



LEGAL ISSUES



Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>
Bryan M. Carson, J.D., M.I.L.S. (Western Kentucky University) <bryan.carson@wku.edu>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

Legally Speaking — Copyright and For-Profit Educational Institutions¹

by **Bryan M. Carson, J.D., M.I.L.S.** (Associate Professor, Coordinator of Reference and Instructional Services, Associated Faculty — Library Media Education Program, Western Kentucky University Libraries, 1906 College Heights Blvd. #11067, Bowling Green, Kentucky 42101-1067; Phone: 270-745-5007; Fax: 270-745-2275) <bryan.carson@wku.edu>

For most of us in libraries, the issues surrounding copyright have been an allusive and sometimes misunderstood element of our working lives. There has been a wide push in recent years to add more content using multimedia to the classroom. While some studies have found statistically significant gains in student learning, others have found no measurable differences. Some researchers have attributed this lack to a difference in learning styles among students.² Once learning styles were recognized and controlled for, however, it turns out that students who prefer visual learning styles do better with multimedia class material, while students with verbal/auditory learning styles perform at the same or lower levels with multimedia instruction.³ These findings suggest that teachers should include a variety of materials and work with all types of learning style preferences in order to maximize student performance.⁴

There are several rights that are included in copyright, including the right to transmit, reproduce, perform, and display. Most colleges rely on section 110 of the copyright statute (17 U.S.C. section 110). The first part of this section governs performance or display of a work in the course of face-to-face teaching, and the second part covers materials transmitted in distance education. However, these sections specifically state that they only apply to nonprofit educational institutions.⁵ As a result, the educational exceptions in 17 U.S.C. § 110(1) and 17 U.S.C. § 110(2) may not be used by for-profit schools.

Distinctions between Nonprofit and For-Profit Schools?

Most schools, colleges, and universities are either set up as nonprofit institutions, or are actually owned and operated by governmental entities. There are numerous state colleges, and some community and technical colleges are operated by local governments or school systems. There are also several tribal colleges operated by Native Americans. And, of course, **West Point**, the **U.S. Naval Academy**, the **Air Force Academy**, and **Gallaudet University** are owned by the Federal government.

A nonprofit college such as **Harvard** may not be owned directly by the state, but it has been given a charter to operate for a public purpose (in this case, educating people). **Harvard** is exempt from taxation. Because the **Internal Revenue Service** recognizes **Harvard** as a charitable organization under section 501(c)(3) of the tax code,⁶ donations made to the school are tax-deductible. Nonprofit institutions are prohibited from distributing profits to owners.

On the other hand, the **University of Phoenix** is a wholly-owned subsidiary of **Apollo Group**. **Apollo** is an **S&P 500** company which specializes in for-profit educational institutions. Their stock trades on the **NASDAQ Stock Exchange** (their ticker symbol is APOL). In the past 52 weeks, their stock has floated between \$42.59 and \$81.68 per share. The revenue earned by the **University of Phoenix** and other subsidiaries of **Apollo Group** is taxed by the Federal and state governments, and profits are distributed to the stockholders.⁷

The educational exceptions found in 17 U.S.C. § 110 are restricted to institutions that operate for a public purpose and are exempt from taxation under section 501(c)(3) of the tax code. If the institution is not tax-exempt, and if donations are not deductible, the education exemption doesn't apply.

Even if a college is nonprofit, it still must be accredited in order to take advantage of the distance learning provisions in section 110(2) of the copyright act. The accrediting body has to be one that is recognized by the **Council on Higher Education Accreditation** and the **U.S. Department of Education**. If the school is not accredited by a recognized accrediting agency, section 110(2) is not applicable.

Fair Use

The educational exceptions in section 110 are only one part of the equation, however. There is one other section in the copyright statute that should be considered: the Fair Use provision found in section 107 (17 U.S.C. section 107). In addition, as librarians we need to consider whether the underlying facts can be presented in a way that alleviates copyright

concerns by using facts which are not subject to copyright. Lets examine each of these concepts in detail.

