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Questions & Answers -- Copyright Column

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Now How About That Injunction?

Phelps wanted to (1) prohibit the completion of the house, and (??) (2) prohibit its sale or lease. They argued that being made whole was not enough. Under a threat of continuing infringement an injunction was required. *Walt Disney Co. v. Powell*, 283 U.S. App. D.C. 111, 897 F.2d 565, 567 (D.C. Cir. 1990).

The Fourth Circuit said there was nothing automatic about injunction; it was entirely discretionary. See *eBay Inc. v. MercExchange, LLC*, 126 S. Ct. 1837, 1839 (2006).

Ceasing construction was moot as the house was virtually completed.

Phelps argued that they have the exclusive right to sell or lease their copyrighted work. See 17 U.S.C. § 106(3). And **Galloway** had to be shut out of this possibility for the 95 year life of the copyright.

The Fourth Circuit found an exception in the “**first sale doctrine**” 17 U.S.C. § 109(a). This permits a purchaser of a particular copy (the **Galloway** house) to sell or otherwise dispose of it. **Galloway** has paid his \$20-thou and can now sell the house.

Phelps countered that the first sale had to be a lawful one and **Galloway**’s skullduggery tainted the whole transaction and deprived him of his rights.

The Fourth Circuit said that might be true if the house sale was going down before the \$20-thou judgment. See, *Palmetto Builders & Designers, Inc. v. Unireal, Inc.*, 342 F. Supp. 2d 468,473 (D.S.C. 2004). But now after the pay-off, the house becomes a lawfully-made copy. The analogy was to a converter who got sued and paid the full value of the personal property that he absconded with. He now has title.

For you lay-folk, conversion is a blanket civil tort for any making off with someone else’s personal property, or chattel as it was once called in olde Anglo Saxon. On the criminal side this might be larceny, burglary, embezzlement, armed robbery or whatever. Which sounds like you could covet your neighbor’s ox or ass, but if he didn’t want to sell, you’d take it at gunpoint and then pay him the value. In fact, you face the criminal law as well and will be looking at jail time. So don’t try that in your own neighborhood.

In the case of patents and copyright, the first sale doctrine does not merely include voluntary sales, but might be a compulsory transfer such as a judicial sale or court-compelled assignment. The only question is whether the patent or copyright holder has gotten his just reward. *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847,854 (2d Cir. 1963).

Phelps said a pirate taking your stuff and then paying you the value after you sue is equivalent to a compulsory license, which is largely a no-no. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 446 n.28, 104 S. Ct. 774 (1984).

The Fourth Circuit disagreed, saying

copyright piracy was not an enforced license because the potential damages paid by the pirate were so much broader than just paying the standard license fee. In addition to the actual damages and profit disgorgement, the court might order the destruction of the infringing article. See 17 U.S.C. § 503(b). And in the ordinary theft type situation, this is typically done. See, e.g., *Loud Records, LLC v. Lambright*, Civ. No. 1:05-0171, 2006 U.S. Dist. LEXIS 38016 (S.D. W.Va., March 30, 2006).

As to houses, it’s true they contain the architect’s expression, but their character is predominantly functional. Before the Berne Convention, there was no protection for constructed architectural works at all. See 1 Nimmer & Nimmer, *supra*, § 2.08[D][2][b], at 2-126. This was changed by the Architectural Works Copyright Protection Act, but Congress has been pretty clear about not having automat-

ic injunctions on pirated building designs.

The court talks about “encumbering” all kinds of property along with the design such as swimming pool, building materials, fence, etc. What they really mean is you’d be destroying a whole bunch of value when the copyright owner had already been paid off. See *Bucklew v Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 931 (7th Cir. 2003).

What **Phelps** has frosted is not just the usual moral indignation over someone taking your design, but the fact that they got no disgorgement of profits. Otherwise, **Galloway** doesn’t own their design and can’t copy it in another house.

Unless, I guess, he rushed and built it in its entirety before they caught him again. Perhaps he could put up a whole sub-division of identical Phelps’ designed French-country houses. 🐼

Questions & Answers — Copyright Column

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QUESTION: *How are oral history recordings and transcripts affected by copyright? Once the interviewee is deceased, does the library that holds the recordings and transcripts have any restrictions?*

ANSWER: Oral histories present interesting copyright issues for libraries. Older histories, such as those recorded as WPA projects during the Depression, may have little documentation concerning releases, etc. Today, most interviewers require the interviewee (person being interviewed) to sign a release. The release states what will be done with recording, the transcript, etc. Assuming that there is no release oral histories clearly belong to the interviewee, although the interviewer may hold copyright

in the question he or she poses. The most important material, however, is the text or words spoken by the interviewee, and the interviewee owns the copyright in his or her words.

Through a release, the interviewee may give the library all rights to use, publish and distribute via the Web an oral history. Death of the interviewee changes only who owns the copyright. It passes to the heirs of the deceased interviewee; therefore, the library still may not do as it pleases with the recording and transcript unless there was a release that permits it to publish, distribute, etc.

