the Health Sciences where Acquisitions work for all four libraries is centralized in Lubbock. Like most libraries, the change in the process of our everyday job duties is as common as the change from print to electronic resources and the ensuing need for organizational change.

**Payment Processes**

Not all of the changes are by choice, but the result of institutional decisions. The institution’s implementation of a new accounting system and the relocation of several of our Finance and Administration departments to other campuses within the city bring about changes specific to the Acquisitions department. The new accounting system changes the format of account numbers for creating electronic purchase orders. It also provides new financial reports, all in a new format. There is also a new look to the vendor payments area. We became a more paperless department because of the relocation of several of our Finance and Administration departments. No longer can a paper copy of an invoice be walked over to Accounts Payable. We became a more paperless department because of the relocation of several of our Finance and Administration departments. No longer can a paper copy of an invoice be walked over to Accounts Payable. Now we request electronic invoices from the vendor and submit them for payment via email attachment. Some vendors still send paper invoices. We scan paper copies and retain them for payment. Also, no longer can an original license be picked up from