

# CREATING SOLUTIONS TOGETHER

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*Lessons to Inform the Future of Collective Licensing*



Copyright Clearance Center



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# Introduction

First created by copyright rightsholders in France in the late 18th century, collective licensing has served an increasingly important purpose. Collective licensing has made it possible for rightsholders to expand the reach of their works and to collect royalties for use of them on an efficient basis. Its success has driven the introduction of more varied collective licensing systems — some voluntary and created by private parties, with or without government supervision, and some statutory and more or less compulsory, created by governments. The continuing need for the efficiency of collective licensing — even in the microtransaction-driven world of the Internet — was made plain as recently as late 2018, when the U.S. Congress unanimously passed legislation to create and regulate a new form of compulsory collective license for the streaming music field.<sup>1</sup>

This collection of essays takes three separate but interrelated looks at the development of collective licensing in text publishing, and has been published in commemoration of the 25th anniversary of the final appellate decision in the case of *American Geophysical Union et al. v. Texaco Inc.*<sup>2</sup> In the *Texaco* case, the U.S. Court of Appeals for the Second Circuit evaluated a collective license of the rights to reproduce copies of scientific and technical articles for the systematic internal use of a business organization as an appropriate exercise of the rights of the rightsholders in those articles; it then held that the business' systematic and unauthorized reproduction of those articles — in place of buying originals, seeking individual permissions or taking the collective license — was not excused by fair use. Copyright Clearance Center's repertory license, cited in the decision, continues to include a standard set of rights from tens of thousands of rightsholders to use tens of millions of works. From 2010 to 2020, those licenses have produced billions in royalties that have been distributed to rightsholders.

Copyrighted works are exploited almost exclusively through licensing. The copyright holder “keeps” their work — in the sense of retaining the bulk of the economic value of the rights contained within it — while providing authorization to others to do more than merely absorb it; that is, more than read it, watch it or listen to it. Those others — whom we will refer to here as “users” — exercise, with authorization provided by a license, one or more of the many rights that are the exclusive purview of the copyright holder: to reproduce the work, to distribute those reproductions, to publicly perform or display it, or to create derivative works from it. Technology makes the exercise of those exclusive rights in a copyright easier. Copyright continues to protect (subject to exceptions and limitations, including fair use in the U.S.) the rightsholder’s right to assert that any exercise of those exclusive rights is solely their province.

Generally, more significant exercises of those rights are worth the effort of the rightsholder and user to negotiate. Motion pictures, television productions, theatrical performances, and other “grand” performances are valuable and both parties will make every effort to reach an agreement directly. However, in many less significant exercises of copyright rights where it is in no one’s interest to negotiate an agreement directly, the transaction costs simply outweigh the value of the transaction itself.

In response, the copyright industries developed the collective license: a single set of terms of general acceptability to both rightsholders and users to govern less significant exercises of copyright rights. The collective license offers a uniform set of rights across millions of works and enables the user to set up internal rules for these low-value transactions that make it more likely that the user and its employees will more easily respect the rightsholders’ rights.

The first major collective license in the U.S. was offered by the American Society of Composers, Authors and Publishers (ASCAP) to bars, taverns, radio broadcasters and other venues that needed access to the rights to perform a variety of music. Collective licenses of different kinds then followed, both voluntary and statutory/compulsory. With the development of the photocopier, voluntary collective licensing came to text publishing with ratification of its propriety from a federal Court of Appeals in a case against Texaco. At the same time, compulsory collective licenses were created for, among other uses, mechanical rights and certain digital rights in music and rebroadcast of television programs through cable and satellite services, and in some other countries for what is called the “public lending right,” or the right of public libraries to lend books to readers as a perceived replacement for the “lost” royalties attributable to books not sold. All these licenses are intended to make efficient markets that permit users to make uses of copyrighted materials and rightsholders to receive royalties for those uses.

The following three essays take separate but interrelated looks at the development of licensing and collective licensing in the text publishing field.

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<sup>1</sup> Music Modernization Act, Pub. L. 115-264 (Oct. 11, 2018).

<sup>2</sup> 60 F.3d 913(2d Cir. 1995).



# Publishing as Embodiment of Licensing | by Lois F. Wasoff

To understand the importance of licensing to publishing, let's begin by looking backwards from the moment that a work gets into the hands or digital devices of the reader, or user. From the reader/user's perspective, the process seems simple: Walk into a bookstore, order online, or initiate a download, make a payment or log in with a subscription, or simply download an open access copy (we'll get to that later), and the reader/user gets possession of or access to the content. But whether that content is available in print or digital form or both, as text or audio, in complete form or abridged, in English or any one of dozens of other languages, and how that content is paid for, even if the price is free, is the result of a series of decisions made by the creators and distributors of the content. Those decisions are embodied in a chain of rights transfers and permissions, all of which are made on the assumption that each entity in the chain is acting with appropriate authority. And the authority exercised by each link in that chain is based on the legal framework of copyright and defined by the terms of license agreements. "Publishing" and "licensing" are not separate concepts; publishing is a particular species of licensing, with its own increasingly varied industry practices that have evolved to meet the constantly changing needs and expectations of that reader/user we first mentioned.

## THE ROLE OF COPYRIGHT

Copyright is well designed to facilitate this distribution channel. It begins with the simple premise that the creator has certain exclusive rights to his or her work. Without that initial exclusivity, there is no foundation for everything that follows.

Copyright protects the rights of authors of original<sup>1</sup> works of authorship and of those to whom authors have licensed or assigned those rights. National laws define the particular rights that are included, but those laws are subject to some international norms created by treaties. So, although there is no such thing as an “international copyright,” it is still possible to make some general statements about what rights and works are covered by copyright.

Copyright protection applies to both published and unpublished works. Although publishers would seem, at first glance, to be concerned only with the first category, the second is of great concern as well. Published works often include quotations from or, in the case of images for example, entire copies of other works. Even if those included works were not previously published, they can be protected by a copyright owned by a third party, so their reuse in another work can have copyright implications.

