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Questions and Answers-Copyright Column

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Questions & Answers — Copyright Column

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QUESTION: *A college librarian asks about possible copyright violations when using lecture capture and that lecture includes copyrighted materials.*

ANSWER: The first important follow up question deals with how is the lecture captured. Podcast with sound only? Or is it filmed? Further, much of the answer depends on what the college does with the lectures at that point. Are they posted on the web? Available over Youtube? Posted in a course management system available only to members of the class?

If the lecture capture is sound only, there is unlikely to be a problem at all. Section 110(1) of the *Copyright Act of 1976* permits the performance of nondramatic literary and musical works in a classroom in a nonprofit educational institution as a part of instruction. Therefore, capturing the reading of a poem, an essay, etc., or singing of a song is not problematic. Where the lecture is then stored and who may access may be a problem; that will be discussed below. If the lecture is videorecorded, then graphic works and photographs may be captured, and section 110(1) permits that. Note that audiovisual works are not included. Section 110(1) does not permit the performance of entire audiovisual works without permission of the copyright owner even in the course of instruction. But small portions of such works included in a lecture capture are likely fair use.

Placing captured lectures on the web so that anyone may access them is not a good idea. Putting them in a course management

system with access restricted to students enrolled in the course causes no copyright problems even if the lecture includes portions of copyrighted audiovisual works. Section 110(2) of the *Act* allows transmission of performances or displays of nondramatic literary or musical works and portions of audiovisual works without permission of the copyright owner if access is restricted to students enrolled in the course. Transmitting a captured lecture that contains an entire audiovisual work and making it available even to enrolled students requires permission of the copyright owner.

QUESTION: *A university librarian asks about works created through artificial intelligence (AI) and who owns the copyright in such works.*

ANSWER: Copyright experts debated this issue for years before there were actual creative works produced by a computer. Today, there are many types of computer-generated works including poetry, paintings, software and music, etc. According to news reports, Google has even created sounds that no human has heard before. The courts in the United States have always held that only works of human authorship may receive a copyright. Consider the reason that copyright exists in this country, to enable owners to reap the economic benefit from their works that, in turn, will encourage them to continue to produce copyrighted works, which thus benefits the public. Would awarding a copyright to a computer encourage it to create additional works? No.

This is similar to the way courts have dealt with whether animals can own copyright. The answer has also been no, because only human authors can make the decisions about whether to grant licenses for the use of their works, etc.

With AI created works increasing, it may be that **Congress** and the courts will have to revisit this issue in the future. As we learn more about animal intelligence and creativity perhaps, the human authorship requirement should also be reconsidered for works by animals.

QUESTION: *A library director asks what has happened with the suit Louisiana State University (LSU) filed against Elsevier over a contract dispute about whether the LSU School of Veterinary Medicine was included in the overall university contract for access to Elsevier's journals.*

ANSWER: The short answer is that the case has settled. The suit was filed in May 2017 in Louisiana state court. (Contract disputes typically are matters governed by state law and decided in state courts.) The vet school had separately subscribed to **Elsevier** content but decided that the contract would not be renewed when it expired in 2016 because the university's contract covered its 35,000 students, staff and faculty,

and the vet school is a part of the university. In October, **Elsevier** cut off vet school access; **LSU** wrote to **Elsevier** and had that access reactivated. The vet school asked to add some medical and veterinary titles to **LSU's** 2017 subscription. **Elsevier** quoted a price and **LSU** confirmed its acceptance of these terms. Nevertheless, in January 2017, access was again terminated.

According to **LSU**, **Elsevier** then refused to honor the agreement or to license any of the agreed upon titles to **LSU**. So, the question before the court was whether there was a valid offer and acceptance. By letter in April, **Elsevier** suggested that **LSU** add the desired veterinary medicine titles to its existing contract and pay an additional \$170,000 in subscription costs plus \$30,000 as a cost increase to the overall contract. **LSU's** existing contract with **Elsevier** is about \$1.5 million annually.

Elsevier says that the dispute arose because **LSU**, without paying for it, was asking the publisher to add a school that previously was separate. The **LSU** contract did not include the vet school, further, neither was there any merger of the university and the school for the contract negotiated.

