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: *A college librarian asks about the recently enacted Music Modernization Act and its implications for libraries and educational institutions.*

ANSWER: Debated in Congress for several years, the **Music Modernization Act (MMA)**, H.R. 1551, was signed into law on October 11, 2018. Many people believed that the **Copyright Act** needed serious revision because of the changes in how music is delivered, with streaming being the predominate delivery mechanism today. Interactive streaming now implicates not only the performance right, but also reproduction and distribution rights. The **Act** has several significant provisions.

(1) A new blanket statutory mechanical license has been added. The mechanical license has been in the **Copyright Act** since 1909 for making sound recordings. It permits those making a sound recording to do so without permission if the copyright owner has already made a recording. The license requires a statutory fee paid to the copyright owner for each record sold. Now the license applies to digital music providers as well. After a transition period, a new Mechanical Licensing Collective will administer the license. This provision does not affect the existing mechanical license for physical copies. (2) Pre-1972 sound recordings were granted federal copyright protection. Before the **MMA**, they were protected only by a patchwork of state common law. Protection now grants a 95-year copyright term from the date the recording was created, but ending no later than February 15, 2067. It also entitles owners and performers of such recordings to be paid digital performance royalties either through Sound Exchange or through direct licenses. (3) Producers, engineers and mixers are now statutorily entitled to share in Sound Exchange royalties. Prior to the **MMA**, there was a voluntary process for sharing royalties with these individuals. (4) The **MMA** increases the likelihood that songwriters and music producers will be paid more often for digital performances. Presently digital distribution services stream many performances without being able to identify the songwriters or publishers of the songs on a recording with no way to compensate these creators. The **MMA** tries to address the problem by establishing a database to identify all of the songs, songwriters and publishers of works streamed. (5) The **MMA** establishes new criteria for setting digital royalty rates. The new criteria require judges on the Copyright Royalty Board to take into account what a willing buyer and a willing seller would pay and accept for the musical rights at issue.

Most of the provisions of the **MMA** will not greatly affect libraries and educational institutions. The extension of federal protection to

pre-1972 sound recordings may have an effect on those institutions that use and archive such recordings, however. The mechanical license provision and the database of songwriters and publishers may have an impact on college radio stations that are engaged in streaming requiring them to pay more royalties.

QUESTION: *A university librarian asks about the latest decision in the Georgia State University e-reserves case.*

ANSWER: In the years that I have been writing this column, there have been several cases that I dubbed “the case that will not die,” such as **Google Books**. **GSU** has become another of those. Originally filed in 2008, the case involved the use of electronic copies of copyrighted articles and book chapters digitized for educational use. The following year **GSU** revised its e-reserves policy and the federal district court ruled that only instances of claimed infringement after that date would be considered. In 2012, the district court ruled in favor of **GSU** and ordered plaintiff publishers to pay **GSU**’s attorney fees.

Plaintiffs appealed to the Eleventh Circuit Court of Appeal. In 2014, the court found in favor of the publishers, reversed the decision and remanded the case to the District Court for the Northern District of Georgia. In 2016, the District Court judge issued its opinion re-analyzing the infringing works and found again that **GSU** was the prevailing party. Publishers again appealed to the 11th Circuit, and on October 19, 2018, the 11th Circuit unanimously held for the publishers, found error in the District Court opinion, and remanded the case again to the District Court. The circuit court held that the lower court judge failed to analyze the fourth fair use factor, market effect, properly, and that she again employed an inappropriate mechanistic approach to weighing the four fair use factors. Further, the 11th Circuit reversed the award of attorney fees. Thus, the case is not over, and **Judge Evans** will have a third try to decide the case in accordance with the law as instructed by the 11th Circuit.

QUESTION: *Harvard University announced in the fall of 2018 that its librarians were now exempted from the work for hire doctrine. A university librarian asks if this has not always been the case.*

ANSWER: Most agree that faculty members who produce scholarly works own the copyright in the works that they produce. There are institutions where this is not the

case, however. Scholarly works written by staff members, however, are typically considered to be produced within the course of their employment and thus are works for hire. **Harvard** had considered faculty-written works to be exempted from the work for hire doctrine but had not extended the privilege to librarians. The new policy means that librarians now own the copyrights in their scholarly works and can make them freely available, if they so choose, or seek royalties for copying their works.

QUESTION: *A university librarian shared her institution’s Policy for Use of Articles and Resources, which states that the school subscribes to a number of databases that provide a permalink to specific resources. This policy requires faculty to use these links in order to avoid copyright infringement. It goes on to say that articles and URLs will not be placed on course pages due to potential copyright infringement should the material be copied or downloaded. She asks if the policy is appropriate.*

ANSWER: The policy of preferring permalinks to databases to which the library subscribes is certainly appropriate. Restricting the use of URLs on course pages is somewhat puzzling, however. If the URL is for a work under a **Creative Commons** license or is freely available on the web with no expectation of royalties, it is unclear why the policy would be so restrictive. Reading a work online or even a student making a personal copy for study and scholarship is likely a fair use. Prohibiting the posting of full-text articles without permission of the copyright holder is different, however, since that clearly is reproduction, display and distribution, two of the statutory rights of the copyright owner.

QUESTION: *A faculty author asks when writers need to get permission to use copyrighted images in academic articles and books.*

ANSWER: Unless the image is in the public domain or is under a **Creative Commons** license, writers should always seek permission to reproduce and distribute copyrighted photographs incorporated into an academic article or book. In order to protect themselves and to respect copyright, publishers typically will not accept for publication works that use copyrighted images without permission of the copyright owner. 🐼