Against the Grain

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Questions and Answers-Copyright Column

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Questions & Answers — Copyright Column

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QUESTION: *An academic librarian asks about the copyright status of makerspace projects. When are they considered intellectual property, and is there any legislation governing them?*

ANSWER: Before I could answer this question, I had to ask what is a “makerspace.” The questioner indicated that this is a developing area in libraries that started in computer/IT areas. It is a “community-operated physical place, where people can meet and work on their projects.” It is sometimes called hacker space. Then I realized that I did know about these — they were earlier called “collaboratoriums,” learning labs, etc.

There is no special legislation dealing with makerspaces and the products of those collaborations. So, the normal copyright rules apply. Works created in a makerspace are eligible for copyright protection if they are original works that have at least a smidgen of creativity. Absent an agreement otherwise among the creators, the copyright would be owned jointly by them. If the work incorporates other copyrighted works, the creators need permission from the copyright owner if the new work is to be distributed, displayed, etc., (such as posting on the web).

Today, 3-D printing capability is often included in a makerspace. It may be that the 3-D printed work created is eligible for patent protection, if it is an original device that meets the other patent requirements.

Libraries should recognize that all of the equipment is likely to be reproduction technology, thus requiring posting the warning of copyright, that was first required for photocopy machines.

QUESTION: *A public librarian asks about eBook annotations developed by Atypen or Hypothesis that will allow interaction with eBooks. How are these annotations different from others? How long will they be active? If the user leaves Atypen or Hypothesis, may they keep their annotations? What is the copyright law re annotations?*

ANSWER: Created as a way to permit readers of an eBook to collaborate with one another, this is how the media described eBook annotations. “eBook annotations add a layer of conversation on top of book content, allowing readers to discuss that book with other readers in real-time. Annotations are very close to becoming a permanent part of both the EPUB standard and the open web-publishing standard, thanks to a partnership between Hypothes.is, EPUB.js, and the World Wide Web Consortium (W3C).”

Not only can users’ groups (such as book clubs) use eBook annotations for conversations, but they also have substantial use in the publishing industry. For example, in copy

editing, collaborative research, pre-publication peer review, and citation. The goal of these projects is to create a way for readers to discuss a book digitally, in real-time, and on any platform or device.

Hypothes.is is an open source technology organization. Its “user-friendly tool” allows academics and scientists to make notes on documents they are reading and share those notes with others. A couple of years ago, it was reported that approximately 3.4 million **Hypothes.is** annotations have already been created across the web. **Atypen’s** Literatum publishing platform hosts nearly about one-half of the world’s English language scholarly journals. With eBook annotations, **Atypen** customers will be able to add an annotation layer to their content for the creation of additional commentary, deep linking to supplementary resources or data, or post-publication peer review on top of the version of record.

Whether users may retain these annotated versions depends on the licenses for these products. The same is true for how long the annotations will remain active.

There are concerns about author trolling which would require moderated discussion to prevent. Annotations in a public domain work, such as *Moby Dick*, would be copyrightable by each author unless participants agree that their comments are public domain. With such an agreement, then the work with the annotations could be published or posted online with no concerns. If the work being discussed were under copyright, then publishing the work with the annotations would constitute a derivative work and would require permission of the author of the original work for publication or posting.

QUESTION: *A scholarly communications officer at a research university asks about the creation of promotional or recruitment videos for the institution. Is the use of copyrighted music in such videos fair use? What about music for athletic performances?*

ANSWER: The short answer to both is no, if the music is copyrighted. There are both blanket licenses (available for a fee) and open licenses available to colleges and universities. Additionally, there is a wealth of public domain music available. Of course, public domain music is not the latest thing that a college or university might want to use for a promotional video. Some universities have received cease and desist letters for using copyrighted music without a license in videos and for events and athletic performances.

QUESTION: *An association publisher asks about including the full text of a couple*

of the Center for Disease Control documents from its public domain website into an online course that has a nominal charge for access to the course. Will this make it appear that the association is charging for access to government documents?

ANSWER: The good news is that this is not a problem. Publications of the U.S. government are not eligible for copyright protection, and the **CDC** is a government agency. It is certainly possible to link to the **CDC** documents in the online course, but there is no copyright problem with including the entire document in the course content. The charge for accessing the course is not for acquiring copies of the government document but for accessing the course.

Even commercial publishers often incorporate parts of U.S. documents into their works and then charge for their publications. This is not a problem, however. The **Copyright Act** actually states that one must identify the copyright free portions of publications that are government documents. See 17 U.S.C. § 403 (2014). One seldom sees this done, however.

QUESTION: *A corporate librarian asks about a recent case involving the copying of industry standards.*

ANSWER: The question of reproducing industry standards is a persistent one for special librarians. The recent case is **Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.**, 896 F.3d 437, D.C. Cir. (2018). The defendant, a nonprofit organization that makes available a variety of public documents including federal safety rules, government-produced videos and product designs, purchased copies of the standards and uploaded them to a public website. Several standards developing organizations filed suit claiming copyright in the materials uploaded by the defendant.

The district court held that private standards groups could claim copyright ownership in standards that they publish. Further, the defendant had not created a genuine issue of fact about whether the use was a fair use. The D.C. Circuit U.S. Court of Appeals disagreed and found that the standards were primarily factual and that the amount and substantiality used was to be weighed in light of the public need being met. The appeals court found that the district court erred in its application of fair use and remanded the case to the district court directing that it develop a fuller record regarding: (1) the nature of each standards posted; (2) how they were incorporated; and (3) the manner and extent to which they were adopted by the plaintiffs.

