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Questions & Answers -- Copyright Column

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one for hire before it would be published the first time.

The effect would be a repeat of the *Fred Fisher* decision and once again blow away Congressional intent.

"The parties to a grant may not agree that a work shall be deemed one made 'for hire' in order to avoid the termination provisions if a 'for hire' relationship ... does not in fact exist between them. Such an avoidance device would be contrary to the statutory provision that 'termination of the grant may be effected notwithstanding any agreement to the contrary.' ... It is the relationship that in fact exists between the parties and not their description of that relationship, that is determinative." 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 11.02[A][2] (2000 ed.).

In interpreting works "for hire," courts focus on actual relationships between the parties and not the language of their agreement. See, e.g. *Donaldson Pub. Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 640-42 (2d Cir. 1967).

Likewise, under agency law, one is not an agent merely because the parties have used the word "agent." The designation does not control facts that show something contrary. 3 *Am. Jur.* 2d Agency §19 (2002).

Despite *Marvel's* dire prediction, all publishers would have to do in a settlement is comply with the demands of collateral

estoppel and file detailed factual findings on the employment status of the author with the court.

Another of Those Estoppels You've Always Wondered About But Been Too Shy To Ask

The doctrine of equitable estoppel applies "where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct." *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001).

Marvel's final contention was they would have gone on to trial had they known Simon would later disavow the agreement. And they would have called as witnesses *Martin Goodman* and *Jack Kirby*. And both have now died.

But there was full discovery with cross-examination in the depositions. Aren't those admissible in evidence?

However the Second Circuit said *Marvel* was overlooking the intent of § 304(c). Congress intended for authors to be able take back their promises. Otherwise, § 304(c) would always be trumped by equitable estoppel.

And further, *Simon's* claim didn't arise until a decade after the agreement. There is no detriment to *Marvel* which has reaped the cash harvest for the twenty-eight year renewal period. And even should *Simon* prove at trial he was not working for hire, *Marvel* can continue to profit from all Captain America works prior to the termination date.

Questions & Answers — Copyright Column

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QUESTION: A professor wants to photocopy several cases handed down by the United States Supreme Court. Since U.S. government documents are fair use, how does this apply if he is copying the cases from a textbook, not the Supreme Court Reporter. Does that make any difference?

ANSWER: Actually, U.S. government documents are public domain rather than fair use which means that the works may be copied, edited, etc., without seeking permission from the copyright owner or applying the four fair use factors. The official *U.S. Reports*, available from GPO, is a government publication and therefore may be freely reproduced, edited, translated, etc. The *Supreme Court Reporter*, published by

West Publishing Company, is a commercially published law reporter, and it contains features that make the volume copyrightable as a compilation such as the headnotes, the editorial features, and the like. However, if the faculty member copies only the case itself without the headnotes, the text of the court opinion, even from the *West* publication, is also public domain.

Taking a court opinion from a textbook presents a different issue since most text or casebooks contain edited versions of cases. Has the editor done enough work to qualify the cases as derivatives work that would be separately copyrightable? Perhaps. The faculty member then has several alternatives to stay within the law: (1) reproduce the

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QUESTION: *The library has a CD subscription which contains the following copyright note: "The information contained herein may not be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying and recording, or translated into another language, without the express written consent of the X Board. All rights reserved." My colleague believes that it is okay to email, fax or mail sections of this work, but that seems problematic since parts of this work are actual copyrighted publications that the library receives in hard copy.*

ANSWER: The first issue is whether the library signed a contract agreeing to those terms. If so, clearly the terms of the license agreement control. The second issue is whether the CD was protected by a shrinkwrap license. Although not all jurisdictions recognize shrinkwrap as a legitimate form of licensing, more and more are doing so. In fact, in the circuit from which this question arose, shrinkwrap licensing has been upheld, and the library likely is bound by the terms of that statement.

QUESTION: *Recently a hospital library received a gift of CD players and CDs for patient use. The library wants to lend CDs and CD players to patients in their rooms so that they may enjoy listening to them. This is a not-for-profit hospital and the library does not charge for this service. Even though almost all of the rooms in the hospital are private rooms, the administration is concerned that this activity will not comply with copyright law. Is there any way to design this service to ensure that it is copyright compliant?*

ANSWER: Assuming that the donor purchased the CDs and that they are not music downloaded via the Internet without permission of the copyright holder, there is no problem at all with lending these copyrighted works to patients along with the necessary equipment. The first sale doctrine permits libraries to lend copies of legitimately acquired materials in their collections. The service as described does not entail reproducing the CDs but merely lending the original CD to a patient, and it creates no copyright problems.

QUESTION: *In order to save space, each year a corporate library that has a CCC annual license for photocopying has its journals microfilmed by a library microfilming house, which either uses the hard copy the library provides or provides film from its collection. It does not seem to be a problem when the microfilm is received and the hard copies are destroyed. The library considers the microfilm version to be a different format of information that has already been purchased, and the microfilm is used in place of hard copy by document delivery staff and scientists.*

ANSWER: Actually, this is a problem. The library is reproducing the journals cover to cover. Such reproduction requires permission of the copyright holder. If the publisher offers a microfilm edition of the journal, it is unlikely it will grant permission for a particular library to make its own microfilm version, but the library certainly may ask. It is possible that the "library microfilming house" has a license for such reproduction and is paying royalties, but the library should inquire.

QUESTION: *A more complex issue is whether to store the journals on CDs instead of microfilm. Aside from the issue of whether CD technology will be around in 10 years, there is interest in exploring this idea of replacing the older microfilm by having it converted to CDs by a jobber. The library would then load the CDs on a server or network them for access from the desktops by users. Would networking the CDs and having them accessible by one person at a time at a workstation change anything?*

ANSWER: It does change things considerably! While microfilming as described above may be infringement, at least only one analog copy is made by such activity. Digitizing a journal and burning it onto CD in order to network it without a license to do so, either through the CCC digital repertory amendment or by a license directly from the publisher, is multiple copying in digital form which is infringement. Moreover, it is not covered under the current photocopy license. The library should contact publishers and seek permission before making a user-created digital version (CD) of a copyrighted journal available throughout the company.

Biz of Acq — EDI in DRA and SIRSI: Current Status of Electronic Data Interchange in Both DRA and SIRSI, and Areas for Future Enhancements

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Abstract

Use of **EDI (Electronic Data Interchange)** can enhance library operations. Beta testing of **EDI** with the **DRA Classic** system at **Jackson Library, University of North Carolina at Greensboro**, is described: the testing process, problems discovered and solved, and ongoing concerns. **EDI** is currently in operation at **Jackson Library**. Workflow advantages and disadvantages are presented. The authors discuss the role of the ILS vendor in setting up **EDI** operations and highlight current **EDI** capabilities of selected book and serials vendors.

Keywords

EDI, Electronic Data Interchange, ILS, integrated library system, BISAC, vendor

What is EDI?

EDI (Electronic Data Interchange) is a standard that provides for direct transmission of business data from one computer to another. When used between libraries and vendors, or vendors and publishers, **EDI** transmits orders, bibliographic records and invoices in a structured electronic format. It allows libraries and vendors to transfer data quickly and easily —

when it works the way it ought to work. Two standards are currently used for **EDI**: the **X12 standard**, developed by the **American National Standards Institute**, and the **UN/EDI-FACT** standard developed in Europe. Each standard has mandatory and optional elements. Certain data elements called "match points" instruct the computer where to place data, linking messages sent by one communication partner to another. Possible match points are ISSN or ISBN, purchase order number, invoice number, or price. Match points are generated by the integrated

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