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## Questions & Answers -- Copyright Column

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tive. His objective was not to repackage “Silk Stockings” but to employ it. “I want the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives.” *Koons Aff.* At P4.

While **Blanch** “wanted to show some sort of erotic sense ... to get ... more of a sexuality to the photographs.” *Blanch Dep.* At 112-13.

Which if you can follow that seems to say that **Blanch** was creating mass media and **Koons** was commenting on the aesthetic consequences of said media. Hence, **Koons** wins on the transformative issue.

2. Is it for commerce or for nonprofit educational purposes? 17 U.S.C. § 107(1). Well, **Jeff** is pretty much into commerce, no matter how you dress it up in ArtSpeak.

*American Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1994) dealt with commercial exploitation via photocopying which was not transformative. But *Campbell* held that commercial use in itself is only a subfactor, and the more transformative, the less commerce will hold weight. *Campbell*, 510 U.S. at 584. **Koons’** work was not a market replacement for “Silk Stockings.” **Koon’s** take-home loot did not exclude the broader public benefits of art.

3. Parody and satire justify copying, which was the whole *Campbell* issue. In satire, “prevalent follies or vices are assailed with ridicule.” 14 Oxford English Dictionary, at 500. If **Koons** is satirizing anything, it’s the genre of the photo and not the photo itself.

“By using a fragment of the *Allure* photograph in my painting, I thus comment upon the culture and attitudes promoted and embodied in *Allure Magazine*. By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary – it is the difference between quoting and paraphrasing – and ensure that viewers will understand what I am referring to.” *Koons Aff.* at p.12.

So where are we? “Niagara” is transformative. It’s not truly commercial exploitation, and commerciality is not dispositive anyhow. So **Koons** wins this one.

### Nature of the Copyrighted Work

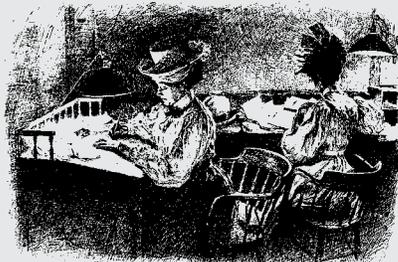
Expressive or creative works are closer to the core of what copyright law intended to protect than factual works.

*Which isn’t to say that non-fiction isn’t protected. It’s just got a whole bunch of facts between two covers, and only the expressive part is protected.*

The district court had called “Silk Sandals” “banal rather than creative.”

*As opposed to Koons’ ... well, whatever it is he did.*

The appeals court disagreed with that, but it doesn’t matter when a creative work is transformed into another creative one.



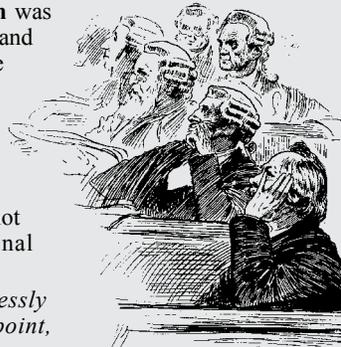
## Amount and Substantiality of the Portion Used

Are the quantity, quality and value of the portion used “reasonable in relation to the purpose of copying”? *Campbell*, 510 U.S. 586.

**Koons** has explained his reasons for using preexisting images vis-à-vis his artistic goals. Did he do it excessively? Did he go beyond his justified purpose?

Of importance to **Blanch** was the first-class airplane cabin and laying the legs across those of a presumed high-roller Alpha-male who paid for the tickets. **Koons** trimmed all that out, leaving this issue in his favor. But the court says this is not a heavy factor in their final decision.

*Which you are breathlessly awaiting. So get to the point, Strauch.*



## Market Effects

Does this impact the potential market for “Silk Sandals”? Does this usurp the “Silk Sandals” market? Well, **Blanch** admitted there was no secondary market for her works, and “Niagara” did not decrease the market for “Silk Sandals.” So **Koons** takes round four.