Copyrights can apply to creative works in various forms, formats and media. Books, articles, photographs and other images, audio-visual works and music, in analog, digital and any other format, can be protected by copyright. There are, however, types of works and aspects of copyrighted works that are *not* protected by copyright. Most importantly, copyright protects the particular *expression* of an idea but not the underlying idea itself. Facts and data are not protected by copyright, although the particular presentation of those facts and data (i.e., a journal article reporting on the results of a study) can and typically will be protected. But that presentation has to have some aspects of originality to it.<sup>2</sup>

Copyright has a specified duration, tied in most instances to the life of the author plus a period of years (70 in the United States and the United Kingdom; 50 in some other countries) or in some circumstances from the date of publication (95 years in both the U.S. and the U.K.). Works for which the term of copyright has expired are in the “public domain” and may be freely used by anyone.<sup>3</sup>

Copyrights are comprised of a set of exclusive rights that are then subject to certain exceptions and limitations. The exclusive rights include the right to control the copying and distribution of the copyrighted work; the right to authorize the creation of works derived or adapted from the original work (for example: creating a screenplay based on a novel, or a French translation of a work originally published in English); and the rights to publicly perform or display the work (which usually arise with respect to musical or artistic works). The individual rights covered by copyright are a “bundle of rights” that can be licensed separately. So, for example, the copyright owner may license a publisher to distribute copies of a work in print and digital form but may retain certain rights for herself (such as, for example, when a professor retains the right to post a copy of an article on her own website or in an institutional repository). An author may divide the granted rights geographically, permitting a book publisher to publish a novel only in the U.S. and licensing another publisher to publish the work in the U.K., and/or may permit the publisher to publish the text of the work, but retain the right to separately license adaptations or derivative works.<sup>4</sup>

Exceptions or limitations to these exclusive rights are specified in the applicable national law. These exceptions vary from country to

country but must fall within the international norms that are contained in the relevant multi-lateral treaties.<sup>5</sup>

## LICENSING AS A FRAMEWORK

With that background in mind, let's go back to our original example, and look at the chain from the other direction, starting with the license (or transfer) of rights from the creator to the publisher that initiates the process by which the work becomes available to the reader/user.

### **Author/Creator to Publisher**

The publisher or other distributor seeking to make the work available must first get the right to do so from the author/creator. For certain types of works, literary agents play an important role as the intermediary between the publisher and the author that the agent represents. Sometimes that is accomplished by an assignment of rights to the publisher; sometimes the publisher becomes the creator, for legal and contractual purposes, through operation of law (as in the case of a “work-for-hire” under U.S. law).<sup>6</sup> Other works (virtually all popular non-fiction and fiction, and most college and higher-level textbooks) are published pursuant to a “publishing agreement,” which is a particular species of licensing agreement. In exchange for payments, usually in the form of royalties and often of advances against those royalties, the creator grants to the publisher the exclusive rights to exercise some (often most) of the creator's rights under copyright. This is where the “bundle of rights” concept mentioned above becomes so important. The specifics of the license granted will be determined by a combination of industry practice and individual leverage in negotiation, but it is this underlying concept that gives the creator the right to, for example, limit the exclusive rights being granted by geography, or format, or language. The creator may retain certain exclusive rights, like the right to license derivative works or adaptations such as movie and stage versions. Although the license could, in theory, be limited in duration, that is a rare occurrence. As a general matter, publishing agreements are for the entire term of copyright, although a license grant may be terminated earlier under the terms of the agreement (for example, if the provisions of an “out of print” clause are triggered) or by operation of law (if the creator or his heirs become eligible to exercise certain termination rights provided for in U.S. copyright law).<sup>7</sup>

### **Publisher to Publisher (Subsidiary Rights)**

Licensing agreements were important to publishers even before digital distribution turned readers into users, especially as a tool for managing rights to works by licenses between publishers.

Publishing agreements for “trade books” (fiction and general interest non-fiction) and for college and higher-level textbooks typically make a distinction between “primary rights” and “subsidiary rights.” The “primary right” conveyed in the agreement is to publish the work in book form, in the territories and languages specified in the agreement. The grant of a right to publish in book form is not as simple as it might appear. The definition of what a “book” is has changed over the years, as digital and other forms of distribution have become common.<sup>8</sup>

“Subsidiary rights” are rights to the work that the original publisher typically exploits through a license to another publisher or distributor. Print rights that are considered subsidiary rights include foreign reprint rights, translation rights, periodical or serial

rights (through which excerpts or abridgments are licensed for publication either before the book is initially published, in which case they are called first serial rights, or after initial publication in which case they are called second serial rights), rights to do book club editions, anthology or collection rights, excerpt reuse rights, rights to do premium or special editions, etc.<sup>9</sup> Subsidiary rights are exploited through license agreements between the original publisher (or if the rights were retained by the author, the author or his agent), and another publisher or producer. In these types of license agreements, the original publisher or author is usually referred to as the “Proprietor” and the licensee as the “Publisher.” Rights to publish the work outside the country of origin are licensed by territory and by language and are typically explicitly limited to print rights only.<sup>10</sup> Reprint<sup>11</sup> and translation agreements<sup>12</sup> typically contain time limitations, so that the right to publish a translated version, for example, may last for a five- or ten-year period.<sup>13</sup>

The grant language in a college textbook publishing agreement will also include the primary and subsidiary rights discussed above, although the subsidiary rights are rarely retained by the author in those types of agreements. Particularly for college textbooks dealing with the hard sciences (i.e., physics, mathematics, chemistry and biology), licenses to exploit the work internationally through reprint and translation licenses are important.

### **Reuse Licenses and Licensing of Excerpts**

The terms of the licenses described above are determined by a combination of industry practice and individual negotiation, and that is also true of certain types of licenses for excerpts. For example, trade publishers have long handled requests from third parties to incorporate portions of a prior work in a new work of authorship on an individual basis. These types of permissions are usually handled by a permissions department that reports to the contracts, rights or legal department within the publisher (although the role can sometimes be “outsourced” to a third party) and are one way in which licensing can facilitate the creation of new copyrighted works. Whether those types of permissions are handled on an in-house basis or not, publishers will often maintain a high level of control over how permissions are granted for a variety of reasons. With respect to famous authors or controversial works, there may be a concern about how the author or the work is presented in or associated with the new work. Sometimes the original author, or the author’s estate, has a contractual right to approve such permissions, which can create additional complexity. But it is difficult to manage these types of licenses in a way that is both responsive to the needs of potential users and cost-efficient for the publisher. The licensing of excerpts is, for trade publishers at least, outside of the publishers’ core business and individual permissions requests are not always prioritized.

There are many other types of reuse licenses that are more appropriately managed through some form of centralized management, through a clearinghouse that can act as an agent for the underlying rights holder or through participation by the rightsholder in collective licensing. For example, among the most economically important rights for college textbooks are those that deal with the use of excerpts in supplemental course materials, in analog and digital formats. Requests for use of those materials in course packs are usually handled through the use of tools like those offered by Copyright Clearance Center’s “pay-per-use” system on its website, where the rightsholder sets in advance the terms upon which reproduction permission can be granted. This licensing of photocopying or digital permission for use in educational materials is particularly ill-suited to an individual, transactional permissions request process between user and publisher, where response time is often an issue, and the generally low per-transaction fees can easily be

exceeded by the costs of the transaction itself.

This robust market in the licensing of excerpts, in both print and digital formats, for use in teaching materials such as custom publishing arrangements and course packs, is an important revenue source for college publishers. These types of permissions are relevant to other kinds of publishing, but college publishers are particularly concerned with these activities since they are both a source of licensing revenue and may have a negative impact on sales if the custom materials replace purchased textbooks.

