

November 2004

## Questions & Answers -- Copyright Column

Laura N. Gasaway

*University of North Carolina*, [laura\\_gasaway@unc.edu](mailto:laura_gasaway@unc.edu)

Follow this and additional works at: <https://docs.lib.purdue.edu/atg>



Part of the [Library and Information Science Commons](#)

---

### Recommended Citation

Gasaway, Laura N. (2004) "Questions & Answers -- Copyright Column," *Against the Grain*: Vol. 16: Iss. 5, Article 25.

DOI: <https://doi.org/10.7771/2380-176X.4080>

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact [epubs@purdue.edu](mailto:epubs@purdue.edu) for additional information.

**Legally Speaking**  
from page 70

**Endnotes**

1. 17 U.S.C. 106 (1).
2. 17 U.S.C. 106(3).
3. 17 U.S.C. 106(5).
4. 17 U.S.C. 106(6).
5. 17 U.S.C. 101.
6. 17 U.S.C. 101.
7. *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Circuit, 2001).
8. *Napster* at 1010.
9. *Napster*.
10. 17 U.S.C. 101.
11. Randel S. Springer, "What is framing?" Available online at <http://www.businesspowerlaw.com/13/300?PHPSESSID=e32c0cdce9fe224b2d6b55463a4a17db>.
12. *Ticketmaster Corp. v. Tickets.Com, Inc.*, 2003 U.S. Dist. LEXIS 6483 (C.D.CA., 2003).
13. "Spider," *WhatIs.com*, available online at [http://whatis.techtarget.com/definition/0,,sid9\\_gci213035,00.html](http://whatis.techtarget.com/definition/0,,sid9_gci213035,00.html).
14. *Ticketmaster*.
15. *Ticketmaster* (Quoting Reply Brief, p. 10).
16. *Ticketmaster*.
17. Springer, Randel S., "Is framing legal?" *BusinessPowerLaw.com*, Available online at <http://www.businesspowerlaw.com/13/301>.
18. For more information on Trademark, Dewey, Dastar, and the OCLC-Library Hotel Dispute: A Question of Trademark or Copyright," *Against the Grain*, December 2003/January 2004, pp. 70-74.
19. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23; 123 S. Ct. 2041; 156 L. Ed. 2d 18; 2003 U.S. LEXIS 4276 (2003). The quote is from Lawyer's Edition Headnote #3.
20. *Washington Post v. TotalNews Order of Dismissal* [unpublished], 97 Civ. 1190 (S.D.N.Y.). Available online at <http://legal.web.aol.com/decisions/dlip/washorde.html>.
21. *TotalNews*.
22. For example, see Stoker, Michael A., "COMMENT: Framed Web Pages: Framing the Derivative Works Doctrine on the World Wide Web," 67 U. Cin. L. Rev. 1301 (Summer 1999); Springer, Randel S., "Is framing legal?" *BusinessPowerLaw.com*, Available online at <http://www.businesspowerlaw.com/13/301>; Rich, Lloyd L., "Internet Legal Issues: Framing," *The Publishing Law Center*, Available online at <http://www.publaw.com/framing.html>; Hoffman, Ivan, *Linking and Crawling Issues*, Available online at <http://www.ivanhoffman.com/linking.html>.
23. 17 U.S.C. 1201.
24. Erin Joyce, "Hacker Mag 2600 Drops DMCA Fight," *InternetNews.com*. Available online at <http://www.internetnews.com/business/article.php/1380791>.
25. *American Jurisprudence* 2d ALibel and Slander@ '6.
26. *Mitchell v. Random House, Inc.*, 703 F.Supp. 1250 (S.D.Miss., 1988).
27. *Moldea v. New York Times Co.*, 15 F.3d 1137 (C.A.D.C., 1994).
28. For more information on defamation, see "Legally Speaking: Libel," *Against the Grain*, Sept. 2000, pp. 79-82.

