Questions and Answers-Copyright Column

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Questions & Answers — Copyright Column

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QUESTION: Are three paragraphs from a copyrighted work too much to put on a Webpage?

ANSWER: To answer this question requires a fair use analysis. (1) What is the purpose of the use? If the text is on a password-protected Website restricted to enrolled students in a particular course in a nonprofit educational institution, the purpose of the use is different than if one is copying three paragraphs and putting them on an open Website. (2) What is the nature of the copyrighted work? Is the work a novel, a poem, a scientific article? How old is the work? Is it still in print? (3) What percent of the copyrighted work do the three paragraphs represent? If the three paragraphs are from a full-length novel, then this is a very small portion. However, if the work is a poem printed on two pages, three paragraphs represents a fairly substantial portion. Even if the copied paragraphs are a small portion of the work, if the copied paragraphs represent the heart of the work, then the amount is too much. (4) What is the impact of the copying of the three paragraphs on the potential market for or value of the work? Does the use interfere with the sales of the work? Does it destroy the value?

If the three paragraphs are from a mystery novel, and they reveal the “who done it,” then not only did it take the heart of the work but it could also destroy the market for the novel. It is always possible to seek permission from the copyright holder to use the three paragraphs on the Webpage.

QUESTION: Section 108(f)(3) appears to be a very unusual section that allows libraries to record television news programs. What is the reason for this provision?

ANSWER: When television news programs began, their value was not fully appreciated by the networks. In fact, for years CBS did not videotape Walter Cronkite and the Evening News. Vanderbilt University Library started the Television News Archive and recorded network news daily. A library could borrow a copy of a specific news tape from the Archive. At some point, CBS began to videotape Walter Cronkite and sued Vanderbilt University for infringing its reproduction and distribution rights. During the debates on the Copyright Act of 1976, Congress recognized that there was something unique about the news, and it gave libraries the right to record the TV news. After passage of the Act, CBS dropped the suit against Vanderbilt, which still maintains the Television News Archive. See http://tvnews.vanderbilt.edu/.

QUESTION: How useful has section 108(h) been to libraries and archives?

ANSWER: Designed to ameliorate the effects of term extension, section 108(h) was added to the Copyright Act in 1998. It is an interesting provision that allows libraries, archives, and nonprofit educational institutions to reproduce, distribute, perform, or display copyrighted works during the last 20 years of their terms if certain conditions are met. At this point, the author has already been dead for 50 years. In order to take advantage of the exception, a library may not take advantage of this provision if: (1) the work is subject to normal commercial exploitation; (2) if a copy can be obtained at a reasonable price; or (3) the copyright owner provides notice that either of the other two conditions are met.

The benefit is that under section 108(h), a library may digitize a work and put it on a publicly accessible Website. In other words, there is no premises restriction, unlike sections 108(b) and (c). The U.S. Copyright Office created a process by which publishers could electronically provide the notice in number 3 above. Unfortunately, not one single copyright owner has utilized this process to notify the world that its works are available or that it intends to republish or reprint such a work.

QUESTION: The Copyright Act appears particularly outdated, as it pertains to audiovisual works. Why does Congress not update it?

ANSWER: There are many reasons that Congress hesitates to amend the copyright law. Moreover, it is not just the provisions dealing with audiovisual works that sorely need to be modernized. First, technology changes so rapidly that lawmakers have difficulty deciding how to amend laws so that they do not impede technological developments. Second, there have been some changes in the law, but they were pretty minor as applied to audiovisual works, but not since the Digital Millennium Copyright Act of 1998. These changes have not worked very well, either. Third, copyright owners and users are copyrighted works are pretty polarized right now, and any changes that one side wants likely will be fought by the other side. The spirit of legislative compromise seems to be dead on many fronts and not just copyright.

QUESTION: What is the difference between the composer’s rights and royalties and those of the rightful owner (or reimburse their customers who bought in good faith) who must return stolen art to the rightful owner (or reimburse their customers who bought in good faith). If the three paragraphs are from a mystery novel, and they reveal the “who done it,” then not only did it take the heart of the work but it could also destroy the market for the novel. It is always possible to seek permission from the copyright holder to use the three paragraphs on the Webpage.

