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Questions and Answers-Copyright Column

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LEGAL ISSUES



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Legally Speaking — Libraries Reverse Course on Need for Legislative Reform

by **Bill Hannay** (Schiff Hardin LLP, Chicago) <whannay@schiffhardincom>

The U.S. Copyright Office in Washington, D.C., wants to know what legislative, regulatory, or other solutions are needed to resolve the problem of “orphan works” and mass digitization, and the library community has responded by saying “no, thank you.” A memorandum submitted by the **Library Copyright Alliance (LCA)** in mid-January unequivocally asserts that “libraries no longer need legislative reform in order to make appropriate uses of orphan works.”



Eight years ago, the **LCA** — which included the **American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries** — wrote to the Copyright Office, asserting that “the **Copyright Act** must be amended to address the orphan work problem.” The **LCA** recommended in its March 2005 comments that Congress “limit the remedies when a user has engaged in a reasonable, but ultimately unsuccessful, search for the copyright owner.”

In its comments filed in 2013, the **LCA** explains that “significant changes in the copyright landscape over the past seven years convince us that libraries no longer need legislative reform in order to make appropriate uses of orphan works.” The changes include the following:

1. Fair use is less uncertain, because of a number of recent court cases and the publication of the **ARL’s Code of Best Practices in Fair Use for Academic and Research Libraries**, available at <http://www.arl.org/pp/ppcopyright/codefairuse/code/index.shtml>.
2. Court-ordered injunctions are less likely to be issued because of a 2006 U.S. Supreme Court decision holding that “irreparable injury” from an infringement of intellectual property can no longer be presumed by judges.
3. Mass digitization is more common, ranging from routine “caching” of Web pages by search engine companies to **HathiTrust’s** orphan works project.

As a result, the **LCA** concludes that the library community feels comfortable relying on fair use; however, **LCA** acknowledges that “other communities” may prefer greater certainty concerning what steps they would need to take to fall within a safe harbor.

If Congress does want to consider legislation, **LCA** “strongly urges” it to abandon the approach in the proposed legislation that passed the U.S. Senate in 2008 (and died in the House). According to the **LCA**, that bill — **S. 2913** which was named the **Shawn Bentley Orphan Works Act** after a long-time Senate staff member — had become “increasingly complex and convoluted” as it worked its way through Congress. Instead, the library group recommends “a simple one sentence amendment” to the **Copyright Act** that would grant courts the discretion to reduce or remit statutory damages in appropriate circumstances.

If Congress prefers to develop a more detailed piece of legislation, libraries would support an effort to amend the copyright laws **only** if it offered significant benefits over the status quo and included the following features (as outlined in an **LCA** statement issued in 2011):

- The non-commercial use (i.e., reproduction, distribution, public performance, public display, or preparation of a derivative work) by a nonprofit

library or archives of a work when it possesses a copy of that work in its collection:

- would not be subject to statutory damages;
 - would not be subject to actual damages if the use ceases when the library or archives receives an objection from the copyright owner of the work; and
 - would be subject to injunctive relief only to the extent that the use continues after the library or archives receives an objection from the copyright owner of the work.
- This limitation on remedies would apply to the employees of the library or archives, as well as to a consortium that includes the library or archives.
 - Copyright owner objections would have no effect on a library’s rights under fair use.

My Prediction: Given the continually-changing legal and academic environment noted in the **LCA’s** report, it seems likely that the Copyright Office (and Congress) will take a wait-and-see attitude before jumping into an active effort to revise the copyright laws. 🐻

Questions & Answers — Copyright Column

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QUESTION: *Does a public library need a public performance license to play children’s music recordings in the library as a background for story hour?*

ANSWER: The playing of music in a public place, such as in a public library, is a

public performance as defined by the copyright law. Sound recordings, however, do not have public performance rights. This means that the performance right belongs to the composer or other copyright owner of the music, and his or

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her permission is needed. One certainly could argue that music recordings aimed at children are intended to be played; not only for individual children, but also for groups of children, and that the use for story hour is a fair use. If the library has a blanket music performance licenses from ASCAP, BMI, and SESAC, these licenses would cover performance of children's music. Assuming that the library does not have music performance licenses, then, as a policy matter, it must decide whether it will continue the practice of playing recorded music for children claiming that it is a fair use or seek permission from the copyright owner.

QUESTION: *How does a school know when instructional materials received from publishers are templates that can be customized or adapted?*

ANSWER: The initial question to ask is under what conditions do publishers make these materials available. There are two ways to know for sure whether instructional materials are templates that may be customized or adapted. The first is to consult any license agreement that comes with the materials or is posted on the publishers' Website, if the materials are downloaded from the Web. The second way is to contact the publisher directly and so inquire. Generally, absent a license agreement which says that the materials may not be customized or adapted, it is permissible to adapt them. The school should not post adapted materials on the Web, however, unless they are password protected for students in the class for which they are being used.