The Fair Use provision of the **Copyright Act** is found in 17 U.S.C. § 107. This is the part of the statute that keeps copyright from infringing on constitutionally-protected speech.⁸ "Fair use gives the **Constitution** breathing space between the limits on expression inherent in copyright, and the freedom of expression guaranteed by the **First Amendment**."⁹ Fair Use applies to both published and unpublished materials, although you can't use as much material from an unpublished work as you can from a published work.¹⁰ The Fair Use provisions of § 107 read:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹¹

The four factors framed above are examined to determine whether a particular use of copyrighted material constitutes Fair Use. The first factor, the nature of the use, looks at whether it

continued on page 58

is for a commercial or a non-commercial purpose. The second factor involves determining whether the work is fiction or drama, nonfiction, educational, or factual. The third factor looks at the amount of material that is used, while the fourth is concerned with whether the use of the work will impair the market for the original material. A good place to find information on the four factors is **Georgia Harper's Copyright Crash Course Website**.¹²

Although no single factor is given more weight in determining whether Fair Use applies, the most pressing questions that for-profit educational institutions must ask are whether the nature of the use is commercial and the character of the use. In a for-profit environment, the nature of the use will always be commercial. The principle cases on commercial use are *American Geophysical Union et al. v. Texaco, Inc.*,¹³ *Basic Books, Inc. v. Kinko's Copies*,¹⁴ and *Princeton University Press et al. v. Michigan Document Services*.¹⁵

In the case of *American Geophysical Union et al. v. Texaco, Inc.*,¹⁶ the Texaco corporate library copied articles and sent them to scientists. The **American Geophysical Union**, a publisher of journals, sued Texaco for copyright violation. The **District Court** found that there was no fair use of the materials,¹⁷ and the **Court of Appeals** affirmed this decision.¹⁸ The decision of the appellate court is only binding law in the 2nd Circuit, which covers New York, Connecticut, and Vermont. However, the **Court of Appeals** decision has been cited many times, not only by lower courts, but also by the **U.S. Supreme Court**. Several other circuits have adopted the reasoning, including the 6th Circuit in the *Michigan Document Services* case. Thus, the **Court of Appeals** decision is currently the most authoritative

statement governing fair use in a for-profit setting. According to the opinion, "courts will not sustain a claimed defense of fair use when the secondary use can fairly be characterized as a form of 'commercial exploitation,' i.e., when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material."¹⁹

Two other important cases involved making the course packs so commonly used by academic faculty. The *Kinko's* and *Michigan Document Services* cases involved making copies that were going to be used for educational purposes in not-for-profit universities. Nonetheless, both cases held that the commercial nature of the businesses, and the fact that these copies were subsequently sold, meant that the copy shops needed permission to duplicate in order to avoid copyright infringement. It did not matter that the materials were being put to an educational use. The commercial nature of the copy shops meant that Fair Use did not apply.

The course pack cases also pertain to copying for library reserves. As a result of the *Texaco* case, a proprietary (private for-profit) educational institution such as the **University of Phoenix** would have to obtain copyright permission in order to make copies, even though a nonprofit educational institution such as the **University of Arizona** could do the same thing, and the duplication would be considered fair use. (But, of course, there are other questions related to the use of electronic reserves.)²⁰

Because the use is considered commercial, the amount of material that can be displayed, performed, or reproduced for class is very limited. At this point, I would not recommend using films, music, or any other type of performances without obtaining permission. Similarly, reproducing copyrighted material as handouts would probably also be problematic, due to the for-profit status of the institution. I

advise for-profit universities to obtain permission before reproducing materials, placing items on reserve in the library, or performing works in class.

Display of Copyrighted Works

Remember that displaying works is different from performing or reproducing them. This usually takes the form of charts, tables, graphs, and photographs which have been projected. In order to determine whether these items may be displayed in class, the Fair Use factors should be considered. We already know that the use is commercial, but it may still be possible to claim Fair Use — if the other three factors are in your favor.

The amount of work used and the effect on potential market are often considered together. Number three asks how much was used, and number four looks at whether this use would substitute for people buying the copyrighted item. Impairment of value is usually — but not always — related to the use of a substantial portion of the copyrighted work. However, in one instance the publication of a 300-word excerpt from a 454-page book was found to have limited the potential market for the book and led to cancellation of a major contract.