There is also a healthy market for the licensing of excerpts for use in business settings. Organizations benefit from — or rely on — the selective reuse of copyrighted content for corporate communications, sales, research and development, training, and other functions. The uses are sometimes significant — such as when a pharmaceutical company licenses use of a figure from a peer-reviewed journal to promote the efficacy of its drug in a presentation to doctors — and other times more mundane — such as when an executive posts a newspaper article on an intranet to track market developments. In many cases, licensing is required; in others, companies will take a license for the avoidance of doubt.

There are parallels between direct business reuse and reuse for educational and *creative* purposes (such as in a new work of authorship). For example, a publisher may want to review, or at least closely track, licenses related to “promotional use,” as in the instance of a pharmaceutical company using an article excerpt to promote its drug. When the author, publication or publisher brand name is prestigious, and/or the reuse is especially public, publisher review provides an important level of discretion in licensing. Additionally, and similarly to textbook publishers in the case of course pack reuse, publishers whose content is reused for commercial purposes may have a business interest in preventing possible cannibalization of revenue. Judgment dictates whether one type of use replaces another, and whether the substitution is damaging to the publisher’s bottom line.

In many cases, however, reuse of copyrighted material in the business context is incidental, and exposure of the content is limited to employees or others working on behalf of the organizations. A newspaper article posted to an intranet for market research is one example; others include archival copying for regulatory or compliance, use of content within internal company training, and everyday sharing of content among employees in adjacent areas of the business. The risk to the publisher of such reuse is low, as are the fees that could be reasonably charged for each instance. In addition, and importantly, companies are loathe to disclose the specifics of their internal operations, and many employees fail to recognize the need for licensing from the outset. The combination of low risk, low value, and reluctance or a lack of awareness around these transactions and their reporting makes them ideal candidates for disposition via collective licensing. Copyright Clearance Center’s voluntary Annual Copyright License (ACL) allows companies around the world to easily secure licenses for such incidental, most often internal, reuse, and it enables participating publishers to capture royalties that otherwise would almost certainly be lost.

Corporate and academic licensing for the reproduction and reuse of materials within an entity like a business or a university is difficult if not impossible to manage on a case-by-case, request-by-request basis. If permissions for those types of uses are not easy to obtain, users will in large numbers simply proceed without permission, revenue will be lost and respect for copyright eroded. Licenses of all of these types are particularly well-suited to collective management of the type offered by Copyright Clearance Center through

its repertory licensing program, the Annual Copyright License, and by reproduction rights organizations in other countries.<sup>14</sup>

### **Licenses Directly to Consumers**

The licensing chain described above has the ultimate goal of bringing the work into the “hands” (literally or metaphorically) of the ultimate user. And with the exception of those exploitations made by the direct exercise of rights by the publisher — like the printing and sale of physical books — distribution of the work will occur through licensing. That is how our original reader/user, with the exception of the traditionalist purchasing or borrowing a physical copy of a book or journal, will get access to the work. The work may be delivered through permitted access to an individual copy of an e-book, through access to a subscription either as an individual user, or as a member of a category (like students or faculty members at a university, or employees of a corporation). Typically, those types of licenses come with associated fees (which may not be obvious to the individual who is benefitting from a corporate or university-wide license). But even if the price is “free” it doesn’t mean that the work is necessarily “license-free.” There is a great deal of content accessible on online (text and images) without having to pay a fee, but which is nevertheless made available subject to licenses (Creative Commons licenses, for example<sup>15</sup>) that include terms like attribution requirements and limitations or conditions on further distribution. Scholarly works published pursuant to an “open access” model are still published and made available pursuant to licensing agreements, but the agreement between the publisher and the author provides that the public will get access to the work without payment since, as a general rule, the costs of publication are assumed by the author or her institution.

## **BARRIERS TO EFFICIENT LICENSING: EXAMPLES**

The benefits of using licenses to manage the acquisition and distribution of content are obvious, but there are a number of complexities that can impede the smooth functioning of the system.

### **Rightsholder Identification (issue for users)**

The simplest version of the rights chain described above — in which the author/creator licenses a well-defined subset of rights to an easily identifiable publisher, and the publisher manages those rights through further licensing — is to some degree aspirational rather than realistic. Although that circumstance does often exist, it is also not uncommon for a potential user to find it difficult or even impossible to identify the entity that controls the rights it wants to license. Consolidation in the publishing industry means that the original publisher may no longer exist, and its “list” may have changed hands many times. Rights reversions can complicate the situation as well. Even if it is clear that rights to a particular work have reverted to the author, that author may be difficult to locate, or the rights may have passed to heirs or subsequent publishers under new agreements. “Orphan works” — works for which the owner cannot be located despite diligent efforts to do so — are a significant problem.<sup>16</sup> Difficulties in locating rightsholders have been partially addressed, but not eliminated, by the widespread availability of online search capabilities.

### **Rightsholder Communication (issue for users)**

Even if the appropriate rightsholder can be located, a quick response from an individual or even a corporate entity is by no means guaranteed. Individuals may not have the knowledge or tools to deal with rights inquiries or may need time to refer the inquiry to



a third party (like a literary agent) who is managing the rights. As noted above, permissions fees are not a critical revenue stream for certain types of publishers (particularly trade publishers) and have historically not been accorded priority by those types of publishers. The resultant delays, particularly in the larger context of the expectations created by the wide availability of digital tools that provide immediate responses, can function as an invitation, and an excuse, for proceeding without permission.

### **Volume of Small-value Transactions (issue for publishers)**

As discussed above, given the relatively low per-transaction fees associated with many types of permissions, it can easily cost more for a publisher to grant a particular permission than it receives in compensation. These issues are compounded when the publisher has to deal with a large volume of permissions requests. Increasingly, publishers have looked to forms of collective management, administered by third parties such as Copyright Clearance Center, to build the tools to handle the volume of requests efficiently and responsively. The availability of those tools is critical — if users cannot get permission to use copyrighted materials easily, immediately and relatively inexpensively, the incentives to ignore copyright and proceed without permission are greatly increased.

### **Fair Use (including litigation).**

“Fair use” is the general exception set out in U.S. law that permits the non-permissioned use of copyrighted materials for certain purposes.<sup>17</sup> It functions as a “safety valve” in copyright and its availability is important in that it provides a means of harmonizing the “monopoly” aspects inherent in the exclusive rights under copyright with First Amendment/free speech considerations. The U.S. doctrine of “fair use” has the advantage of flexibility — since it describes the process by which a determination is to be made rather than specifically describing a particular activity, it can be applied to changing circumstances and in situations involving new technologies.<sup>18</sup> However, that advantage can also create complexity in a licensing context. Outcomes under a “fair use” analysis are not always clear. Users that are risk-adverse and concerned about infringement may err on the side of caution and seek licenses in circumstances that would be likely to fall within fair use. But more commonly, users are inclined to take a broader view of fair use than is justified by the statute and case law. Those users are sometimes disappointed when a court disagrees with their understanding of its application. But given the difficulty inherent in the enforcement of copyright and in seeking redress for infringement, some prefer to risk relying on an aggressive interpretation of the law, particularly if procuring a license is a complex, expensive or time-consuming process.

