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# Questions and Answers--Copyright Column

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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 university librarian asks under what conditions may a university “rip” a video and put it into a course management system? Is the process of “ripping” a violation of DMCA?*

**ANSWER:** Under the *U.S. Copyright Act*, a course management system (CMS) is considered to be a form of distance learning or transmitted performance of audiovisual works. Therefore, the *TEACH Act*, section 110(2) of the *Act* applies. That section permits the performance of full works in the course of instruction via transmission except for audiovisual works. Only portions of those may be performed for a class without permission. To show the full work, permission is required.

The first step should be to try to purchase the work with performance rights for use in a CMS. If it is not available for purchase, then copying a portion of a video to show in class or to put on a CMS is permitted, if the other conditions contained in section 110(2) are followed.

Under the *Digital Millennium Copyright Act* (a 1998 amendment to the *Copyright Act*), there is an exemption for use of videos in the course of education which have technological controls that prevent their use. Every three years the **Register of Copyrights** is charged with rulemaking responsibility for determining classes of works that should be exempted from the section 1201 (part of the DMCA) prohibitions on circumvention. There is now an exemption under this rulemaking for educational uses by college and university faculty and students. So, if there is no version available for purchase which does not have anti-circumvention controls, then a school may rip the video. However, only portions of it may be performed or posted on a CMS or for direct performance for a class (section 110(2)) without permission of the copyright holder.

**QUESTION:** *An archivist asks the following about building museum collections on the civil rights movement with materials focusing primarily on the 1960s. Many of these archival collections may contain photographs and papers gathered by that collection’s donor. The donor was not the creator of a particular photograph, etc., and thus could not transfer copyright of those photographs archives. In many cases, it may be impossible to determine the originator/creator of the photographs. (1) Since the archives may be providing reproductions of photographs and artwork for display in the museum, and the primary purpose of both entities is to serve as an educational institution, would the use of reproductions solely for the museum’s exhibits be allowed without seeking copyright permission from the originators/creators? (2) If the museum does not use the images on items to be sold in the gift store or similar*

*products, does this relieve any concerns about infringement? The museum will charge an admission fee, however this is for operating costs and not as a source of profit.*

**ANSWER:** (1) As a general matter, good purpose does not excuse copyright infringement. Typically, reproduction for display without permission of the copyright owner is infringement. The archives may find some help under section 108(h) of the *Copyright Act*, however. The difficulty will be in determining whether the photographs’ copyright terms fall within the last 20 years of the term of copyright. The chart at <http://www.unc.edu/~unclng/public-d.htm> will help in determining the term of copyright based on the work’s publication date. Many of these works from the 1960s are not yet in the public domain because the “author” has not been deceased for 70 years.

Most libraries and museums go ahead and use these items from their collections for display, reproduction, etc. It is useful to use a disclaimer about the fact that the copyright status of the work is unknown and that if the author comes forward, the institution will be delighted to include the notice of copyright. While there is some risk in doing this, it is most likely that such use would be determined to be a fair assuming that archivists have done all they can to locate authors and seek the necessary permissions.

(2) It probably is a good idea to limit the use of such reproductions to display and to avoid using the images on products that will be sold in the museum store. Typically, it is understood that museums charging an admission fee is to underwrite museum costs and is not for commercial purposes.

**QUESTION:** *A college librarian asks for clarification about the recent report from the U.S. Copyright Office about the making available right in this country.*

**ANSWER:** The United States is a party to two international treaties that are collectively known as the **WIPO Internet Treaties**. Signatories to these treaties are required to provide a right that gives copyright owners the exclusive right to authorize the on-demand transmission of their works to the public. This country never enacted that exact language in its copyright law, and the question addressed by this study and report from the Copyright Office is whether, under a combination of various provisions of the *Act*, the U.S. government has provided the substance of the making available right.