And the holding goes to **Koons** who will continue laughing his way to the bank.

*And just to make you even more ill, “Michael Jackson and Bubbles,” Koons’ life-sized gold-leaf plated statue of the Goretex nose lad and his chimp sold at Sotheby’s for \$5,600,000.*

*Why did our parents think it was such a smart move to send us to college? 🐒*

## Questions & Answers — Copyright Column

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**QUESTION:** *If an educational institution sponsors a conference with speakers, educational materials and handouts, should the institution ask presenters and speakers to confirm that they are the sole authors of any conference materials or, if not, that they have obtained copyright permission from the owner to distribute their works at the conference? Should speakers be asked for permission to copy their presentations and materials onto a CD for distribution to conference participants or for posting on a Website?*

**ANSWER:** It certainly is a good idea to ask speakers to sign a speakers’ agreement asking them to certify that the material included in handouts, slides, etc., is their own work, or if the speaker has used other peoples’ works that he or she has permission to distribute it at the conference. This is especially important if the

distribution will go beyond the attendees, for example, if the conference proceedings will be published or posted online with the handout material included.

Some institutions ask for a list of materials that speakers want to use and actually seek permission themselves rather than relying

on the speaker to have obtained appropriate permissions.

Any planned distribution of speakers’ original conference materials should be listed in the speakers’ agreement. Some speakers will give permission for distribution in handouts but not for any electronic distribution whether on CD or on a Website.

**QUESTION:** *A university produces a series of materials and it owns the copyright for these materials. Later there is litigation (not over the copyright) but in which the defense attorney asks for copies of the material. Must the university comply with the court order?*

**ANSWER:** An institution must comply with a court order or it is guilty of contempt of court. Sometimes legal counsel may challenge the validity of a court order, but absent that, there is no wiggle room on compliance.

**QUESTION:** *A hospital is considering posting on its intranet four articles in PDF format. The library does not have an institutional subscription to the journals either in print or in electronic format. Further, no copyright royalties have been paid or even contemplated for intranet posting. What alternatives does an institution have to be able to post the articles on the intranet without infringing copyright?*

**ANSWER:** The first step is to check to make sure that there is no institutional license through services such as **EBSCOhost** and or

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**MDConsult.** If there is a license, then the terms of the license control whether the articles may be posted on the intranet. PDF format is really irrelevant since the format does not change the copyright status of the work. Another alternative is to seek permission directly from each publisher, stating the potential use of the article, the length of time it will be posted, the number of potential users, etc... The hospital library could also pay royalties directly to the **Copyright Clearance Center** for posting of these articles on a per-transaction basis. The CCC also offers blanket licenses for hospitals, for for-profit and nonprofit institutions.

**QUESTION:** For bulletin boards in a public library's children's area, is there any restriction on posting graphics found on the Internet or copying them from books?

**ANSWER:** Yes, there are restrictions. One of the rights of copyright owners is the right of public display. So, copyrighted graphics and illustrations from books and those found on the Web should not be reproduced for public display without permission of the copyright holder. There is an exception for displaying books and book jackets, but not for reproducing them for display. Section 109(c) of the *Copyright Act* states: "...the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time to viewers present at the place where the copy is located." So, enlarging graphics or illustrations from a book or reproducing them from the Internet for a bulletin board in a public library requires permission. Placing the original book jacket on display is not a problem.

Had the library been in an elementary school, the display may have been permitted if it was part of instruction under Section 110(1).

**QUESTION:** Playing music recordings for dance classes at a college is a very common practice. Should the school pay royalties for this? What about dance schools? How does copyright apply to dance clubs with a disc jockey?

