Against the Grain

Manuscript 8255

Questions and Answers-Copyright Column

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Questions & Answers — Copyright Column

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QUESTION: *A middle school teacher asks whether it makes a difference if she prints copies of an article for each student in her class or simply provides a link to an online version of the article for her students.*

ANSWER: While printing copies of the articles for students is likely a fair use, there is a difference in printing versus providing a link for students to access the article. Printing concerns the reproduction and distribution rights of the copyright owner, and fair use is an exception to that right. Providing a link implicates no right of the owner.

There are practical reasons for choosing one over the other. Printing copies of the articles for students makes sense when each student needs a copy in front of them for a specific classroom activity. Not all students may have access to computers or the internet. Further, the online link may not allow printing but merely reading on screen. On the other hand, relying on a link helps train students to use the Internet and is most useful when students can read from the screen or print at the student's choice.

QUESTION: *A college art librarian asks about virtual reality art creations and whether they qualify for copyright protection.*

ANSWER: To date, virtual reality (VR) has been primarily used in video games but there is much promise that VR will soon change how we search the internet and use social media. Although still in its infancy, VR allows artists to use color and light and incorporate it with motion so that three-dimensional works seem to float in the air. Not only does VR permit the artist to create new and different types of works, but it also allows viewers to interact with the works in ways not previously possible.

Section 102(a) of the *Copyright Act* defines the types of works that are eligible for copyright protection. While VR works

are not mentioned in the statute, the section's wording indicates that new types of works can be protected under these eight broad categories, and this has occurred. For example, in the early 1980s, courts held that video games (not mentioned in section 102(a)) were copyrightable as audiovisual works even though the sounds and images varied based on manipulation by the players of the games. Therefore, there is unlikely any difficulty with claiming copyright protection for these works. As with other types of works, these works must be registered for copyright in order for to sue infringers. Some speculate that enforcement of copyrights in VR works may be more difficult, however.

Of more concern are VR created solely through artificial intelligence without human intervention. In the United States, only human authors qualify as authors for copyright purposes so works created by machines or animals are not eligible for copyright protection.

QUESTION: *A college librarian asks whether schools are permitted to hire commercial copy shops to produce materials for the classroom that were obtained under a Creative Commons license.*

ANSWER: This issue was recently addressed by the Second Circuit U.S. Court of Appeals in *Great Minds v. FedEx Office & Print Services*, 886 F.3d 91 (2d Cir. 2018). *Great Minds* is a non-profit organization that designs educational materials that it sells in book form and releases them to the public without charge but subject to a **Creative Commons** license. The license allows "any member of the public to download, reproduce, and distribute the materials subject to the terms of the license." It offers a "worldwide, royalty-free, non-sublicensable, non-exclusive, irrevocable license to ... reproduce and share the materials, in whole or in part, for noncommercial

purposes only." **FedEx** is a commercial enterprise and **FedEx** concedes that its copying services are commercial in nature, and that its reproduction would be impermissible under the license if **FedEx** were acting as a direct licensee.

The court found that **Great Minds'** license did not explicitly address whether licensees may engage third parties to assist them in exercising their own noncommercial use rights under the license. Due to the absence of any clear license language to the contrary, licensees may use third-party agents such as commercial reproduction services in furtherance of their own permitted noncommercial uses. In this case, because **FedEx** acted as the mere agent of licensee school districts when it reproduced **Great Minds'** materials, and because there was no dispute that, the school districts themselves sought to use **Great Minds'** materials for other than permissible purposes, **FedEx's** activities did not breach the license or violate **Great Minds'** copyright.

QUESTION: *An archivist asks about archival works that enter the public domain and what are the circumstances under which a user must seek permission from the archives to use the work.*

ANSWER: The question does not specify permission for what. There are two possibilities here: copyright permission and access permission. No permission is required to use copyrighted works by reproducing sections or even the entire work. However, the archives control access to the work. It owns the artifact and may control who, if anyone, has access to that work. Usually, access is controlled to protect the work from damage. Fortunately for users, most archives want to make works available to the public and that is why they are digitizing their collections, which both protects the artifact and provides access to the content.

QUESTION: *A publisher asks whether handwriting can be copyrighted.*

ANSWER: The short answer is no although the underlying literary work certainly may be copyrighted. It would have to be a font based on the handwriting of someone even to consider the issue. One can imagine that the handwriting would also need to be that of a famous person to attract sufficient attention to raise the issue of copyrightability.

Although in common speech, "typeface" and "font" often are used interchangeably, they are not the same. A font is actually a file or program (when used digitally) that informs one's printer or display how a letter or character should be shown. A "typeface" is a set of letters, numbers and other symbols that are consistently used to compose text or other combination of characters. In a typeface,

continued on page 51

Cases of Note from page 49

policy for repeat offenders, implement it, and inform its users.

The 9th Circuit found AOL did not have an effective policy in place at the time due to the email SNAFU that had new emails falling into a vacuum. Or at least evidence from which a reasonable juror could conclude no effective policy.

And So ...

We go back to the trial court level for a jury

to consider the issues of contributory infringement and safe harbor protection.

In the course of plowing through this, you might have wondered just what the damages might be for the pirating of four stories. And was the battle worth it?

If we can believe Variety Feb. 5, 2002, Ellison's lawyer didn't take the case on contingency. At that point, Ellison had shelled out \$250,000 in legal bills.

But from Techdirt June 10, 2004 we learn that "after years of fighting, it looks like AOL just got fed up and has paid him off in a settlement to go away."

design elements are repeated and consistently applied. The U.S. Copyright Office Compendium states that typefaces are not eligible for copyright protection. This is not true in some European countries and Great Britain, however.