The case of *Harper & Row, Publishers, Inc. v. Nation Enterprises*²¹ involved the autobiography of former president **Gerald Ford**.²² When **President Ford** wrote his autobiography, *The Nation* magazine published an article about the book and included an unauthorized excerpt of about 300 words.²³ Under normal circumstances, this short excerpt would not be considered to be substantial. However, in this case, the part that was quoted was the part that dealt with **Ford's** decision to pardon ex-**President Richard Nixon**. This portion of the book was described as being among "the most interesting and moving parts of the entire manuscript."²⁴ Some have even said

continued on page 59

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/~unc1ng/gasaway.htm

QUESTION: *A museum is mounting an exhibition of LP record album cover art. These album covers are part of a few personal collections that are being loaned to the museum for the exhibition. The album covers will be exhibited strictly as examples of art produced for this medium. Does the museum need permission from the recording company in order to display the album covers? May the museum reproduce them on promotional materials or must it create its own designs for use in promotional materials?*

ANSWER: In recent years there has been considerable interest in the cover art on record albums — CDs just do not inspire the same art, probably due to the smaller size. This exhibit should attract a great deal of interest. The art-

work on album covers is copyrighted as with other works of art, assuming the requirements of copyright protection were met at the time. Assuming that the cover art is copyrighted, whether the recording company owns the copyright in the artwork or if the artist who created it owns the copyright is an important issue, but it need not be answered for the first part of this question.

The owner of a record album has the right to display that copy publicly under the first sale doctrine embodied in section 109(a) of the *Copyright Act*. The owner of that copy has chosen to lend it to you for display, so the first sale doctrine that permitted the owner to display the work is transferred to the museum to display that copy publicly.

Reproduction of the artwork on the cover presents another issue entirely. Using the art for promotional materials would require permission of the copyright holder, likely either the recording company or the artist, but either could have transferred the copyright to someone else.

QUESTION: *For mandatory regulatory filings, are for-profit companies required to get permission for providing copies of copyrighted works to government agencies?*

ANSWER: There is a strong argument that copies of articles required to accompany mandatory regulatory filings with various federal agencies are fair use. Even if they are not fair use, the **Copyright Clearance Center's**

continued on page 60

Legally Speaking
from page 58

that it was the only reason why anyone would read the book.²⁵

Every Fair Use decision requires careful scrutiny of the four factors. Each factor stands on its own, and each must be considered separately in order to determine whether the use is Fair Use. This analysis should be done each time before a use is made.

Take, for example, a pharmaceutical horticulture class. During a lecture, a faculty member may wish to use a table or figure for illustration purposes. Suppose that I wanted to use a figure that showed regulation of ethylene responsive genes in the postharvest physiology of flower senescence. There is a great flow chart showing the process on page 819 of the *Encyclopedia of Plant Sciences*.²⁶ The article has one figure, two tables, and 29 color photographs and illustration plates. One of the photographs and one of the illustrations are also relevant to the topic. We will look at the four factors to determine whether the use is Fair Use.

Our B.O.S.S. Puts YOU in Charge!

BASCH Services for Libraries and Publishers
Subscriptions, Inc.

88 N. Main St. • Concord, NH 03301 • Phone: 1-800-226-5310 • Fax: (603) 226-9443 • www.basch.com

1. <i>The nature of the use.</i>	We know that the use is commercial, because of the for-profit status of the institution.	This factor is against Fair Use.
2. <i>The nature of the copyrighted work.</i>	The <i>Encyclopedia of Plant</i> is a non-fiction, factual, and non-dramatic work. According to the publisher, it is "A multi-faceted reference work . . . [that] addresses the core knowledge, theories, and techniques employed by plant scientists, while also concentrating on applications of these in research and in industry." ²⁷ Clearly this work is meant to be used as a factual resource.	This factor is in favor of Fair Use.
3. <i>The amount of the copyrighted material used.</i>	In this situation, the flow chart and the two plates are very small in comparison to the entire three volumes of the <i>Encyclopedia of Plant Sciences</i> . It appears to be a reasonable and limited amount of the work in question. Even compared to the 29 plates, using two plates appears to be reasonable. This factor is in favor of Fair Use.	This factor is in favor of Fair Use.
4. <i>The effect on the potential market.</i>	Displaying a few plates, tables, or figures in a lecture does not impair the market for the original.	This factor is in favor of Fair Use.