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Chromatic scale is a scale of twelve pitches, each a semitone above or below the adjacent one. And that's completely over my head.

In an arpeggio, you take a chord and play it one note at a time. Okay, I get that.

The error was not harmless because the Trust's expert witness testified that **Zep** had copied an original chromatic scale. He said "Taurus" had public domain elements that were modified in an original way. And this would go to extrinsic substantial similarity.

An original element of a song need not be new; just created independently in a creative way. *Swirsky*, 376 F.3d at 849.

The jury charge was dismissive of his testimony and contrary to a 9th Circuit holding.

So this got sent back for a new trial.

*Our son, who was a young teen in the glory days of **Led Zeppelin**, listened to both intros and said he couldn't hear any similarity. So trust would lose on the intrinsic test with him on the jury.*

*He also had an interesting take on laches. He reasoned that **Randy California** was alive from '71 to '97 and heard "Stairway" numerous times. How could anyone not hear it? Over. And. Over.*

He was pals with **Led Zep**, and as a musician's musician, knew how music is put together.

If he had no objection, why should his heirs be able to bring suit? 🐼

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QUESTION: *A North Carolina school librarian asks about the photographs of **Queen Anne's Revenge**, the vessel of the pirate, **Blackbeard**, found shipwrecked off the coast of North Carolina and the recent litigation with the State of North Carolina for copyright infringement.*

ANSWER: In *Allen v. Cooper*, 895 F.3d 337, 4th Cir. (2018), the appeals court reversed the district court decision. Plaintiffs claimed copyright infringement for the posting of six photographs of the shipwreck on a state website violated a 2013 settlement between North Carolina on one side and the salvage company and photographer on the other. The district court held that the **Copyright Remedy Clarification Act of 1990** abrogated Eleventh Amendment immunity for states from copyright infringement suits. The Fourth Circuit disagreed and found that the settlement's language did not constitute a waiver of Eleventh Amendment immunity, nor did the aforementioned Act abrogate sovereign immunity of the state. Further, none of the exceptions to sovereign immunity applied. The case was remanded to the district court instructing it to dismiss with prejudice all claims against state officials. 🐼

Random Ramblings — Sex, Intellectual Freedom, and Academic Libraries

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Are academic libraries able to deal with overtly sexually oriented materials required by their faculty for teaching and research? I have two reasons for writing this column. First, I'm using it as a practice run for a presentation that I'll be giving at the **2018 Charleston Conference**. I'll be examining the broader question of objectionable resources in general, but sexual materials will be a key part of my presentation. Second, I was chair of the **ACRL Intellectual Freedom Committee** from 2002-2006 before it was disbanded. I often heard that intellectual freedom wasn't an issue for academic libraries, but I strongly disagree.

The proximate cause for my research was a presentation at **Wayne State University** on December 2, 2017, by **Jennifer Nash**, Associate Professor of Gender & Sexuality Studies and African American Studies at **Northwestern University**. She gave a fascinating talk on the role of African-American women in X-rated movies with a focus on the 1978 film, *Sex World*. Surprisingly, the African-American woman overcame the prejudices of the white male and seized the more powerful role in the relationship. I came away from the talk asking whether academic libraries would buy such materials for legitimate research needs. I also remember my spouse telling me about an assignment in the 1970s where she was required to visit an adult bookstore. I could see a similar assignment today to view an X-rated film.

In other words, faculty and students could have a need for such materials for legitimate teaching and research, but would the academic library buy them?

A few words are in order regarding pornography and commercially produced X-rated films. The most important fact is that pornography among consensual adults is legal. The Supreme Court has effectively decriminalized pornography. Commercial pornographers wish to avoid prosecution and want clear guidelines about what is legal or not. Child pornography is illegal because actors under eighteen cannot give legal consent. Most X-rated films show consensual acts where both men and women are eager to participate in sex and are shown having a good time. Violence does occur in about 13% of pornography according to one research study, but the violence shown is most often

consensual. Furthermore, in X-rated films, women also abuse men. Finally, the producers of X-rated films can find more than enough willing female and male actors so that issues of sex trafficking are irrelevant for mainstream productions.

The rules for following Constitutional principles including freedom of speech are different for private and public academic libraries. Private institutions have a much greater ability to control the research and teaching of their faculty. Religious institutions have broader rights to require that their faculty and students adhere to certain standards as long as doing so does not interfere with civil liberties enshrined in law, e.g., a prohibition against racial discrimination. Some federal or state programs require further restrictions if the institution

accepts tax dollars, but many offer exemptions from some rules for religious and other private institutions. One very clear exception is the ability to have single-sex colleges and universities without facing a discrimination challenge. On the other hand, a private institution that wished to support teaching topics that require the use of objectionable materials such as X-rated films may find it easier to do so than a publicly funded institution. Politicians or concerned citizens would have a much greater ability to apply pressure on the institution to avoid teaching such subjects even if doing so ran counter to the cultural diversity of the

nation and the principle that moral beliefs cannot drive policy without sufficient proof that such laws have a secular purpose. I understand that overlooking constitutional rights happens frequently and that many individuals or institutions are unwilling or unable to challenge such actions in court where they often receive an unsympathetic hearing from judges and juries. One common example is the difficulty, including threats of funding cuts, that institutions of higher education have faced in sponsoring art exhibits with erotic or blasphemous content.

My answer to whether the academic library should buy materials such as X-rated videos for valid teaching and research is quite simple. The mission of the academic library is to support the teaching and research needs of faculty, students, and staff. The

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