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Questions and Answers: Copyright Column

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After the presentation of this paper at the 2013 Charleston Conference, Judge Chin issued a short opinion on November 14, 2013, finally putting the Google Books case to rest. He seized on Judge Baer's concept of "transformative" use as "fair use" and applied it to Google itself, dismissing the authors' complaint against Google. This sets the stage for the Second Circuit Court of Appeals to deal with both *HathiTrust* and *Google Books* at the same time. A more detailed discussion of Judge Chin's decision was published in the December 13 - January 14 issue of *Against the Grain* (p.41). — WMH

Endnotes

1. Bill Hannay is a partner in the Chicago-based law firm, **Schiff Hardin LLP**, and an Adjunct Professor at IIT/Chicago-Kent College of Law. He is a frequent speaker at the Charleston Conference and the author of nine books on antitrust and trade regulation.

2. For a fascinating collection of excerpts from Steve Jobs' email introduced as evidence in the case, see Zachary Seward, <http://www.theatlantic.com/business/archive/2013/05/the-steve-jobs-emails-that-show-how-to-win-a-hard-nosed-negotiation/276136/>.

3. Changes in the marketplace itself may bring procompetitive effects as well. For example, in October, **Accenture** announced that it has built and will operate an end-to-end e-commerce and direct-to-consumer distribution solution for **HarperCollins Publishers** eBooks globally. The project commenced with the launch of **HarperCollins'** www.CSLewis.com and www.Narnia.com. See <http://newsroom.accenture.com/news/accenture-to-create-global-e-book-fulfillment-platform-for-harpercollins.htm>.

4. For example, in response to member concerns, the Digital Content & Libraries Working Group of the **American Library Association** has focused on influencing the so-called "Big 6" trade publishers to sell eBooks to libraries on reasonable terms. See *Ebook Business Models for Public Libraries* (August 2012), <http://www.americanlibrariesmagazine.org/blog/ala-releases-%E2%80%9Cebook-business-models-public-libraries%E2%80%9D>.

5. See **Andrew Albanese**, *Publishers Weekly*, Sep. 24, 2013, <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/59222-after-quick-hearing-google-books-case-appears-ready-to-be-decided.html>.

Questions & Answers — Copyright Column

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QUESTION: A university librarian asks whether it is permissible to provide copies of articles to distance education students who received an incomplete in courses from a previous term, but who now want to complete the course. They are not currently enrolled at the university.

ANSWER: At the request of a user, libraries that meet the *Copyright Act's* Section 108(a) requirements are permitted to make single copies of articles for users under Section 108(d), but only one article per journal issue. There is no requirement that the user be enrolled in the institution in order for the library to take advantage of this exception. The library must have no notice that the copy distributed to the user will be used for other than fair use purposes. Further, the library must have provided the required warning to the user.

If the articles come from a licensed database, however, the terms of the license agreement apply. Such licenses typically restrict access and copies to enrolled students, faculty, and staff. Thus, providing copies from the database to a non-enrolled student would likely violate the agreement.

QUESTION: An elementary school teacher asks whether there is a maximum number of students who can view a video in conjunction with an educational unit. May more than one class see the video at the same time?

ANSWER: There is no maximum number of students who may view a video in a class session. Section 110(1) of the *Copyright Act* permits the performance of an audiovisual work in the course of face-to-face teaching in a nonprofit educational institution. In order to qualify for this exception, the following requirements must be met: (1) students and teachers must be simultaneously present in the same place; (2) no members of the public may be present; (3) the performance must occur in a classroom or other place normally devoted to instruction; (4) the performance must be part of instruction; and (5) the copy of the work that is performed must be a lawfully made copy.

Having more than one class present in the room to see the video is not a problem as long as teachers and students are present. If the performance is for entertainment as opposed to instruction, then a public performance license is required. The **Motion Picture Licensing Corporation** (<http://www.mplc.org/>) and **Swank Motion Pictures Inc.** (<http://www.swank.com/>) offer public performance licenses for motion pictures and videos.

QUESTION: An academic library has a license to an online journal, but the publisher embargoes the most recent 18 months of the publication. For articles within that time period, only citations are available. If the library makes interlibrary loan requests for articles for faculty members via ILL within that 18 month period, must it pay copyright fees after the fifth request?

Or does the library have a current subscription to that journal within the meaning of the *Interlibrary Loan Guidelines*?

ANSWER: This question is likely to be asked with increasing frequency as more journals are available electronically and libraries migrate their subscriptions from print to digital access. The *Interlibrary Loan Guidelines* were developed by the Commission on the New Technological Users of Copyrighted Works (CONTU) at the request of Congress in 1978 and were published in the conference report that accompanied the *Copyright Act of 1976*.¹ They are silent as to this issue, but if the subscription was for the printed journal to which the library has a current subscription, requests for missing articles or even embargoed ones beyond the suggestion of five would be treated as a current subscription.

With an online subscription, the publisher likely would say that ILL fees must be paid beyond the suggestion of five for articles published during the 18 month embargo. There is also a strong argument that the library has a current subscription, however. If the license agreement for the journal is silent as to this issue, ILL requests beyond the five can be treated as covered by the current subscription.

QUESTION: A college librarian was asked by two psychology professors about using a purchased Webinar in their classes. The professors purchased a membership in order to obtain access to the Webinar and assumed that they were buying a downloadable Webinar which they could share with their students. What they actually received was access with an account and a password. Since they purchased access, the professors asked whether they may "reformat" the Webinar by downloading it to a DVD to permit showing it to classes since they purchased access.