## **CONCLUSION**

Historically, written works reached their readers through the sale of physical copies. Licenses were, for that reason, primarily a tool that authors and publishers used to define their relationships with each other. Copyright law, not license terms, defined the rights and privileges of most readers. Digital distribution has dramatically changed that paradigm. Licenses now increasingly define the relationships between authors and publishers on the one hand and their customers on the other. “Readers” have become “users” and licensing has assumed critical importance to the publishing industry specifically and to the dissemination of content generally. The acquisition of rights to works, and the terms of their distribution, by *publishers*, is continuing, as a general matter, to be managed by individually negotiated contracts. The means by which *users* get access to those works, particularly when access is to portions or excerpts, is increasingly being accomplished through the use of collective or non-negotiated licensing tools.

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- <sup>1</sup> “Originality” in a copyright context does not mean “novel” or “unique.” A work is sufficiently “original” to be eligible for copyright protection if it includes some level of creative expression, which can be very small, that originates with the author.
- <sup>2</sup> The classic example of an entirely factual work that isn’t eligible for copyright protection is a “white pages” telephone list, where the work is entirely comprised of “facts” (names and associated addresses and phone numbers) and there has been no originality or creativity associated with the selection, organization or arrangement of those facts.
- <sup>3</sup> Works may also be in the public domain for reasons other than their date of creation or publication. Some works were created under circumstances that prevented copyright from being claimed (as is the case in the U.S. for works created by the federal government) or have lost their copyright protection (as is the case for some works published in the U.S. before January 1, 1978, when the U.S. copyright law was changed to eliminate certain formalities that had been a prerequisite to copyright protection). It is also possible for a work to be dedicated to the public domain, or for rights under copyright to be waived by contract.
- <sup>4</sup> Some jurisdictions (including Germany and France) limit by law the extent to which an author can transfer certain exclusive rights to a publisher or other distributor.
- <sup>5</sup> The most important of those treaties is the Berne Convention, which is administered by the World Intellectual Property Organization (WIPO). Berne is the oldest (it dates from 1886, although it has been amended many times since) and most widely accepted international treaty dealing with copyright and currently has more than 160 signatories. The “three-step test” against which exceptions to the exclusive rights of copyright owners must be measured is found in the Berne Convention and has been incorporated into other important treaties and trade agreements. The text of the Berne Convention can be found at the WIPO web site, at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html) . The “three-step” test is in Article 9(2).
- <sup>6</sup> A “work made for hire” is an exception to the general rule that the individual creator of a work is the owner of the copyright. Under the circumstances set out in the definition of the term in Section 101 of the Copyright Act, the party commissioning a work can be its owner if (i) the work is prepared by a full-time employee acting within the scope of his or her employment, or (ii) if the work is being specially commissioned, falls into one of 9 specified categories, and is covered by a written agreement signed by both parties identifying it as such.
- <sup>7</sup> Sections 203 and 304 of the Copyright Act give the copyright owner and certain specified successors the right to terminate license grants during a 5-year window commencing, in the case of works copyrighted after January 1, 1978, 35 years after the grant was made and in the case of works copyrighted before that date, 56 years after the date copyright was secured. The provisions related to termination are very complicated and require strict adherence to the time frames, notice requirements and other provisions set out in the Copyright Act.
- <sup>8</sup> Newer contracts will include an explicit limitation to print form if that is the intention of the parties. The rights to produce the book in other formats, such as audio or e-book formats, are often included in this primary grant. But even a grant that is explicitly limited to print format will typically specify the type of print publication covered. The grant may be for hardcover only, or for hardcover and softcover trade editions (which are generally the same size and quality as hardcover books but bound differently). Mass market print or reprint rights (books that are smaller in size, usually of lower quality and sold in different channels at lower prices), may be included as part of the primary grant but are more typically treated as a “subsidiary right.”
- <sup>9</sup> In the US, an established, successful trade author, represented by a literary agent, will often retain the rights to first serialization and foreign reprints and translations of his work. If the author is retaining foreign reprint and translation rights, the license grant will be limited as to language and territory as well.
- <sup>10</sup> Given the ease with which content in digital forms can cross national borders through online distribution, it is important that only one publisher has the right to do electronic versions of a work in each language.



- <sup>11</sup> For English language works in particular, there is an important international market for reprint rights, which are licenses that permit the local publisher to distribute the work in a specified territory in English. Licenses between English language publishers in the U.K. and the U.S. are common and, in an exception to the usual rule, such agreements are often for the term of copyright rather than a specified term of years.
- <sup>12</sup> Often the publisher of the translated version will own the copyright in that version, so at the end of the term the original publisher has to either renew the agreement or enter into a new agreement with a different local publisher. The new local publisher will then either do an entirely new translation (to avoid infringing the rights of the first translator) or license the rights to the existing translation.
- <sup>13</sup> Other types of subsidiary rights are for nonprint, adapted versions of a work. Among these may be electronic rights (which are increasingly considered to be primary rights), audio rights (which again, may also be granted as primary rights), dramatic rights, motion picture rights, television and radio rights and merchandising (also called commercialization) rights. Primarily adaptive rights (such as dramatic and merchandising rights) are, at least in the case of a well-established author, most likely to be retained by the author.
- <sup>14</sup> The laws of some countries create exemptions to copyright that nevertheless require compensation to the copyright owner. To facilitate payments for these and other types of uses, many countries have created forms of collective or compulsory licensing, under which the copiers pay a small fee (sometimes in the form of a per page levy, sometimes as a levy on the machines used to make reproductions). The funds are collected and distributed by collecting societies known as “reproduction rights organizations” or “RROs.” In the U.S., there are no mandatory exemptions for such activities, although large numbers of copies are made in reliance on the “fair use” exception (discussed below) or under individual permissions agreements or blanket licenses. Copyright Clearance Center (CCC) is the U.S. RRO. It administers licensing systems by registering publishers and lists of works, then granting licenses to users who choose to seek them. Participation in the CCC system of collecting and disbursing photocopy royalties is entirely voluntary for both publishers and users.
- <sup>15</sup> Creative Commons licenses can be used for analog works, but their primary use is in connection with works published online. The creator can choose the type of license she wishes to associate with her work (with varying degrees of retained control by the creator or obligation on the part of the user) and take advantage of a tool available at the Creative Commons web site to embed code with the digital copy of the work that includes a link to, and information about, the terms of the license. The use of a Creative Commons license is not a dedication to the public domain, although Creative Commons offers a separate tool (“CC0”) to accomplish that for those creators that intend to abandon all rights under copyright. There is more information at the Creative Commons web site (<https://creativecommons.org/>).
- <sup>16</sup> Attempts to create a legislative solution for this problem in the U.S. have so far been unsuccessful. Further information about this effort can be found at the Copyright Office site (<https://www.copyright.gov/orphan/>).
- <sup>17</sup> The U.S. “fair use” doctrine was first developed by the courts but is now set out in Section 107 of the U.S. Copyright Act (17 U.S.C. §107). It states that a particular use will be deemed “fair” (and therefore non-infringing) if it is made “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” The consideration of whether a particular use is “fair” must include four factors: “(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.”
- <sup>18</sup> The U.K.’s “fair dealing” exception, although very similar to the U.S. exception (including in its common-law heritage) has dealt primarily with the use of quotations for criticism and news. The laws of other members of the E.U. do not have the same general “fair use” or “fair dealing” exceptions, but instead include more detailed and specific exceptions for particular uses and users.



