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Questions and Answers: Copyright Column

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Questions & Answers — Copyright Column

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QUESTION: *A state government librarian has been working with HathiTrust to digitize older state Banking Commission reports. Hathi had the volumes digitized but did not want to make any volumes newer than 1923 available to the public. The librarian believes that the state's public records law means that documents and publications produced by state agencies cannot be copyrighted. She was able to convince Hathi to proceed with the Banking Commission reports. Another state publication the librarian would like HathiTrust to digitize and make available are the state court reports (judicial opinions). Five of the volumes in the middle of the set of reports have copyright notices at the bottom of the Table of Contents page, but none of the other more than 300 volumes do. Why do those five volumes have a copyright notice? Is it possible for a state agency to claim copyright on a publication produced by the agency when the state has an open records law?*

ANSWER: According to the Copyright Office's Compendium (which is now being revised and soon will be posted on the Web), official state government documents such as judicial opinions and statutes are not eligible for copyright. But the *Copyright Act* is a federal statute and applies only to federal documents. So, under the federal *Copyright Act*, a state government could claim copyright in its publications. Most do not do so, however. It is likely that there was a change at the state printer and the notice was inserted in those five volumes during this time. Then, at some point, the matter was corrected for future volumes.

For documents that are not official judicial opinions and statutes, the issue is more complicated, and some states do claim copyright in those documents they publish. The theory for not allowing copyright is that citizens of the state have already paid for the publication with their tax dollars and thus should not have to pay for them a second time.

Another complication occurs when states do not publish their own judicial opinions and statutes but contract with a private publisher to do so. The private publisher likely will claim copyright in the volumes. One could argue that the statutes themselves without annotations or other extraneous matter or the judicial opinions without annotations or editorial additions should be copyright free.

QUESTION: *An art history professor asked how many images he may show in his classes. For the most part, these images come from disks sent by the publishers of art history textbooks. The professor assumes that the publishers want the images to be used for teaching purposes, and that permission to use the images is not necessary. Is there a difference between displaying images in a face-to-face classroom as opposed to posting*

them on a course management system as a PowerPoint presentation? Is it fair use if the artist has been deceased for more than 70 years?

ANSWER: It is very likely that publishers intend for the images on the disks be used for display in art history courses. If there is any license agreement that accompanies the disks, one should follow it. Otherwise, showing the images in a live classroom is permitted under section 110(1) of the *Copyright Act*, so teachers are allowed to display images to students with no permission required. Today, most teachers display images via a computer and an LCD projector. If there is any transmission of the images through a network, such as a course management system, section 110(2) applies. The professor may display images in a class session in same quantity he would use in a face-to-face classroom. There are limitations on the display, however. For example, students are not permitted to download the images, and images may not be retained beyond the class session.

Whether the artist is deceased is irrelevant. The image is the photograph and not the underlying painting or sculpture. So, it is the life of the photographer that controls. Today, photographs of two-dimensional works of art that are a faithful reproduction of the work are said to lack the requisite originality to qualify for copyright, however.

QUESTION: *A school librarian reports that her school has just adopted iPads for each student. In celebration of the upcoming Teen Read Week, she wants to feature students reading using "iREAD" instead of just "READ," and then create the posters such that the poster border looks like an iPad. Does the combination of "iREAD" and a poster made to look like a giant iPad go too far? None of these images would be posted on the school's Website.*

ANSWER: This clearly seems like fair use. The librarian is simply displaying posters that use the idea of "iRead" taken from an iPad. Further, the posters are not being distributed but simply posted in the school for a short period of time.

QUESTION: *An individual owns railroad photographs from the 1920s, 1930s and 1940s. The photographers are deceased. The individual wants to be the sole owner of the photographs. He asks if he acquires a copyright to these photos, would it make him the sole owner?*

ANSWER: It appears that the person owns copies of these photographs (maybe even the only copy of them) but not the copyright. The law provides that the photographer owns the copyright, although he or she may have transferred it to someone else. Since the photographers are deceased, their heirs own the copyright in these photos, if the photos were protected by

copyright. In order to own the copyright, there must be a written transfer of copyright from the owner (photographer or heir) to the individual.

There is certainly a possibility that the photos are no longer protected by copyright. When they were taken, the term of copyright was 28 years, but there was also a renewal term. One would have to know for each photo when it was taken, whether it was registered for copyright, if the copyright was renewed, etc., in order to determine whether the work is now in the public domain. If a photograph was published in the United States before 1923, it is definitely in the public domain. If it was published but never registered, it is now in the public domain. If registered and then renewed, it may still be protected by copyright. If the works are in the public domain, there can be no copyright.

If the photograph has never been published, and the photographer has been deceased for more than 70 years, it is now in the public domain. These photos existed as of 1978, and may have passed into the public domain at the end of 2002 if that was longer than 70 years after the photographer's death. Otherwise, the term of copyright is life of the author of the unpublished photograph plus 70 years.

QUESTION: *A university librarian writes that a campus is planning to institute a central depository for course syllabi. Plans have barely begun, but one professor who regularly balks has done so again, this time over a question of copyright ownership. Who owns the copyright in course syllabi? May a faculty member refuse to have her syllabus included?*

ANSWER: Many colleges and universities are posting syllabi either as a part of an institutional repository or to provide evidence in case the legislature or other funders have questions about what is going on in classes. In most academic institutions, faculty members own the copyright in their syllabi. Placing them in the repository does not require an assignment of copyright but rather a simple permission on the part of the owner to have it reproduced and displayed in the repository.

Another issue involving syllabi is that there are different types of syllabi — some syllabi actually contain full text of all of the readings assigned rather than just a citation to them. This type of syllabus also raises some issues about reproduction and distribution. For either type of syllabus, however, putting them into an institutional repository makes sense and may either be fair use or covered by the faculty member's employment contract.

Certainly, a faculty member may refuse to post her syllabus, but such refusal may violate the employment contract and could result in disciplinary action or even termination.