In this analysis, three out of the four factors were strongly in favor of Fair Use. Thus, using a few tables, charts, figures, and illustrations from a factual non-fiction work would appear to be Fair Use — even in a for-profit setting — as long as the amount remains reasonable and limited and the use does not impair the market for the original.

Facts That Are Not Copyrightable

One final issue to consider when using material in a class is whether you can use facts that do not qualify for copyright protection. Under the *Copyright Act*, facts can't be copyrighted. Compilations of facts may be copyrighted, but the underlying principle itself may not

be. Even with compilations, there must be a spark of originality in the way that the editor selected or arranged the facts in order to qualify for copyright.

The premier case dealing with compilations of facts was *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*²⁸ This case dealt with the issue of whether telephone books could be copyrighted. The U.S. **Supreme Court** ruled that in compilations, it is the editorial effort of selecting and arranging the facts that constitutes originality. "These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that **Congress** may protect such compilations through the copyright laws. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement."²⁹ [Citations omitted.] In the *Feist* case, the **Supreme Court** found that arranging a telephone directory by the last name of the subscriber does not possess that "creative spark" of originality needed to trigger copyright protection.³⁰

Since the physical properties of an organic compound are facts, they can be used in class. The periodic table, as an arrangement of elements by increasing atomic number, is simply a fact. The arrangement required no "creative spark." Thus, the periodic table does not even qualify for copyright protection. Suppose the teacher wanted to use a table such as the "Bound Lengths Between Elements Other than Carbon," which is table 3.4B in *Dean's Handbook of Organic Chemistry*.³¹ This table does qualify for protection. However, the information presented in the table — that Diborane (B₂H₆) has a bound length of 1.77 Angstroms, for example — is not copyrightable.

continued on page 60

Conclusion

Librarians and faculty members in for-profit schools face different challenges from those in nonprofit or governmental institutions. The educational exceptions found in 17 U.S.C. §110 are not available. This can have a substantial impact on the educational process. However, the principles of the fair use doctrine still apply, and for-profit schools may be able to claim a certain amount of fair use (although less than nonprofits would be able to use). It is even better, however, if for-profit institutions look for information and materials that are not subject to copyright, either because they are facts or because they are in the public domain. This will help keep away lawsuits, while still allowing students to access the materials they need in order to learn. 🌱

Questions & Answers from page 58

annual copyright license covers electronic copies made to accompany regulatory filings, however. A corporate library also could seek to have these copies covered in its license agreements with publishers,

QUESTION: *A library recently had a visit from a contemporary children's author and wants to create a Webpage with information about her and her works as represented in one of the library's collections. The dust jacket images are eye-catching and would greatly enhance the webpage. Is it permissible to use these images or must the library seek permission?*

ANSWER: The library would need permission to use the dust jacket images. The author is unlikely to hold the copyright in the jacket art unless she is also the artist, but she may be able to help the library obtain permission by working through her publisher. The publisher itself may not own the copyright in the artwork, but often the publisher only contracts with the artist to use the artwork on the jacket. In this situation, the publisher could not grant permission to the library to use the images on the website. The publisher could help to identify the artist and locate him or her, however.

QUESTION: *When an academic library obtains a copy of an article for a user through interlibrary loan, may it place an electronic copy of the article on a password protected website for the user to retrieve rather than placing a copy of the article in the campus mail or emailing it to the user? If so, how long may the library leave it on the website for retrieval?*

ANSWER: Many libraries have adopted this practice even though the current section 108 of the *Copyright Act* does not envision such activity since it was adopted for an analog

