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Questions & Answers -- Copyright Column

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word. They went on to say it is "seriously rivaled" title-wise only by *United States v. 11 1/4 Dozen Packages of Article Labeled in Part Mrs. Moffat's Shoo Fly Powders for Drunkenness*, 40 F. Supp. 208 (W.D.N.Y. 1941).

But enough of this legal ribaldry.

Beginning in *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939) the Court created a presumption that absent an agreement to the contrary, the commissioning party wanted control and the artist consented. *Id.* at 31.

But What About the Renewal Term?

Did the parties intend for the commissioner to get that too?

This appeared to be settled in 1955 in a dispute over song lyrics. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569, 570 (2d Cir.). The song writer got paid a big five dollars, and the Second Circuit ruled that the writer thereby gave up his copyright, BUT the renewal term required a separate assignment. This was confused, however, by the song writer being an independent contractor.

Until the mid-1960's, the federal courts looked for an employer/employee relationship in finding a work for hire. The Ninth Circuit was the first to find a work for hire in a commissioned work in *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298 300 (9th Cir. 1965). In 1965, the Second Circuit held independent contractors explicitly fell in the category of work for hire. *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 568 (2d Cir. 1966).

Subsequently, the Second Circuit held "the purpose of the [1909 Act] is not to be frustrated by conceptualistic formulations of the employment relationship" and applied the "instance and expense" test in determining a work for hire. *Picture Music, Inc. v. Bourne, Inc.* 457 F.2d 1213, 1216 (2d Cir. 1972).

Independent contractors could now create works for hire and the agreement surrendering copyright was outside the renewal right question.

Plus, in the *Hogarth* case, the *Tarzan Books* were derivative works with ERB holding copyright to the originals. The Second Circuit had previously ruled that the copyright owner has the right to "direct and supervise" the artist, which if he directs and supervises sufficiently, makes it a work for hire. *Id.* at 1216.

Copyright — 1909 Act Slowly Squeezed Out of Issue

Playboy Enterprises, Inc. v. Dumas, United States Court of Appeals for the Second Circuit, 53 F.3d 549; 1995 U.S. App. LEXIS 10191 (1995).

Freelance artist **Patrick Nagel** created 285 works of art for **Playboy** between 1974 and 1984.

What? You never looked at the skin magazine in question during those years? Well then, you've probably seen these on calendars — silkscreens of uber-babes in semi-erotic poses. They were big on squatting in high heels.

Nagel died in the last year just as he was starting to emerge as a major artist. He had been invited on a Good Morning show where he was coaxed into participating in what was then the new exercise called "aerobics," and had a heart attack.

Nagel got \$800 to \$1,200 each during his life. After his death, **Playboy** marketed them as "The Playboy Collection by Patrick Nagel." Being savvy, **Playboy** only sold the ones done after 1978.

The heirs did nothing, but an uneasy **Playboy** brought a declaratory judgment action asking for a ruling that it owned all the paintings that had appeared in the magazine.

The only chance the heirs had was a claim for the art under the 1909 Act which did not define "employer" or "work for hire" as clearly as the 1976 Act.

Which is to say that in the year 2002, they might have gotten the renewal rights to a few of the paintings. There's that math again. 1974 + 28.

However, the Second Circuit had by then applied the "interest and expense" test to works for hire and said the test was met when the "motivating factor in producing the work was the employer who induced the creation." *Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974). Also, "an essential element of the employer-employee relationship, [is] the right of the employer 'to direct and supervise the manner in which the writer performs his work.'" *Picture Music, Inc. v. Bourne, Inc.*,

457 F.2d 1213, 1216 (2d Cir.).

In *Siegel*, **Superman** was held not a work for hire because, although it was revised at the request of publishers, it had existed fully blown long before the relationship was formed.

The district court held the **Nagel** paintings were not done at **Playboy's** "expense" because Nagel as an independent contractor had his own tools and assistants. The Second Circuit held this flat wrong saying expense could be nothing more than the artist being paid. *Royalties* on the other hand weight against work for hire. See *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 642 (2d Cir. 1967).

Playboy actually controlled certain aspects of the paintings plus paid money meeting the "interest and expense" requirement.

And everything after 1978 **Playboy** got because in the later act work for hire was explicitly defined as something done in scope of employment or commissioned "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire ..." 17 U.S.C. § 101 (1988).

The evidence got a little flaky there, but **Nagel** had accepted checks which in each instance read "by endorsement, payee acknowledges payment in full for services rendered on a work-made-for-hire basis."

Questions & Answers — Copyright Column

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QUESTION: Recently there has been discussion on several listservs about "orphaned works." What are they?