**ANSWER:** Sound recordings do not have public performance rights except for digital transmission of the recordings, but the musical compositions embodied on the recording do have performance rights. Educational institutions have an exception for the performance of musical works in the course of instruction under Section 110(1) — dance classes in the college are permitted to use recorded music as a part of instruction. Private dance schools that use music recordings are not eligible for the exception and must pay royalties to **ASCAP**, **BMI** and **SESAC** for music registered with them. Dance clubs (nightclubs) also pay royalties for the performance of music, whether they have a DJ or just play CDs. 🐾

## From the University Presses — How to Establish a Research Agenda for Scholarly Communication, Part I: A Paranoid View

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Just as I was beginning to think I was running out of things to say in this column, the **ACRL** obliged by issuing a report in early November on "*Establishing a Research Agenda for Scholarly Communication: A Call for Community Engagement.*" This is the product of a special meeting convened on July 21 by the **ACRL's Scholarly Communications Committee** co-chaired by **John Ober** and **Joyce Ogburn**. Besides these two, the assembled group included **Karla Hahn (ARL)**, **Charles Henry (CLIR)**, **Heather Joseph (SPARC)**, **Suzanne Lodato (Mellon)**, **Clifford Lynch (CNI)**, **Kara Malenfant (ACRL)**, **Meredith Quinn (Ithaka)**, and consultant/facilitators **October Ivins** and **Judy Luther**.

I am going to respond to this report in two parts. The first I call "*The Paranoid View*" as it represents my immediate, gut-level reaction and may help librarians understand how this report will be viewed by some publishers who share the kinds of concerns to which I give voice in this first part. The second part to follow I will call "*The Sympathetic View*" because it comes from discussions I had with a number of people with whom I shared this version including **Karla Hahn** (who visited **Penn State** recently) and my **Penn State** librarian colleagues, **Nancy Eaton** and **Michael Furlough**, who opened my eyes to other dimensions of librarianship I had not seen so clearly before and thus provided a fuller context for me to understand what underlies this report. (I also benefited from reading the draft of an article by **Furlough** forthcoming in *College & Research Libraries* and an article to which **Karla Hahn** referred me on the evolution of peer review.) This kind of successful collaboration itself may bear out the hopes expressed by the report for more "community engagement." As you read on, though, remember that this immediate response will appear in some ways grumpy and defensive. In *Part II*, I will try to restore some balance.

It is a very well-informed group that the **ACRL Committee** convened, but one cannot help wondering in light of the report's subtitle if it really makes sense to

create such an agenda without wider participation at the outset. Though people like the two consultants and **Clifford Lynch** know a great deal about how publishing works, nevertheless there are noticeably absent from this group any direct representatives of three major stakeholders in the system of scholarly communication: university administrators, faculty, and presses. It is true that the report itself acknowledges "the limitations of this singular brainstorming effort" (p. 16) and calls for "community efforts" to refine and expand the agenda. And **Joyce Ogburn** herself, having heard of a skeptical comment I made to press directors on the **AAUP** listserv, extended a special invitation to university presses: "We would welcome input from the UP community regarding particular points to which presses would like to contribute or any additional research questions that could be added." This invitation is much appreciated. Still, as one of my colleagues recently observed, they "welcome our responses to the questions and issues they've framed, but it never occurred to them we might have something interesting to say about how they get framed in the first place, or even about what questions are worth asking."

A case in point is the lengthy section at the end devoted to "*Public Policy and Legal Matters.*" Anyone familiar with the debates about copyright will immediately recognize that the agenda set forth here reflects the viewpoint of librarians about fair use and the other issues discussed here, as in this claim: "Our current environment may be undermining the intent of fair use provisions as works of research and scholarship shift from print to digital formats..." Actually, university presses can agree with this statement, but only if it is interpreted also to mean that the digital environment has unleashed major new threats to the revenue streams of presses through the expansive interpretations of fair use embedded in the operation of many e-reserve and course management systems — obviously, not the meaning intended in this report. The unabashedly positive comment about the **Google Books Library Project** also is clearly a library-centric viewpoint.

Particularly telling is this admission: "Libraries may not have the requisite experience and expertise in assembling copyright services to assist authors to incorporate others' material



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