# Evolution of Copyright Law from Guild and Printing Monopolies to Human and Natural Rights | by Mark Seeley

The original impetus in 16th century England for crafting a copyright law was the question of State control over printing privileges rather than ecclesiastic control, which Parliament believed had become more urgent after the widespread distribution of convenient (and relatively inexpensive) printing techniques. The Crown began to exert this control by granting monopoly powers to a guild of publishers in 1557. Authors, composers and other creators at this time were not automatically deemed to be the owners of their

works — rather, the monopoly grantees held these rights or, in some cases, artistic patrons exercised such rights. However, the next evolution in copyright — the insistent question of the inherent rights of individual authors and composers in their own works — animated the debates that led to the eventual enactment of the Statute of Anne 150 years later.<sup>1</sup>

The U.K. Statute of Anne must be seen in the context of a larger philosophical movement in Europe concerning the rights of the individual against the powers of the state. Mark Rose makes this point in his 1993 book, “Authors and Owners”<sup>2</sup> in mentioning Daniel Defoe’s struggle with the stationers’ license statute and censorship, and quoting Defoe’s 1704 “Essay on the Regulation of the Press” when authors, at the time, had no copyright in their works but were liable for defamation claims:

*For if an Author has not the right of a Book, after he has made it, and the benefit be not his own, and the Law will not protect him in that Benefit, 'twould be very hard the Law should pretend to punish him for it.*

After considerable legislative debate around this question of authorship as a personal property right, the Statute of Anne was enacted in 1710. In contrast, while resolution of the issue took longer, the debate on the Continent was more straightforward. Concepts around the personal nature of the property rights of authors and creators were widely discussed in France in the 18th century, and the French Revolution in 1793 expressly abolished most of the rights of guilds and monopolies and empowered the individual in his or her rights. This debate in France was exemplified by the playwright Isaac le Chapelier’s statement in 1791 that a writer’s creation is “*the most sacred, legitimate, unquestionable and most personal of all properties.*”<sup>3</sup> The French author’s right tradition was eventually followed in the 19th century in Germany and other European countries.

In his 2014 book “The Copyright Wars,” Peter Baldwin attempts to distinguish the Anglo-American copyright tradition from the continental European author’s right tradition by pointing out that *copyright* has a more commercial transactional quality (including the significance of readers or the lack of same) while the *author’s right* approach focuses more exclusively on the creative dimension, including what are termed “moral rights” — in particular, protecting the integrity of the work, and ensuring proper attribution. While it is important to recognize the differences in the two legal traditions, they each provide authors and other creators with the essential rights to distribute, translate and alter their works, as well as the right to authorize others to do so on the creator’s behalf.

Paul Goldstein and Bernt Hugenholtz in their 2013 “International Copyright” textbook, while noting the differences in the two principal copyright traditions, emphasized the overall commonality of approach:

*...while an indisputably utilitarian thread runs through much of the intellectual history of English and American copyright, so too does a vibrant motif that the author has a natural right to profit from [her] creativity and labor...[and at the same time] utilitarianism has crept into the author’s right laws of the civil law tradition.... [These two evolutions suggest that] traditional differences will move further into the background as [the] systems gradually converge under the combined influences of international harmonization and a growing international information economy.<sup>4</sup>*

The U.S. follows in the U.K. copyright tradition, but America’s founders were no doubt aware of the philosophical discussions about author and property rights in 18th century France, and this general awareness of the two approaches was likely a factor leading to

the form of protection of authors in the U.S. Constitution and the first U.S. Copyright Act (developed nearly simultaneously, in 1788 and 1790 respectively). It is a testament to the broad understanding in the new Republic of the importance of new knowledge that “Authors and Inventors [were given] the exclusive Right to their respective Writings and Discoveries.”<sup>5</sup> This incentivizing aspect has been a core concept of copyright law since the 18th century, initially in the U.K. and then the U.S. and only incidentally and later on the Continent.

The U.K./U.S. copyright tradition is different from the European tradition in the former’s grant of flexibility to the author should she choose to alienate some or all of her property rights under copyright laws, as contrasted with the inalienability of certain rights under the latter’s author’s right laws. Under this framework, it is understood that copyright interests can be divided and subdivided almost infinitely, with grants that can be limited in time and/or geography, and that the “bundle of rights” (distribution, translation, etc.) can be divided up and licensed separately and individually (particularly if done on a non-exclusive basis).

Rights, however, are but empty promises unless they can be exercised (and are in fact exercised, at least occasionally). One rationale given for the early printer monopolies was that printers were believed to be better at ensuring that copyrighted works would be distributed and sold than authors might be. Commercial interests — and commercial skills — were deemed critical in developing audiences and readers, in growing public literacy, and in negotiating with other commercial participants in other regions and geographies. An important alternative to this reliance on printers (and their counterparts in music, art and theater), however, began to develop in the 19th century with the creation of collectives of creators and rights. These collectives represented both an important method for bolstering individual creators’ rights and a further evolution in copyright law.

## COLLECTIVE APPROACHES FOR THE DEVELOPMENT OF CREATOR RIGHTS

The individual rights of authors, composers and other creators continue to be a critical feature of the copyright laws in all countries but, as Dr. Mihály Ficsor noted in his 2002 publication on collective management,<sup>6</sup> there have almost always been instances (particularly with respect to performance rights):

*where individual exercise of...rights did not seem possible, at least not in a reasonable and effective manner; and [more recently], with the ever newer waves of new technologies, the areas in which individual exercise of rights has become impossible, or at least impractical, is constantly widening.*

In the 20th century, text publishers and film and music companies became in themselves collective managers of rights catalogues, particularly as companies merged and sectors consolidated. At the same time, collective organizations emerged and gained strength, including in the U.S. where *voluntary collective licensing* remains the norm (as compared to the statutory systems in Europe). Solutions for music rights clearances across multiple companies for public performances of musical works are obtained in the U.S. through BMI and ASCAP (and for digital transmissions of sound recordings through Sound Exchange). Collective rights licenses and negotiations have maintained their importance in the 21st century, particularly in the context of “big data” and the interest of technology companies and researchers in accessing and using data from multiple, almost universal sources. Further, as Goldstein and Hugenholtz put it, “the explosion of individualized uses of copyrighted works, whether through uploading, downloading, or

streaming, has vastly increased the number of uses to be managed...”<sup>7</sup>

Collective rights management societies (sometimes referred to as “collecting societies”) such as SACD in France (founded in 1777) came into being at nearly the same time as the fiery debate over the natural rights of authors, and are part of a long struggle by authors, composers and other creators for the recognition of the value of their works and their rights in them. Victor Hugo, who is famously associated with the development of the Berne Convention (aimed at protecting content internationally), also helped to found the SGDL in France for authors (1837) and later the International Literary & Artistic Association (known by its French acronym as ALAI), and similarly the French composer Ernest Bourget was instrumental in forming SACEM for music (1851).<sup>8</sup> The Berne Convention was first proposed to the Swiss government in 1883 by the ALAI, and Switzerland acted as a host for several conferences on the topic; the Convention was formally ratified by its ten initial (mostly Western European) signatories in 1887 (although the United States did not ratify the Convention until 1989, more than 100 years later). The Treaty itself does not mention collective licensing or rights but indicates that authors and composers may authorize the use of their works in various ways, including (presumably) through collective rights management.

