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## Questions and Answers--Copyright Column

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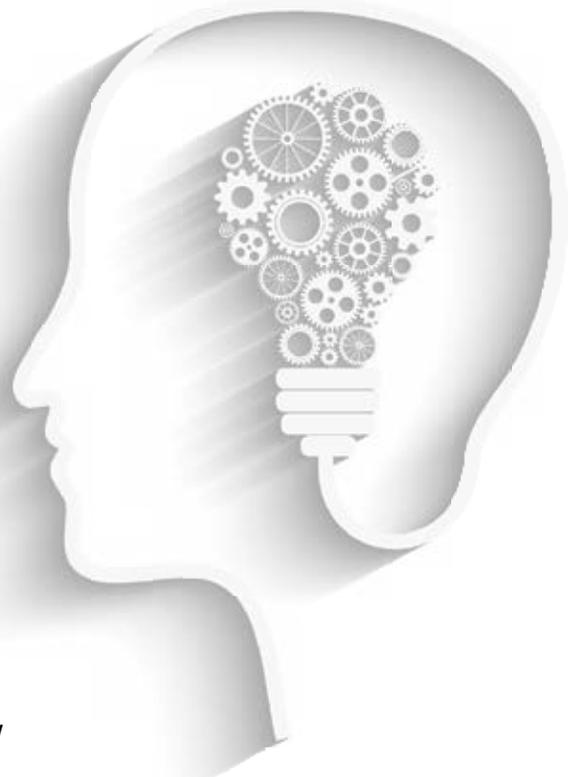
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## Questions & Answers — Copyright Column

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[www.unc.edu/~unclng/gasaway.htm](http://www.unc.edu/~unclng/gasaway.htm)

**QUESTION:** *A number of librarians have asked about the Register of Copyrights' new report on orphan works. Are the recommendations good or not?*

**ANSWER:** The Register of Copyrights Report on Orphan Works and Mass Digitization (<http://copyright.gov/orphan/reports/orphan-works2015.pdf>) was issued in June 2015. It follows an earlier report on orphan works published in 2006. It is difficult to characterize the entire report as a good or bad idea because it is long and complex and contains a number of recommendations. It is safe to say that the recommendations appear to make it more difficult for libraries to reproduce and use orphan works than the earlier report's recommendations would have done. Librarians had high hopes that there would be an easy procedure for conducting a good faith search for the copyright owner and then, after such a search, provide that no damages would be awarded against the library for use of the orphan work before a copyright owner comes forward. Indeed, this is still a part of the

recommendations, but an additional potentially cumbersome requirement would be placed on libraries wishing to digitize or otherwise reproduce an orphan work. The additional requirement is to provide notice of the intent to make use of the orphan work.

Think about digitizing a collection of old unpublished letters which have not yet entered the public domain. Conducting a search for the owner of the copyright in each letter will be extremely cumbersome, much less having to provide a notice of intent to use for each piece of correspondence in the collection by registering each intent with the Copyright Office. So, many librarians are very disappointed in the Register's recommendations because it places additional burdens on them rather than free orphan works for use.

Another objection to the report is that it disparages the potential of using fair use to deal with the orphan works problem. Many librarians may well decide to reject the notice of intent to use procedure and rely on fair use despite its limitations such as not being very

predictable as to outcome and not providing an exception to the remedies for copyright owners.

For mass digitization projects, the report suggests an extended collective licensing program which would permit libraries and other institutions to proceed with these projects. The report recommends a pilot program of such licensing and the Copyright Office is seeking comments on extended collective licensing for mass digitization. See <https://www.federalregister.gov/articles/2015/06/09/2015-14116/mass-digitization-pilot-program-request-for-comments>. A pilot project is not necessarily a bad idea, but there are concerns about it and how it would work despite the fact that some other countries are adopting this approach.

It is unclear whether Congress will adopt the proposed legislation that is included in the report. The question for librarians is whether to oppose the recommendations in the report and rely on fair use or to seek amendments to

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the recommendations that would make them more palatable and workable for libraries.

**QUESTION:** *A librarian in a for-profit educational institution asks: (1) whether she may take advantage of the section 108 library exceptions; (2) whether the faculty may make copies and show movies for their classes, or does the school have to purchase the license; and (3) whether anyone in the institution may use the Fair Use Guidelines.*

**ANSWER:** (1) Section 108 of the *Copyright Act* does not use the term “nonprofit,” but instead, subsection (a) sets out three requirements for a library to qualify for the exceptions contained in the remainder of 108. First, the reproduction or distribution must be done without “direct or indirect commercial advantage” to the library. (This is the closest requirement to anything like “nonprofit,” but it is different.) Second, the collection must be open to the public or at least allow persons doing research in the same or a similar field. Third, the reproduction or distribution of the work must contain the notice of copyright.

A court has never answered the question of whether a library in a for-profit school can qualify for the library exceptions since there may be some indirect commercial advantage. Most library copyright experts say that such libraries can qualify, however.

(2) For faculty members making copies of copyrighted articles, poems, etc., for their classes, it is certainly safest to take a license. To some extent it depends on how willing the school is to take the risk. One can get licens-

es from individual publishers or through the **Copyright Center** including a campus-wide license which typically costs about \$5 per student per year.

