

## **COPYRIGHT CORNER**

### **Table of Contents Service: Fair Use?**

By Laura Gasaway

Many libraries offer a “table of contents” service for their users. Whether such a service runs afoul of copyright law has long been debated in library circles; neither the courts nor Congress has considered the matter and whether it qualifies as fair use. For some types of libraries, contents services are traditional and ubiquitous. Several libraries even advertise their table of contents service on the Web.

When a library receives journal issues, it may either photocopy the table of contents page or scan it to circulate to users. Sometimes a single photocopy of a table of contents is circulated to multiple users; other times multiple copies are produced so that each user interested in that particular journal receives a copy of the contents page. This practice raises three different issues for fair use: (1) photocopying either single or multiple copies of journal contents pages, (2) scanning contents pages and posting them on an intranet (whether password protected or not), and (3) permitting users to use contents pages as a selection device for articles they want reproduced for them.

Libraries implement such services for two purposes: as a notification device so users will know what articles from a particular journal are available and to permit users to select which articles they want the library to reproduce for them. In some subject disciplines, commercial or nonprofit alternatives distribute tables of contents. For example, in law there is *Current Index to Legal Periodicals*, published by the University of Washington Law Library. It is a weekly subject index to law reviews and other law journals that also contains tables of contents. This is done with permission of the journals. But in other subject disciplines there is no specific table of contents alternative. Ingenta’s Reveal service provides an electronic table of contents service, as do several journals themselves.

The contents page is copyrighted along with the entire journal issue. Some tables of contents contain nothing but factual data: author, article title, and page number. Although facts are not copyrightable, the arrangement of the facts might be, but such an arrangement would have to meet the originality standard with its creativity requirement in order to qualify for copyright protection. Other journal contents pages also contain abstracts, which are separately copyrighted as derivative works. Thus, contents pages that contain abstracts are more likely to be copyrighted than those that contain only bibliographic data.

When a company has an Annual Authorization License or Photocopy Annual License for in-house copying with the Copyright Clearance Center (CCC), that license permits libraries to photocopy tables of contents for employees. It does not permit any electronic distribution or storage of contents pages. Companies that have the add-on Digital Repertory Amendment are allowed to scan tables of contents and to distribute them to company employees if the journal is not available in digital format.

If tables of contents pages are copyrightable, a non-CCC licensed library that reproduces copies of contents pages has reproduced a protected work, which may raise copyright concerns. Except for preservation under sections 108(b) and (c), libraries are limited to single-item copying at the request of an individual user. The question is whether copying contents pages is fair use. It well may be, although the matter has never been litigated.

Scanning tables of contents for distribution to users, absent a CCC or other license, may be more problematic. Publishers generally are more concerned about digital than analog distribution of their works. There is more chance that digital tables of contents could be distributed outside of a particular library than that photocopies could be.

Under section 108(d), libraries are permitted to make a single copy of a journal article for a user. One way that users often make requests for copies is via a table of contents page reproduced and distributed to users. Users circle the article they want and return the contents page to the library as a way of ordering photocopies from the library. Thus, for these libraries, the table of contents service is more than a notification device—it is an ordering device. A court is more likely to find this copyright infringement than a simple notification.

For non-CCC libraries there is an alternative in addition to commercial table of contents services. Bibliographic data are factual in nature. An individual listing of an article in a table of contents is not copyrightable. So, if a library strips out bibliographic data from tables of contents of various journals and then assembles them by subject, it has created a new compilation that it may distribute either by photocopying or digitally. Reproduction of the articles still presents the same copyright issues, but the notification device created by the library from a variety of sources does not.

Back in the early 1980s when publishers sued pharmaceutical companies for copyright infringement for in-house photocopying of articles from their journals, the interrogatories queried whether the library reproduced tables of contents and provided them to employees of the company. These cases were settled, so the issue of distribution of reproductions of contents pages of journals was never litigated. It remains a common practice among libraries, including those that do not have annual CCC licenses.

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