Fonts, by contrast, may be protected by copyright as long as the font qualifies as computer software or a program and meets the typical requirements for copyright. Commercially created fonts are typically available through license agreements and the terms of the license apply. Thus, in the United States, only the font software and not the artistic design of the typeface may be protected by copyright. A font based on handwriting would be protectable, but not typeface.

QUESTION: *The manager of a campus bookstore asks about the recent fake textbook case.*

ANSWER: On April 5, 2018, the federal district court for the Southern District of New York fined **Book Dog Books**, a textbook selling company, \$34.2 million for selling fake textbooks. The court ruled in favor of the **Educational Publishers Enforcement Group** (comprised of Cengage, Pearson Education, John Wiley, and McGraw-Hill Education) and awarded damages for both trademark and copyright infringement. **Book Dog Books** is the parent company for a number of textbook selling companies. At issue were pirated copies and non-U.S. editions of textbooks. Litigation has been ongoing for a number of years. According to the publishers' attorney, "The jury in this case recognized the inherent value of textbooks and educational publishers, and that book distributors must exercise vigilance to avoid buying and selling counterfeit textbooks." **Book Dog Books** has announced that it will appeal. See *John Wiley & Sons v. Book Dog Books*, S.D.N.Y., April 5, 2019, case 1:13-cv-00816-WHP-GWG.

QUESTION: *A public librarian asks about the huge number of copyrighted works that will enter the public domain in 2019.*

ANSWER: It is true that an enormous number of works will enter the public domain beginning on January 1, 2019, and each January thereafter. When the *Copyright Act of 1976* was passed, the term of copyright changed to life of the author and 50 years; in 1998, the *Sonny Bono Copyright Extension Act* increased it to life of the author plus 70 years. Works published between 1923 and 1963 originally received 28 years of protection. At the end of that period, they could be renewed for a second 28 years; if not so renewed, they passed into the public domain. The *Copyright Act of 1976* gave those renewed an additional 19 years of protection for a total of 75 years. The *Sonny Bono Act* also increased the maximum term of works published between 1923 and 1963 to a total of 95 years. On January 1, 2019, works published in 1923 that are still protected by copyright will have reached that 95 years of protection and will enter the public domain. 🐾

Legally Speaking — U.S. Libraries and the GDPR

by **Bill Hannay** (Partner, Schiff Hardin LLP, Chicago, IL)
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The news in the last few weeks (as well as your email inbox) seems to have been filled with references to the "**GDPR**." Why? Because this European Union law — the **General Data Protection Regulation, (EU) 2016/679** — went into effect on May 25, 2018, and can significantly affect not only European-based companies but also companies based outside the EU that do business in Europe. Okay, but what about U.S. libraries? The short (lawyerly) answer is that the **GDPR** may or may not apply to them.

The **GDPR** wrought a major change in the territorial scope of EU data protection law. Under Article 3 of the **GDPR**, the Regulation applies *inter alia* to the "processing" of "personal data" of "data subjects" (i.e., individuals) who reside in the EU by a "controller or processor" that is not "established" in the EU, where the "processing activities" are related to:

"(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the [European] Union; or

"(b) the monitoring of their behaviour as far as their behaviour takes place within the [European] Union."

Thus, for example, a U.S. company is subject to the **GDPR**'s provisions if it "processes" personal data of an individual residing in the EU when the data is accessed for the purpose of offering goods or services or of monitoring the individual's behavior in the EU. How does that fit with U.S. libraries? Let's walk through the analysis:

First, does your library collect "personal data"? Sure, you do. Every time a new borrower registers, you collect his or her name and contact information. That's personal data. Every time, he or she checks out a book, that information is recorded... and what people are reading is very personal data.

Second, does your library collect personal data relating to individuals who reside in the EU? Local public libraries probably don't, but university and research libraries almost surely have some borrowers that are EU residents: foreign-exchange students, visiting faculty, and their spouses and children.

Third — and this is the most thought-provoking part of the analysis — does your library "process" (let's just say "use") the personal data of the EU residents for the purpose of offering goods or services (either free or paid) to such individuals in the EU? (Or possibly in order to "monitor" their behavior in the EU?)¹ Ask yourself what possible activities a U.S. library might engage in that would involve offering the library's goods or service to an EU resident in the EU. Suppose that a U.S.

library sent out an email announcement to all of its registered borrowers inviting them to a free presentation by a lecturer on a topic of current interest and suppose further that some of those emails went to email addresses of borrowers who had moved (back) to Europe. Technically, that hypothetical might fit the jurisdictional requirement of the **GDPR**, but the library's email announcement hardly seems a likely target of the law. (Especially since the service, i.e., the lecture, is not being provided in the EU.)

Of course, if the hypothetical were changed to one in which the U.S. library regularly offered some sorts of goods or services that would be delivered in the EU, then a different conclusion would seem appropriate. In this circumstance — which may be far-fetched — the U.S. library would be well-advised to bring its data protection scheme into compliance with the **GDPR**.

One simple step you can take to comply with the **GDPR** is for the library to obtain explicit consent from the data subjects (e.g., the individual borrowers) to use their personal data to email information about library programs including offers of goods or services.

Library registration forms often include this sort of routine consent, but if not, it is easy enough to add it. (This is one reason you have recently been receiving notices of changes in Terms of Use agreements from vendors and others.)

There are other steps necessary for full compliance with the **GDPR**, and those are somewhat more complicated. But these systemic changes may not be necessary, if your library does not engage in the data processing activities that would bring it within the jurisdictional parameters of the **GDPR**. 🐾

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Endnotes

1. The preamble to the EU regulation explains "monitoring" behavior as follows: "whether natural persons are tracked on the Internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes."