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Questions & Answers -- Copyright Column

Laura N. Gasaway

University of North Carolina-Chapel Hill School of Law, laura_gasaway@unc.edu

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He and others are concerned that much library material is purchased from Europe and lots of books are printed in China. So here's my take on it.

1) China is not a concern. U.S. and European publishers are getting their printing done in China. That doesn't mean the books and journals are sold in China. They are printed and stitched together there. The authorized first sale is somewhere else.

This is the same confusion our Commerce Department is falling into with the compo-

nent parts of iPads manufactured in the U.S., shipped to China for assembly by ill-paid drudges, and then brought back to the U.S. for sale. Commerce counts it as a sale by China and adds it to our dreadful trade imbalance.

2) Parties can agree on the place of sale, and if you look at some of your standard form contracts you will note that the place of contracting has been selected. All any library need do is print a standard form purchase invoice with a condition that the seller agrees the sale is in the U.S. You're not trying to evade some sales tax that might get those menacing revenue agents stirred up.

3) Why does the library world always assume publishers are slaving to levy an

extra tariff? The price is already calibrated to what the market can barely bear and crawls up annually at a rate designed to not give you total catatonic sticker-shock. It is truly inconceivable that European publishers would leap to lay more costs on already near-bankrupt university and public libraries. Taken to the extreme, the publishers would be preventing library circulation and eliminate the sole reason libraries are buying the stuff.

4) And if push utterly came to shove, the U.S. Congress which manages to pass door-stop bills on a too-regular basis could maybe manage to amend the *Copyright Act*. 🐼

Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>
www.unc.edu/~uncInlg/gasaway.htm

QUESTION: *A university librarian asks why there is a debate over whether fair use is a defense or a right and whether it makes any difference.*

ANSWER: This is one of the central debates in copyright law and there is not an absolute answer. (Sort of like "what is the meaning of life?"). In law, a defense is something that may be raised by a defendant to defeat the claim made by the plaintiff in a lawsuit. In section 107 of the *Copyright Act*, in order to determine whether the use is a fair use, courts are directed to evaluate a particular use in relation to four factors. This makes it clear that fair use is a defense to copyright infringement because a court is involved only in the context of litigation. So, fair use certainly is a defense to a claim of copyright infringement, but it is also more. Often fair use is defined as an affirmative defense which means a new fact or set of facts that operates to defeat a claim even if the facts alleged by the plaintiff in the claim are true. In other words, the defendant did make the copies of a protected work, but the purpose of the use, amount of the work copied, etc., are such that a court would find that the use is a fair use, and this defeats the infringement claim.

But is fair use also a right? There is a significant difference between a right and defense. A defense is raised only in the context of litigation — in other words, someone has been sued for copyright infringement and then raises the defense of fair use. By contrast, a legal right is a power, privilege, demand, or claim possessed by a person by virtue of law. So, a right exists under the rules of a legal system, such as the law of a country. Sometimes fair use is defined as a privilege rather than a right, but this simply presents a circular argument since *Black's Law Dictionary* defines a right as a privilege and a privilege as a right.

Individuals who argue

that fair use is a right are those who want expanded ability to use copyrighted works without permission of the copyright owner. Copyright holders, however, want to restrict fair use to a defense only. The difficulty in the copyright law is that the statute actually uses the term "right of fair use" in the library provision, section 108(f)(4). It is difficult to know if this was intentional on the part of Congress or was inadvertent, but it certainly has furthered the debate on this issue. This contrasts with section 107's direction to courts and serves to enhance the confusion.

Does the difference between a defense and a right make a difference? Perhaps or perhaps not, but the problem is this. If fair use is a right, then one gets to assert fair use as a matter of law so that an infringement claim would not even be filed. Maybe the answer is that fair use falls somewhere in the middle between a defense and a right. To some extent, this is the essence of an affirmative defense. The debate over whether fair use is a right or a defense is likely to continue, and unless the **U.S. Supreme Court** or Congress speaks definitively on the matter, no clear answer is possible.