ANSWER: Unfortunately, the answer is no. It appears that the professors simply acquired access for a single user although the membership for access should have been a clue. Their mistake in what they were acquiring is a shame, but they most likely signed (or clicked on) a license agreement and they are actually bound by the actual terms of the contract. Downloading the Webinar to a DVD and showing it to a class would violate the terms of the agreement. They should contract the publisher and seek the permission they need. It could be that the publisher will grant this permission without charge, and the professors and the institution will have the comfort of knowing they are not violating the contract.

QUESTION: A public librarian asks about a local historian-author who wants to use some very old photographs of the city of Chiefland, Florida, which hang in one of the branch libraries. The photos are quite

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old, likely pre-1920. Examination of the photographs does not reveal a watermark, photographer's name, or any other identifier. Individuals depicted are not identifiable. Further, the photos have hung in the library so long that no one seems to know how or from whence they came. What are the copyright implications if the library permits such use? Are the works in the public domain? Or should the author be concerned about the copyright issue?

ANSWER: In all likelihood, the library does not own the copyright in the photographs but instead owns a copy, perhaps the only copy. Therefore, the historian does not really need permission from the library to reproduce them. If there is any infringement, it is on the part of the historian and not the library. For photographs that are copyrighted, the author needs permission from the copyright owner.

If the photos were taken in the United States before 1923, they are in the public domain. 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 photograph when it was taken, whether it was published, 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, the photograph may still be protected by 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 they likely passed into the public domain at the end of 2002 if that was later 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. If the works are in the public domain, there can be no copyright.

All of this is to say that it is complicated! Would I take a chance and go ahead and use the photos if I were the local historian-author? Yes, I would with a disclaimer that the copyright status is somewhat unclear although the photographs appear to be in the public domain. 🌿

Endnotes

1. See Conference Report, H.R. 94-1733 (1978).

Random Ramblings — If Research Is Good, Is More Research Better?

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If research is good, is more research better? I'm asking this question after attending the debate between **Rick Anderson** and **Jean-Claude Guedon** on scholarly communication during the **2013 Charleston Conference**. **Anderson** was countering the point from **Guedon** that spending \$2,000 from grant funding was an effective way to provide open access. To him, this meant that \$2,000 less research would be produced. The assumption behind this assertion was that more research was good, but this assumption isn't self-evident even if we accept the proposition that research is good. What follows are my thoughts, however naïve, on this topic.

I'm not an expert in STEM (science, technology, engineering, and medicine) so that the first thing I did was ask the **Wayne State University** Library System science librarian and former student of mine, **Jim Van Loon**, to see if he could help me discover any published discussion of marginal return on research investment. He volunteered to look for me and found that, while there is significant interest in measuring research output, return on investment (ROI) in research funding has not been widely studied. This result didn't entirely surprise me since I would expect researchers to avoid questions like this one. In the wrong hands, any answer that too much research could be counterproductive would be a dangerous weapon to cut funding.

If I were to use logic to answer this question, the law of diminishing returns would settle the issue. The *Free Dictionary* by **Farlex** states the following: "law of diminishing returns *n*. The tendency for a continuing application of effort or skill toward a particular project or goal to decline in effectiveness after a certain level of result has been achieved." (<http://www.thefreedictionary.com/law+of+diminishing+returns>) I like this common sense definition because it is clear enough to explain the concept while avoiding the complexities of the economists' definitions about units of production. To apply this law to research, increasing funding for research would be unproductive at some level, at least in the short run, because not enough trained researchers, lab space, and publishing outlets would be available to make efficient use of the increased funding. As was seen in past efforts such as ramping up research initiatives after Sputnik, ways are found to absorb the extra funding, though the argument might still be made about the utility of these heightened efforts. The counter argument to this point is that the United States is in a period of declining funding for research so that the STEM disciplines won't face the problem of the law of diminishing returns anytime soon.

The issue during the Charleston debate most often revolved around funded STEM research, but research occurs in many other disciplines, some funded and some not. The issue of more

research can then become time and expectations. In the Humanities, Social Sciences, and Fine Arts, university tenure and promotion committees are asking for more research because the competition for a limited number of tenured or tenure track positions allows them to increase research expectations. You also don't have to be connected to higher education to create research. Independent scholars still publish their efforts, sometimes without any expectation of monetary gain but because they are passionate about their subject areas and wish to share what they have learned. With the increased ease of self-publishing, these researchers have ways to publish their research with relative ease and at a relatively low cost. The amateur naturalist or rock hound could even publish non-funded research in STEM disciplines. Is this increased amount of research good or bad? If no one looks at it, it's perhaps irrelevant.

To continue my naïve view of research, I'm going to divide research into three categories that overlap. The first type is research that satisfies intellectual curiosity with few or no "practical" consequences. Whether or not Shakespeare wrote the plays attributed to him or whether a historical figure was a traitor or a loyalist may elicit great debate but has little impact on the "real" world. I would say the same for literary and fine arts criticism, though both can nurture the human spirit. Whether or not too much research exists in these areas may also be irrelevant since no one needs to pay much attention to it and outside funding is scant.

I would put much of social science research into the second category since it can influence public policy, determine whether someone makes money in the stock market, or has a harmonious relationship with co-workers. Much library and information science research falls into this category, though I'm not sure that the research has made libraries any more effective. The usefulness of this research depends upon its accuracy, its general applicability, and whether policy makers pay any attention to it. Even if well done, this research may be valid only for a certain place or a certain time and will need to be redone as circumstances change. Replication may increase the ability to generalize findings but does not necessarily prove the inaccuracy of earlier research. The practical implications of any such research are often highly debated and often ignored by those who don't agree with them. To use my favorite example of its imperfections, the stock market may be the most researched topic in the world; but the results of this research seldom guarantee profit over the long run. I would also put much medical research in this second category because microbes and humans change to adapt to their environment. The medicine that worked against a

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