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Legally Speaking-What is Intellectual Property?

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LEGAL ISSUES

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Legally Speaking — What is Intellectual Property?

by **Bryan M. Carson, J.D., M.I.L.S.** (Coordinator of Reference and Instructional Services, Western Kentucky University Libraries) <bryan.carson@wku.edu>

Dear Readers,

Welcome to the *Legally Speaking* column. This month marks a beginning, as I am beginning my editorship of *Legally Speaking*. It is a daunting task to take over for two very talented and dedicated editors, but I will attempt to do my best. As an editor, I will try not to make too many changes (since we all know better than to change something that works). As readers, you should not notice any differences with the types of articles or issues presented in this column.

As the column editor, I will be soliciting suggestions for articles to be written and issues to be covered. This column will not work without you, the readers, helping out. I am always available (except for vacation and times of overwork and high stress, such as the first week of classes). If there are issues that you feel need to be addressed, or if there are any budding writers out there, please be sure to email me at <bryan.carson@wku.edu>. Although the topics often involve intellectual property, I am open to suggestions. —BMC

What is intellectual property, and why do we need to know about it? Intellectual property is the basis of our system of publishing. "Intellectual property describes a wide variety of property created by musicians, authors, artists, and inventors ... It is designed to encourage the development of art, science, and information by granting certain ... rights [which] allow artists to protect themselves from infringement."¹ The way in which we protect these rights is through copyright, trademark, and patent.

The intellectual property concept that librarians, publishers, vendors, and distributors are most familiar with is copyright. We know that copyright protects the written word. (Since computer programs contain written code, they are also protected by copyright

rather than patent.²) But what does it really mean to us? What we write on our own time belongs to us. However, what we write for our employer belongs to them. Yet at the same time, many universities and research institutes have a tradition of academic freedom. As a result, all authors need to know the policies of their employer or their institution. Publishers need to be aware of these issues and make sure that their authors have the rights to their works.

The copyright law states that "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."³

The basis of academic freedom is that faculty can say whatever they want, write whatever they want, and publish whatever they want. This principle has been applied by extension to many librarians outside of universities. What a faculty member publishes is supposed to belong to them, and college professors can't be fired for their theories. This is the basis on which most of our scholarship is based. Publishers also operate on the assumption that what they are receiving is the property of the faculty member. Yet the scholar is an employee of their institution. How do we reconcile the two principles?

Let us examine this issue from a library standpoint. Jody is a librarian at a medium-sized Midwestern university. Part of her job is writing instruction sheets for the library catalog. She also creates pathfinders and research guides for the library patrons, and in addition Jody has created a bibliography of reference sources for publication. The instruction sheet is a "work for hire,"⁴ so the copyright resides with the university. The bibliography she prepared is her own work, so Jody owns the copyright. The problem comes up when Jody wishes to build on a pathfinder to create a bibliography for publication. This is

somewhat unclear, since it might be a part of her job and therefore a "work for hire." Or the pathfinder may be a work she has created on her own, and therefore she would own it.

To some extent ownership depends on the job description of the librarian. If Jody was expected to produce pathfinders as part of her job, then the university owns the work. If Jody voluntarily wrote a pathfinder that she didn't have to write, then it is akin to the bibliography for publication. Just because Jody wrote on the pathfinder at work doesn't make a difference. "If a work would not otherwise be regarded as falling within the employment relationship, the fact that a portion of the work was done during working hours, and that the assistance of the employer's facilities and personnel was obtained in some degree in preparing the work, will not necessarily render the work the property of the employer. Conversely, a work within the scope of an employee's duties, but prepared at home during non-working hours, is not *ipso facto* outside the work for hire ambit."⁵

The courts have borrowed from the law of Agency and have articulated "three standards as to when an employee's conduct falls within the scope of employment: 1. It is the kind of work [s]he is employed to perform; 2. It occurs substantially within authorized work hours and space; 3. It is actuated, at least in part, by a purpose to serve the employer."⁶ Once ownership by the institution is established, the next question is to find out if there is an institutional intellectual property policy, since some colleges and universities grant rights that are not found in standard copyright law. If the university has a policy that grants creators additional rights, then the general copyright law does not apply. In that case, Jody and her publisher need to make certain that they have read the institutional intellectual property policy. For example, **Indiana University's** intellectual property policy reserves the rights to everything except "traditional works of scholarship and creativity."⁷ Many policies differentiate between the "traditional scholarly work generally expected of faculty" and "University assigned efforts."⁸ This policy is similar to many found at institutions of higher education.