QUESTION: *A college librarian asks about the possibility of placing on reserve items which the library does not own but instead obtains through interlibrary loan.*

ANSWER: The ALA Model Policy on Interlibrary Loan states that "in general the library should own a copy of the item placed on reserve." This means that the majority of the works in a library's reserve collection should be owned by the institution, but occasionally a copy placed on reserve might be the property of the faculty member, or it could be obtained from another institution through interlibrary loan complying with the CONTU interlibrary loan guidelines. Both

faculty-owned and ILL copies should be exception rather than the rule.

QUESTION: *A few years ago, there was much in the press about orphan works, and it was expected that the copyright law would be amended to deal with orphan works as do the laws of several foreign countries. What has happened to orphan works legislation?*

ANSWER: As the term copyright has become progressively longer, a large number of works published in earlier years but still under copyright are increasingly unavailable for use because no one can locate the author or publisher in order to seek permission. Thus, these works most often are not used because no one is willing to risk an infringement action. In 2005, the **Register of Copyrights** initiated a study of the problem caused by these orphan works and reported to Congress in January 2006 calling for legislation to amend the copyright law to provide protection for anyone who uses an orphan work. In order to take advantage of the provision, a user would have to conduct a reasonable search to locate the copyright owner. After such a search, the user then would not be responsible for any damages for that use should the copyright owner later come forward. However, the user would be responsible for damages for use after that time and would have to negotiate future royalties with the owner in order to continue using the work.

It appeared that the legislation would move swiftly through Congress, but it met a roadblock when media photographers raised strong objections. The proposed amendment has languished since that point. An easy solution to the roadblock might be to permit the legislation to go forward but exempt photographs from its provisions. To my knowledge, this has not been proposed, however.

During the **Google Books** settlement talks, however, interest in orphan works has again surfaced. In the proposed **Google Books Settlement**, there were some proposals that

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Random Ramblings — Falling Prices in the Out-of-Print Book Market

Column Editor: **Bob Holley** (Professor, Library & Information Science Program, Wayne State University, Detroit, MI 48202; Phone: 248-547-0306; Fax: 313-577-7563) <aa3805@wayne.edu>

Prices are taking yet another tumble in the out-of-print book market. While I don't have statistically valid evidence for this decline, I see the signs. As a small book dealer, I have recently been evaluating some older stock. Almost without exception, I have reduced my prices to remain competitive. Since many of these items were older to begin with, I don't believe that a decline in popularity is the key factor. Furthermore, I donate books that I can't sell to libraries and check their value on *used.addall.com* for my income tax deduction. Before this year, the median value for almost all books was never lower than \$1.95, the standard minimum price on some selling sites. Now, I am valuing many gifts at \$1.00. Since these cheap books are often yesterday's best sellers and other popular materials with large print runs, this statistic means that hundreds of copies are available for next to nothing.

I believe that increased competition is the reason for declining prices. **Better World Books** and **B-Logistics** are actively soliciting books from the library market. More libraries now sell directly, most often with "free" labor from their Friends groups. I am among the experts that spread the word to libraries that they could get more money for their books than the standard book sale prices. Seventy-seven people attended my ALCTS Webinar on

maximizing revenue from unwanted gifts and library discards. Thrift stores have also entered the market. **Goodwill** outlets from around the country are channeling their wares through the various online vendors. While I don't completely understand how they can make any money, some large vendors sell thousands of books per month if not per day at prices as low as one penny. These massive sellers depend upon volume and provide generic descriptions for the materials that they sell. They also often make mistakes such as describing a paperback as not having a dust jacket and generally have lower customer approval ratings. They often crowd out smaller vendors by taking up the first page or two when listings are organized by price. In fact, many items have a large price gap, often several dollars or even more, between the offerings from the mega-sellers and those from smaller vendors.

