Against the Grain

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Questions & Answers -- Copyright Column

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QUESTION: Many librarians write reviews of books and music. This question relates to reuse of these published reviews without permission of the reviewer.

Outside of my job as a music librarian, I have written reviews for FANFARE, a national CD magazine. The Web was in its infancy, so the understanding was that all work was for one-time publication in the print edition. There was no online version at the time. Whenever anyone asked permission to use portions of reviews (or even whole ones) in advance, I granted it. But recently, it came to my attention that a batch of my reviews are posted at a commercial Website not owned or operated by FANFARE. To my dismay I have found many more reprints on the Web done without my knowledge or consent. Several of those who have appropriated this material claim copyright to it themselves, according to the marks on the files.

I challenged the publisher, who said that he believed that his copyright entitled him to sell portions of the magazine (or whole books) as he saw fit even though my reviews are not works for hire. Is there anything I can do?

ANSWER: One important matter is whether the reviewer ever assigned the copyright in his work to the publisher of the journal. Transfers of copyright must be in writing. If so, the publisher owns the copyright. Putting the journal online, however, raises all of the issues from the ***New York Times v. Tasini*** case which held that freelance authors own the electronic rights to their works unless the copyright transfer to the publisher specifically stated that the electronic rights were being transferred. It might help to remind the publisher of this. Unfortunately, however, the only real threat is filing suit.

QUESTION: The library has some 16mm films from the Federal Aviation Authority (FAA) that are used by the Aviation Department. If federal government materials are in public domain, is it possible to convert the format of the films to video? If the library does change the format, does the film still remain in public domain?

ANSWER: If the films were actually produced by the **FAA**, a government agency, then they are public domain. This means that

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Legally Speaking

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cause to believe that a crime has been committed, that the suspect has committed the crime, and that the search will turn up evidence proving that the suspect committed the crime.

The concept of particularity keeps officers from using a search warrant as a license for a general search. The warrant must specify the location to be searched, the type of records that are included, and the specific person whose records are being investigated. The police are not allowed to look at records with information about people who are not named in the search warrant.

The requirements of probable cause and particularity help to keep library and bookstore records private, while still providing a way for investigators to do their jobs. The purpose of the 4th Amendment is to establish rules by which everyone must live. These rules help our society achieve the delicate balance between the need for security and the right of privacy.

the library or anyone else may reproduce them, convert the format, etc. It might be a good idea to examine the films carefully to make sure there is no copyright notice. It is possible that they were actually produced for the **FAA** by a government contractor which actually does hold the copyright. Changing the format of a public domain work does not create any new copyright in the underlying work. It remains in the public domain.

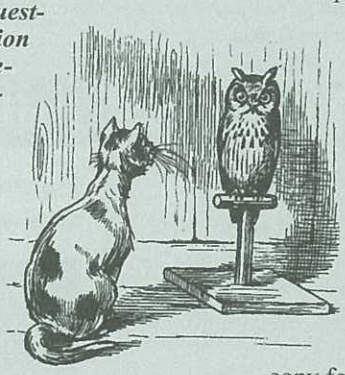
QUESTION: There is a video produced by the BBC in 1988 called "Race for the Double Helix." It is out of print but available used through several vendors. The BBC will not respond to the library's request for permission to make a copy. Various offices respond that they are not the one responsible and cannot help. If the library makes every effort to get permission and fails, must it purchase a used copy or could it make a copy from a loaner?

ANSWER: The question omits some critical information. Did the library once own the tape which has now been destroyed or damaged; is this an acquisitions question? If it is the former, Section 108(c) applies. The library may duplicate the tape from a loaner after it makes a reasonable effort to find an "unused" copy at a fair price. In other words, it may replace the lost or damaged copy but only if new copies are no longer available.

On the other hand, if the library is trying to acquire something it has never had in the collection, the Copyright Act provides no permission to reproduce the tape at all. Thus, purchasing a used copy may be the only way to lawfully acquire the video.

