Against the Grain

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Questions and Answers-Copyright Column

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Questions & Answers — Copyright Column

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Column Editor's Note: *This is my last copyright column for Against the Grain. I have been writing this column for over 20 years and have very much enjoyed answering your questions and explaining the law to librarians, publishers and authors. I left the law library at the University of North Carolina when I became associate dean for academic affairs and then spent my last three years before retirement as a full-time law teacher. I retired from my job in 2013 but continued to produce the column. I knew that there would be a day when it was time to give up the column, and the time has come.*

I am so pleased that Will Cross, Director of the Copyright and Digital Scholarship Center at the North Carolina State University Libraries, will be taking over the column. Will is a fabulous writer, and I know that he will do an excellent job. He was a wonderful student and I was privileged to teach him both as a law student at the University of North Carolina and when he was a graduate student in the School of Journalism there. — LG

QUESTION: *A medical librarian asks about using charts and tables from articles, which the library treats as a one complete work. Is this correct?*

ANSWER: Technically, charts and tables are separate graphic works. How to treat them depends on the following. If the author of the article or book authored the chart and they have been neither separately published nor published elsewhere, then the chart is a small part of that article or book. Reproducing it would count as copying a small portion of the work. By contrast, if the chart is authored by someone else and is used in that book or article with permission, then it must be treated as a separate work and permission would be required from the original producer of the chart.

QUESTION: *A publisher inquires about the recent French dispute over the old photographs of the works of Picasso.*

ANSWER: This case presents a very complicated fact pattern as well as the recognition of foreign judgments in U.S. courts. Working with Picasso in the early 1900s, photographer Christian Zervos compiled some 16,000 photographs of Picasso's works and published a multi-volume collection of the photos in 1932 known as the *Zervos Catalogue*. A French citizen, **de Fontbrune**, later acquired the rights to the catalog. In 1995, **Alan Wofsy**, an American art editor, obtained permission from the Picasso estate to reproduce the master's

works and began publishing a new reference collection, *The Picasso Project*. It included some of the photographs that appeared in the *Zervos Catalogue*. **De Fontbrune** sued **Wofsy** in France; the French court ultimately found that **Wofsy's** use of the *Zervos* photos infringed copyright. The court prohibited **Wofsy** from future use of the photographs and imposed a fine of approximately \$1,680 for each future use of the prohibited works.

Almost a decade later, copies of *The Picasso Project* were found in a French bookstore. **De Fontbrune** sued to enforce the previously awarded fine that resulted in a 2012 judgment against **Wofsy** of \$2.2 million. To enforce the French judgment against **Wofsy**, **de Fontbrune** sued in California state court under the state's *Uniform Foreign-Country Monetary Judgments Recognition Act* (most U.S. states have a similar statute).

Wofsy successfully argued that the French judgment contravenes fundamental U.S. public policy that favors free speech and promotion of the arts. According to the court, fair use would also prevent recognition of the French judgment and *The Picasso Project* was fair use as it was published as a reference work for libraries, academic institutions, art collections and auction houses. Regardless of the merits of the judgment in France, free speech is grounded in the U.S. Constitution and anything that contravenes it is repugnant to U.S. public policy.

QUESTION: *A college librarian asks if borrowing textbooks through interlibrary loan violates copyright.*

ANSWER: The simple answer is no. Textbooks are not treated differently from other books for ILL purposes. Borrowing the textbook for a user is no problem, unless the library that owns the work has signed a license agreement not to lend the work to anyone outside of its own institution. In that case, any infringement would be on the part of the lending library and not the borrowing one. The borrowing library should not copy the work, other than small portions, for library reserves or for users, however.

QUESTION: *A researcher asks about scientific charts and tables of data. If someone takes this information and creates his or her own depiction of the data is this copyright infringement?*

ANSWER: The data contained in scientific charts, graphs and tables is factual and facts are not copyrightable. The presentation of the data in a chart or other graphic depiction may be copyrightable as a graphic work, however, if the chart is sufficiently original. This means

that someone else can take the data to create another graphic depiction and claim copyright protection for the new presentation of the data. He or she should cite where the data was previously published, however.

QUESTION: *A corporate librarian wonders about requesting permission to reprint a work that specifies a print run quantity of 5,000 copies. If that quantity is exceeded through the years, must permission be obtained again?*

ANSWER: Yes. Permission requested and received covers only what is specifically granted. Therefore, whenever the reprint number is reached, it is time to make another request. Reprint requests may be made directly on the Copyright Clearance Center websites for CCC members. Otherwise, contact the original publisher to seek permission.

QUESTION: *A university librarians inquires about the new search engine for digital images introduced by the Creative Commons.*

ANSWER: The Creative Commons introduced CC Search, which is described on the CC website as "a tool that allows openly licensed and public domain works to be discovered and used by everyone." It currently covers more than 300 million images and aggregates across multiple repositories into a single catalog from 21 major collections such as major museums and Flickr. Moreover, it facilitates reuse of images through machine-generated tags and one-click attribution.

The CC does not verify whether the images are properly CC licensed or if the information is accurate or complete. The CC warns users that they are responsible for independently verifying the license status and attribution information before using the image.

Plans for CC Search include not only images but also additional media types such as open texts and audio. The ultimate goal is to provide access to all 1.4 billion CCC licensed and public domain works on the web.

QUESTION: *A college faculty member asks what is the difference between a de minimis amount and a fair use amount.*

ANSWER: A *de minimis* amount is defined by Miriam Webster's "as lacking significance or importance; so minor as to merit disregard." A fair use portion is larger than so minor as to merit disregard. One of the four fair use factors is the amount and substantiality of the portion used in comparison to the work as a whole. It is both a quantity and quality test. A commonly cited example of a fair use portion is one article from a journal issue or a single chapter of a book. If the portion reproduced represents the heart of the work, it will fail this test regardless of the quantity copied. 🍄