New Features Include:

Research Reports

Invited Papers

Review Articles

Topical Papers

Editorial Comment

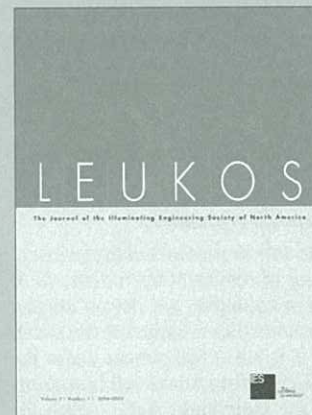
Letters to the Editor

i n t r o d u c i n g  
**LEUKOS**

The Journal of the Illuminating Engineering Society of North America

IESNA's new quarterly **online journal**, LEUKOS, will be available to all members and subscribers at [www.iesna.org](http://www.iesna.org).

\*Members will have free access to all issues, and they will have the option to purchase a printed compilation issue annually for \$25.00. \*Subscribers have access to the online journal, and the compilation issue is included in the subscription price.



David L. DiLaura, Editor



For ordering information, contact:  
IESNA 120 Wall Street, New York, NY 10005  
Fax: 212-248-5017; Phone: 212-248-5000 ext. 111.  
"for trial access, contact [lprestia@iesna.org](mailto:lprestia@iesna.org)"

Questions & Answers —  
Copyright Column

Column Editor: **Laura N. Gasaway** (Director of the Law Library & Professor of Law, University of North Carolina, CB #3385, Chapel Hill, NC 27599; Phone: 919-962-1321; Fax: 919-962-1193) <[laura\\_gasaway@unc.edu](mailto:laura_gasaway@unc.edu)> [www.unc.edu/~unclng/gasaway.htm](http://www.unc.edu/~unclng/gasaway.htm)

**QUESTION:** As more and more librarians become involved in online publishing and in editing online journals, they are now faced with questions that in the past existed only in the

realm of publishers. If a journal wants to publish papers on a journal Website that were not accepted to appear in the printed version, what

continued on page 72



**Questions & Answers**  
from page 71

*are the copyright concerns it should address for the Web publication?*

**ANSWER:** This can be handled quite simply by revising the copyright transfer form. On that form, the journal should indicate that some papers will appear in print while others will appear only on the journal Website. Then on the copyright transfer form, require that the author transfer the reproduction and distribution rights for both printed and electronic versions. Additional considerations might include what other uses of the article the journal is willing to permit the author. For example, (1) may the author post the article on his or her own Website; (2) if author Website posting is permitted, is there a period of time before the work can be posted, e.g., six months; (3) may the author publish the paper that is published only on the Website in another journal; (4) if yes, only in a printed journal or in another e-journal; (5) may the author reuse the paper as a book chapter; (6) what rights does the author have to reproduce the article in photocopies and distribute to classes; and (7) may the faculty author post the article on a password protected Website for students. Additionally, does the journal want the author to credit the journal Website in any permitted uses? I encourage publishers to grant these rights back to the author.

**QUESTION:** *How can a library stop a patron from burning CDs? The library asks no questions and places no limits on the number of CDs a patron reproduce.*

**ANSWER:** It is important not to assume that CD burning is copyright infringement. It may not be. For example, if a patron owns a copy of a CD and makes a duplicate for use in his or her car, it is not infringement under the **Audio Home Recording Act** which is sections 1001-1010 of the **Copyright Act** — even the **Recording Industry Association of America** agrees. (<http://www.minidisc.org/ahra.html>) Or the patron may have a subscription to **Audible.com** which permits subscribers to download audible books to CD and other devices. In other words, the copying may be permitted by the law, by a license agreement or as a fair use.

The only duty of the library is to post the notices on reproduction equipment as required under section 108(f)(1) and for the library itself to follow the law. Just as the library does not inquire about the use a patron will make of a photocopy, it should not inquire about copies in other media.

**QUESTION:** *An art museum is trying to put together an online gallery consisting of images of the paintings in its collection. Is artwork automatically copyrighted because it is considered to be unpublished? Does your chart concerning published works apply to artwork? (<http://www.unc.edu/~uncing/public-d.htm>) Most of the collection mainly consists of pre-1950 artwork.*

**ANSWER:** Works created before 1978 are covered by the **1909 Copyright Act**, and fed-

eral copyright applied only to published works. When the work in question is a painting, what does “publication” mean? Publication certainly has a more consistent meaning for books, journals, and the like. The central question is whether display in a gallery or museum constituted publication. Unfortunately, it was not consistently applied from federal circuit to circuit. The majority view was that public display was equivalent to publication, however. For paintings produced between 1923 and 1963 that are considered to be published, the copyright had to be renewed or they entered the public domain after the first 28 years of protection.