An interesting issue the case raised was jurisdiction. **Elsevier** is a Dutch company and its contracts usually require that litigation take place in the Netherlands. This is common for corporations whether foreign or domestic. U.S. companies typically would specify the state in which the company headquarters is located as the jurisdiction for lawsuits. A problem for state supported colleges and universities is that they are often required by state statute to sign contracts only if the contracts specify that state as the jurisdiction for any disputes to be settled.

QUESTION: *A publishing librarian asks whether the exceptions for nonprofit educational uses in a classroom and for distance education also apply to nonprofit educational publishers.*

continued on page 49

Legally Speaking from page 47

on Facebook. In 2011, **Governor Jay Nixon** signed Missouri State Bill 54, which bans students and teachers from communicating and being "friends" on the social networking site. (The law is intended to prevent inappropriate relationships between children and teachers.) So if you are a librarian in a state school, you should check out your state's laws before "friending" a student ... for any reason. 🐾

Bill Hannay is a partner at the Chicago-based law firm, Schiff Hardin LLP, a regular speaker at the Charleston Conference, and a frequent contributor to Against the Grain. In his spare time, he is an Adjunct Professor of Law at IIT/Chicago-Kent law school and a playwright.

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Questions & Answers from page 48

ANSWER: No. The statute does not use the phrase “nonprofit educational uses” but uses that take place in nonprofit educational institutions in the course of instruction. A nonprofit publisher is not an educational institution. Many entities are nonprofit but are not educational institutions. It depends on how the entity is organized under the tax code. Additionally, there are for-profit schools that do not qualify for the nonprofit educational institution exceptions to the *Copyright Act*.

QUESTION: *Who owns the copyright in a contemporary photograph of a painting or sculpture?*

ANSWER: Photographs are protected by copyright as pictorial, graphic or sculptural works. Generally, the photographer owns the copyright in a photograph of a work of art, unless the photo was a work for hire. In that case, the copyright is owned by the hiring entity.

Assume that the underlying work of art is still under copyright, if the photograph is an exact recreation, with no elements of originality such as lighting, angle, etc., then the artist owns the copyright as the photograph is a reproduction of a work of art. If the art were

in the public domain, the photographer would own the copyright in a photograph of the work if it possesses the requisite originality.

QUESTION: *A children’s librarian asks about the recent case that decided child-focused literary guides infringed the copyrights in the underlying novels.*

ANSWER: In *Penguin Random House LLC v. Frederick Colting d/b/a Moppet Books*, 2017 U.S. Dist. LEXIS 145852, the district court for the Southern District of New York found that the defendant company was creating unauthorized children’s guides to classic novels. The defendants claimed that the works they created were protected as a fair use. Called “Kinderguides,” the books were summaries of novels such as *Breakfast at Tiffany’s*, *The Old Man and the Sea*, *On the Road* and *2001*.

The court stated that it was not necessary to determine substantial similarity since the guides were based on the plaintiffs’ novels. Defendants claimed that they had copied unprotectable “fictional facts,” described as characters and storylines. The court held that copyright protects not only the literal text of a work but also made up facts about characters and events. These are creative and are protected expression. The kinderguides were a simple recasting, an abridgment. The use was not found to be a fair use. 🐼

Rumors from page 43

ers, **Wendy Hagenmaier** (Georgia Tech) collaborates on *Lost in the Stacks*, **Sarah Hare** (Sarah Crissinger) (Indiana University) on the ACRLog team, **Inge Haugen** (Virginia Tech) works with Ithaca S+R and in the book, *This is What a Librarian Looks Like*, **Kate Hill** (UNC Greensboro) named Libraries Fellow North Carolina State University, **Heather Howard** (Purdue) managing large scale data-driven deselection initiative, **Maoria J. Kirker** (George Mason University) sees expansion between collaboration in public and academic libraries, **Amanda M. Lowe** (Univ of Albany, SUNY) wants to overhaul marketing materials for the library, **Michael Rodriguez** (Univ of Connecticut) named LJ Reviewer of the year for 2015, **Kelly Durkin Ruth** (US Naval Academy) likes cookbooks and gardening, **Katrina Spencer** (Middlebury College) was a doctoral student for a brief period, has curated several multi-format displays, **Jennifer Thogersen** (U of Nebraska, Lincoln) Fulbright Fellow 3013, **Katy Kavanagh Webb** (East Carolina University) is Chair of LITA’s minority scholarship granting committee. I have just highlighted a few things. Read more on pages 79-89 this issue.

continued on page 64