ANSWER: The simple answer is that an orphaned work is a copyrighted work with no living parents. More specifically, it refers to works for which the copyright holder is unknown or whose owner is difficult or impossible to locate. Under the 1909 Copyright Act the problem was often solved by the renewal requirement. After the first 28 years of copyright protection, a copyright holder had the opportunity to extend the copyright an additional 28 years, but he had to apply for a renewal. Failure to renew meant that the work entered the public domain after the first term of copyright. Most orphaned works passed into the public domain after the first term due to failure to renew. While this has always been a problem

for some older copyrighted works, with the extension of the copyright term to life of the author plus 70 years or 95 years after date of first publication for works of corporate authorship, the problem is even more acute.

The **Register of Copyrights** is currently seeking comments from libraries and others about the problems encountered in dealing with orphaned works since the addition of 20 years to the copyright term extended the time in which obtaining permission to use orphaned works must continue to be sought. It may create an inappropriate burden on the users of copyrighted works to try to obtain permission to reproduce orphaned works since it is virtually impossible to do so. The **Register** hopes to be able to make a statutory recommendation to ease or eliminate this problem so that these works that are

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no longer economically viable may be used more freely than others.

QUESTION: *The music teacher in an elementary school acquired the rights to perform "Fiddler on the Roof" publicly. She adapted the work by simplifying it so that young children could easily perform it. Is this mutilation of the work?*

ANSWER: It certainly would constitute an unauthorized adaptation of the work absent permission to do so. It is possible, however, that in obtaining the rights to perform the musical she also acquired the rights to adapt the work by simplifying it for young performers. In order to answer the question, the terms of the license she obtained must be examined.

QUESTION: *When researchers use a digital camera to copy pages from text is this any different than photocopying? Does the library need to be more restrictive?*

ANSWER: The issue is reproduction regardless of the technology the patron uses to make the reproduction. If the library provides the camera for users, then the camera must contain the section 108(f)(1) notice of copyright just as is required for self-serve photocopy equipment. Otherwise, the individual researcher might be liable if his activities are not fair use, but the library is not liable.

QUESTION: *An academic library wants to include on the library Website copies of scholarly articles produced by the institution's faculty. Is there any copyright problem with doing so?*

ANSWER: Often the faculty member does not own the copyright in her own scholarly articles. In fact, most publishers require that the faculty author transfer the copyright in order to have the article published in the journal. Some publishers are beginning to be more flexible in what they will permit the faculty member to do with her articles such as posting them on a Website so many months after the printed journal is available. The library should talk individually with faculty members to determine the copyright status of the article. Moreover, if the publisher owns the copyright and it is necessary to seek permission, the faculty member is more likely than the library to be able to obtain free permission to digitize the article and post it on a campus Website.

QUESTION: *If an instructor owns a copy of a commercially produced video, may he make an additional copy and place that copy in the library for course reserve materials?*

ANSWER: Duplicating videos is pretty clearly copyright infringement except for pres-

ervation by the library under the narrow conditions detailed in sections 108(b)-(c). Imagine that the work was a book that the faculty member owned. Would it be infringement if the faculty member duplicated the entire book and placed it on reserve? Yes. It is no different for videos. Certainly, under the first sale doctrine, the faculty member may place his own copy of the video on course reserves, but reproduction of the work as described is infringement.

QUESTION: *Upon death of the copyright holder, to whom do the rights transfer?*

ANSWER: If the copyright holder has a will, she may leave the copyrights to any person or entity including a university or a library. In other words, copyrights are property just like the individual's automobile, clothing, etc. If the copyright holder dies intestate (without a will), the applicable state law governing intestacy apply. In most states, this means that the surviving spouse gets one-half of the estate with the other half divided among the children. If there is neither spouse nor children, the estate then usually goes to the author's siblings.

QUESTION: *A library has a current subscription to a journal but does not have the 1953 volume. The library has received four*

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ary reasons for this concern. In the past year, 58% of respondents indicate that their materials budget has increased. 21% say they have experienced a decrease, while 19% say they have seen no change. One person did not respond to the question. The average increase was 7.6%, ranging from 0.5% to 30%. The average decrease was 7%, ranging from 3% to 10% reduction.

The materials budget for books is much more widely split. 36% report an increase, 43% report a decrease, and 21% report no change. The average increase was 13%, ranging from 0.5% to 50%. The average decrease was 11%, ranging from 1% to 50%.

Journal budgets have increased for 60% of respondents, decreased for 19%, and have not changed for 19%. One person did not answer the question. Of those with an increase, the average was 8%, and ranged from 1.1% to 12.5%. Decreases averaged 15.2%, ranging from 2% to 50%.