The treaty provisions were forward looking and included language where the impact of technological advances was embodied without having to go back and amend the treaty pro-

visions. The United States ratified the treaties in 1998 which necessitated several changes in the copyright law via the DMCA. The government has consistently maintained that, taken together, the section 106 exclusive rights provided by the *Copyright Act* encompass the making available right. The Register’s February 2016 Report concurs with this opinion but suggests that the **Congress** continue to monitor court opinions so that it can provide legislative clarity should that prove necessary. The full text of the final report is available at: [http://copyright.gov/docs/making\\_available/](http://copyright.gov/docs/making_available/).

**QUESTION:** *Why is Elsevier trying to shut down Sci-Hub which provides an excellent service to scientists around the world?*

**ANSWER:** In 2011 a researcher from Kazakhstan created Sci-Hub that provides free access to over 48 million peer-reviewed articles. The researcher did not have permission to create the database of articles which is referred to as a “Pirate Bay” for scientific articles. So, the quick answer is that the reason **Elsevier** is trying to shut it down is because it is copyright infringement. The federal district court for the Southern District of New York issued an injunction and ordered the site to shut down in October 2015, but the researcher is refusing to do so. Newspaper accounts highlight the argument as being about who owns science.

Not surprisingly, the site has been very popular in developing countries. The articles are available without a subscription, and according to the researcher, there were approximately 80,000 visitors to the site each day. The lawsuit claimed that Sci-Hub illegally accessed the accounts of students and academic institutions to provide free access to articles through the **Elsevier** platform, ScienceDirect. Because the site is hosted in Russia, it is difficult to shut down the site. The researcher cited Article 27 of the *U.N. Declaration of Human Rights* “to share in scientific advancement and its benefits” as justification for creating the infringing site and claimed that **Elsevier’s** business model is illegal. While the domain name Sci-Hub was seized in the suit, the site is still available through alternate Websites. The suit continues and claims irreparable harm which experts predict **Elsevier** will win the suit for \$750-\$150,000 for each article. In other words, millions of dollars in damages. Collecting those damages may be difficult, however, due to the location of the researcher.

**QUESTION:** *A public librarian asks about reports of the federal government. When a private publisher republishes a federal government report but does not charge*

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*the content are these protected by copyright?*

**ANSWER:** Works published by the U.S. government are not protected by copyright according to section 105 of the *Copyright Act*. So, the only material that can be protected in a work that incorporates works of the federal government is any new material added such as a preface, editorial comments, explanations, etc.

The notice section of the *Act* provides that a copyright owner may place a notice of copyright on works, and that notice includes the name of the copyright owner, the date of publication and the symbol ©, the word “copyright” or the abbreviation “copr.” Section 401(d) states that the good faith defense is not available to a defendant in a copyright infringement suit if the work in question contained the notice of copyright. Section 403 says that the good faith defense is available to alleged infringers if the work in question consists predominately of one or more works of the U.S. government unless the notice of copyright does not contain a statement, either affirmatively or negatively, identifies those portions embodying any work protected by copyright. In other words, the work would need to specify that the preface, editorial comments, etc., are protected by copyright or that no copyright is claimed in the portion comprised of a government publication. One seldom sees this done, however. 🐼

**Cases of Note**  
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Then the court did agree the infringement fell closer to the willful end than the innocent end of \$750 to \$30,000 and set the damages at \$20,000 x 24 infringements.

On appeal, **TAT** argued that the \$480,000 was grossly disproportionate to any actual damages suffered by **Tattoo Art**.

*Which while true, is interesting given that TAT was pretty clearly willfull and should have been up in the \$150,000-each range.*

The 4th Circuit held that **TAT** was arguing that the Congressional authorization under the *Copyright Act* was “constitutionally excessive” and found this an “unavailing argument.” 🐼

# Booklover — Not Nobel But Noteworthy

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**Disclaimer:** *This Booklover column is not about a Nobel Laureate.*

Exploring Nobel literature is an ongoing bucket list process that periodically takes a turn down other literary roads. Four books have recently caught the attention of this booklover: **Bruce Chadwick’s** *I Am Murdered: George Wythe, Thomas Jefferson, and the Killing That Shocked a Nation*; **Jessica Wapner’s** *The Philadelphia Chromosome: A Mutant Gene and the Quest to Cure Cancer at the Genetic Level*, and the two books by **Ta-Nehisi Coates:** *The Beautiful Struggle* and *Between the World and Me*. History, scientific research, and race relations — welcome to my world.