QUESTION: *Who is responsible for violating the law when a professor makes a DVD copy of a VHS tape and the library then places the DVD on reserve?*

ANSWER: The professor is definitely the direct infringer. The library could be viewed as encouraging or furthering the infringement by accepting the infringing copy and putting it on reserve, however. To a large extent, whether the faculty member or a librarian is responsible for the infringement does not matter because it is the institution itself that will be held liable. The school might then take action against the faculty member, of course. To protect the library, it should develop a policy about whether it will accept copies of DVDs that are not lawfully made, purchased or acquired by

gift and then follow the policy it adopts. Many libraries accept for reserve only DVDs that are purchased by either the library or the faculty member or which are donations of purchased (not reproduced) DVDs.

QUESTION: *Since so few libraries have ever been sued for copyright infringement, which libraries are the most vulnerable? Is there a difference between public and academic libraries regarding liability?*

ANSWER: Libraries that make concerted efforts to learn about the copyright law as it is amended and interpreted by new court decisions, follow that law, develop policies about how to handle various copyright problems, and educate their staffs about the law and the library's policies are not likely to be sued even if a library makes a mistake and infringes copyright. That said, there are libraries that are more at risk than others. If one were to create a liability scale, then libraries in for-profit companies are the most vulnerable because they may be unable to take advantage of the exceptions that the copyright law provides for libraries, particularly nonprofit ones. The second type of library that is likely to be most liable is the for-profit educational institution which operates much as do other corporate libraries for copyright purposes. Academic and public libraries are the least likely to be sued, but they are not immune to suit as the *Georgia State University* case (see 863 F. Supp. 2d 1190 (N.D. Ga. 2012)) illustrates.

In fact, academic libraries must be divided into state-supported universities and colleges versus privately supported ones. State-supported universities are protected by Eleventh Amendment immunity which does not mean that they cannot be sued for copyright infringement but that they cannot be sued for damages. Plaintiffs can still sue for injunctions, costs, and attorneys' fees. Academic institutions that are privately supported do not have Eleventh Amendment immunity, so they are more at risk of suit than are publicly supported ones. Public libraries generally receive their support from local government, and therefore do not qualify for Eleventh Amendment immunity. They are not usually sued, however. A library is much more likely to receive a cease and desist letter from a copyright owner, and it would then have the opportunity to settle rather than litigate.

QUESTION: *If a poet voluntarily registers the copyright on her poems, does she have to register each poem individually? Or does*

registering a collection of poems extend the registration to each individual poem?

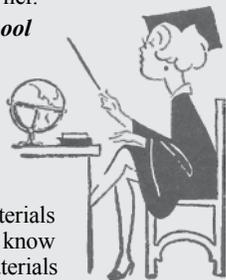
ANSWER: According to the U.S. Copyright Office, published collections of poetry can be registered on a single application with a single fee if all the poems are owned by the same copyright claimant. Unpublished poems can also be registered as a collection on a single application with the payment of a single fee and a deposit of one complete copy or phonorecord of the collection if all the following conditions are met: (1) the elements are assembled in an orderly form; (2) they bear a single title identifying the collection as a whole and (3) "the copyright claimant in all of the elements and in the collection is the same; and all the elements are by the same author or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each of the elements." See <http://www.copyright.gov/fls/fl1106.html>.

Registration of an unpublished collection of poems extends the benefits of registration to each poem in the collection, although the only listing of the work in the Copyright Office's catalogs is by the collection title and not by individual poem title.

QUESTION: *What permissions are required for a university to stream video works across a college network and off campus using the Web?*

ANSWER: Section 110(2) of the *Copyright Act* provides an exception for nonprofit educational institutions to transmit performances of copyrighted works as a part of a class without permission of the copyright owner. An institution has to meet several conditions in order to take advantage of this exception. Although other conditions apply here, the most relevant is that the recipients of the performances must be enrolled in the particular course to view the performance. Schools must take measures to prevent reception by others who are not enrolled. Whether the transmission is to the campus only or is beyond, it must be limited to students enrolled in the course. Another important condition is that only reasonable and limited portions of a video may be performed without obtaining permission from the copyright holder.

If the school wishes to stream entire motion pictures, it must seek permission and should specify whether recipients are enrolled in the specific course, whether the stream is to be available to the entire campus, or whether it is to be shown beyond the campus. Royalty fees probably would vary depending on the answers to these questions. 🐾



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which has bought by Amazon and morphed into CreateSpace. Mitchell was recently interviewed as a top tech influencer. <http://www.techfaster.com/top-tech-people/interview-with-mitchell-davis-chief-business-officer-of-bibliolabs/> And *ATG*, being the great publication that it is, interviewed Mitchell in this issue, p.49.

This is funny! I am having lunch today with Mitchell and Myer Kutz who was interviewed (about publisher backlists when he was at Wiley) in v.1#4 of *Against the Grain!* What a coincidence! Myer is still working but he is also playing golf at Kiawah and he has a new book, *In the Grip* which I am looking forward to reading! It sounds fascinating!

And in the peer review space, interesting discussion of cutbacks in copyediting and other services in open access and indeed all of academic publishing. I remember when Sandy Thatcher (where are you

these days, Sandy?) guest edited an issue of *ATG* about this. The topic has resurfaced on *Scholarly Kitchen* and *liblicense* again. We asked a question on the *ATG* news channel about this and got some interesting responses ...

<http://liblicense.crl.edu/discussion-forum/>
<http://scholarlykitchen.sspnet.org/scholarlykitchen>
<http://www.against-the-grain.com/dao;u-specials/>
<http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0056178>

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