Before publishing any work, make sure that you know who owns the copyright. Find out if the work was prepared within the scope of employment. Check to see if the institution has an intellectual property policy, and then read the document. Each one of us,

continued on page 54

Questions and Answers — Copyright Column

by **Laura 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>
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QUESTION: *The university library has been approached by a department chair to supply free photocopies to faculty for research purposes. Free in this case means paid for by the library. How does the copyright law apply to this? Is the library responsible for any possible violation of the law if it pays royalties for the copies, but does NOT do the copying? One of the reasons the faculty member is requesting this service is the short loan period for ILL books. A photocopy would permit permanent access to needed research material as well as permit annotations in margins, etc.*

Legally Speaking from page 52

whether librarian, publisher, or distributor, needs to be aware of copyright law, and of our organization's policies. Knowing the policy is useful knowledge, since it always pays to be safe. 🐾

Endnotes

1. *West's Encyclopedia of American Law* "Intellectual property" 183 (Eagan, MN: West Group, 1998).
2. "Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, films, tapes, disks, or cards, in which they are embodied." 17 U.S.C. §101.
3. 17 U.S.C. §201(b).
4. "A 'derivative work' is based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other format in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which as a whole represents an original work of authorship, is a 'derivative work.'" 17 U.S.C. §101.
5. Nimmer, Melville B., *Nimmer on Copyright* §5.03[B][1][f] (New York: M. Bender) (Rel. 42, June 1997).
6. *id.*
7. Indiana University Office of Research and University Graduate School, *Intellectual Property Policy* (adopted May 9, 1997) <<http://www.indiana.edu/~rugs/respol/intprop.html>>.
8. Northern Kentucky University, *Intellectual Property Policy* p.3 (adopted December 20, 1999) <<http://www.nku.edu/~senate/itlect.pdf>>.

ANSWER: Your library clearly meets the requirements under Section 108(a) so that it qualifies for the library exemption. Under Section 108(d), a library that meets 108(a) definition of library is permitted to make single copies of works such as a book chapter, one article from a journal issue, etc., for a user if certain conditions are met. These conditions are: (1) the copy must contain a notice of copyright, (2) the library must have no notice that the copy is going to be used for other than fair use purposes, and (3) the library must post prominently and place on the request form a warning in accordance with the Register of Copyright's regulations.

Even copying an entire book is permitted under Section 108(e), but in addition to meeting the three conditions above, the library also has to first make a reasonable determination that a copy cannot be obtained at a fair price. This would require even consulting used book dealers to try to purchase the work for the patron to use first. Few libraries have the staff time to do such searches, so typically libraries limit the copying they do for users to that permitted under subsection (d). Just making a copy of an entire work because of the short interlibrary loan period is not permitted under the library exemption.

Any liability for non-fair use copying that is not done by the library would be incurred by the university and perhaps the individual faculty member who does the copying. The library is responsible only for the photocopying it does.

QUESTION: *How can an author modify copyright transfer agreements with journal publishers to reserve some individual rights? What sorts of changes are most often needed?*

ANSWER: It depends on the exact language of the publisher's transfer agreement, of course. Certainly the publisher will need at a minimum a reproduction and distribution right to publish the work in its journal. Other rights depend on what you actually envision doing with the work. In general look for: (1) the right to reuse the article in a later work (such as a chapter in book you will write later), (2) the right to reproduce copies of the work for distribution to your classes, (3) the

right to reproduce and distribute a limited number of copies to professional colleagues, (4) the right to post the article on your homepage after the article appears in the print publication, and (5) the general electronic rights—do you want to grant all other electronic rights to the publisher or retain them. What you want also may depend on the work itself as well as any uses you may be contemplating.

The "how to" is easy. Just mark out terms that you do not like and write in new ones. The publisher may or may not be willing to negotiate terms, but it is certainly worth a try!

QUESTION: *A professor requires that his/her students purchase a certain textbook for a class. Because students are required to have the book, is it fair use for the professor to use figures or charts from that text in course materials to supplement teaching? For example, students are required to read a chapter, and the instructor uses a chart or table from the chapter in some PowerPoint slides for further class discussion or explanation purposes. Would making this slide material available electronically in a password-protected electronic reserves system be fair use since the students have purchased the text, or is permission still needed?*

ANSWER: The display of the materials to the class is permitted—even if the class has not purchased the textbook. Section 110(1) of the

Act allows teachers to display works to students in face-to-face teaching, regardless of whether that material is from the assigned textbook or not. In my opinion, it would also be fair use to put the same charts and graphs on a password protected e-reserves system for the students in that class. This time, the fact that the students have purchased the text is important. That means no permission is needed even after the first semester or term use.

QUESTION: *In a non-profit library, if library staff is making a presentation to staff, and spontaneously come across a cartoon or other graphic that fits, may we use it without seeking permission as long as the source is attributed? What about if the staff makes a routine monthly presentation and wants to use that same item repeatedly?*

ANSWER: There certainly is a strong argument that displaying a work one-time for in-house use is fair use. A display is different than copying the work and distributing it to everyone who attends the presentation. When one looks at the fair use factors, a one-time display to an in-house audience has little market effect where multiply copying may have considerable market effect. Repeated use changes the dynamic. Now it is not a one-time use but rather is being used for different audiences over time. If that display is to be repeated, seeking permission is likely required. 🐾