Legally Speaking Endnotes

1. Many thanks to **Jack Montgomery** for helping me edit this article. He made some excellent suggestions, and for that I am grateful. However, any mistakes that you find are entirely mine.
2. **Stephen M. Smith & Paul C. Woody**, Interactive effects of multimedia instruction and learning styles, 27-3 *Teaching of Psychology* 220 at 220.
3. **Smith & Woody** at 223.
4. **Smith & Woody** at 223
5. In fact, § 110(2) specifies that they be nonprofit *accredited* institutions [emphasis added].
6. 26 U.S.C. § 501(c)(3).
7. This information is from **Zacks Investment Research**. Retrieved February 13, 2008, from <http://www.zacks.com>.
8. **Bryan M. Carson**. *The Law of Libraries and Archives*. Lanham, MD: Scarecrow Press, 2007: 79.
9. **David L. Lange**, *Theory and Practice in Copyright, Address at Intellectual Property in the Digital Age* (University of Wisconsin School of Education/University of Wisconsin Law School, May 8, 2001).
10. **Carson** at 98.
11. 17 U.S.C. § 107.
12. **Georgia Harper**, Fair Use of Copyrighted Materials, *Crash Course in Copyright*, University of Texas System Office of the General Counsel (last modified January 30, 2003), available at <http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm>.
13. **American Geophysical Union et al. v. Texaco, Inc.**, 60 F.3d 913; 1994 U.S. App. LEXIS 40786; 35 U.S.P.Q.2d (BNA) 1513; Copy. L. Rep. (CCH) at 27,417; 144 A.L.R. Fed. 745 (2d Cir. 1994).
14. **Basic Books, Inc. v. Kinko's Graphics Corp.**, 758 F. Supp. 1522, 1991 U.S. Dist. LEXIS 3804, Copy. L. Rep. (CCH) at 26709, 18 U.S.P.Q.2d (BNA) 1437 (S.D.N.Y. 1991).
15. **Princeton University Press et al. v. Michigan Document Services, Inc.**, 99 F.3d 1381; 1996 U.S. App. LEXIS 29132; 1996 F.E.D. App. 0357P (6th Cir.); 40 U.S.P.Q.2d (BNA) 1641; Copy. L. Rep. (CCH) at 27,579 (6th Cir. 1996).
16. **American Geophysical Union et al. v. Texaco, Inc.**, 60 F.3d 913; 1994 U.S. App. LEXIS 40786; 35 U.S.P.Q.2d (BNA) 1513; Copy. L. Rep. (CCH) at 27,417; 144 A.L.R. Fed. 745 (2d Cir. 1994).
17. **American Geophysical Union et al. v. Texaco, Inc.**, 802 F. Supp. 1; 1992 U.S. Dist. LEXIS 16411, Copy. L. Rep. (CCH) P27013, 24 U.S.P.Q.2d (BNA) 1796 (S.D.N.Y. 1992).
18. **American Geophysical Union v. Texaco Inc.**, 60 F.3d 913, 1994 U.S. App. LEXIS 40786, Copy. L. Rep. (CCH) P27417, 35 U.S.P.Q.2d (BNA) 1513, 144 A.L.R. Fed. 745 (2d Cir. N.Y. 1994).
19. **Texaco** at 922.
20. See my article in the September issue of *ATG*: **Bryan M. Carson**, Electronic Reserves and the Failed CONFU Guidelines: A Good Place to Start Negotiations, 19-4 *Against the Grain* 30, 32, 34.
21. **Harper & Row, Publishers, Inc. v. Nation Enterprises**, 471 U.S. 539; 105 S. Ct. 2218; 85 L. Ed. 2d 588; 1985 U.S. LEXIS 17; 53 U.S.L.W. 4562; 225 U.S.P.Q. (BNA) 1073; 11 Media L. Rep. 1969 (1985). (Hereinafter Ford Case.)
22. **Gerald R. Ford**, *A Time to Heal: The Autobiography of Gerald R. Ford* (Harper & Row 1979).
23. *Behind the Nixon Pardon*, 228-13 *Nation* 353 (April 17, 1979).
24. Ford Case at 565, quoting Reply Brief for Petitioners 16, n. 8.
25. **David L. Lange**, *Theory and Practice in Copyright, Address at Intellectual Property in the Digital Age* (University of Wisconsin School of Education/University of Wisconsin Law School, May 8, 2001).
26. **E. J. Woltering**. Senescence, Flowers. *Encyclopedia of Applied Plant Sciences*. Amsterdam, Boston: Elsevier Academic Press, 2003: 819.
27. **Elsevier Academic Press**. *Encyclopedia of Applied Plant Sciences*. (Last modified July 19, 2007.) Available at http://www.elsevier.com/wps/find/bookdescription.cws_home/673632/description#description.
28. **Feist Publications, Inc. v. Rural Telephone Service Co., Inc.**, 499 U.S. 340; 111 S. Ct. 1282; 113 L. Ed. 2d 358; 1991 U.S. LEXIS 1856; 59 U.S.L.W. 4251; 18 U.S.P.Q.2d (BNA) 1275; Copy. L. Rep. (CCH) at 26,702; 68 Rad. Reg. 2d (P & F) 1513; 18 Media L. Rep. 1889; 121 P.U.R.4th 1; 91 Cal. Daily Op. Service 2217; 91 Daily Journal DAR 3580.
29. **Feist** at 347.
30. **Feist** at 347.
31. **George W. Gokel**. *Dean's Handbook of Organic Chemistry*. 2nd ed. New York: McGraw Hill, 2004: 3.17.

world. On the other hand, only one user can retrieve the article, and one could argue that it is the equivalent of delivering one photocopy of the article to the user.