As noted, the number of collective management organizations (CMOs), including music performing rights societies, has increased dramatically since the late 19th century. Reviewing the World Intellectual Property Association’s (WIPO) list of core international organizations with CMO members (CISAC, IFRRO, SCAPR<sup>9</sup>), the number of CMOs appears to be nearly 400 organizations (though there may be some duplication here as some music CMOs are members of multiple international organizations). Copyright Clearance Center is itself a member of IFRRO; IFRRO’s members (over 100 full members and over 50 associate) include both the CMOs (called Reprographic Rights Organizations or RROs in text publishing) and other organizations which represent authors, publishers and other producers of text-based content such as books and journals.

The calculation of the revenues for rightsholders generated through CMO licensing can be difficult to determine, as some CMOs are more transparent than others, and due to the mixing at times of collective and individual licensing revenues (and in some cases, some duplicate reporting). It is apparent however, looking at data from CISAC and IFPI (and focusing only on performance rights in broadcasting revenues in the IFPI reporting) and from individual RROs, that music and text CMOs generated well over \$14B in royalties for rightsholders in 2018, the vast majority of that in music. For authors and publisher rightsholders, the major RROs generated well over \$1B in royalties in 2018, which compares favorably to the \$50B figure for global publishing revenues in 2018 (IPA/WIPO report<sup>10</sup>), meaning that this “secondary” source of revenue for text publishing amounts to the entire publishing markets for mid-sized countries such as Brazil, Turkey or Belgium. Considering that most RRO licensed uses involve published science and educational content, and given that general trade publishing represents more than 50% of revenue in most countries, the impact for these more specialized publishers is likely even more significant.

In his foundational work described above, Ficsor identifies the fundamental functions of CMOs as follows: monitoring the use of copyrighted works; negotiating with prospective users; providing licenses in exchange for appropriate remuneration (often on the basis of a published tariff system); the collecting of such remuneration; and distributing of the moneys among the owners of rights.<sup>11</sup> More recently, Tarja Koskinen-Olsson (former head of the Finnish RRO and currently a member of the CCC Board of Directors)

and her co-author Nicholas Lowe prepared a 2012 report on collective management as part of a WIPO educational program<sup>12</sup> which covered similar issues as did Ficsor's report, but helpfully simplified the description of CMO relationships as firstly an upstream relationship between the individual rightsholder and the CMO, and secondly a downstream relationship between CMO and users. The Koskinen-Olsson report emphasized the importance of CMOs for users, noting that "treating users in a non-discriminatory manner is one of the cornerstones of collective management," along with the importance for users of navigating large volumes of permissions.

National laws in many countries, particularly European civil-law jurisdictions, have specific provisions for CMOs and expressly grant them rights with respect to copyrighted works (such that authors and creators are essentially opted in to collective licenses). These are commonly referred to as "statutory licenses." Tariffs and levies — essentially taxes on copiers, printers, scanners, storage devices and in some instances even paper — are often used in these countries to develop a reliable base for remuneration. WIPO and IFRRO conducted a survey in 2016 of text and image levies<sup>13</sup> and reported that there were nearly 30 countries with levy systems (although half were, at the time of the survey, still in the process of implementation). European countries were heavily represented among the 30, but countries in Africa and South America are also active in this area. That same survey noted that some €359m were generated for rightsholders in 2015 through such systems, although it noted that, due to the resolution of disputes over past royalties due and other one-time issues, this might be an unrepresentatively higher number than average. Levies are not the only mechanism for remuneration under statutory licenses even in these civil law countries, however, and fee-paying licenses are also often negotiated directly.

In addition to governance standards set out in national laws establishing civil law statutory license systems, CMOs themselves and the international organizations of CMOs (for example, CISAC) often have their own governance standards. The European Union's CMO Directive of 2014<sup>14</sup> also provides governance standards, with emphases on representation of rightsholders, responsible distribution of remuneration, regular reporting and transparency. The potential for multi-territorial licensing that was encouraged under this Directive was also reinforced in the Directive on Copyright in the Digital Single Market of 2019.<sup>15</sup>

Many CMOs are formed by creators and their producers and publishers on a voluntary basis, particularly in countries where there are no statutory rights granted to CMOs; the predominant responsibility of CMOs in such countries is the negotiation of fee-bearing licenses with users and the equitable distribution of the resulting royalties among the participating rightsholders. Copyright Clearance Center is an example of such, identified by Ficsor as being involved in "agency-type rights clearance."<sup>16</sup> However, even in countries such as the United Kingdom or the United States where "agency licensing" is the predominant model, some compulsory licenses have been put into place, particularly in connection with music.<sup>17</sup>

ASCAP and BMI are other U.S. examples of agency organizations. They were formed in 1914 and 1939, respectively, to represent rightsholders of musical compositions and provide licenses (principally blanket or flat fee licenses) for public performances from vaudeville through concert halls to radio and television broadcasting,<sup>18</sup> and have been joined more recently by the relatively smaller SESAC, as well as Sound Exchange in relation to digitally transmitted performances of sound recordings. ASCAP and BMI operate under consent decrees (1941 and 1950, respectively) that resolved lawsuits brought on antitrust grounds. Those consent decrees



have been amended periodically as the market has evolved, and today they address, among other things, the limitation upon ASCAP and BMI to obtain solely non-exclusive licenses from their participating creators (thus preserving individual licensing even within a collective licensing context). As of late 2020, there is continued discussion of whether the consent decrees are out-of-date in the highly competitive environment dominated by the Internet. In the meantime, they create a governance structure concerning matters such as reasonableness in fee structures, somewhat similar to the CMO Directive in Europe.

As noted above, collective licensing is particularly appropriate for high-volume, repeated instances of copying or re-distribution, where the transaction costs associated with licensing rights on a direct, individual, producer-to-user model would be prohibitive. Even in countries where there are extensive statutory collective licenses, it is accepted that for high-value works and for unusual or complicated use-cases, transactional individual licensing is the appropriate legal model. For example, online digital rights are still viewed in most countries as requiring a greater degree of individual licensing or opting-in to collective licensing schemes, as it is understood that the potential for financial harm given the ease of digital copying and further unauthorized online distribution is very significant.