The op market also has many more casual sellers as the word spread that money could be made from selling used books. As often happens, the influx of new sellers led to greater competition, lower prices, and less profit. *Half.com* in particular makes it easy to sell a few books now and then since their commission structure doesn't penalize smaller sellers as **Amazon's** does.

Another factor in the price decline may be automatic pricing programs. Larger vendors have developed programs that dynamically adjust prices according to set rules to gain the maximum competitive advantage. Small vendors can "rent" the same capability from several sources. I often find that an item that I have just listed at the lowest price is then undersold by a few pennies within the next few hours once the price bot finds my item. I'd like to know what happens when two bots compete against each other. Does the price decline to zero? I've even heard stories of dealers who offer books at ridiculously low prices to trap the automatic pricing program into matching that price, at which point the dealer buys the item before increasing the price to reasonable levels.

What does this all mean? Casual sellers can throw away the books on how easy it is to make money in the op market. Making a decent profit requires greater skill in selecting materials for sale, accurately describing the items, and providing excellent customer service. Libraries are finding even more bargain buys on the Internet. On the flip side, libraries are discovering that many fewer withdrawals and unwanted gifts have value beyond book sale prices. The biggest challenge may be for the Internet sites that set a minimum listing price for sellers who use their services. **Amazon** has set the bar as low as it can go with their penny books. Alibris has already changed its \$1.95 minimum to \$.99, which may still be too high for some items. *Half.com* may also need to consider its \$.75 minimum. If their profitability depends upon a commission structure that assumes higher prices, they may also have to adjust what they charge third party vendors.

While not the main subject of this discussion, the threat of eBooks overhangs the op market. Personally, I think that the current op market for physical materials can co-exist with the eBook market as long as eBook vendors use licensing to stop a secondary eBook market from developing. Compared with the \$4.00 cost including shipping for a physical book, the current price for an eBook may still seem high. Some buyers will also still prefer a physical copy or won't want to buy an eBook reader. In the music area, I still successfully sell physical CD's where the digital equivalent of the whole album or the individual song is available.

Selling out-of-print materials now takes place in an efficient, mature market. Some sellers will drop out because the profit isn't worth the time. Others will become more efficient or provide added value in greater reliability and customer service. A final group will sell an occasional item now and then or remain involved as a moderately profitable hobby.

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would, at least partially, solve the orphan works issue problem, but the judge has yet to rule on whether the settlement can go forward. Many legal scholars, librarians, and others have criticized the proposed settlement's handling of orphan works and opined that this should be left to federal legislation and not to private ordering among parties to the **Google Books** suit. It is possible that an amendment will again move forward in **Congress**, but it is not clear that this will happen.

QUESTION: *A school librarian asks how long the school should archive its emails and whether any of those emails that contain copyrighted material subject the institution to liability for infringement due to the archiving.*

ANSWER: Each organization, school, etc., should have a record retention policy which includes how long it will archive email. For state-supported institutions, the length of time should take into account the state government policy. For private institutions, the length of time may be based on the statute of limita-

tions for bringing suit that would be based on any email. In any event, most libraries do not stand alone but are a part of a larger institution or organization, and their policies should be those of their parent organizations.

On the other hand, a library might be responsible for archiving email of a particular individual or entity as a part of a general archival project, in which case the length of retention would be the same as for other items. The retention policy might be "forever" if the emails are to be archived for future researchers.

The copyright infringement issue is much easier to answer. Even if any archived item contains any infringing material, the institution is not likely to be liable under section 512 of the **Copyright Act**, the online service provider liability provision. In offering email services to its staff, faculty and students, the institution is considered to be a passive provider, and it would not be liable for the infringing activity of a user of the service if certain easy-to-satisfy conditions are met. Once the institution is aware of the infringing activity of a user, however, it has a responsibility to take disciplinary action and can even cancel the user's access to the email service.