Articles should remain available on a website for only a limited time such as one to three weeks. A user would be alerted that the article is available on the website with a single user

password and that it will remain available for only X number of days. After that time, the article would be deleted even if the user has not yet retrieved it.

QUESTION: *What are the copyright issues regarding copying an assessment tool that was published in 1960 and reproduced*

continued on page 61

Cases of Note — Tripping Over Fair Use

by Bruce Strauch (The Citadel) <strauchb@citadel.edu>

Bill Graham Archives v. Dorling Kindersley and RR Donnelley & Sons, United States Court of Appeals for the Second Circuit, 448 F.3d 605; 2006 U.S. App. LEXIS 11593 (2006).

In 2003, **Dorling Kindersley (DK)** published *Grateful Dead: The Illustrated Trip (Illustrated Trip)*, a cultural history of — you guessed it — **The Grateful Dead** with a double-entendre on LSD.

Incredibly, this is a 480-page coffee table book! I'll pause while you let that sink in. And then of course you'll naturally ask, do Deadheads own coffee tables?

No, of course not. They live in VW vans. This is for all those Bourgeois Bohemians of the Boomer generation who are tort lawyers and software moguls but still live in memory of a romanticized rebellious past.

Anyhow, there are 2,000 images in the book. A typical page is a collage of images and graphic art with explanatory text.

Bill Graham is — can you guess? **Bill Graham** and the Family Dog? Does that ring any bells? Of course it does. **Bill (né Wolfgang Grajonca)** was the acid rock concert promoter who hosted the non-stop 1965-70 party at the **Fillmore Theatres** (East and West) and Winterland — the church of rock 'n roll. And that means all that poster art for the **Paul Buttefield Blues Band**, **Jefferson Airplane**, **Buffalo Springfield**, **Big Brother and the Holding Company**, *et al.* **Bill** has now passed on to that psychedelic party in the sky, but **Bill Graham Archives (BGArchives)**, presumably belonging to his heirs, continues to make money off the sale of posters, original concert tickets, and of course, T-shirts.

It's America after all. As a software mogul, you'll want to decorate your summer McMansion in Vermont with this stuff. And of course wear one of the shirts when you drive the Range Rover to Starbucks.

BGArchives claims copyright in seven of the concert posters in *Illustrated Trip*. **DK** tried to negotiate a license, but there was no meeting of the minds. **DK** went forward with publication. Note, that the seven posters are significantly reduced in size and have captions describing the concerts in question.

BGArchives made post-publication demands which were rejected, and then sued under the **Copyright Act** of 1976, 17 U.S.C. § 101 et seq. Each side moved for summary judgment on the issue of fair use, that statutory exception to copyright infringement. **BGA** lost in the district court, and hence this appeal. So let's look at those fair use factors.

Fair or What?

1. Purpose and Character of Use

The key to this one is whether the new work is “transformative.” See **Pierre N. Leval**, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990). Does it merely supersede the original, or add something new in the way of character, expression, meaning or message? **Campbell v. Acuff-Rose Music, Inc.**, 510 U.S. 569, 579 (1994).

The district court found the posters were originally ... well ... posters. But *Illustrated Trip* is a biographical work. Placing images in chronological order on a 30-year timeline is transformatively different from tacking them on a telephone pole to advertise a concert.

Curiously, the poster images of this famous era were themselves extremely transformative, using out of copyright images of Franz Stuck, Alphonse Mucha, L'Assiette au Beurre, and the Jugend School. Which is to say, almost none of them were actually original art.

BGArchive of course challenged this, arguing that the images were not transformed unless each was accompanied by comment or criticism. See 17 U.S.C. § 107 (stating that fair use of a copyrighted work “for purposes such

as criticism, comment ...[or] scholarship ... is not an infringement of copyright”).