## **TRANSACTIONAL LICENSING FOR NEW TECHNOLOGIES: NEW MARKETS AND NEW USES**

New technologies have always presented challenges for copyright law, in some cases raising questions about copyright applicability to works in new media, and in other cases raising questions about the degree to which the reproduction capability of new technologies can substitute for existing copyrighted-works markets or forestall the development of new “on demand” markets. Printing, photography and eventually photocopying were all examples of new technologies that over time presented new challenges for copyright law.

We tend to think that printing itself is “old technology” in light of its invention in the 15th century, but the reality is that printing methodologies and technologies have also increased dramatically over the past century, substantially increasing the speed of production, lowering costs, and helping to create global (or many linked regional) markets for books and periodicals. At the same time, cheaper and faster printing capabilities have also enabled quicker and more pervasive counterfeiting.

Photography as it developed in the 19th century was not always seen as a creative endeavor meriting copyright protection — the view of some was that a photograph merely copies what already existed in nature. It was protected first under “neighboring rights” laws in Europe but gradually became more accepted by the mid-20th century as a form of creative work that merits copyright protection.

News and newspapers were critically important in a developing country such as the U.S. in the 19th century — informing and influencing citizens and voters and providing important market and shipping information — but news articles were not considered copyrightable subject matter until the 1909 Copyright Act (concerns existed then and now concerning news and the idea/expression dichotomy). Will Slauter’s 2019 book, “Who Owns the News,”<sup>19</sup> discusses the alternate market for copyright-like protection of news that developed in the 19th century through syndication and the bartering of services; he also reports that, even after the 1909 Act, other legal doctrines such as the “hot news” doctrine<sup>20</sup> were used to provide some time-limited protection for newspaper content.



Technologies that facilitate the reproduction of copyrighted works have existed for some time — music has dealt with such issues in connection with technology ranging from music rolls for pianos to tape and digital recordings. The mass-market photocopy machine as developed in the 1950's raised a huge number of issues for text publishers and was an important impetus toward the U.S. copyright revision efforts in the 1960's, which would eventually result in the 1976 Copyright Act.

Professor and Judge Benjamin Kaplan (1911-2010)<sup>21</sup> in his influential 1967 work “An Unhurried View of Copyright”<sup>22</sup> addressed the question of photocopying in the context of the copyright revision debate of the time. Among other things, he noted that some copying might well be considered fair use, that other copying would no doubt have significant commercial impact on existing markets, that the photocopying market itself was a new market, and that there might be questions about photocopying in connection with out of print works and scholarly research needs. Kaplan noted that “machine copying of texts is getting progressively easier and cheaper, and it can be done privately, without attracting much attention to itself,” and he raised concerns about:

*...subject[ing users] to civil and even criminal liability for acts now as habitual to them as a shave in the morning, especially as publishers are still far from devising any simple methods by which this public could calculate and make the payments that might clearly legitimate those habits.... We do hear talk of creating some ASCAP-like system, but at present this is only talk.*<sup>23</sup>

That ASCAP-like system discussion was of course the early discussion about the creation of a new U.S. CMO for text content, dealing with precisely these mundane but critically important questions of routine copying — made even more significant in the later era of scanners and PDFs — where it may be the case that the people engaged in the copying are not “professional counterfeiters” but members of the general public.

This question of the scope of protection and the balancing of fair use factors in photocopying was featured in the seminal case on the copyright issues raised by the copying of scientific and medical journal articles, *Williams & Wilkins v. United States*.<sup>24</sup> The publisher in this case brought suit under the 1909 Copyright Act (pre-1976 Act adoption) against the National Institutes of Health and the National Library of Medicine for their practice of photocopying and mailing out copies of medical journal articles on request (with burden-based, and not copyright-based, limits on the number of pages and articles provided in any given instance). The fair use elements that we are familiar with today from the 1976 Act (Section 107) were merely common law elements at this time, and the Court of Claims (sitting as an appeals court) found the copying to be a fair use, and thus not infringement, as there was no adequate showing of harm (what we would think of today as the fourth 107 factor), and since medical research might be “injured” if the activity was held to be infringement (loosely, the first 107 factor). The Court of Claims also noted that the differing interests of publishers and science warranted “legislative solution or guidance, which has not yet been given . . .” and did not want to risk the purported harm to science of stopping or limiting this routine photocopying in the absence of such guidance. In the sidebar note below I comment further about the balancing of fair use factors involving research and education against the commercial viability of specialized science and medical publishers.

The preeminent Nimmer copyright treatise<sup>25</sup> was highly critical of the Court of Claims result in *Williams & Wilkins*, arguing that the “harm to publishers” analysis confused damages and liability, and noting that actual damages are often difficult to prove, which is why statutory damages are available as an alternative. Nimmer then notes that the discussion about the harm to science is peculiarly

general, not limited to the specific practices in question. Finally, Nimmer noted that *Williams & Wilkins* is at its core only an intermediate appellate court decision because the Supreme Court upheld the decision only because it was equally divided as Justice Blackmun did not participate, and that other circuits might well reach different conclusions, perhaps involving more careful analysis of copyright law — as in fact happened twenty years later (under the “new” 1976 Copyright Act) in *American Geophysical Union v. Texaco Inc.*<sup>26</sup>

## CONTU, PHOTOCOPYING AND THE 1976 U.S. COPYRIGHT ACT

In conjunction with the work undertaken legislatively and in the U.S. Copyright Office in the 1960’s and early 1970’s on major U.S. copyright law revision, Congress created the National Commission on New Technological Uses of Copyrighted Works (CONTU) in 1975 to address questions about computer programs, works created through the use of computers, and photocopying. The Commission was chaired by Stanley Fuld, former Chief Judge of the State of New York, with copyright law professor Melville Nimmer as vice-chair, and included ten well-respected publishers, librarians, writers and legal professors. The final CONTU report was issued in 1978,<sup>27</sup> although there were several follow-up reports on library photocopying from the Register of Copyrights that produced no changes to either law or practice.

The CONTU Report quoted from earlier legislative deliberations on the difficulty of the issues around library photocopying, fair use, and permitted uses, noting a 1961 House Committee report’s general statement that “photocopying should not be permitted where it would compete with the publisher’s market.... Thus, when a researcher wants the whole of a publication, and a publisher’s copy is available, [she] should be expected to procure such a copy,”<sup>28</sup> although exceptions were contemplated for small excerpts of a work or when a work is out of print. The proposed solution for multiple and commercial photocopying was much simpler — “an industrial concern should be expected to buy the number of copies it needs from the publisher, or to get the publisher’s consent to its making of photocopies.” It was noted in the Register’s Report of 1961 on copyright law revision that there was discussion of the:

*...possibility of a contractual arrangement whereby industrial concerns would be given blanket permission to make photocopies for which they would pay royalties to the publisher.*<sup>29</sup>

In 1965, a supplementary report was prepared which outlined the concerns on the part of authors and publishers about overly generalized references to “teaching, scholarship or research” in the proposed Section 107, as such references might lead to the conclusion that all uses connected with such activities would be deemed “fair”. Educational organizations advocated for a clearer description of circumstances where copying would be lawful. The 1965 report also noted that:

*It was suggested that a clearinghouse for educational materials, through which it would be possible to avoid problems of clearances, is a practical possibility for the near future.*<sup>30</sup>

These discussions about blanket licenses for industry and a clearinghouse for educational institutions are likely the basis for Benjamin Kaplan’s comment concerning a possible ASCAP-like system.

