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Questions & Answers -- Copyright Column

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and the First Amendment. According to the Sony case, "the purpose of this use served the public interest in increasing access to television programming, an interest that 'is consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves.'" [Citation omitted]²³

The Supreme Court has also found that parody, which is protected by the First Amendment,²⁴ is allowed by the Fair Use doctrine.²⁵ According to Professor David Lange of Duke Law School, "Fair use gives the Constitution breathing space between the limits on expression inherent in copyright, and the freedom of expression guaranteed by the First Amendment."²⁶ This quotation is actually an application of Professor Lange's thesis, since it came from a lecture covered by state common law copyright. While I would not be able to quote Professor Lange under the *Stanley* case,

one of the main points of Professor Lange's presentation was that there is a constitutional problem with a view of copyright so strict that reasonable quotations are not allowed. Under the *Hemingway* case, the protections of Fair Use still exist even though the copyright is common law rather than statutory.

Summary

The common law of copyright is an area about which most people are not immediately concerned. Although most common law copyrights now fall under the Federal statute, many copyrights can still be protected under both Federal law and the common law. For some issues, the common law may give even greater protection. Certainly the Federal statute has not totally preempted the field of copyright law.

Although there is some discussion of whether the Fair Use doctrine is available as a defense under common law copyright, many scholars and courts feel that Fair Use is included in the common law. Some re-

searchers even believe that the First Amendment constitutionally requires the principles embodied in the Fair Use Doctrine. These scholars believe that Fair Use comes under the Freedom of Expression clause, and that denial of Fair Use in a courtroom would amount to a governmental denial of free expression.

The *Stanley* and *Hemingway* cases point out only a few of the potential problems with common law copyrights. If the Federal Copyright Statute does not apply (when materials are unpublished and not covered by Federal copyright law), then the courts must decide whether state common law copyright applies and whether the Fair Use Doctrine applies. Ernest Hemingway once said that "I only know that what is moral is what you feel good after and what is immoral is what you feel bad after."²⁷ After reading this article, you should have some tools other than your own feelings to help you analyze the status of Fair Use for works protected under common law copyright.

Questions & Answers — Copyright Column

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tected ones; the user at least knows the item is online and then can decide whether to subscribe in order to obtain the full-text content.

QUESTION: Now that the library is receiving many CDs that accompany books, is there a problem with making backup copies to keep in technical services for replacement should the originals disappear from the back of the books? The practice has been to make copies of disks that accompany books, place the copies with the books and keep the original disks as archival copies. Since these copies are not for general distribution, but rather as a safeguard in case of loss, is this fair use?

ANSWER: Although some libraries have routinely made backup copies of many types of nonprint works, the statute is clear. One may make a backup copy only of computer programs without permission from the copyright holder. Other materials have no backup copy provision. Software is covered by section 117 of the Copyright Act, but it is limited to computer programs.

A library certainly could seek permission for duplicating CDs as a way to guard against accidental loss or destruction.

QUESTION: A faculty member who teaches a number of music courses in which the students have to listen to a wide

QUESTION: A colleague at my university is publishing a textbook. She is planning to use samples of folktales, poetry, etc., and is in the process of getting permission. Should she be unsuccessful in obtaining permission, she wants to substitute works that are in the public domain. The library has located some examples of fairy tales and poetry that were published well before 1923 but the anthologies in which they appear were published later, some as far back as the 1940s but many in more recent compilations. Is the date of the anthology the relevant date?

ANSWER: No, the critical date is the date of first publication of the poem or tale. Republication in a new anthology does not change the underlying copyright date for the individual piece. On the other hand, anthologies are copyrighted, but the copyright is in the compilation and not in each individual piece. Additionally, the anthology copyright covers any new materials added such as a new preface, editorial comments and the like.

QUESTION: A work for an online news service produces abstracts of copyrighted articles and stories and publishes them online. Does a content owner have any legal grounds on which to prohibit ab-

stracts of that content, whether the work is available online or in print? Does it make a difference that the news service is provided free and for non-commercial purposes plus includes appropriate attribution of the original source? Could the service simply include a link to the site on which the item originally appeared even if access to some of these requires a subscription fee?

ANSWER: Abstracts that are condensations or relatively full summaries of the contents of a copyrighted work probably do require permission since they are derivative works by being summaries or condensations of the original work. If, however, the abstract is merely descriptive of the contents, then there is no problem. For example, "This article discusses these four topics, has a chart on X that appears on page Y, and is written by this expert."

