Against the Grain

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Copyright Questions and Answers

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Questions and Answers — Copyright Column

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Question: Is it necessary to keep a paper record of ILL borrower requests that are submitted by our patrons or is an electronic record of the past three years' requests sufficient?

ANSWER: Records in any form are just fine. The **CONTU Interlibrary Loan Guidelines** simply say that the borrowing library must retain records for three calendar years. Certainly the intent of the guidelines is that the library be able to search the records by title in order to determine when the library has reached its "suggestion of five" for that journal title for the calendar year. The guidelines, however, are silent as to the format in which records must be retained.

Question: I want to use an audio recording from 1899 of an evangelist reading a portion of the Bible. Has the copyright expired? The U.S. Copyright office says they do not deal with anything prior to 1972. They wrote to me the following: "There is no federal copyright protection for a U.S. sound recording fixed prior to 1972. It is possible that material recorded (such as music, spoken words, etc.) may be protected. However, if the material in question consists of Bible verses, then no federal copyright protection exists." This work was put on a record in the 1950s by Word Records with Paul Harvey, but they do not know anything back that far. The original recording was apparently made in the State of Illinois, but the state says that state laws do not apply.

ANSWER: Sometimes it is simply worth assuming the risk when one wants to use a work such as this 1899 recording. The great likelihood is that if there ever was a copyright, it has expired. As the **Copyright Office** indicated, sound recordings were not protected in this country before 1972. Therefore, even the 1950 placement of the recorded reading on a record was not eligible for copyright protection. The State of Illinois has already indicated to you that state law does not apply to the 1950 record. Thus, there is no protection for the sound recording. If the words were simply being read from the **Bible**, then there is no copyright in the text. Fixing the reading of the text in the sound recording in 1950 does not change the fact that the underlying work is from the **Bible**.

Question: There is a faculty member who would like several popular videos placed on reserve (e.g., "The Crying Game"). (1) Can a library purchase the videos so that a faculty member can show them in class? (2) Can the library lawfully put these titles on reserve so that students can check them out and view them either in the library or at home?

ANSWER: Yes to both Questions. Section 110(1) of the **Copyright Act** permits a nonprofit educational institution to perform videos in class if showing the tape to the class is a part of instruction. The school could either purchase or rent the videos that are shown in the classroom. Note, however, that performance of videos in distance learning classes is not permitted without a license according to Section 110(2).

Only public performances are reserved for the copyright holder. Placing videos on reserve so that students may check them out to view them either at home or in individual viewing stations in the library is just fine. These are private as opposed to public performances. If your library should indeed offer a public performance, then royalties would have to be paid.

Question: If a for-profit library sets up vertical files on main subjects, areas of interests, trends, in the industry, etc., may it photocopy journal and newspaper articles to place in the vertical file?

ANSWER: Section 108 does not mention the issue of copying for vertical files. Section 108(f)(4) indicates that libraries also have fair use rights, and making single copies for a vertical file is probably fair use. A court would apply the four fair use factors to make this determination. There is one thing that might lead a court to find that vertical file copying is not fair use, and that is because there were vertical files in libraries prior to the advent of the photocopier. Libraries used to put original copies of articles torn from journal issues and actual clippings from newspapers. If your company has an annual authorization license from the **Copyright Clearance Center**, then such copying of works covered by the license is permitted under the terms of the license.

Cases of Note
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(*whatever that means*) since nearly all fair use is for commercial purposes. The question is whether **Fox** will profit from exploiting **Beanie Babies** without paying a licensing price. *American Geophysical Union v. Texaco,* 60 F.3d 913, 922 (2nd Cir.1994).

Fox was not making editorial commentary. He could have done that without photos. The photos of the babies were designed to make obsessed fans cuddle up with images of babies they hadn't located or couldn't afford. The infringing photos were included to achieve commercial success. No one would be real interested in a **Beanie Baby** trading card without a photo on it.

Fox was not transforming the work to serve a broader public purpose. He was not writing *Deconstructing The Beanie Baby Buying Frenzy.* He was not offering a 12-step program to break addicts of the **Beanie Baby** buying habit.

(2) Amount and Substantiality of Work Used. **Fox** argued all he used was an image. But the images were verbatim copies of the protected babies which shows the great value of those images to both the originator and the plagiarist. Was the copying more than necessary to further the "fair use" of the plagiarist? *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.,* 150 F3d 132, 144 (2nd Cir.1998).

Fox could have merely listed names and prices of babies. But that would have sold poorly. He wanted the charm and delight of the protected babies.

(3) Effect of the Use on the Market Value of Beanie Babies. **Fox** said the handbooks had no negative effect on the sale of babies. A handbook is not a substitute for a toy.

The Court said, true, but **Fox** was ignoring **Ty**'s exclusive right to create derivative works. The fact that **Ty** hadn't done so was meaningless. At any time in the life of the copyright, **Ty** could develop his own handbook or license someone to do it.

There was no evidence of **Fox** aiding in the sale of babies. The fact the handbook was on the bestseller list merely reflected the popularity of the babies themselves. And that was done by the shrewd tactic of not flooding the market—indeed to the contrary, creating artificial shortages. See Ty, *Inc. v. GMA Accessories, Inc.,* 132 F.3d 1167, 1171 (7th Cir.1998). **Fox** creating derivative works could flood the market and drive down demand.