Endnotes
1. Bill Hannon is a partner at the Chicago-based law firm Schiff Hardin LLP and a frequent lecturer on library-related topics at the Charleston Conference. He is an Adjunct Professor at IIT/Chicago-Kent College of Law and author of numerous books and articles. He may be contacted at <whannon@schifhardin.com>.
2. Dealers caught in the middle are unlikely to be indemnified by their insurance companies. Insurers take the position that a dealer who must return stolen art to the rightful owner (or reimburse their customers who bought in good faith) has not suffered a direct physical loss, so it is not a covered loss. It’s a “legal” loss.
4. Or, more optimistically, it may simply mean that there have been fewer thefts, but the arrest and conviction of Barry Landau suggests that the problem of book theft from institutions is a continuing one.
I n part one I looked at the first five reasons of my 10 Reasons Why the Internet Is No Substitute for a Library” (http://bit.ly/5oYnQb) in an effort to see where I went wrong. Herewith, the next five in that list.

eBooks are the best example of a wrong prediction. I guessed in 2000 that this monumental change would not occur until about ten years from today. The advent of the iPad, however, catapulted eBooks a long, a very long, way. I have to admit that I was wrong about how long it would take us to get to a successful eBook reader. Add to the iPad the relative inexpensive cost of eBooks, and the floodgates are wide open. ebrary’s (http://www.ebrary.com/corp/) offering of tens of thousands of academic titles for literally spare change is also helping to widen the tsunami.

As for the maturation of eBook readers, I have read on multiple ones: Kindles, Sonys, the Edge (a now defunct reader), iPads, and smart phones, to name a few. The iPad proved the best experience so far. Some will argue that the comparison isn’t fair because the iPad is more a tablet than an e-reader. Semantics, really. Still, even the iPad isn’t perfect (http://bit.ly/psZ3oz). DRM (digital right management) issues still loom large (or not, http://bit.ly/vE-ACC8), as do issues of format. Copyright hasn’t been resolved, just ask Google (http://bit.ly/9FyDn6). Further, I am troubled about how this translates into scholarly reading, various ebrary solutions notwithstanding. It cannot be done very well currently, though I believe it will be done well, eventually. Today, however, a medium for scholarly eBooks that provides access and service at the highest of levels remains on the “to do” list.

Furthermore, so far the frequency of eBook usage in academic libraries is at best very limited. I think this will likely change as more and more high school students, coming as they already are from library libraries (or facsimiles), push out remaining paper acolytes. What remains an imbroglio is the attitude of most students to etexts. A majority say they want eBooks but this has yet to translate into high usage of same. Then there is the problem of what is going on in that electronic environment. Wired generations are easily distracted (http://nyti.ms/bGoKmx). Digital natives are also research challenged (http://huff.to/c9fPTn). This is, of course, an argument that could be made about any generation of students, but it does appear to have worsened of late. Finally, there is the question of what the Internet experience is doing to our brains (http://bbc.in/n1u68r). We know it is doing something, but the jury is out whether this is good, bad, or indifferent.

As for the paperless library — well, it hasn’t made an appearance yet. Most now think this is a mission impossible. That is not to say that we won’t see a dramatic curtailment in traditional print books in the future. I thought that a decade ago and think it is true today. But the dramatic change in which libraries are being built without books at all, or with only a handful, hasn’t shown up, at least not to the degree promised. The University of Texas at San Antonio’s Applied Engineering and Technology Library (http://bit.ly/JUoUy) claims (http://bit.ly/bhFfpl) to be a bookless library. I have no reason to believe otherwise. Some, however, believe the idea is a myth in the making (http://bit.ly/ucN2Tn). Frankly, if we cannot figure out a way to reduce the carbon footprint of libraries, the profession will be in trouble.

The will behind the erection of large, grand libraries has gone, unless we can talk Bill and Melinda Gates, Brin and Page into using their foundations to become the modern day Andrew Carnegie for libraries.

Although I didn’t call it this, the creation of a national digital library, my eighth point, is still waiting creation. I correctly argued then it would prove too costly. It still is. Perhaps the best argument for it is Robert Danton’s (http://bit.ly/chcoRE), but even he recognizes that it will take the concerted effort of all of us just to get close. If we spend the dollars needed, what will be left for anything else? Frankly, I still fret over the whole idea of re-mastering digital images, though I see less and less of this in the professional literature. Digitization is not a one-and-done process. If this is true, then whatever the cost of such a facility just increased significantly.

The Internet remains the proverbial mile wide, but I will concede that it is now a little more than an inch deep — let’s say at least

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