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“Workshopping” Copyright Questions and Practical Solutions

Kyle K. Courtney, an attorney and the first Copyright Advisor in the Office for Scholarly Communication at Harvard University, led the work-shopping breakout session. This session focused on the practical applications of copyright laws and how to find solutions. The speaker’s easy attitude and knowledge of the subject matter made this a relaxed session.

Finding solutions in copyright is a continual matter of judgment calls and risk assessments. Although there are many tools to assist with determining copyright status and use, librarians and information professionals must make individual judgments on how to proceed with copyright issues. Many times, this takes the form of assessing the amount of legal risk associated with actions. One methodology of minimizing risk could be as simple as including a disclaimer with materials made available with information about asserting ownership. This can also have the added benefit of acquiring more information from the rights holders. Per Kyle, librarians may be in the best position to identify orphan works. The resources and knowledge available to librarians make this profession uniquely suited to locate ownership rights.

Solutions to copyright issues can be easy or difficult depending on the situation, and the fact that copyright is automatically applied means that there is no shortage of copyright questions. Many copyright problems do not have general answers, and therefore, much depends both on the work and on the institution. A good example of this is the phrase “reasonable price” under the law. What would be reasonable for one organization may be un-reasonable for another organization. Aside from market value, the intended

use of materials and the budget available to the organizations can play a large part in determining reasonableness. It is always best to get permission for collaboration, as this minimizes risk. Sidestepping problems can be, in certain circumstances, a better solution than assuming risk. For example, using an alternate edition or similar item from within the public domain negates the need for copyright permissions and risks.

Courtney also shared advice that some rights holders are much more difficult to deal with than others, and some rights holders should be outright avoided if possible because of their tendency to sue, even if potential exceptions or fair uses might apply to a use. Examples of entities that guard their intellectual property closely include Disney, Steven Spielberg, NFL/MLB, and the Picasso estate. All rights holders protect their rights through different means and intensities, and librarians should consider which rights holders are generally unfriendly to any uses, much less, unauthorized uses. Librarians should always consider the benefit of the work. If none, it should probably not be included. This is what is known as the threshold test, which determines the purpose of including a work. To illustrate this, Courtney discussed an example of a thesis paper seeking to include a work of Picasso as the cover illustration. The paper, entitled “Comparative Musical Trios in History,” wished to have Picasso’s copyrighted work *Three Musicians* as the cover. As the work does not deal directly with depictions of musical trios, nor is it necessary for the book’s analysis, and as the rights holders are notoriously strict, the student should likely not use the painting. Courtney had us imagine, however, what if the paper was analyzing artistic depictions of musical trios in the 20th century? Perhaps, then, this painting would be subject to analysis and interpretation and be ideal for a strong fair use case.

An important part of the workshop discussion was about what could be copyrightable. Works must be more than an organization of facts and statistics and must be original. They must be both creative and “*fixed in a tangible medium of expression*” (17 *United States Code*, § 102(a)). To illustrate this, Courtney utilized *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), in which white page telephone books were shown to be non-copyrightable, as they were merely organizations of facts, without enough creativity to satisfy the test for copyright protection. At one time, a common reference was to the “sweat of the brow” test, in which the amount of work and creativity that goes into a work determines its copyright status. Presently, that test is no longer valid, but it illustrates the nature of creativity—sometimes it involves a creative action of some kind. For example, a table of contents in the front of a book might not be copyrightable, while an index could be determined “creative enough” due to the creative process of word selection involved. A work must achieve a minimum amount of creativity to be protected by copyright. As an example, Courtney dis-

cussed a student-created computer-searchable dictionary that consisted of thousands of word files from another copyrighted dictionary. The issue was with the copying of the definitions themselves. Courtney went on to explain that while it was a dictionary of “facts”—the definitions—these definitions themselves were actually creative expression. Each dictionary has its own unique definition for each word. Because of this, the student dictionary was most likely derivative of the original and not a fair use either. However, this student demonstrated an alternate course of action by partnering with the existing dictionary to create a new and permitted work, bringing the best from both projects together.

Perhaps the most useful piece of information was what Courtney referred to as the special super powers of librarians: 17 U.S. Code § 108(h). By this, the speaker meant a power that is extremely useful but rarely used. Section 108 of U.S. copyright law details the exclusive rights of libraries and librarians concerning copyright, which is well known to librarians. However, librarians currently underutilize 108(h), which states that libraries may copy or digitize works that are in the last 20 years of their copyright terms without permission if they meet the following criteria: the work is not subject to normal commercial exploitation, a copy cannot be obtained at a reasonable price, and the rights holder has not filed notice with the Register of Copyrights that the above two conditions apply. This section gives considerable power to librarians to make copies of works that are difficult to obtain.

This session primarily focused on improving the ability of librarians and other information professionals to respond to copyright issues. From the practical to the hypothetical, Courtney answered all questions during this session. As this session was limited by necessity, Courtney recommended that participants continue researching copyright workshopping issues. Copyright is an expansive and ever-changing field, and it warrants further exploration and consideration.