QUESTION: *A library has a cost-recovery outreach program where it provides library services for small hospitals that do not have a library or only have a core collection, for attorneys and for individual health care professionals. The program provides reference service including searches of the literature, training on locating medical information, and supplies copies of books and articles, either from its collection or via interlibrary loan from another library. When using interlibrary loan, does it matter if the patron is an unaffiliated patron? Should the lending library be notified of the status of the user? Is this activity “systematic” distribution under section 108(g)(1)?*

ANSWER: The unaffiliated status of the user is not particularly relevant in the interlibrary loan equation. The issue is whether the borrowing library counts the ILL request in its suggestion of five and pays royalties when it exceeds the CONTU guidelines. If the user’s request will take the library over the suggestion of five, then royalties should be included in the cost recovery calculation. The legislative history that accompanied the Copyright Act indicated that while the system of interlibrary loan may be systematic, the use of ILL alone does not violate section 108(g)(1).

QUESTION: *Is the library liable when a user infringes copyright by downloading from an electronic database an entire online textbook?*

ANSWER: Generally no. License agreements typically detail the rights and

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responsibilities of licensee libraries under the license. These responsibilities usually include education of the user group about the terms of the license and online notification of what is permitted. Libraries are not required to take extraordinary measures to prevent users from infringing. So, only a user who is flagrantly violating the terms of the license or who asks a librarian if something violates the license is the library likely to be liable.

QUESTION: *Who should pay the royalties for materials placed on electronic reserves or incorporated into course management software such as Blackboard®?*

ANSWER: For copyright purposes, who pays royalties is not the issue as long as royalties that are due are paid by someone. The first thing a library should do is determine whether it has already licensed the materials for use in e-reserves or in course management software. If yes, no royalties are due. Assume that the answer is no and that the use exceeds fair use.

Very few institutions place the burden for paying royalties on the individual faculty

member for putting materials on e-reserves. Nor would most libraries directly charge students for the material. Most libraries bear the costs themselves or have sought assistance from the college or university to cover the cost of royalties for e-reserves. (In tuition-driven institutions, students certainly indirectly pay for royalties). The same is true for royalties for materials posted for students in course management software. Faculty members are not likely to be asked to pay the royalties nor would they be willing to do so. Students who have paid tuition and fees will assume that these charges cover the cost of any materials, so some colleges and universities may decide to include an amount in the fees to cover royalties. Some institutions simply set aside funds to cover these costs or see that academic departments do so. There is no "one size fits all" for dealing with royalties for reproducing and distributing copyrighted works via e-reserves and course management software. Each institution should design a system for paying royalties that works for it.

QUESTION: *A library has a large collection of both historical and recent photographs. In the past, patrons requested reproductions of photographs from the collection which the library produced at cost. Today, users often*

ask the library to digitize the photograph and to provide the user with a digital copy.

ANSWER: When a library provided copies of copyrighted photographs to users upon request, most institutions required the user to certify that he or she would obtain permission to include the photograph in a publication or make other uses of it that would not be considered fair use. While it is understandable that a user might request a digital copy, there are some problems when a library digitizes a copyrighted photograph for a user. On the other hand, a reproduction is a reproduction.

However, a user has greater ability to upload and distribute digital copies of photographs than was possible with a single photo-reproduction. Certainly, a library that decides it will provide digital copies of photos should redesign the form on which the user will certify that he or she will seek permission for publication, posting or other distribution of the photograph. Even with this certification, a library could be found to be enabling the infringement by providing a digital copy of an analog photograph and should work with legal counsel to determine the wisdom of this action. 🌳

Biz of Acq — Learning @ Your Library [Conference]: Kolb's Experiential Learning Model and the Institutional Learning Process

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Abstract

Library conferences offer the chance for individuals from different institutions to share information. This paper explores how an institution can itself undergo the same learning process as its constituent individuals through the actions taken before, during and after a conference. **Kolb's Experiential Learning Model** provides an analytic framework for this exploration.

How much do we learn at library conferences? To quote a phrase much beloved by librarians everywhere (and particularly by a certain professor from library school): well, it depends. As information professionals, we operate under an ideology that information should be shared. Conferences offer the opportunity for individuals from different institutions to share information on such topics as best practices, future trends, and methods of handling specific problems. Such an environment fosters learning at an individual level.

By examining only the possibility for the individual to learn from library conferences,

however, we ignore the opportunity for learning to take place within an institution itself. Actions taken by individuals within an institution before, during, and after a library conference provide support for this paper's perspective — that institutions undergo the learning process through the actions of their constituent individuals. **Kolb's Experiential Learning Model (ELM)** serves as an analytic framework for this exploration of the institutional learning process. This model was chosen because it is both process- and individual-oriented, making it easily adaptable to the paper's focus.

It is important to acknowledge that the institution is comprised of individuals, and that individual learning drives institutional learning. However, this paper outlines how the process of individual learning is mirrored by the institution itself, through the actions of information dissemination among an institution's constituents. While it is possible to explore this process in theory alone, this paper takes the form (if not methodology) of a qualitative case study of the author's institution. This in-

troduces the potential for biased observation; however, it is necessary to frame the analysis as a case study rather than simply as a theoretical exploration in order to provide valuable context for any reader wishing to apply this model to his or her own institution.

Background

In order to establish context for the utilization of **Kolb's ELM** it is necessary to provide some background information on the conference attendee (the author) and the needs of both the attendee and the institution. The steps taken before and after the conference to address these needs will be explored under the appropriate stage of the experiential learning model.

The attendee is a recent library school graduate working in his first professional library position as Head of Acquisitions. In this position, the attendee supervises a staff working in a number of different areas: monographs, gifts, binding, print and electronic journals, and databases. For seven years prior to his

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