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Questions & Answers -- Copyright Column

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An expert report relying on stock elements is excludable. Lists of similarities are “inherently subjective and unreliable, particularly where the lists contain random similarities, and many such similarities could be found in very dissimilar works.” *Herzog*, 193 F.3d at 1257.

A work could, however, be protected if its unprotectable elements are arranged in a unique way. See *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (observing that the arrangement of puppies in a photograph may constitute a protectable element).

The expert reports focused on concepts and ideas behind the painting and *EPCOT*, but not the expressive aspects of those concepts and ideas. The arrangement of a variety of world cities in a village is a stock idea that’s been around for many **World’s Fairs**. Neither the idea of a Moroccan casbah or a French provincial village nor their placement beside each other is protectable by copyright. 🐾

Questions & Answers — Copyright Column

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QUESTION: *A music library is evaluating the feasibility of a CD preservation program and is considering the following to preserve its existing collection of CDs proactively but is concerned about whether these actions infringe copyright. (1) Create a single duplicate copy of CD holdings and store these copies in a secure dark archive. (2) Continue to circulate the originals as normal, but if an original becomes lost or damaged beyond usability, first conduct a search to see if a replacement copy can be found in-print or otherwise available on the market at fair market value. (3) If no such replacement can be found, create a new copy from the duplicate in the dark archive and use that for future circulation.*



ANSWER: While the plan makes sense as a preservation matter, some of

the actions do infringe the copyright. (1) The only backup copies for libraries that are permitted are under section 108(b), and that is for unpublished works only. CDs, and music CDs in particular, typically are published. Reproducing these CDs to create backup copies without permission is infringement. What the library can do is to purchase two copies of each CD and place one in a dark archive. (2) Number two follows the requirements of section 108(c) for replacement copies. (3) If no replacement copy can be found at a fair price, then the library is permitted to make a replacement copy which could be made from the purchased CD in the dark archives.

Even if the **Copyright Act** were amended to further library preservation, it likely would permit copying for preservation only if the work were at immediate risk of loss or destruction. CDs are not considered to be so fragile.

QUESTION: *A library is considering downloading audio books as a less expensive alternative*

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to purchasing the books on CD. Would this present copyright concerns?

ANSWER: Yes, it would present copyright concerns if the intent is to download books onto a server so that multiple users can listen to them rather than paying a license fee. While individuals may purchase downloads from **Audible.com** and other companies, the license agreement to which they must agree assumes that the downloading is being done for one listener. The proposed activity is equivalent to buying one copy of a printed book and then making photocopies of it to lend rather than purchasing multiple copies. It may be possible to obtain a multiple listener license from these companies, which the library should do if it intends to substitute downloads for purchasing books on CD.

QUESTION: A school takes the position that fair use does not apply to podcasts since they are syndicated and are not confined to the classroom. Is this correct?

ANSWER: Actually no. A podcast is simply a way to disseminate a speech or a talk. So, it depends on the podcast and the copyright owner. The owner may be delighted to have the podcast made public to everyone; on the

other hand, the owner may restrict access or require anyone who obtains access to agree to the terms of a license. Fair use does apply to podcasts, but if the work is licensed, the license agreement trumps fair use.

QUESTION: When posting materials on Blackboard for a class, if the articles and chapters are documented and properly cited, is it necessary to seek permission to post them? Or is documenting/citing the source enough to satisfy copyright concerns?

ANSWER: This question mixes two things: copyright and plagiarism. The copyright concern is copying the materials in the first place since reproduction is one of the exclusive rights of the copyright holder. Plagiarism is claiming original authorship of someone else's work or incorporating it without adequate acknowledgement. So copyright is not concerned with citing or attribution typically but with reproduction, distribution, display, etc.

Before the Web and course management software, faculty members often photocopied handouts and distributed them to the members of a class. *The Guidelines on Multiple Copyright for Classroom Use* were negotiated guidelines that **Congress** endorsed in 1976 as a good balance of the interests of publishers and those of educators. They specified which activities and within what limits would

constitute fair use for producing handouts of copyrighted works for students in nonprofit educational institutions. One requirement is that the faculty member seek permission when the same item is used as a handout for a second term. Applying the guidelines to the electronic environment means that posting an article for a class on **Blackboard** (within the limits of the guidelines) would require permission for use the second semester.