It is established that fair use can protect the use of copyrighted material in biographies and other forms of historic scholarship, criticism, and comment require original source material to properly treat their subjects. “Much of our fair use case law has been generated by the use of quotation in biographies ...” **Am. Geophysical Union v. Texaco, Inc.**, 60 F.3d 913, 932 (2d Cir. 1994).

Just as I'm doing here.

And that goes for pop culture — the glory days of the **Fillmore** — as well as a biography of — *chortle* — **Millard Fillmore**. See **Twin Peaks Prods., Inc. v. Publ'ns Int'l. Ltd.**, 996 F.2d 1366, 1374 (2d Cir. 1993). (noting that a work that comments about “pop culture” is not removed from the scope of Section 107 simply because it is not erudite).

The Second Circuit found that the posters originally had a dual purpose of artistic expression and promotion. In *Illustrated Trip*, the images are historic artifacts marking particular concerts where ... well, who can remember exactly what went on at a **Dead** concert. But this is separate and distinct from the original purpose and thus is transformative. See **Elvis Presley Enters., Inc. v. Passport Video**, 349 F.3d 622, 628-29 (9th Cir. 2003) (find the use of short clips of **Elvis** performances are transformative when they are short and a voice-over discusses **Elvis'** career).

This holding is bolstered by the manner of **DK's** display. The images were reduced in size so that a mere glimpse of their expressive value is discernible. And they were combined with text, timeline and original art work to form a blended collage, enriching the presentation of the cultural history and not exploiting the artwork for commercial gain. Plus, in a 480-page book, there are only seven contested images.

Yes, *Illustrated Trip* was published with the aim of making a profit. But the “crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” **Harper & Row Publishers, Inc. v. Nation Enters.**, 471 U.S. 539, 562 (1985). Which is to say they weren't selling posters or a poster book.

So **DK** wins on that one.

2. Nature of the Copyrighted Work

Poster art is right at the core of protected creative expression. This would weigh in favor of the copyright holder. But when you've got a transformed work, the second factor is not “likely to help much in separating the fair use sheep from the infringing goats.” See **Campbell**, 510 U.S. at 586.

continued on page 62

Questions & Answers from page 60

many times in various texts? Is it infringement to reproduce it?

ANSWER: The first question is whether the assessment tool is protected by copyright or whether it is in the public domain. If it were published in 1960, the copyright would have expired in 1988 (28 years after the date of publication). The copyright would have had to be renewed in 1988; if it were renewed, then the work would have received an additional 47 years of copyright protection. Another 20 years was tacked on in 1998. Assuming the renewal occurred in a timely fashion, copyright protection would last until 2055. If it were not

renewed in 1988 then the work is now in the public domain.

It the work is still under copyright, whether permission is required depends on the use that will made of the reproduction of the assessment tool. Reproducing it or a portion of it for scholarship or research is likely to be fair use. Reproducing it for use in teaching in a nonprofit educational institution may be fair use. Making copies for other purposes probably requires permission. The fact that the assessment tool has been reproduced many time in textbooks does not necessarily mean that it was done without permission or paying royalties. 🌿

Cases of Note
from page 00

3. Amount and Substantiality of the Portion Used

Interestingly, the reference is to the amount of the copyrighted work taken. *New Era Publ'ns Int'l, ApS v. Carol Publ'g Group*, 904 F.2d 152, 159 (2d Cir. 1990). So smothering seven posters in 480 pages doesn't help **DK**. And of course, each of the seven was taken in its entirety.

All the same, it is sometimes necessary to copy the entire work to make a fair use of it. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) (images used for a search engine data base must be copied entirely to be recognized). So factor 3. turns on a reference back to factor 1. purpose and character of the use. *Campbell*, 510 U.S. at 586-87.

And back there, the court concluded the images were historical artifacts and by reducing the size, **DK** displayed the minimal image necessary to ensure they were recognized as historic artifacts.

4. Effect of the Use upon the Market for or Value of the Original

You look not just at market harm, but harm that could result from widespread use in *Illustrated Trip* fashion. *Harper*, 471 U.S. at 568.

Yes, as your mom said, what if everyone did it?

