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Copyright Questions and Answers

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Questions & Answers — Copyright Column

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QUESTION: *The school purchases all of music performed by the band — each piece (1st trumpets, a copy for everyone, 3rd trumpet, a copy for everyone, oboe, a copy for each, etc.) But, because students lose and/or mutilate their music, the band director has begun to file the original purchased music and then makes copies for each student. This way, if the tuba player loses his music, the entire band does not suffer. Is this a violation, since the sheet music is purchased and the copies are not kept.*

ANSWER: There are published guidelines on the educational uses of music that are voluntary guidelines that were negotiated in 1976. They are published in the House Report that accompanied the Act (House Report 94-1376). According to these guidelines, emergency copying for performance is permitted as long as the school does purchase the music afterwards. Copying as preservation is not actually mentioned in the guidelines. Under section 108, a library is not permitted to do preservation copying in advance of actual loss, deterioration, etc. So, by analogy, this may be problematic.

On the other hand, it is very common practice, however, for performers to photocopy their sheet music for ease of performance, and few would think this is infringement since they have purchased the sheet music and are just putting it in a format to facilitate performance. While there is no direct statutory authority to permit the copying described, it is unlikely that a court would find it other than fair use. Several of the fair use factors lead to this opinion — the character of the use (nonprofit educational use and nonprofit performances) and the market effect — none since the music was purchased.

QUESTION: *The library recently received a donation of several videotapes that a user bought at a garage sale. They are all labeled "demo tape," "Not for sale or rental," "Screener for video retailers," "Please return to sales rep" and the like. May these be used in the library collection? Or may the Friends group sell them in their book sale?*

ANSWER: These tapes should not be added to the collection as they are not so intended. If you want to contact one of the pro-

ducers and seek their permission, do so. The tapes likely are review or demo copies only, however.

Sale by the Friends group raises other issues, but many libraries claim that those sale items were never part of the collection anyway. So, it may be okay if the library is willing to assume the risk. The library should be careful to make sure that the tapes do not have anything identifying them with that library.

QUESTION: *What is permitted in reproducing images of works of art, not only for library slide collections, but also on the Web. Clearly there are many works of art, such as the Mona Lisa, Sistine Chapel, Van Gogh's self portrait, and Monet's Haystacks, that are in the public domain. Photographs of three-dimensional works may be the "creative" work of the photographer and therefore copyrightable by the photographer. But what about photographs or two-dimensional images of works of art? May they be repro-*

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graphs would be numbered. Although the U.S. courts did not adopt this proposal, the fact that it was seriously considered points out the enormous change that occurred in just a few short years.²⁹

As the importance of Internet research continued to grow, many courts posted opinions which had previously been unpublished. Unpublished cases had been accessible for a number of years through microfiche, newsletters, and looseleaf services. However, these cases were not very useful to attorneys because of court rules forbidding the use of unpublished cases.³⁰

In August of 2000, the 8th Circuit Court of Appeals declared that the rule forbidding the citation of unpublished cases was unconstitutional. The reasoning of the court was that "Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded."³¹ The 8th Circuit concluded that the Constitution did not allow courts to ignore previous decisions; to do so was an abuse of judicial power.

The ideas of vendor-neutral citation and use of unpublished cases are in many ways the last frontiers in legal research. Both of these concepts rely on access that has only been possible since the development of the Internet. The vendor-neutral citation format has been discussed or adopted in several states,³² and the use of unpublished opinions is on the rise. It remains to be seen what will happen with these two concepts.

Throughout the centuries, written law has give society rules to live by, and ideals to strive for. The printing press made reproduction of books feasible, and the Internet made publication easy. With the heritage of the printed law book keeping our liberty intact, we can start the new Millennium knowing that legal publishers and law libraries will play an important part in the world of tomorrow. As the future becomes the present, the written law ensures that we also look at our past. After all, those who cannot remember the past are condemned to repeat it.³³

duced at will in slide form for the library or by faculty on their Webpages? What about copying from more recently published books and periodicals or does the publisher or photographer now own the copyright?

ANSWER: Photographs of either two or three-dimensional works of art are also copyrighted. This is the case even though the underlying work is now in the public domain. The photograph of that work still may be protected since photographs are copyrightable regardless of subject. Many art history teachers, etc., have asked to have so-called "copy photography" exempted, but so far the Act has not been so amended.

Reproducing the photos is no different than copying any other copyrighted work for the library. For faculty Webpages, if access to the images are limited to one class, password protected, and available only one term without permission of the copyright holder, it may fall under the multiple copying guidelines since putting something on a restricted Website is the equivalent of multiple copying. However, teachers should closely follow those guidelines which includes restricting access to the class and removing access at the end of the term. Otherwise, it is infringement.

QUESTION: *An instructor wants to reproduce for her class reader a portion of an out-*

of-print book, published in 1970 by a small, independent publisher. The instructor has been unable to locate the publisher in order to seek permission, nor could she locate the printer. It appears that both are no longer in business. Further, the author cannot be found in the local phonebooks. Does the instructor have any other recourse for seeking permission to reproduce a portion of the book for the course reader? If a permission-granting source cannot be located, is it appropriate to apply the four factors delineated under the fair use section of the Copyright Act to evaluate whether or not to reproduce a portion of the work?

ANSWER: Not only is it appropriate to apply the four fair use factors, it is all that one can do. Then conduct a risk assessment. What is the chance someone will complain, and if they do so, what is the likely worst case scenario?

Since the publisher and printer appear no longer to be in business and the author is not in the phonebook, there are a couple of other things you might do. (1) Look for the author via the Internet and other phonebooks from surrounding towns. (2) Contact the U.S. Copyright Office to see if they can give you any clue from their records about the location of the copyright holder, since the defunct publisher may have transferred the copyright. Then, do the risk assessment. It may be that there is so little risk that the faculty member should just go ahead and reproduce the material for the course reader.

Papa Lyman Remembers (part of) The XX Century

by Lyman Newlin (Book Trade Counsellor, Broadwater Books) <broadwater@wnyip.net>

As usual, my story is being written just as the deadline approaches. But there's a coincidence with two notable dates. The first lines are being written on November 11, 2000. The November eleventh which stands out in my memory is that of nineteen hundred eighteen — the day ending World War I — Armistice Day as it was called until 1954 when its name was changed to Veterans Day and it became a national holiday commemorating the veterans of both world wars. On that day 82 years ago the town of Garrett, Indiana was wildly celebrating as were thousands of other municipalities large and small. But the Garrett celebration was atypical in that a large percentage of citizens were of German lineage. To have a German surname or accent or to be a pupil or in any way associated with a parochial school of Lutheran affiliation which used the German language (or had used it prior to America's entry in the War) was sure to be suspicious of being friendly to the "Enemy." Between our home and our school I had to pass a small Lutheran elemen-

tary school. If there were two or more fellow pupils going past that school and we could catch "one of them" we would chase him back into his school house. If we caught him he was due for a good pummeling. Kids were not alone in this physical display of "patriotism." During the first Armistice Day (11/11/18) celebration some "patriots" forced the Lutheran pastor to crawl on his hands and knees behind an American flag during a parade. I don't recall similar public behavior during or after WW II, although there was much "to do" about citizenry of Japanese lineage. Incidentally, just to show you how things come full-circle, I have been a Lutheran myself for more than three decades now, and both of my sons went to Lutheran catechism school.

The other recent and much more generally and cordially celebrated holiday was All Saints Day — Halloween. In fact this day is rapidly affronting Christmas as being generally more popular with kids. "Tricks or Treats" was not the way they did this holiday in my day—I can't

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