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Questions & Answers - Copyright Column

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Questions & Answers – Copyright Column

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We are so excited to have this column, which will be a continuing ATG column for future issues. Thanks, Lolly, for all your wonderful work! — KS

The following questions have been submitted to me over the past few months, usually via email.

Question: *What is the scope of the exemption in section 108(c) of the Copyright Act? Suppose a library purchased a microfilm copy of a copyrighted work published a number of years ago. It has since been discovered that the type of film used by the publisher is unstable and could deteriorate rapidly as well as hasten, if not cause, the deterioration of other films in the collection. Thus, it is a “deteriorating” copy as required by the statute. Consequently, the library wishes to remaster this and other films of this same type to a more stable, durable type of film and destroy the original. Does section 108(c) justify this action? What if the library could obtain an unused replacement copy but only in the unstable format?*

Answer: As is often the case, there is no black and white answer to this question. I believe that the library could make a stable copy. Section 108(c) permits the library to reproduce a work after it makes a reasonable effort to find an unused copy available at a fair price. The term “unused copy” indicates that it is not only a copy that has not been previously used, but also a copy that is usable, i.e., one that is stable. If the only format that is available for purchase at a fair price is another unstable microform, then the that copy is not usable.

Question: *A professor makes a cassette with excerpts of various musical recordings, thereby creating, in essence, a “compilation” or anthology. The professor is unable to identify the sources of most of these recordings. She wants to place these “home made” cassettes on reserve indefinitely (i.e., beyond even an academic year) so that students may listen to them in the library’s listening rooms in preparation for aural examinations. May she do so?*

Answer: The Guidelines on the Educational Uses of Music permit faculty members to make a tape of various recordings for the purposes of constructing aural exercises. The guidelines are silent about placing the tape on reserve in the library, however. I believe that it would be fair use to place these on reserve so that students could check them out to review them for the aural exercise. The Music Guidelines are silent about reuse of the tape, so I assume reuse is permissible. Of course, it would be preferable if the faculty member remembered the source of these recordings.

Question: *Under section 108(c) a library is permitted to reproduce a lost, damaged, stolen or deteriorating work in its collection after it makes a reasonable effort to find an unused copy at a fair price. What is a “reasonable effort” and a “fair price”?*

Answer: While none of the statutory language defines these terms, there is a definition of “reasonable effort” in the legislative history. The House Report that accompanied the 1976 Act, H.R. 94-476, says about reasonable investigation specifically in relation to section 108(c):

“The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located using the address listed in the copyright registration), or an authorized reproducing service.”

While this definition is not particularly helpful, it does give some guidance. It really means that a library should do the normal things it does to replace an entire volume, and to exercise independent judgment about what constitutes a reasonable investigation for the particular type of work involved.

I have located two published definitions of “fair price” related to the Copyright Act. Both give some guidance, one from the viewpoint of the

copyright holder and the other from the users of copyrighted works. The first comes from a booklet published by the **Association of American Publishers** in 1978 dealing with nonprofit library use. It states that the fair price of a work is (a) the suggested retail price if available from the publisher; (b) if not so available, the prevailing retail price; or (c) if an authorized reproducing service is used, the normal price charged by that service. A 1995 **American Library Association** publication, *The Copyright Primer for Librarians and Educators*, (2d ed. 1995) at p. 27, defines fair price thusly.

“The fair price of a reproduction is the price as close as possible to manufacturing costs plus royalty payments...” If the original format was multivolume and single volumes are not available, it could be argued that the full set price is not a fair price for a single volume.”

Question: *A professor is teaching a film course. The students must give class presentations about the films they watch for class. The library owns copies of the films they use. These student presentations are considered part of the teaching activities of the class. When the students make their presentations, they must show brief “clips” or excerpts to explain the scenes to which they are referring. Is it permissible for them to copy these clips/excerpts onto a videotape in order to avoid cueing up and fast forwarding the originals?*

Answer: Under section 110(1) students and teachers are permitted to perform a film or video in the course of instruction. This section of the Act does not permit reproduction, however. In my opinion, putting the clips on a tape in order to show them to the class is more than likely a fair use. However, either the student herself should keep the tape or tapes should be erased. They should not be retained for later use since the reproduction is simply to facilitate the performance in the class. 