QUESTION: One of the public libraries in the system is located near the Emily Dickinson homestead, and it has a significant collection of material about her and her work. The library has copies of a number of dissertations. Researchers frequently ask the library to copy entire dissertations for their use. Academic libraries in the area have a variety of practices they follow, but most have a reference copy and a circulating copy of the dissertations created at their institutions. Some do reproduce the dissertations and charge for the copy. As degree granting institutions, do they have some rights to the material?

The practice here has been to refer the public library and its requestors to UMI's Dissertation on Demand service because none of the librarians is uncomfortable recommending that anyone copy anything in its entirety. Are dissertations different?



ANSWER: Most universities require graduate students to sign some sort of release that gives the library the right to hold the dissertation and use it to fill interlibrary loan requests. If ILL results in making a copy, there is not much problem since the release signed by the student author grants this permission. However, if the release or agreement from the student author says that the library may lend only the original or not reproduce the dissertation, then even the degree granting institution has no right to copy if for researchers.

QUESTION: May a corporate library archive and put its Internet searches on the company Intranet? If the library conducts a search and downloads it to a library hard drive, archives it on one company server and then emails the results to a patron, there are now three copies of the material. Is this a problem?

ANSWER: The term "Internet searches" indicates that the search really involves material on the open Web or digital products for which the company has a license. For licensed material, the terms of the license agreement control what use may be made of search results. Material on the Internet is copyrighted just as it is in print. Reproducing the material widely and putting it even on an Intranet raises copyright concerns. If putting the searches on the Intranet means simply putting the question and then the url's where the information was found, this is no problem. It is the reproduction of the copyrighted work that is of concern.

Normally making one copy for a user is permitted under Section 108(d) but multiple copying is not permitted. Having works accessible by multiple users within the company counts as multiple copying. However, if the copies are "transitory" and are destroyed as soon as the patron has received the results, there is no problem. But if the library is indeed making three copies and retaining them, it should seek permission.

Cases of Note - Commercial Appropriation

by **Bruce Strauch** (the Citadel) <strauchb@citadel.edu>

SURF NEKKID or You Should be So Lucky

Yes, those lusty lads and lassies at Abercrombies are at it again.

George Downing, **Paul Strauch**, **Rick Steere**, **Richard Buffalo Keaulana**, **Ben Aipa**, **Mike Doyle**, **Joey Cabell v. Abercrombie & Fitch** 2001 U.S. App. LEXIS 20377 (9th Cir. 2001).

The long string of names are of course **surfer dudes** among whom we find one of the illustrious **Strauchs** of this world.

Abercrombie is that famous outfitter that loves to use hunks and hunkettes to peddle shirts, khakis, jeans and outerwear. Its subscription catalog "Abercrombie and Fitch Quarterly" (Quarterly) is a national miniscandal that uses 80% of the company's ad budget. This sex-oozing 250 page tome has seasonal themes, photos of hot models, stories, news and editorial.

In 1998, **Abercrombie** held a photo shoot at Old Man's Beach, San Onofre Beach, Calif. While there, they purchased photos of the above **dudes** from surf photographer **LeRoy Grannis** for $100 each. Said photos had originally been snapped at the 1965 Makaha International Surf Championship in Hawaii.

Thus making the surfers into fairly old dudes as the Strauch who authors this fabulous column was only a senior in high school in that year. And I can guarantee you he's old.

Abercrombie put together the Spring 1999 Quarterly, "Spring Fever", with a section called "Surf Nekkid" and a 700-word story "Your Beach Should Be This Cool." Old Man's Beach was described, not Hawaii. But the story was illustrated with the dudes — names captioning the pics — in Hawaii.

Two pages later featured ads for "Final Heat Tees", shirts based on what the dudes were wearing in the Hawaiian competition.

The **dudes** saw this as a commercial misappropriation of their names and likenesses and sued.

It's not stated in the facts whether there were nekkid models. It's only way down in the opinion that you learn that — gasp — there were!

Abercrombie won in the district court on summary judgment and **dudes** appealed to

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