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Questions & Answers -- Copyright Column

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the settlement agreement ran ad infinitum. But you have to assume this based on the 2d Circuit's holding plus the thing was drafted by lawyers and folks in the music publishing biz.

It's tricky to see just what Newsome was angling for. An outrageous claim to both songs to bargain down from? A question of fact as to just what went on creatively in that limo?

Newsome argued that she was not a party to the original suit, did not sign the settlement, and the settlement did not bind her. But Clamike was acting as her agent in bringing and settling the suit, and at all times, she behaved as though this were the case. She admitted to receiving money and accompanying accounting statements. She admitted to knowing she and Brown were credited as co-authors.

Accepting the royalties from "3Man" for over 35 years bars her from disclaiming co-authorship. See *Nat'l Am. Corp. v. Fed. Rep. of Nigeria*, 597 F.2d 314, 323 (2d Cir. 1979) (holding that a principal's acceptance of payments pursuant to a settlement agreement constitutes ratification of the agent's authority to bind the principal).

Or as they love to say, she is "collaterally estopped" from denying she was a co-author.

Questions & Answers — Copyright Column

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QUESTION: *As a library in a for-profit educational institution, what rights does the library have concerning reproduction and other exceptions to the Copyright Act?*

ANSWER: Many of the exceptions are available only to nonprofit educational institutions. For example, the classroom exception found in section 110(1) and the distance education provision in section 110(2) are restricted to nonprofit institutions. Also, the negotiated *Multiple Copying for Classroom Use Guidelines* and *Educational Uses of Music Guidelines* apply only to nonprofit education. Neither the library exception nor fair use is so limited. Section 108, the library exception, contains criteria that a library or archive must satisfy in order to qualify for the exception, but nonprofit status is not one of them. A library must: (1) receive no direct or indirect commercial advantage from the reproduction of copyrighted works, (2) be open to the public or to researchers conducting specialized research

and (3) copies reproduced under this exception must contain the notice of copyright.

The exceptions for educational institutions, by contrast, are limited to nonprofit educational institutions. This includes the exception for classroom performances and displays and for distance education and online instruction are available only to nonprofit institutions. The reason for this restriction is statutory recognition of nonprofit education as a public good.

Fair use is not limited to nonprofit educational institutions, but it is probably less robust for for-profit institutions. One interesting development is that copyright owners do not appear to charge higher royalties for permissions to for-profit educational institution libraries. Thus, the royalties for electronic reserves, coursepacks, etc., seem to be the same for both types of schools.

QUESTION: *The library in an educational institution is familiar with the Videotaping*

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Guidelines that apply to the recording, retention and use of recorded television programs. Do these guidelines apply to cable and satellite television programs as well? The Audiovisual Department wants to record cable and satellite programs as a way to get around purchasing the programs. Is this permitted?

ANSWER: The 1982 negotiated *Videotaping Guidelines* apply only to broadcast television for programs that are broadcast over the open airwaves. They apply only to nonprofit educational institutions and are very restrictive regarding how long programs may be retained and used. The guidelines do not cover satellite and cable. The reason is that satellite and cable are not broadcasts; instead, they are transmissions.

QUESTION: *A school issues tablet computers to all students and wants to use the tablets to reduce the weight of backpacks for students by providing digital copies of their textbooks so they can use the digitized copy of the book at school and leave the hard copy of the book at home. An added advantage is the note-taking features of the tablet PC. Since it does not harm the publisher, is it infringement to digitize textbooks in PDF format for students if one copy of the printed textbook is purchased for each student? Or does the TEACH Act permit this activity?*

ANSWER: Sometimes when thinking about digitizing works, it is useful to analogize it to photocopying. Suppose that the school purchased one print copy of all the textbooks

it uses for each student. It decides that students should have a copy of each textbook at home as well as at school, so it photocopies each textbook and provides a photocopy to each student so that each he or she has both a purchased copy and a photocopy. Is this infringement? Certainly. The publisher lost a sale for each of the photocopies made. Moreover, there is no exception that permits reproduction of entire works for students.

Publishers are unlikely to give permission for a school to photocopy textbooks when published copies are available. The same is true for digitizing textbooks without permission of the copyright owner. The school needs permission to digitize the textbooks even if there is no digitized version available. Digitizing does harm publishers since they may want to market the digitized version separately, and copyright protects potential markets as well as actual ones.

The TEACH Act applies to works that are performed (such as music, movies, etc.) and those that are displayed (charts, photos, etc.) It does not generally apply to the reproduction of works except that it does allow a school to digitize a portion of a movie if no digital version is available and a page or two from a textbook for display, but not an entire textbook.

QUESTION: *The library is considering a project that involves several stages: (1) scanning lists of illustrations contained in selected art books, (2) scanning the actual images themselves, (3) mounting the scanned images on a publicly available Website, (4) arranging the images so they can be retrieved via the scanned lists of images, and (5) creating a*



link from the catalog record for the book to the scanned illustration list. The purpose of this project is help students and faculty determine from the library catalog what illustrations are contained in a particular book and then to provide access to those images. Typically, catalog records do not provide this information and capability. The scanning approach is favored because it would require less labor than keying the list into some sort of contents note in the catalog record.

ANSWER: Scanning the list of illustrations and including the list in the catalog record is likely to be fair use since it is factual and is in the nature of a finding tool. Scanning the actual images, however, goes beyond what is permitted under the law. The case *Kelly v. ArribaSoft*, 280 F.3d 934 (9th Cir. 2002), permitted the use of thumbnail images by a visual search engine, and it is possible that a library's use of thumbnail images to direct users of the catalog to lawfully posted digital images. Scanning the images from the art books is not likely to be considered lawful reproduction. If, however, the library has licensed access to digital images, the finding tool the library creates from the list of illustrations likely would

Adventures in Librarianship — Shall I Sit?

by Ned Kraft (Ralph J. Bunche Library, U.S. Department of State) <kraftno@state.gov>

Doctoral candidate **Ian Flapp** announced in this month's *Journal of Transitional Anachronisms* his discovery of a heretofore unknown play by the 18th century artist, barrister, and amateur physician **Lord Wendell Foresail**. **Flapp** found the scraps while searching the as-yet-uncataloged Prickly deposit at the **Stanton-on-Ho Archives**. Though the doctoral candidate plans to publish the play shortly as part of his larger thesis, he must first piece it together from chunks large and small.

Lord Foresail, you'll remember, is widely known for his paintings of lingonberries, often found in the less desirable **Brighton Beach** hotels, and his written opinion on *Hexford v. Pollyfroth* establishing the right of landowners to dig holes wherever they like. As a physician, **Foresail** was less successful, though no less enthusiastic. In his day, many impoverished folk from **Stanton-on-Ho** climbed to the middle class by suing **Lord Foresail** for the untimely death of a loved

one. That this Renaissance man also tried his hand at the stage comes as a surprise even to his biographers.

Flapp has transcribed several scraps to satisfy the public's hunger. The play, apparently a comedy, takes place in the crumbling manor house of one **Freddy Dunder**, a lay-about whose fortune has been wasted on the usual temptations. It is called "*Shall I Sit?*" This scene takes place in **Dunder's** library and includes his long-suffering fiancé, **Hilliard** or "**Hilly**."

H: Won't you come to Mother's for tea, darling?

F: I wish I could, my sweet, but I'm scheduled for a thorough lashing this afternoon. If I have to choose...

H: Oh, you're horrible. You could make her so happy with so little effort. To say nothing of my happiness which seems to interest you not a bit.

