

## MEMORANDUM

TO: William C. Pratt, Jr., President, The Literary Club

FROM: Joseph J Dehner, Counsel

RE: Papers / Website

DATE: April 4, 2016

Mr. President, you asked for a summary of the Club's policies and practices regarding the collection, archiving and distribution of papers delivered by Club members. This Memorandum is provided for that purpose.

1. Literary works, including papers delivered by Club members, are created by their authors. Authors own their works. By common law and otherwise, the author of a work owns the copyright covering the work.

This is recognized by the Club's Constitution. Article VIII states in part: "All papers written by a member shall remain the member's property and will not be carried on the Club's records if the member so requests."

Accordingly, if a member requests that a paper not become part of the Club's records, the member may elect not to provide a copy to the Club's Secretary or anyone else. If, however, a member elects to provide a copy of a paper to the Club, then the member does so subject to the Constitution and other rules of the Club.

Certain presenters of papers have on rare occasions elected not to provide a copy to the Club, exercising this right. Based on currently available information, it is understood that the collection of papers going back to its founding consists of papers that the authors willingly provided to the Club, without express restrictions on use.

2. The Club has authority to make use of papers it receives in accordance with its organizing documents. The Constitution of the Club, as recently amended, says the following:

Article II, Section 5. The Secretary shall keep minutes of all meetings of the Club and of the Board of Management; keep a record of papers read before the Club, and have such minutes and papers transcribed, bound and placed in the custody of the Librarian and stored in digital form on the Club's website by the Archivist.... All records shall be open to the inspection of members.

Article VI, section 2. Members may personally introduce visitors to the rooms or to the meetings...."

These provisions mean that papers of the Club will be posted on the website and kept also in hard copy form in a transcribed, bound manner. Article VI implies that when a visitor comes to

the Club's rooms, including the Library, the visitor has access to papers that are not under lock and key. If a member accompanies a visitor to the Club's library to read a paper, it is appropriate for the visitor to read and make appropriate use of it. By providing papers to the Club, members have granted rights to the Club to display them both on the website and in the Library.

The Club has for years made a second bound copy of papers and provided the volumes to the Cincinnati Historical Society (CHS) and more recently to its successor Cincinnati Museum Center (CMC) pursuant to deeds of gift. CMC keeps these papers in its archives and shares them for appropriate use with the public. The Club has informed CMC that the Club's grant of use extends only to the Club's rights.

Making papers available in this manner does not mean that the Club, CHS or CMC has released them to the "public domain" free of copyright considerations. If a third party copies a Club paper and distributes it as a reproduction of the paper, this could raise a claim of unauthorized use by the author against the infringing copier. The Club is within its rights to keep copies of papers that authors have provided in the Library, on its website and in bound volumes given to CHS and CMC. This is not in derogation of an author's rights, so long as the author provided the paper to the Club without express restriction on its safekeeping or use.

3. A concern was recently expressed by a member concerning posting of papers on the Club's website. As discussed above, website posting is appropriate. The member who raised this question provided a reminder that on May 7, 2007, the membership approved creation of the Club's website. Minutes of that meeting state that the approved motion was as follows:

“[T]he Literary Club may maintain a website with postings limited to the following:

- Recent papers only with the permission of the author accessible only to members;
- The content of the yearly program accessible only to members
- Other items as specifically authorized by the Board of Management.”

Since approval of this motion, the Club has implemented the website, and the Board of Management has discussed and approved items beyond the initial stated items. For example, there is a directory of members on the website. Other features have been added since 2007. The posting of papers is done consistently with the Club's Constitution.

4. Although it was not specifically addressed in the recent meeting that overwhelmingly approved the project of digitizing the entire collection of the Club's records over time, I comment as follows on the Club's relatively recent practice of recording the presentation of papers. I do so for two reasons: (a) there may be a misimpression that a presented paper is cloaked with some type of "privilege" that makes it secret; and (b) it is a subject of the Club's Bylaws.

Presenting a paper before the Club audience (including visitors) is a form of publication. The presentation is oral, not written, though on occasion members provide a copy to one or more members for their benefit. When one presents a paper orally, it is a publication to those listening. Thus, if a member were to commit a slander against a third party or reveal a

proprietary or trade secret matter while reading to the Club, the member should understand that there is no legal privilege or right to do so that would immunize the member from legal consequences.

The Club's By-laws provide:

Section 3. Members and guests are not permitted to make audio or video recordings of a paper without the express permission of the speaker and presiding officer.

This creates a more strict rule about the Club's use of audio and video recordings than applies to papers. As is true for papers, the member presenting the paper may agree or not agree to such a recording. If the member agrees and the presiding officer at the time agrees also, and if the Board of Management approves this as a matter of course, then the Club could post audio or video recordings on the website and keep digital recordings among the Club's records.

5. A final observation. The Club may consider whether to restrict or expand its current system of archiving and making accessible papers and recordings. If it wished to do so, the Club could adopt a rule forbidding any form of publication of papers to non-members, even for historical purposes, even long after the death of an author (though an author is always free during life to distribute a paper as the author wishes). On the other hand, members may want the Club to publish papers freely to the public as a means of publishing works into which they invested time and talent but may not wish to incur individually the expense of creating their own author websites or engaging a publisher. The Club could, for example, create separate public and private sections of its website, as certain other literary organizations have done. When the membership approved creating a website in 2007, President Christenson reported on the background, including the period when Club papers were digested and published in newspapers and otherwise. As he wrote then,

A positive approach would outweigh the unfavorable current reputation some think we already have as a secretive society withdrawn from the life of the city. Other members think we are more withdrawn than we have ever been from city life for good reason and ever prefer this as more in line with our history and traditions.

President Christenson's conclusion at the time was this: "We should have no fear of saying publicly or on a website who we are or what we write about."

The Club may discuss and adopt changes to its Constitution or By-laws, and the Board of Management is also authorized to change what appears on the Club's website.