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Questions and Answers-Copyright Column

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Questions & Answers — Copyright Column

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QUESTION: *A public librarian in Montana asks about the recent dispute involving the use of a photograph in a political campaign without permission.*

ANSWER: Photographer, **Erika Peterman**, sued the **Republican National Committee** claiming unauthorized use of one of her photographs in a political mailing attacking the Democratic candidate for Congress. One of her clients is the **Montana Democratic Party** and she contracted to take photographs at a dinner in Helena. She registered the copyright in the photographic portrait of the candidate in May 2017 and gave limited use rights to the **Democratic Party**. **Peterman** then learned that the **RNC** had distributed an attack ad in a mailing that used the photos of the candidate without her permission.

The photographer filed suit in the U.S. District Court in Missoula. The **RNC** filed a motion to dismiss the suit; the court denied the motion in March 2018, holding that there were still factual issues to be determined. Examining the use of the photograph by the **RNC**, the court applied the four-factor fair use test found in section 107 of the **U.S. Copyright Act**. Under the first factor, the court held that the purpose and character of the use did not favor the **RNC**, and the use was only minimally transformative despite the few lines of text added to the photo. A separate purpose is not the same thing as transformation, which is the critical inquiry. Transformative use remains a disputed fact at this stage in the case.

The second factor, nature of the copyrighted work, focuses on the fact that the work is an artistic portrait. This weighs against a finding of fair use. The **RNC** copied the entire work under amount and substantiality used, the third factor. In addition to copying the entire work, the qualitative aspects of the portrait were maintained in the **RNC** use. There are no facts regarding the fourth factor, market effect. The use may have prejudiced future derivative use of the photograph, but the pleadings present no such evidence. It is premature to rule on this factor. The court thus held that there are disputed issues of material fact remaining to determine whether the **RNC's** use was a fair use. Therefore, the matter will go to trial.

QUESTION: *An elementary school teacher asks whether he can read and record a book to use as a learning station in the classroom.*

ANSWER: Under section 110(1) of the **Copyright Act**, a teacher is allowed to read an entire literary work to a class in a nonprofit educational institution as part of instruction. Reading to one individual student or to individuals sequentially would also be covered under section 110(1). Recording is not mentioned in that section, however. It seems unlikely

that a copyright owner would object to such recording in the classroom if the book were not available in audio format.

QUESTION: *A publisher asks whether ECG tracings are copyrightable. If not, does this mean that they may be used by anyone?*

ANSWER: The short answer is no. Facts are not copyrightable. If the presentation of facts has some creativity, there may be thin copyright protection, but that is all. It appears that for ECG tracings, the machine itself always presents the data in the same format, thus eliminating any originality/creativity. Further, the *2017 Compendium of U. S. Copyright Office Practices*, chapter 300, states that works produced by a machine or mere mechanical process are not copyrightable if there is no creative input or intervention by a human author. The *Compendium* then uses as an example medical imaging produced by X-rays, ultrasounds, magnetic resonance imaging or other diagnostic equipment.

The uncopyrightable images may be used by anyone as long as any personally identifiable information is removed to preserve patient privacy, which is required under **HIPAA**.

QUESTION: *An academic librarian notes the recent announcement of the Sonny Bono Memorial Collection and asks what makes the digitization and distribution of these of these work possible.*

ANSWER: Section 108(h) of the **Copyright Act** was added to ameliorate the effects of extending the term of copyright with the **Sonny Bono Copyright Term Extension Act of 1998** that changed the term of copyright from life plus 50 years to life plus 70. The change to the library and archives section of the **Act** provided that a library or nonprofit educational institution could, during the last 20 years of a work's term of copyright, reproduce, distribute, display or perform the work in facsimile or digital form if the work is no longer available and the purpose of the use is for preservation, scholarship or research.

Professor Elizabeth Townsend Gard at **Tulane University Law School** and her student interns have created the **Sonny Bono Memorial Collection** and scanned some works that have long been out of print but are still in this last 20 years of copyright protection. Moreover, **Professor Townsend Gard** has encouraged libraries to scan their works that fall into the same time span and are no longer available on the market. The **Internet Archive** has made these works available for download. The **Internet Archive** has also promised to host works in the last 20 years of copyright protection that libraries have identified as no longer being available. Congratulations to

Professor Townsend Gard for her outstanding work and to the **Internet Archive!**

QUESTION: *A science teacher asks whether tables are copyrightable.*

ANSWER: Typically, tables are not copyrightable. Tables that simply present data in a straightforward grid are not copyrightable. If the table uses words rather than Arabic numbers, there may be some originality/creativity in the text that may create a thin copyright. That smidgen of creativity may create a copyrightable work, but this does not mean that someone else could not present the data with new text or in a different format and that table would also be copyrightable.

QUESTION: *A corporate librarian asks about books published before 1950 that contain no notice of copyright. If a publisher later republishes the work, may the library digitize that first edition?*

ANSWER: If a work was published before 1978 without notice, that work is in the public domain. This means that anyone is free to republish, reproduce or display the work in any format. Therefore, as long as the library digitizes the first edition and does not use any additional material that was included in the republished version, the library may digitize the work and use the digital version however it wants.

QUESTION: *An academic librarian asks about the copyright status of the song "We Shall Overcome."*

ANSWER: The iconic song was made famous during the Civil Rights movement. Lyrically it is described as being descended from a 1900 hymn published by **Charles Albert Tindley**. The modern song was said to have first been sung in 1945 in a strike by tobacco workers in Charleston, South Carolina. It was published in 1947 in the *People's Songs Bulletin* by an organization directed by **Pete Seeger**. For years, anyone who wanted to use the melody and lyrics had to pay royalties to **Ludlow Music**.

The publisher has now declared that the lyrics and melody of "We Shall Overcome" are now in the public domain. This was because of litigation and claims of fraud after a court held that the key verse of the song lacked originality. The producers of *Lee Daniels' The Butler* was told it would have to pay \$100,000 in royalties for a license fee in order to use the song. Since the 1960s, royalties from the song have been donated to the nonprofit **Highland Research and Education Center** that provides scholarships within African American communities. Now all may use it freely. 🐼