An excellent alternative is to provide a link to the item on the Web or to a licensed resource to which the educational institution subscribes. It requires no permission to post the link.

QUESTION: May a library place on reserve a copy of a journal issue that is personally owned by a faculty member? If so, may it remain on reserve for multiple semesters?

ANSWER: Yes. If the journal issue is owned either by the library or by a faculty or staff member, it may be placed on reserve indefinitely. Putting an original copy on reserve does not implicate copyright in any way since the library is not reproducing the work for reserve. If it is a photocopy that is being placed on reserve, whether personally owned by a faculty member or made by the library, it is a reproduction and permission should be sought for use after the first term it is on reserve for that faculty member. 🐾

Something to Think About — Sometimes It Hurts

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There are many times in libraries when things go haywire. We have had tornados, water damage, mold, stolen materials, erratic behavior, changing workflows, improper management of materials and many more circumstances that bother your equilibrium. Somehow, libraries and library staff always seem to right themselves and make things work well again. Coping with problems seems to be our forte. We have had incorrigible patrons and homeless sleepers that challenge our very core, but again we come out on top. I once worked in a library that had a staff member who shot the Director and fired at other staff. The world seemed like it was ending, but the routine of our lives helped to heal the wounds and start us on a recovery that would guide us toward leadership in a technologically developing world. You can never know what will be happening next, so you strive to keep your legs under you and keep going. Each day seems to be that way when you've seen forty years of library work. The positive attitudes help to put one foot in front of the other until a new trail is blazed. Through all of these hard times and changes we find the adrenalin flowing and a new source of energy that renews our philosophies and stamina.

The one event that really stops a staff is the loss of one of its members. A few weeks ago, our Ac-

quisitions Librarian passed away. We stopped to grieve and support each other. Everyone remembered so many wonderful times and funny incidences. **Suzan** was a friend to everyone. She was quiet, and an extremely hard worker, finding ways and places to acquire materials that never seemed to be on the map. It was hard to believe that she wouldn't just come through the door some morning and say hey to all of us. You feel that in your heart, and yet you know the dichotomy, that she will never come again. Staff gathered in small groups, some in offices, some in hallways, some in outside spaces. We all searched for a way to cope with the realism. We wanted a way to have closure, and yet there was none at that time.

The management went from group to group and person to person asking if everyone was ok, then they told us if the sadness was too much, we could go home. Some people gradually left the workplace, finding solace among other friends, nature, or the secure walls of homes and churches. We were offered on-campus counseling, individually or in groups and there was a gathering in our training room to honor her memory. Since **Suzan** was a chocoholic,

everyone vowed to eat as much chocolate as they could between 9 and 10 A.M. that Thursday, her normal Collection Development Team's meeting time. That day,

Suzan's obituary appeared in the papers and an agency was named as the benefactor of money in her name. No surprise to any of us that it was an animal rescue group. Everyone donated graciously and we hoped that would be enough to remember her. Many of us have absorbed bits and pieces of her job until another person can be found for that position, and find we are adapting slowly to the changes in her leaving. She worked on the other side of the partition from me and I can still hear some of her daily comments and laughs when I get low. She has never failed to lift us in life or death.

The interesting part of this life drama is that the administration, as affected as everyone else, has been great in supporting our grieving processes. They recognized the problem, afforded us a number of ways to pursue our separate processes, and they have continued to check on our progress in the midst of end-of-year procedures. I understand that not all workplaces follow these procedures, but it is important to the efficiency of the Team. People must understand that you care about them and can afford some simple changes in the face of grief, before they can want to buy into the Team needs and be supportive of the Group at other times. Being respectful of others feelings is important to the smooth working of a Team. You may not find this in any books, but I find it each day in the hearts and minds of all who work here. Is this something you need to think about in your workplace? 🐾