To link to an online article that the news service abstracts, no permission is required under the conditions described in the question. The fact that the online news service is not for profit is very important. The fact that a link to the content on a publisher's Webpage requires a password in order to access to the content is no problem. Many such lists of links include password pro-

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International Dateline

by **Anthony Watkinson** (Visiting Professor in Information Science at City University, London, England; Phone: +44 1993 811561; Fax: +44 1993 810067) <anthony.watkinson@btinternet.com>

When I visit North America I find certain puzzlement about whether Europe is an entity to be looked upon as an analogue of the United States of America or Canada, a federation of states or provinces. Over here we are not sure either and this applies in particular to those Europeans who are resident in the UK. Do we still make our own decisions or have we merged our sovereignty?

What does it look like in the information environment across Europe? There certainly are European initiatives. For example SPARC Europe has emerged as an outgrowth of **LIBER** (www.kb.dk/liber/umbrella/sparc.htm) and **LIBER** is the "principle association of the major research libraries of Europe." Rumour has it that this worthy organisation fought off a strong bid from the UK for the privilege of being the host. Another pan European body, **EBLIDA – European Bureau of Library Information and Documentation Associations**, having spawned first ECUP and then the facetiously named **TECUP** has now followed up with **The Frankfurt Group** (www.sub.uni-goettingen.de/frankfurtgroup/). This is a consensus forum for academic and research information representing the key players in the information chain and has already produced a "statement" on the vexed question of Value Added Tax, a candidate for "harmonisation." If we look at information provision for the

purposes of European lobbying the International Association of **Scientific, Technical and Medical Publishers (STM)** is often more prominent than the **Federation of European Publishers (FEP)**, which is the delegated body for the national associations. As the Dutch run much of the **STM** sector in Europe it is not surprising that the secretariat of the **STM** association (www.stm-assoc.org) is based just outside Amsterdam.

Nevertheless, in spite of the existence of these powerful players at a European level, this International Dateline will concentrate on UK initiatives, which in practice seem more relevant and more advanced than most programmes in other European countries and attempts at co-operation across international boundaries. Laws are still made internationally. Funding comes from national governments.

These initiatives are also, characteristically, government initiatives. Across Europe there is nothing like the distrust of "big government", which is such a common feature of American life and politics. Even **Mrs Thatcher** did not stamp out what to many Americans have to be viewed as "socialist" practices. In the following sections I shall look at some latest developments in the context of **JISC**, big government in the UK impinging on education. The acronym will be explained below. There are lots of others which I shall try to side-step. It is bad enough to try to keep up with acronyms in one's own country and no one should be forced to remember foreign ones.

The other theme is co-operation across

the information chain, which again is characteristically European. There is no lack of library activists, although it has to be admitted that most of the running in the "pricing wars" came from the USA. In Europe however for a variety of reasons publishers and librarians find it easier to talk at a representative level and there have been some developments from these conversations which are good news for both sets of players and the authors and users that both serve.

What is JISC?

This may be one of those questions that you were not aware that you had asked. However for those interested **JISC** stands for the **Joint Information Systems Committee** of the national bodies funding higher and further education in the UK. In UK parlance higher education is education leading to a degree in colleges and universities while further education is basically VoTech. The origin of **JISC** springs from the seminal **Follett Report** of 1993 (<http://www.ukoln.ac.uk/services/papers/follett/report/>), much cited and little read, and the emphasis is on centralised infrastructure and services provided for the teaching and learning community with the Internet seen as the mechanism for delivery. The current jargon is ICT – information and communications technology, which is not quite synonymous. **JISC** has now embarked on its second five-year strategy. A huge generalisation might be that a period of experimentation, particularly through the eLib programme, which was to my mind often misguided, has now given way to heavy investment in provision. At the same time the co-operation with the publishing

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range of music selections has asked about making CDs of the selections for the students to use. He has created a CD for his classroom presentations and these include selections from a large number of sources. Last year he wanted to copy that CD for each student in his class and have the bookstore sell copies to the students at cost. The library convinced him that this was problematic, but he still wants to make three to four copies of his presentation CDs and put them on reserve in the library. Is there a problem if the library permits him to do this?

ANSWER: Under the *Guidelines on the Educational Uses of Music*, it is permissible to make a musical anthology for aural exercises, and the faculty member's in-class use appears to be such. The guidelines permit only one copy to be made, but one could argue that three to four copies still comply with fair use.

QUESTION: *As an individual, I am interested in republishing some 18th and 19th century books from a nearby research library and converting them to text. Do I need explicit permission from the library to scan these older books, convert them to text, and republish them?*

ANSWER: If the work was published in the United States prior to 1923, the copyright has expired and no permission is required from the copyright holder to digitize the work or to republish it because it is in the public domain. However, the research library may refuse to lend its copy to use for this digitization project because of concerns about potential damage to the artifact, but the library does not hold the copyright. Thus, you do not need permission from the library for republishing, but you do need its permission to use library book copies in the manner in which you have described. The library's interest is in preserving the books. 🐼