For showing videos in classes, however, the school definitely needs a license. Classroom performances and displays are covered under section 110(1) of the *Act* which permits nonprofit educational institutions to perform video works in the course of instruction. But, this exception is not available to for-profit schools.

(3) It is unclear what is meant by the Fair Use Guidelines. Certainly, individual students and faculty members conducting research may take advantage of section 107 fair use. The first fair use factor “purpose and character of the use” is harder for someone in a for-profit entity to claim, however, but it is not impossible. No single fair use factor answers the question alone, and one must apply and balance the other three factors to determine whether a use is a fair use or not: nature of the copyrighted work, amount and substantiality used, and market effect.

**QUESTION:** *A library assistant in a health science library asks if she can provide a copy of a journal article to a patron or via interlibrary loan if the article makes up the entirety of a specific issue of a journal. For example, a patron who requested an article in a supplement of a medical journal. That supplement contained only that one particular article, however.*

**ANSWER:** Section 108(d) of the *Copyright Act* says that libraries may provide a single copy of an article from a journal to a

patron. The exception contains neither a page limitation nor any restriction on what happens when an article comprises an entire issue. If it is a single article, the library may reproduce it for the patron. The assistant should make sure that it is just one article and not a symposium issue which has multiple articles on the same topic, however. Further, this assumes that the journal is a subscription and not a licensed digital journal. If it is a licensed journal, then the terms of the license agreement apply regarding reproducing copies and to whom they may be provided.

**QUESTION:** *Does the library in a for-profit school need a license for each film or even books it lends to students?*

**ANSWER:** Good news! Lending books or films to the school’s students, faculty, or staff does not require a license. This is covered by the first sale doctrine instead of section 108. The first sale doctrine is found in section 109(a) of the *Copyright Act*. It says that when someone has a lawfully acquired copy of a copyrighted work, he or she may dispose of that copy however he or she chooses. This also means that libraries may lend the copies they own without any additional payment of royalties to the copyright holder. It does not permit



reproduction of the work but applies just to the copy owned. Note that the first sale doctrine applies to acquired copies, meaning purchased or donated copies, and not to digital copies licensed to the library. In case of licensed digital copies, the terms of the license agreement concerning the lending of copies apply. 🐾

## The Scholarly Publishing Scene — Multi-Client Studies

Column Editor: **Myer Kutz** (President, Myer Kutz Associates, Inc.) <myerkutz@aol.com>

**B**ack in the early nineties, after the initial assignment rush that attended the founding of my publishing consulting practice began to wane and I needed to goose revenues, I took a leaf out the playbook of much larger consulting companies and conducted two major multi-client studies. Such studies involve getting multiple organizations interested in a particular issue to support research culminating in a report that describes the research, tabulates results, and summarizes and interprets them. The value for the supporting organizations is that the deliverable is worth more than the amount of money each puts into the study. The benefit to the organization carrying out the study is that the total amount of money collected subsidizes a major research effort and provides a reasonable profit.

The first step, of course, is to pick a topic of sufficient interest to stakeholders in a changing, or better yet collapsing market or a burgeoning customer demand. Then give the research project a sexy name that will encourage them to listen to a proposal. The names for my

two multi-client studies were **The Changing Landscape for College Publishing**, which addressed forces buffeting the college textbook publishing business and **The Developing Worlds of Personalized Information**, which dealt with the future of professional and scholarly publishing.

The next step is to define the methodology. Both studies would use the same one, basically. Research would be carried out through a combination of in-depth face-to-face and telephone interviews and written questionnaires. Next determine how the qualitative and quantitative data and conclusions and recommendations would be presented in a final report.

Then we had to find potential sponsors and sell them on their need for the study. Fortunately, my partner, **Carol Gold**, whom I brought in for her unmatched market research expertise in the publishing area, and I had enough industry connections we knew well enough so that we could get an audience without having to make cold calls. We sounded believable enough to get 13 sponsors for the college publishing study

at 15 grand each. They were **Barnes & Noble**, **RR Donnelly**, **IBM**, **Kinko’s**, **The Maple Press**, **Xerox**, and seven publishers, including **WC Brown**, **WH Freeman**, **Houghton Mifflin**, **McGraw-Hill**, **Macmillan**, **Thomson**, and **Times Mirror**. Most of these names will be familiar to readers of this column, others not so much perhaps.

We did a bit better with the professional and scholarly publishing study, again at 15 grand per sponsor. Besides **RR Donnelly** and **Lotus Development**, we had 13 publishers and information services organizations, including **Butterworth Heinemann**, **Elsevier**, **Engineering Information**, **Harcourt Brace**, **McGraw-Hill**, **Mead Data Central**, **RS Means**, **The New England Journal of Medicine**, **OCLC**, **Scientific American**, **Thomson**, **Times Mirror**, and **Williams & Wilkins**. It was great, but not totally great. **Carol** and I had both had lengthy stints at **Wiley**, but we couldn’t get **Will Pesce** and his crew to back either study.

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