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Questions & Answers -- Copyright Column

Laura N. Gasaway

University of North Carolina-Chapel Hill School of Law, laura_gasaway@unc.edu

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Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>
www.unc.edu/~uncldng/gasaway.htm

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 (1) The only backup copies for libraries that are permitted are under section 108(b), and that is for unpublished works only.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 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 acknowledgment. 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.

Cases of Note from page 58

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) with its incredibly low standard for originality nonetheless dealt with a compilation of data and not sculptural design.

Now this semi-mystifies me because adding knobs and doo-dads to a bed seems more creative than putting business phone numbers in a separate section from home numbers. And knobs and doo-dads are sure separate from bed qua bed of box springs, four legs and mattress. Indeed, in a world without mosquito nets or overhead mirrors for the sexually raunchy, bedposts serve no functional use whatsoever.

Nonetheless, the Fourth Circuit goes with their distinction between utility and decoration as laid down in **Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., Inc.**, 74 F.3d 488 (4th Cir. 1996).

"[T]he industrial design of a unique, aesthetically pleasing chair cannot be sepa-

rated from the chair's utilitarian function, and therefore, is not subject to copyright protection. But the design of a statue portraying a dancer, created merely for its expressive form, continues to be copyrightable even when it has been included as the base of a lamp which is utilitarian. The objective in designing a chair is to create a utilitarian object, albeit an aesthetically pleasing one; the objective in creating a statue of a dancer is to express the idea of a dancer." *Id.* at 493.

Well, that doesn't make a lot of sense to me. But the Fourth Circuit is in Richmond, VA. and these judges must decorate their Federalist mantles with bronze dames with clocks in their bellies.

And incredibly, they go on to say that an Illinois district court laid down a stringent test that design compilations detached from the furniture must be works of art as traditionally conceived. Which would at least be easy to apply. Knobs and doo-dads off a bed: not art. Bronze naked dame absent the clock: art. But this got reversed on appeal by the Seventh Circuit. 🐼