Prior to 1978, the majority of courts held that sale of the original work transferred the copyright in that work unless the parties otherwise agreed. So, the museum may actually own the copyright in many of the works in its collection. Moreover, if no claim of copyright was made on the original painting, and there was no effort made by the artist, museum or gallery to prevent public copying, courts in some circuits have held that the work has become public domain.

Generally the “When Works Pass into the



Public Domain” chart does apply, but it is not 100% accurate for pre-1978 paintings, depending on the circuit and whether the museum actually acquired the copyright when the original work was purchased either by the museum or by a donor who then gave the painting to the museum.

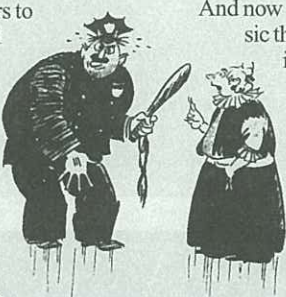
**QUESTION:** *A faculty in the university has produced a song cycle based on the poetry of Gustavo Adolfo Becquer, a 19th century, Spanish poet. The library has not been able to find any answers concerning his copyrights. It has written publishers, but has received no response. Becquer died in 1870; could his work still be under copyright?*

**ANSWER:** His poetry is public domain. Even in Spain where the copyright term was life of the author plus 50 years, the copyrights would have expired in 1920. Thus, the faculty member is free to prepare a derivative work based on his poems. If the faculty member contributes enough original work, which it sounds as if he has, then derivative work is eligible for copyright protection even though the underlying work is in the public domain. No one can copy the faculty member’s song cycle, but others are free to write their own song cycles based on **Becquer’s** poetry. 

## Cases of Note — Vicarious Copyright Liability — Grok Out

by **Bruce Strauch** (The Citadel) <[strauchb@citadel.edu](mailto:strauchb@citadel.edu)>

*Metro-Goldwyn-Mayer Studios and every other bloated movie/ music conglomerate v. Grokster Ltd., StreamCast Networks Inc. and a quarter page list of other outfits that sell peer-to-peer software*, United States Court of Appeals for the Ninth Circuit, 380 F.3d 1154; 2004 U.S. App. LEXIS 17471 (2004).



And now for all you peer-to-peer music thieves out there, the resounding **Grokster** victory over a class of 27,000 companies, conglomerates, combines and song writers that own nearly every single movie and piece of music in the US of A.

The lead sentence of the opinion approaches the sublime. At least for legal writing. “From the advent of the **player piano**, every new means of reproducing sound has struck a dissonant chord with musical copyright owners...”

**Grokster** and **StreamCast** distribute software that permits teenagers with body piercings, tattoos and their caps turned backwards to share computer files. And this can be used to copy digitized music and movies.

Your typical Internet transaction has a “client” personal computer making contact with a “server” that hosts a Web page. The server is a

centralized source. And that of course was where **Napster** went awry, but more about that later.

With peer-to-peer there is no central server. Every computer connects with the others that use similar software and is both server and client.

If this seems like peer-to-peer for dummies you can really sink your teeth into **Yochai Benkler**, *Coase’s Penguin, or, Linux and The Nature of the Firm*, 112 Yale L.J. 369, 396-400 (2002); **Jesse M. Feder**, *Is Betamax Obsolete?: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster*, 37 Creighton L. Rev. 859, 862-68 (2004).

**Napster** operated a **centralized indexing software** with all its files on it. The client would send a search request and **Napster** would locate the desired song and transmit it.

**StreamCast** uses **Gnutella** open-source software. Our outlaw teenager sends a search request to all computers in the network for that desired song. Open-source means the software is in the public domain. Yes, he even gets that for free.

A Dutch company **KaZaa BV** developed “supernode” architecture whereby numerous computers operate as indexing servers and our teen accesses the nearest one. This was marketed as “**FastTrack**” and was initially used by both **Grokster** and **StreamCast**. Following a spat with **KaZaa**, **StreamCast** developed its

*continued on page 73*