

October 2016

Questions and Answers-Copyright Column

Laura N. Gasaway

University of North Carolina-Chapel Hill School of Law, laura_gasaway@unc.edu

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Recommended Citation

Gasaway, Laura N. (2013) "Questions and Answers-Copyright Column," *Against the Grain*: Vol. 25: Iss. 5, Article 27.

DOI: <https://doi.org/10.7771/2380-176X.6623>

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Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>
www.unc.edu/~unclng/gasaway.htm

QUESTION: *When negotiating a license for an institution with John Wiley & Sons for access to one of its databases, a librarian has requested inclusion of the following clause, following the LIBLICENSE model, under terms and conditions:*

The Licensee and the Authorized Users may access or use the Licensed Materials in ways that are consistent with this Agreement's terms and conditions and the Copyright Act of 1976 (17 U.S.C. § 101, et seq.) including the Copyright Act's limitations on exclusive rights provisions.

The company response was "Wiley will not accept the Fair Use provision (which applies to print.)" Is this accurate? Why would the company try to deny fair use for an electronic resource?

ANSWER: This question highlights the difference between copyright law and licensing. Under general copyright law, fair use certainly does apply to electronic resources as well as to print. The problem with license agreements is that they are contracts between the library and the publisher which can either expand or contract rights provided under the *Copyright Act*. In fact, there is a specific provision in the library subsection of the Act which says that contracts trump copyright. Section 108(f)(4) states that nothing in section 108 affects "any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collection."

So, as the questioner indicates, **Wiley** has determined that it will permit licensees to insert a fair use provision into its license agreement for digital materials. The reason is likely that the company wants to define the uses that may be made of its products and chooses not to permit such a provision to be added to the license. A librarian then has several choices: to continue to try to negotiate with **Wiley**; to accept the license as offered; or to reject the license and not acquire access to the resource.

QUESTION: *A college professor asks several questions regarding the use of still frame images or drawings from any sources such textbooks or found on Google and used in a face-to-face and/or online learning in a password protected course management software. (1) Is it necessary to provide notice of copyright for each image? (2) Where should the notice of copyright be displayed? On the slide with the image, in the note section of the slide (students will see this), or what about*

creating a list for the entire Power Point at the end of the lecture? (3) What is necessary to constitute "notice of copyright"? (4) What if the professor does not know whether the image or drawing is protected by copyright or who created the work?

ANSWER: (1) Face-to-face teaching and online are treated in different sections of the *Copyright Act*. For the face-to-face, section 110(1) there is no requirement to include the notice of copyright. However, it may be plagiarism not to do so — in other words, it may appear that the faculty member claims to have created the image or drawing.

This is not a good thing to model for students, so including the notice of copyright on all copies is preferable. For online instruction, the statute actually requires notice of copyright. Section 110(2)(D) (i) states that the institution is not liable for infringement for using the image if it: (a) institutes policies regarding copyright; (b) provides materials to faculty, staff, and students that accurately describe and promote copyright compliance; and (c)

"provides notice to students that materials used in connection with the course may be subject to copyright protection." The best way to do this is to include the actual notice of copyright.

(2) The placement of the notice does not make too much difference. Putting it on the individual slide would probably be preferred by copyright owners and certainly is more similar to a footnote, but there is no reason that notices could not be placed in a list at the end of the slides for the class session.

(3) Notice of copyright consists of three elements: (a) The word "Copyright," the "C" in a circle (©) or the abbreviation "COPR"; (b) the year of first publication; and (c) the name of copyright holder.

(4) When the copyright status of a work is unclear, one could include the note: "copyright unknown" or something to that effect for a particular slide.

QUESTION: *There have been recent news reports about a complete revision of the Copyright Act. Is this likely to occur?*

ANSWER: The Intellectual Property Subcommittee of the U.S. House of Representatives has shown particular interest in revising the copyright statute following the March 20, 2013, recommendation of **Maria Pallante**, Register of Copyrights calling for updating the *Copyright Act*. The Subcommittee announced the revision effort a month later (see http://judiciary.house.gov/news/2013/04242013_2.

html). The primary reason for considering a complete update of the copyright statute is because of the impact of digital technology on copyright. **Chairman Goodlatte** stated:

There is little doubt that our copyright system faces new challenges today. The Internet has enabled copyright owners to make available their works to consumers around the world, but has also enabled others to do so without any compensation for copyright owners. Efforts to digitize our history so that all have access to it face questions about copyright ownership by those who are hard, if not impossible, to locate. There are concerns about statutory license and damage mechanisms. Federal judges are forced to make decisions using laws that are difficult to apply today. Even the Copyright Office itself faces challenges in meeting the growing needs of its customers — the American public.

The Subcommittee has been conducting a series of hearings, and the first was held May 16, 2013. By July 2013, four hearings had been held and future ones are likely. There appears to be little agreement on appropriate solutions to the problems, and lobbying efforts promise to be strong. The **Library Copyright Alliance** (ALA, ACRL and ARL) has submitted a statement and other library associations probably will do so also. The hearings are likely to continue for many months, and librarians should monitor what is happening and be willing to contact their Representatives.

QUESTION: *Is the Google Books case still ongoing or has it been settled?*

ANSWER: Every few years it seems that there is a copyright case that will not die — today it is the **Google Books** case which has continued for eight years so far. In earlier columns I discussed various stages of the litigation. Most recently, in July 2013, the U.S. Court of Appeals for the Second Circuit directed the federal district court judge to rule on whether the **Google Books Search** constituted fair use prior to deciding whether the suit warranted class action status (see WL 3286232 (2d Cir. July 1, 2013)). In late August, **Google** argued that the scanning was transformative use and therefore was fair use. Not surprisingly, the **Authors Guild** says that such scanning is not transformative use and that **Google** is earning income from the work of the **Guild's** authors by copying their works without permission.

So, the matter is again before **Judge Denny Chin** of the Southern District of New York, this time to decide on whether the scanning that **Google** has done is fair use. The importance of this issue for scholars, librarians, and authors cannot be overstated. 🍌