Against the Grain

Volume 10 | Issue 4 Article 22

November 2013

Questions and Answers: Copyright Column

Laura N. Gasaway
University of North Carolina, Chapel Hill

Follow this and additional works at: http://docs.lib.purdue.edu/atg

Part of the Library and Information Science Commons

Recommended Citation
Gasaway, Laura N. (1998) "Questions and Answers: Copyright Column," *Against the Grain*: Vol. 10: Iss. 4, Article 22.
DOI: https://doi.org/10.7771/2380-176X.2961

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.

Questions and Answers — Copyright Column

by **Laura N. Gasaway** (Director of the Law Library & Professor of Law, CB # 3385, University of North Carolina, Chapel Hill, NC 27599; phone: 919-962-1049; fax: 919-962-1193) <laura_gasaway@unc.edu>

Libraries are often confused about the difference in the copyright implications of in-house copying for users and interlibrary loan. The following questions are samples of some I have received in the past few months dealing with this issue.

Question: A hospital library is uncertain what restrictions apply when the library owns the journal and copies for in-house library patrons. Does it make a difference if it charges the patron for such copies?

Answer: In-house copying is basically what sections 108(d) and (e) of the Copyright Act permit. Think of this provision as the one governing copying for an end user even if the library ultimately will have to obtain the copy from interlibrary loan. However, the library must first meet the requirements of section 108(a): (1) the library is open to the public or to researchers doing research in the same or a similar field, (2) there is no direct or indirect commercial advantage to the library from such copying activities and (3) each copy reproduced contains a notice of copyright. Further, the library must give the user the warning specified in sections 108(d)-(e), i.e., the Register's warning, prior to making the copy for the user. Whether the library charges the user for making the copy is not the issue; cost recovery or making a profit is what matters. If the library makes a profit on that copy by what it charges the user, then the library has received a direct commercial advantage. If instead the library simply covers its cost in reproducing the copy for the user, then there is no direct or indirect commercial advantage.

Question: Does it make a difference if the library is in a for-profit entity?

Answer: This is not absolutely clear. Certainly, the answer is easier if the library is in a nonprofit organization. The question of whether a library in the for-profit sector copies for commercial advantage has never been litigated. In **American Geophysical Union v. Texaco**, 37 F.3d 881 (2d Cir. 1994), the courts, especially the district court, seemed to say yes, although Texaco was a section 107 fair use case and not a section 108 library exemption case. The safest bet is to consult corporate counsel to assist the library in making the decision about whether and how Texaco applies to the particular corporation.

Question: What restrictions apply as to how often a library may copy from the same journal title?

Answer: There are no restrictions in section 108(d) except that only one article from a journal issue can be reproduced for a user. For section 108(e) larger portions can be reproduced for users but the library must first make a reasonable effort to purchase a copy for the user, and this includes even a used copy. Section 108(g)(1) states that libraries may even copy the same material on separate occasions. This means that if several users request the same article, each user is treated as an individual and the copy may be made.

Question: Are there different rules that apply for interlibrary loan copying?

Answer: Yes, although these are not truly rules but are in the nature of guidelines or suggestions. Under the CONTU interlibrary loan guidelines, each calendar year a library may request only five items from a periodical title going back over the most recent 60 months of that journal. The borrowing library is limited to a guideline of five each year and must main-

tain records on the number of times it borrows from the most recent 60 months of each periodical title. When the library makes the sixth request from that title, it should then seek permission, pay royalties to the publisher, purchase the article from an authorized document delivery service or pay royalties to the Copyright Clearance Center.

Question: What happens when the user's request cannot be filled from the library's collection and the item must be obtained through interlibrary loan? How does all of this work together?

Answer: The user is still bound to one article per periodical issue even if the library has to get the copy through interlibrary loan. In the interlibrary loan guidelines, the suggestion of five applies to the library and not to the individual user. So, the user could use up the library's five annual requests for articles from that journal title by requesting five articles from five separate issues of the journal. The library must administratively decide whether to honor such a request or then be prepared to pay royalties on subsequent requests from that journal title during the year.

Legally Speaking
from page 57

selves but instead that they are in competition with other series.

Obtaining Federal Trademark Registration

In order to obtain a federal registered trademark for a series title, a publisher must file a trademark registration application with the PTO. If the series title is found to be non-descriptive by the PTO, the series title will be registered on the Principle Register. If, however, the series title is deemed to be descriptive by the PTO then registration will only be permitted on the Supplemental Register. Registration and the Supplemental Register does not provide the publisher with the full scope of protection provided by the Principal Register but it will probably preclude another publisher from using the registered series title for their publications. Furthermore, the publisher of a series title that is registered on the Supplemental Register may at some later date demonstrate that the series title has acquired secondary meaning. If the publisher can prove the series title has acquired secondary meaning, the series title will be eligible for registration on the Principle Register.

Conclusion

Literary titles, whether a single title or a series title may be protected. Although the copyright law will not protect titles, trademark and unfair competition law may protect these valuable properties. Federal trademark law is particularly useful for publishers who wish to register series titles while trademark common law and unfair competition laws are most suitable for the protection of single titles.

Please note: This article is not legal advice. You should consult an attorney if you have legal questions that relate to your specific publishing issues and projects.

***Lloyd L. Rich** is an attorney practicing publishing and intellectual property law. He can be reached at 1163 Vine Street, Denver, CO 80206. Phone: (303) 388-0291; FAX: (303) 388-0477; E-Mail: rich@csn.net; Web Site: http:// www.publaw.com. **Jennifer L. Fountain**, a graduate of the University of Denver School of Law, provided the research for this article.*

Endnotes

[1] Pocket Books, Inc. v. Dell Publishing Co., 267 N.Y.S.2d 269,272 (1966).

[2] J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 10.3 at 10-7 (Fourth Ed. 1997).

[3] Id. § 10.3 at 10-7 to 10-8.