What makes Nobel literature words different from bestseller words, narrative words, or just the words of a well-told story that you just want to read again and again? This is an unresolved question for me and requires constant pondering — which is okay because the only way to hopefully answer it is to continue reading. Not a bad solution to the problem.

There have already been two passes through **Chadwick’s** book. Each time I am intrigued. The glorious illustration of the founding fathers and the beginnings of this experiment called democracy is not what you get. You get a piece of history told in three parts and only 240 pages in such a real, gritty and densely rich way that you feel you are walking the streets of either Colonial Williamsburg or Richmond Virginia investigating a murder. Part One of the book is a description of “The Murder.” Part Two details “The Investigation.” Part Three transcribes “The Trial.” **George Wythe** was one of this country’s founding fathers. He was the first law professor, signed the Declaration of Independence and represented Virginia at the Constitutional Convention. He was held in high esteem in the early community of our nation. Thus it was a shock when **Wythe**, on his deathbed, accused his young hooligan grandnephew of poisoning him for his money. Of the many interesting details, nuances of the period and vignettes of day-to-day life in the 1800s, the one that left me really thinking was the reasoning behind the decision of the two lawyers who came to the grandnephew’s defense. Politics makes for strange bedfellows. Pick up the book and find out.

From a capsule of our Nation’s history to the historical timeline of a de novo scientific discovery that lead to a drug to manage chronic myelogenous leukemia (also referred to as CML) is not such a stretch. “The First Clue” has the reader “hovering” over a microscope with **David Hungerford** in 1959 when he realizes that one of the chromosomes, in a sample prepared from a patient with CML, is too short. This short chromosome that **Hungerford** observed would be known by many names, one of which is “The

Philadelphia Chromosome.” **Hungerford** had a passion for photography as well as science. The new camera-equipped microscope, where he spent his time staring at the black and white squiggles called chromosomes, was located at a cancer center in Philadelphia. Geography was the influence for the name of the aberrant chromosome that is formed by a translocation between chromosome 9 and 22 in patients with CML. With 38 chapters, some of which are entitled “Right Number, Wrong Place,” “Where the Kinase Hangs the Keys,” “Plucking the Low-Hanging Fruit,” “Not Over My Dead Body Will This Compound Go into Man,” “Buzz in the Chat Rooms,” and “A Gleevec for Every Cancer,” **Wapner** writes in a way to honor the science and appeal to the layman. It is a gift. She excels at it.



Threading the two previous books’ themes to race relations might be a difficult weave, but the crafting of words to explain a perspective is one where **Coates’** genius shines. The power in his two books is so great that it leaps from the page. You want to memorize it so you can quote it, because just telling someone what the book is about doesn’t do it justice. And justice is one of the things that **Coates** is looking for. His first book *The Beautiful Struggle* tells his story of growing up in Baltimore. His second book *Between the World and Me* is written to his son as a guide for what it means to be a black man growing up in America.

I leave you with a piece of **Coates’** knowledge from *The Beautiful Struggle*:

“The Knowledge was taught from our lives’ beginnings, whether we realized it or not. Street professors presided over invisible corner podiums, and the Knowledge was dispensed. Their faces were smoke and obscured by the tilt of their Kangols. They lectured from sacred texts like Basic Game, Applied Cool, Barbershop 101. Their leather-gloved hands thumbed through chapters, like ‘The Subtle and Misunderstood Art of Dap.’ There was the geometry of cocking a baseball cap, working theories on what jokes to laugh at and exactly how loud; and entire volumes devoted to crossover dribble. **Bill (Coates’ brother)** inhaled the Knowledge and departed in a sheepskin cap and gown. I cut class, slept through lectures, and emerged awkward and wrong. My first day at Lemmel (middle school where **Coates** attended school), I was a monument to unknowledge. I walked to school alone, a severe violation of the natural order of things. ...Everyone moved as though the same song were playing in their heads. It was a song I’d never heard. I shrugged my backpack a little tighter on my shoulder and made my way.

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