And just to make it more complicated, we balance public benefit from the use with "personal gain the copyright owner will receive if the use denied." *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

There was no effect on poster sales, **BGArchives'** primary market. But what about a derivative market in licensing the images for use in books?

"[I]t is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar." 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][4] (2005). But what is to be considered the loss of potential licensing revenues for "traditional, reasonable, or likely to be developed markets." *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 (2d Cir. 1994).

And then, the Second Circuit again goes back to factor 1. and says **DK's** use is a transformative one. The market is a transformative market (collage type books) and not a traditional one (poster reproduction). A copyright owner cannot bar others from a fair use market "by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work." *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132, 146 (2d Cir. 1998).

So **BGArchive** does not suffer market harm from the loss of license fees.

So, **Strauch**, what was that **Family Dog**

thing you mentioned back at the beginning?

And what an alert reader you are. The Family Dog was a loose partnership headed by super-hippie Chet Helms, a giant in the Bay Area music scene. Initially Chet partnered with Graham, but they split. Chet went on to mount near nightly shows at the Avalon Ballroom from 1965-70.

Helms began as manager for Big Brother and the Holding Company, bringing in his college pal Janis Joplin as their singer.

The first three rock dance concerts in history were Family Dog events at the Longshoreman's Hall in San Francisco in 1965. They were titled "A Tribute to Dr. Strange," "Tribute to Sparkle Plenty," and "Tribute to Ming the Merciless." They also featured the first light shows.

Do you catch that significant end year? 1970? Rock died hard when the Boomers finished college.

And how about some Bill Graham trivia? He had a lifelong dream of being a character actor and got his chance playing a promoter in Coppola's "Apocalypse Now" and Oliver Stone's "The Doors." He had a meatier role as Lucky Luciano in "Bugsy."

He died in a helicopter crash in 1991 after declining to take the limo with the drummer for Huey Lewis and the News. 🐻

Biz of Acq — Quick Tips for Media Selection and Acquisitions

by **Matt Bailey** (Media Resources Coordinator, Carleton McKinley Gould Library, Carleton College, One North College Street Northfield, MN 55057; Phone: 507-222-7670; Fax: 507-646-4087) <mbailey@carleton.edu>

In consultation with **Anita Grommesh** (Library Acquisitions, Carleton McKinley Gould Library, Carleton College, One North College Street Northfield, MN 55057; Phone: 507-222-5554) <agrommes@carleton.edu>

and **Vicki Burgess** (Library Acquisitions, Laurence McKinley Gould Library, Carleton College, One North College Street Northfield, MN 55057; Phone: 507-222-4262) <vburgess@carleton.edu>

Column Editor: Michelle Flinchbaugh (Acquisitions Librarian, Albin O. Kuhn Library, University of Maryland Baltimore County, 1000 Hilltop Circle, Baltimore, MD 21250; Phone: 410-455-6754; Fax: 410-455-1598) <flinchba@umbc.edu>

Column Editor's Note: Specialty collections such as videos can be a challenge to Collection Management and Acquisitions Librarians who often have to work without a Media Librarian in-house and guess their way through genres and industries that they know nothing about. Even those working with Media Librarian's in house, such as myself, will find new ideas in Matt Bailey's excellent article. I'm please to say that I have a couple of new vendors to try. — MF

My job title, Media Resources Coordinator, means I am responsible for acting as the liaison

to all faculty, staff, and students for our media collection (currently about 7,400 titles on DVD and VHS). Faculty at **Carleton** have always taken an active role in collection development, and this holds true for media as well: faculty select about 70% of our media purchases. This makes my job somewhat easier, since I don't have to guess at what titles to buy to support the curriculum, but it can also make building a well-rounded collection a little tougher.

Any primarily faculty-selected collection will be, by nature, idiosyncratic and eclectic, so it's up to me to select titles to round out and balance the media collection. This — let's not

kid ourselves — is the fun part of my job. But I don't approach this selection without some careful thought. In selecting titles to complement those chosen by faculty, I try not to compete with our local video stores that stock all the newest and biggest releases or with the public library — located one block from campus — that provides access to popular movies and television series on DVD. The reasons for this are many. Firstly, our collection, despite its breadth, is meant primarily to support the curriculum of the college. Secondly, I feel it is essential to provide access to material

continued on page 63