September 2003

Questions & Answers -- Copyright Column

Laura N. Gasaway

University of North Carolina, 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. (2003) "Questions & Answers -- Copyright Column," *Against the Grain*: Vol. 15: Iss. 4, Article 24.
DOI: <https://doi.org/10.7771/2380-176X.4491>

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

devise the formula in that sense of origin.

Except in the case of Coke he surely does. But that was the example that our imagination-challenged Court actually used.

When Copyright Bumps Up Against Trademark

But there is the problem of publisher versus author. The consumer might value either or both in making a purchase. By not attributing the artistic creator at **Time/Fox**, this creative soul would be deprived of a righteously earned reputation. That, however, would bring us into a head-on clash with the law of copyright which is designed to handle the matter. When copyrights and patents expire, the right to copy without attribution passes to the public. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1938).

Which perhaps explains the Court's initial caution about over-extending the Lanham Act.

"The **Lanham Act** does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of ex-

clusivity." *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 34 (2001). Or copyright of course.

Lanham is designed to prevent your competitors from using your source-identifying mark and thereby reduce consumer shopping costs, and guarantee that the producer will reap the gain from his reputation of making a fine product. *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

And Congress has already addressed the author attribution issue with great specificity in the **Visual Artists Rights Act of 1990**, § 603(a), 104 Stat. 5128. It gives the author of an artistic work the right "to claim authorship of that work." 17 U.S.C. § 106A(a)(1)(A). It is limited to works of visual art, is personal to the artist (not **Time/Fox**), and lasts only for the life of the artist.

To permit suit for misrepresentation of authorship of non-copyrighted works would blow away these limitations.

And then there would be the practical problems of attribution. The **MGM film Carmen Jones** was based on a musical by **Oscar Hammerstein II**, which was based on the opera by **Georges Bizet** which was based on the novel by **Prosper Merimée**.

Time/Fox were not the creative souls behind *Crusade*. That credit belonged to all the camera folks in the armies and navies of the U.S., Canada and Britain.

And then there's a nice quip. "We do not think the **Lanham Act** requires this search for the source of the Nile and all its tributaries." [Lexis *2049].

Although it would seem that Visual Artists Rights Act would were they still alive.

Further, if we followed the **Fox** theory, a manufacturer would face Lanham liability for not crediting the creator of *Crusade* — and — also face Lanham liability if it did credit the creator, and the credit seemed to imply the creator's approval or sponsorship.

To follow that, you must keep reminding yourself this is for a public domain work. Repeat. Public domain work.

The creative talent behind *Crusade* could have been protected by copyright if **Fox** hadn't flubbed it and not renewed. AND if **Dastar** had advertised that its video *Campaigns* was "quite different" from *Crusade*, then **Fox** could sue not for reverse passing off but under the "misrepresents the nature, characteristics [or] qualities" part of § 43(a)(1)(B). 🍄

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> www.unc.edu/~uncclng/gasaway.htm

Question: *The institution recently sponsored a film festival at which a staff member took photographs which are to be posted on the library's Website. Some of the photos depict members of the library staff, all of whom have agreed to have their likeness posted on the Website. For other festival goers who can be*

identified, does the library need to get their permission for posting the photos? Do they have to be identified by name?

Answer: This is not really a copyright question but is a right to privacy or, if the person is famous, a right of publicity question. My usual advice is not to worry about it when photos are taken at a public event. If someone complains about their photo being on the Website, the library can then remove that photograph. However, if the individual is a student, the library may want to seek permission because of the **Federal Educational Rights and Privacy Act (FERPA)** concerns. This is a situation in which university counsel should be consulted.

Question: *A for-profit service sells and distributes, via the Web, a coursepack of journal articles for college courses. Most of the articles the service distributes are contained within databases to which the service has subscribed, so copyright should be covered in their*

contract agreement with publishers. Occasionally, an article is not available in one of these databases and the for-profit service has requested that the library provide it with a copy. The service then obtains copyright clearance from the CCC "before" making the work available online in the coursepack. Is there any problem with the library providing the service with a copy? Should the library require an official request? What does the for-profit service need to do to be compliant with the copyright law?

Answer: No, there is no problem in providing the service with a copy. The for-profit service is handling the copyright permissions and royalties. Under section 108(d) of the **Copyright Act**, a library may provide a copy to a user upon request. If royalties are due because of the use the patron will make of the material, either the supplying library or the requesting entity must pay them. In this instance, the for-profit service is handling the royalties. It is unclear what is meant by an "official request." Does this mean an interlibrary loan request?

The only responsibility of the library that provides the copy upon request is to give the section 108(d) warning to the requestor, make sure the copy contains the real notice of copyright and that the request is for not more than one article from a periodical issue. It is the for-profit service that must ensure its own compliance. The university library should not

be concerned about the for-profit service's compliance but instead should worry about its own compliance.

Question: *The school choir director is under the impression that a work of music can be reproduced for each member of the choir for a college choir performance without penalty as long as the photocopies are collected and destroyed within forty-five days. This sounds like flagrant infringement, is it?*

Answer: It sounds pretty suspect to me also. The **Educational Uses of Music Guidelines** which were developed in 1976 and published in *House Report 94-1476* allows photocopying sheet music for performance but for emergency purposes only. For example, one of the performers has lost the music and the performance is imminent. According to those guidelines, even after the performance the school still has to purchase the music. I would require the faculty member to bring in some proof of an agreement from music publishers before committing the school to such a practice.

