

September 2011

Questions & Answers -- Copyright Column

Laura N. Gasaway

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

Follow this and additional works at: <https://docs.lib.purdue.edu/atg>



Part of the [Library and Information Science Commons](#)

Recommended Citation

Gasaway, Laura N. (2011) "Questions & Answers -- Copyright Column," *Against the Grain*: Vol. 23: Iss. 4, Article 29.

DOI: <https://doi.org/10.7771/2380-176X.5954>

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.

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/~unclng/gasaway.htm

QUESTION: *A librarian in a for-profit educational institution asks about interlibrary loan and making copies for “the customer.” The lending library sent an electronic copy which the borrowing library then printed for its patron. How does section 108(d), which allows libraries to make single copies of articles for users, affect license agreements? Could the article be forwarded to the patron in electronic format and still comply with the copyright law? Does it matter if the article requested through ILL was published more than five years ago?*

ANSWER: If a license agreement permits the library to print a copy for a user, then making the copies is fine. Section 108(f)(4) states that license agreements take precedence over the exceptions in section 108. The concern about the license agreement is whether it restricts copies to an institution’s own students, faculty and staff.

When a patron requests an article that the library does not own, the first question is whether the for-profit library qualifies for the section 108 exceptions. This matter has never been litigated, but most librarians believe that even for-profit college libraries may take advantage of the ILL Guidelines. The Act itself is silent on providing electronic copies via ILL, but many libraries certainly offer this. Whether the lending library itself scanned the article or whether the electronic copy came from a licensed product is important. If the latter, then the terms of the lending library’s license agreement applies as to whether sending an electronic copy to satisfy an ILL request is permitted. Assume that the lending library’s license agreement allowed use of the database to satisfy ILL requests and also permitted the library to send electronic copies to borrowing libraries for ILL. Then the borrowing library should be able to provide the electronic copy directly to the patron.

If the lending library scanned the article itself, it may or may not be fair use. The ILL Guidelines do not deal with digital copying. Again, many libraries do it anyway. But the issue is less clear than under a license agreement,

If the request is for an older article, then the ILL Guidelines do not apply because only the last five years of a journal title are governed by the Guidelines.

QUESTION: *For a library digitization project of documents published by the university, is copyright permission necessary? The library will make these documents available on the Web.*

ANSWER: The answer is yes, but it very

easy to get permission. In fact, the library should contact the university president or his or her designee and seek permission to put these documents on the Web. Permission can be obtained for all documents with just one request. In other words, rather than seeking permission for each individual title, the library can make a single request for all documents published by the university.

QUESTION: *Recently there was a news story about an individual who apparently has been indicted for misappropriating more than 4.8 million articles from JSTOR. He reportedly obtained access illegally through the library at MIT and has been charged with abusing computer networks at MIT and with disrupting the servers at JSTOR. He could be sentenced to 35 years of imprisonment. In response to this situation, some librarians and scholars have indicated they believe that access to scholarly articles should be free which is apparently what this individual was attempting to accomplish. How likely is it that this will happen?*

ANSWER: Not very. Despite the fact that **Larry Lessig** and others have stated that the price **JSTOR** charges for providing access to these articles is too high, copyright law is totally contrary to the idea that this valuable property will be made available free unless the publisher (owner) so decides. The United States is a capitalistic country, and publishing is a business. What publishing companies produce is articles, books, etc., and this is valuable property which they sell and/or license. Owing the copyright to these articles is critical for these publishers.

Certainly more and more scholarly articles are going to be available free as scholars avoid traditional publishers and post them directly on the web. But users of these articles and papers also lose something important — quality control. Publishers have organized peer reviewing and offered some assurance of the quality of the articles. Direct publishing on the web by authors has no such assurance. Libraries and scholars will trust the work of some authors, but for other authors, they may be unable to verify the authors’ credentials, the accuracy of their work, etc. Like it or not, journal publishers provide this for the articles published in their journals.

Journal publishers license **JSTOR** to provide electronic access to their journals and back issues. **JSTOR**’s own Website states that it is “a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive of over one thousand

academic journals and other scholarly content.” Many publishers rely on **JSTOR** to provide electronic access to their back files. Even though **JSTOR** is nonprofit, it must support itself through license fees and through fees for the downloading individual articles by non-licensed users.

An individual who obtains access by violating **MIT**’s license agreement with **JSTOR** is likely to be prosecuted, especially at the level of 4.8 million articles!

QUESTION: *Should a public library include a copyright notice on all copies of articles it provides to satisfy ILL requests?*

ANSWER: Yes, according to section 108(a) of the *Copyright Act*, in order to qualify for the exceptions provided in section 108, one of the requirements is to include a notice of copyright on copies made under the section. If the library has licensed journal databases, then the license dictates: (1) whether the library may use an article from the database to satisfy an ILL request and (2) whether the library must include a notice of copyright on copies it provides for ILL. Typically, the copyright notice appears automatically on electronic copies, however.

QUESTION: *A university library has provided ILL services to a small non-profit institution and has done so since 2002 through a contract. The smaller school has its own library staffed by a librarian and one other staff member. The contract requires that the university library provides ILL services directly to students at the smaller institution, presumably based on an annual payment. How does this contract affect the ILL Guidelines and the suggestion of five? Must either the university library or the smaller college library pay royalties on copies provided?*

ANSWER: The contract to provide ILL services does not change any responsibilities under the *Copyright Act* or under the ILL Guidelines. The ILL Guidelines apply, and either the university, as the lending library, or the smaller institution, as the borrowing library, must maintain the ILL records and follow the suggestion of five. Typically, the borrowing library would do this. With the contract, however, the university library may charge a higher fee for services, keep the records of these transactions for the borrowing library and pay the royalties for copies beyond those that are fair use. Or, it may put the responsibility on the borrowing library. One or the other must do it, though.

QUESTION: *Are photographs published or unpublished for copyright purposes?*

ANSWER: Were the photographs published in a book or journal article? In a newspaper? In a collection? Posted on the Web? If not, they are unpublished. 🌿