The greatest increase was seen in the budget for electronic resources. 75% report an increase in the past year, while only 6% experienced a decrease. 13% say there was no change, and 3 people did not respond. The average increase was 14%, ranging from 2% to a whopping 100%. Decreases averaged 7.5%, ranging from 3% to 12%.

On average, the biggest portion of the budget is going to books by a narrow margin of 24.5%. Journals and E-Serials are tied at 18.5%, online resources earned 14.8%, CD-ROM's were 1.6% and the other category received 1.5%. It is important to note that these are the averages of the percentages reported on the survey, so the responses do not add to equal 100%. Nine people did not respond to this question at all.

Homepage

The majority, 87%, of respondents do have their own homepage. Only 10% said they did not, and one person did not respond. This seems to be on par with the past two years' results; 81% reported having a Webpage in 2004, and 88% in 2003.

Document Delivery and Pay-Per-View

When asked if their library used commer-

cial document delivery or pay-per-view, the results were fairly evenly split. 45% said yes, 49% said no, and 6% did not respond. Of those who indicated yes, their budgets varied much more; percentages ranged from 0.6% to 3%, with an average of 1.2%. Dollar amounts ranged from \$5,000 to \$142,557 with an average of \$40,510.

Most people, 51%, feel their document delivery operation is very effective. Only 4% said they were not very effective, and 11% indicated "other." Comments from those who indicated other ranged from "effective" (as opposed to VERY effective), to "cannot evaluate." 34% did not respond.

Pay-per-view operations did not receive the same praise; only 15% said their operations were very effective. 4% responded that they were not very effective, 32% responded "other," and 49% did not respond.

A majority of respondents indicated that they use ILLs or pay-per-view operations as a concrete factor in collection purchasing decisions. 64% said yes, 26% said no, and 10% didn't respond.

The vast majority keep and use statistics on their electronic resources. 94% claimed that they did, while no respondents indicated no for an answer. The other 6% did not respond to the question.

Training

96% of those surveyed indicate that their library provides training for Library Technical Assistants. Only two people responded that their training was not provided. Survey respondents were asked to indicate what type of training was provided, and most marked more than one category. 80% said that in-house classes were provided by existing staff, 53% use continuing education with experts from outside the library, 32% use satellite transmissions, 70% have travel to conferences and workshops funded, and 19% fund credit courses. 17% indicated "other."

Paperback Only

30% of respondents said they have implemented paperback only approval plans. 38% said they have not, and 32% say they don't have an approval plan. Only 38% have implemented paperback only for firm orders.

Electronic Journal Subscription

In the ever increasing move to all things electronic, 89% of respondents claim to have can-

celled paper subscriptions in favor of electronic subscriptions to journals. The approximate dollar amount of these cancellations averaged \$318,400, with a range from \$6,000 to \$2.5 million (!). Archiving this information is a top concern for most; 32% say they are keeping electronic information in whatever format they acquire it. 13% are keeping paper for the present, and 45% have other methods of archiving their materials. 17%, however, believe that some other library will worry about this!

Distance Ed

Distance education is offered by 64% of institutions surveyed. These courses are offered in various locations, from "anywhere" via the Internet, to remote campus locations across

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interlibrary loan requests for the same article from the 1953 volume within the past year. Should the library refuse the sixth request or look into purchasing the volume?

ANSWER: The **Interlibrary Loan (CONTU) Guidelines** apply only to the most recent 60 months of a journal title; thus, the suggestion of five is inapplicable to this situation. On the other hand, four requests within a calendar year for a particular article from this volume points to the conclusion that the library may want to acquire the volume.

QUESTION: *In old deeds of gifts to libraries for manuscripts, the term "literary*

rights" or "literary property rights" reserved often appears. What does this mean?

ANSWER: Authors and their heirs have what is called the right of first publication. This means that for an unpublished work, the author and the author's heirs retain the right to publish that work and that it is only the physical copy of the manuscript that is being donated and not the copyright. Thus, the library would have the right to publish the work either in print or by posting it on a Webpage only after the work has entered the public domain. This would occur 70 years after the author's death except for works created before 1978 which remained unpublished through the end of 2002 and for which the end of 2002 was a greater span of years than life plus 70. Thus, these works are already in the public domain.

state, to internationally. Distance education is supported by most institutions, though the degree of support varies widely. Some offer electronic resources only, some provide librarian(s) support, and some provide ILL services.

Type of Librarian and Years of Experience

The majority, 40%, of our survey respondents are academic librarians. 2% are special, 2% tech services, 1% reference, and 2% other. No respondents indicated government or public as their description.

Again, the population seems to be an aging one. The average number of years our respondents have been a librarian was 19.8, with a range from 1 to 35 years. The past three years, the average has stayed almost flat, going from

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