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Questions and Answers: Copyright Column

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QUESTION: A corporate librarian asks about providing copies as required by U.S. Government agencies under a variety of regulations for seeking new drug approvals, various applications, etc. When a company must provide these copies, is it fair use or is it covered under the Copyright Clearance Center (CCC) license that the company has for internal company copying? Has the law changed recently?

ANSWER: There is no change in the law that permits the supply of copies to a government agency as a part of a required filing. The Annual Copyright License from the CCC does cover digital copies of copyrighted works provided to government agencies as required filings. Moreover, Paul Goldstein, in his multi-volume treatise on copyright, has long posited that supplying copies as required by a government agency as a part of an application process or other regulation is a fair use.

QUESTION: A new faculty member is publishing a book with a university press. She wants to include three photographs in the book, and the status of the copyright of each is unclear. (1) The first photograph was published in 1921. (2) The second photograph was taken in the 1930s, and the photographer is unknown; it was provided to the author by a family member who had a copy of the photograph. Is there a copyright owner? Does it matter that the photograph had no notice of copyright indicating when the photo was taken? (3) The third photo was from a local college yearbook and was taken in 1946; the identity of the photographer is unknown. Is the photographer the copyright holder? Or is the college the owner the photograph was published in its yearbook? Is the work in the public domain if the copyright was never registered?

ANSWER: Each of these three photographs presents different issues. (1) The photograph first published before 1923 in the United States clearly is now in the public domain. (2) For the second photograph, as with most photos, the problem is that they are unpublished works. No notice of copyright was required unless the work was published. Notice was essential on published works or the copyright holder lost rights in the work. More than likely, this photo has never been published. Unpublished works that existed as of January 1, 1978, entered the public domain at the end of 2002 or life of the photographer plus 70 years. Assume that the photo was taken in 1930. If the photographer died soon after, then it entered the public domain at the end of 2002. But, if the photographer lived until 1960, the copyright will not terminate until 2030. So, it is likely that this photograph is still under copyright, but it is unclear without knowing the name of the photographer and his or her death date. On the other hand, if the photograph is a family photo that has never been published, then the chance of anyone complaining is very slight, especially if it is a snapshot and not a studio photograph. Often it is worth taking the risk to go ahead and publish such a photograph because the likelihood of any complaint is so slight.

(3) The third photograph presents yet another issue because it was published in a college yearbook in 1946. It is not certain who owns the copyright in the photograph since it may or may not have been a work for hire. In all likelihood, the college owned the copyright in the photo because the photographer was hired by the college and the photograph was published in its yearbook. If published, not only would the work have had to contain a notice of copyright in 1946, but registration was also required. Even if both notice and registration were present, unless the copyright were renewed in 1974, it would have entered the public domain that year. If renewed, the copyright would not expire until 2041. However, renewal of a college yearbook copyright is unlikely, so the photograph is probably public domain.

QUESTION: A U.S. academic institution sponsors a study abroad program taught by its faculty and staff. The students are U.S. students who are studying abroad, and some courses are offered online from the home institution. Students access databases from the home institution. Does operating in a foreign country make any difference? What if there are a few foreign nationals enrolled in the U.S. study abroad program?

ANSWER: The good news is that U.S. law applies to students enrolled in the U.S. institution’s study abroad program. Typically, students who access licensed databases from the U.S. institution are covered under the license agreement for that college or university. This is continued on page 59
true whether the students are U.S. nationals or not. In future license negotiations, it would be a good idea to clarify that study abroad students enrolled in the U.S. institution’s foreign study program are included in the license.

QUESTION: At a public school, the concern is about making the multiple copying of school music performances. These include students singing music selections, graduation ceremonies and orchestra performances. The teachers want copies of the Christmas Music program for each student to keep. Is this permissible? What section of the TEACH Act governs this?

ANSWER: It is not the TEACH Act, but section 110(4) of the Copyright Act that permits the performance itself (so long as there is no admission charge and no payment of fees or performers, promoters, etc.). The Guidelines on the Educational Use of Music governs copying the music performance. These were negotiated guidelines that were published in the House Report that accompanied the Copyright Act of 1976. The Guidelines are found on many Websites such as: http://www. unc.edu/~unceng/music-guidelines.htm. The Guidelines state at A.4. “A single copy of a student’s performance may be made for evaluation and rehearsal purposes. This copy may be retained by the educational institution or the individual teacher.” Thus, the Guidelines do not permit multiple copying of the performance or copies provided to students.

QUESTION: An academic librarian is trying to find an equivalent English phrase for a commonly used expression on Russian dissertations and also on some older publications, mostly serials, that were published in amateurish fashion (reproduced from typescript, somewhat like samizdat except by Russian émigrés in Paris and other countries). Literally it is something like “published with the rights of a manuscript” and sometimes appears as just “with the rights of a manuscript” and is a sort of copyright statement. Is there some similar phrase used at any time in English along the lines of: “publication retains rights of a manuscript” “published with all of the rights attendant to a manuscript” “holds the rights of a manuscript” “by all rights a manuscript?”

ANSWER: Probably the closest in the United States is “All rights reserved” along with the copyright notice. It was required under the Universal Copyright Convention (not really so universal since it was primarily western hemisphere). However, now the UDC is pretty much subsumed by the Berne Convention which the United States finally joined in 1989. “All rights reserved” is no longer needed. There is nothing specific about manuscript publishing rights in this country because of the right of first publication which automatically belongs to the author. Thus, no specific language is needed on manuscripts.