Question: *Some members of the library staff have compiled a glossary with common terms taken from various sources. The definitions have not been copied verbatim but have been rewritten. Is it necessary to cite the sources for these terms?*

Answer: The answer to your question is no, but it is not really a copyright question since you have indicated that the material was not

continued on page 92

When, Why and How Libraries Provide Access to Journals through Electronic Titles and Storage Facilities Instead of Hard Copies

by **Rob Withers** (Assistant to the Dean & University Librarian, King Library 225, Miami University, Oxford, OH 45056)

Column Editor: **Michelle Flinchbaugh** (Acquisitions Librarian, Albin O. Kuhn Library, UMBC, 1000 Hilltop Circle, Baltimore, MD 21250; Phone: 410-455-6754; Fax: 410-455-1598) <flinchba@umbc.edu>

Column Editor's Note: The April *ATG*, edited by **Rosann Bazirjian**, examined issues related to the retention of print titles. In this article, **Rob Withers**, Assistant to the Dean & University Librarian, **Miami University Libraries**, expands the topic by reporting library practices as discovered in a survey of **OhioLINK** libraries to find out their actual practices in regards to the retention of print journals in-house.

In ancient and not-so-ancient times, libraries were conceived of as physical spaces where materials were collected so that people could come and use them on site. Limited amounts of space within libraries and money for supporting overlapping print and electronic subscriptions confront libraries with difficult decisions about how to best provide access to periodicals. In the past, journals have been discarded, stored in microfiche formats or housed in compact shelving. With the advent of electronic journals and the growth of storage facilities, libraries have new options, although decisions about when, why, and how to take advantage of these resources are by no means easy or without prospective drawbacks. This study will examine responses to a survey from academic libraries in the state of Ohio to determine how libraries are providing access to periodicals.

The survey used for this article was emailed to librarians at eighty-three institutions in **OhioLINK**, a statewide consortium consisting primarily of academic libraries. The

survey was emailed to librarians with responsibility for collection development or to the director of the library. Responses were received from twenty-six institutions. Close to half of the responses (46%) came from public institutions. Three quarters (77%) offered four year degrees, half (50%) offered graduate degrees, and slightly more than two thirds (38%) had a graduate enrollment exceeding 10% of the undergraduate enrollment. A variety of institution sizes were represented, with sizes of less than 2,000 students (29%), 2,000 – 5,000 students (46%), 5,000 – 10,000 students (4%), and more than 10,000 enrolled students (19%). Institutions with less than 5,000 students included a mix of those offering two-year, four-year, and graduate degrees; approximately one third (33%) were state-assisted institutions. Only one institution with 5,000-10,000 students responded to the survey; and institutions with more than 10,000 students include a mix of two-year institutions and institutions granting bachelors and advanced degrees; all of these institutions were state-assisted.

Challenges in Providing Access to Journals

The idea of paying a slight surcharge for providing access to electronic and print formats has become less attractive in tight budget times, and budget constraints have caused many libraries to re-examine the desirability of maintaining over-

lapping subscriptions to print and electronic versions of the same journal title. Eliminating overlapping subscriptions can free up money which can be used for other titles—or for maintaining existing subscriptions. However, libraries must consider risks inherent in relying exclusively

on electronic versions of journals. Some electronic versions may not include all advertising, letters to the editor, graphics, and charts contained in the print version. Moreover, in some instances, graphics or charts may be difficult to read when

printed from the electronic version, either because of the quality of the file or because color graphics are replaced with black-and-white copies. In addition, electronic versions may be published later than the print version, either because of unintentional publication delays or embargoes of one or more of the most recent issues included in the licensing agreement for the electronic version.¹ Assessing these prospective challenges is a daunting task, as reviewing the contents and timeliness of individual publications entails a substantial investment of time and energy.

Placing materials in storage also has prospective benefits and drawbacks. Advantages of using storage can include the ability to protect materials from vandalism, to preserve older or deteriorating materials, and to provide storage space for journals which are unavailable in existing library facilities.² Delivery time for journal articles has typically been swift,³ and the development of services for delivering articles in electronic format may further increase the speed with which materials can be made available. Arguments against moving journal titles into storage remain, however. Titles in facilities can't be browsed, and no matter how rapid delivery systems are, some users will be deterred by any delay in accessing articles. Moreover, some studies suggest that older issues of journals may be used regularly in the scholarly process.⁴ An additional obstacle can be that users have become attached to traditional locations within the library.⁵ Some studies have indicated a decrease in usage of titles in storage facilities.⁶

Local Environment

Libraries in Ohio benefit from membership in **OhioLINK**, a statewide consortium which includes most academic libraries and some special libraries such as the **Cleveland Clinic** or

continued on page 93

Questions & Answers from page 91

copied from a source but was really an original work compiled from a variety of sources. Citing the original source for these terms is not necessary unless the library is trying to be absolutely accurate and indicate the origin of terms as in the **OED** and other reference works. Another consideration might be the purpose of the glossary. For example, if it is aimed at students, they are less likely to be concerned with the origin of the term than if the audience is librarians, faculty or scholars.

Question: A faculty member has received thirty-six microfilm reels containing the *Papers of Charles Sumner, 1811-1874*, through interlibrary loan to use for research for a work he is writing. How much may he copy under fair use?

Answer: If these papers were unpublished, they are now in the public domain. Works that existed as of January 1, 1978, but which were never published, passed into the public domain at the end of 2002 or life of the author plus seventy years, whichever is greater. For these papers, it would be the end of 2002, and they would now be public domain. If the papers were published, however, it is the publication date which would determine whether the work is still under copyright.

Even if the papers were still under copyright, making copies for scholarship would be covered under fair use applying the four fair use factors. Amount and substantiality used is one of those factors, but there is no absolute in number of words, reels or percentages that qualifies as fair use. A court applies all four factors to determine whether a particular use is a fair use.