Section 108 of the 1976 Copyright Act deals with reproduction by libraries and archives, and it began to take shape in the 91st

Congress (beginning in 1969) through the 94th Congress (1975). The CONTU Final Report highlighted the Senate Judiciary Committee discussion in 1975 on the continued legal uncertainty in library photocopying, describing *Williams & Wilkins* as a “holding operation” pending Congressional action.<sup>31</sup>

CONTU might be best known for two sets of guidelines, one dealing with in-classroom teaching and the other dealing with the interpretation of the proviso in Section 108 about limited copying that would not amount to a substitution for subscription or purchase. The Classroom Guidelines were agreed to in 1976 by the Authors League, the Association of American Publishers and an ad hoc group of educational institutions, and emphasized that instructors could make multiple copies of short excerpts of published content for student use (short poem or excerpt from longer poem; article, story or essay if less than 2,500 words or an excerpt if the published piece was longer; single illustrations) if the teacher making the copy was doing so spontaneously and so close in time to the class that it would be unreasonable to wait for permission. The Classroom Guidelines also contained conditions concerning potential cumulative effect, and provisions about copying not being used to substitute for anthologies or collective works, or to diminish the purchase of books or reprints, and about the same material not being repeatedly copied by the teacher from term to term. The interlibrary loan guidelines (known as the “rule of 5”) require permissions or licenses:

*...with respect to any given periodical...filled requests of a library or archive within any calendar year for a total of six or more copies of an article or articles published in such periodical within five years prior to the date of the request...*<sup>32</sup>

The clear view in the late 1970’s from the courts, from copyright law experts, from various stakeholders, and from the U.S. Congress and Copyright Office was that photocopying of text content remained a contentious and complex issue, even with sector agreements and guidelines on certain photocopying circumstances. The stakeholders believed that a CMO that would enable efficient licensing at a modest per-transaction rate would give greater certainty for users, authors and publishers, and would guarantee remuneration for creative works. The stage was set for the creation in 1977-78 of Copyright Clearance Center.

## THE FORMATION OF COPYRIGHT CLEARANCE CENTER

Copyright Clearance Center (CCC) was formed in 1977 as a not-for-profit corporation by a group of authors and publishers, together with several user stakeholders — unusual for a CMO. From the time it opened its doors in 1978 (on the effective date of the Copyright Act of 1976), CCC has consistently collaborated with users as well as rightsholders to ensure that its license and related offerings meet both sides’ needs and expectations. CCC’s core mission statement is about accelerating knowledge and innovation through advanced copyright solutions, and CCC has over the years expanded the licenses it offers from the simple pay-per-use transactional services (the Transactional Reporting Service or TRS) it offered in 1978 (available today on its website and Marketplace service) through annual repertory licenses for different groups of users and geographies (beginning in 1984) to a whole series of discovery software and rights management services (starting in 2001). Licenses can be obtained for individuals, for educational institutions, for companies, and for many other organizations, and those licenses today cover an enormous variety of content, including books, magazines, newspapers, blogs and other text-based materials, although scholarly published content has always been core to CCC’s mission.

The formation, activities and governance of CCC are consistent with the aspirations noted by Ficsor and Koskinen-Olsson for CMOs (and their proposed, and the European Commission's enacted, guidelines for CMO operations) for the transparency of reporting to rightsholders and for creative engagement with users over the evolution of usage needs. CCC's representation of authors' and publishers' rights also reflect the imperative for collective licensing to supplement (and not replace) individual licensing and sales initiatives for higher-value publication rights. As noted above, copyright is meaningless, as are the author's rights in the European model, in the absence of a means to exercise those rights that is also reasonably useful to users; CCC's and other CMOs' services provide precisely those means for those "secondary" uses of copyrighted works.

## THOUGHTS ON THE VALUE OF COLLECTIVE LICENSING TO THE SCIENTIFIC AND SCHOLARLY PUBLISHING COMMUNITIES

Scientific, technical, medical and scholarly journal publishing (sometimes referred to as "STM" publishing) is a natural market for collective licensing solutions such as those offered by CCC, and STM publishers strongly supported the formation of CCC and of the collective licensing programs of other CMOs around the world. The reasons for this strong support by STM publishers continue to this day.

First, the content published by STM publishers is valued highly by researchers, scholars and educators. Given that individual specialized journals may be considered expensive (somewhere between \$1,600 to \$2,000 on average annual subscription price, as noted in the April 2020 annual Library Journal survey), there is a strong demand for copies of individual articles for particular needs at reasonable "by the piece" prices.

Second, the STM market is large and diverse. Although there are four or five major publishers with portfolios of more than 500 journals, there are many thousands of scholarly publishers, including some which publish only one or two journals (some of which are the leading journals in their fields). This size and diversity make permissions processes quite complicated, and collective licensing solutions can help to remove much of the friction involved.

Finally, scholarly publishing is so closely aligned with — truly part and parcel of — scholarly research and education that publishers are highly incentivized to support efficient and effective licensing mechanisms.

There are some advocates who would argue that "fair use" copyright principles in the U.S., and other research-oriented copyright exceptions in other countries, mean that users should be able to copy STM journal articles without obtaining permission or the payment of licensing or transaction fees if they have a scholarly or educational purpose. In fact, such research- or teaching-oriented uses address only one of the four factors for determining fair use under U.S. law — and all four factors must be considered in any fair use analysis. Fair use is specifically intended to balance the interests of both the users and the copyright holders and not to simply deliver "free use" rights to a user who falls into a particular category.

This need for a fair balancing of the interests was evident in the reasoning of both the appellate court and the US Supreme Court concerning the copying of scientific and medical journal articles in the *Williams & Wilkins* case. The creation of CCC occurred after this case, and arguably at least in large part because of this case. In any event, CCC's founding was strongly supported by the medical publishers involved in the *Williams & Wilkins* case — both the plaintiff and its supporters in the industry — as a way of demonstrating (i) that there was in fact a vibrant market for copies of individual articles (which represents the market impact factor in any fair use analysis, sometimes described by the courts as the most important single fair use factor and today set forth as the fourth factor in Section 107) and (ii) that the publishers were avidly interested in making that market as convenient and efficient as possible for the users.

New or expanded education and research exceptions in copyright laws are promoted constantly in many countries in the world, including most recently (as of 2020) in the EU's new Directive on Copyright in the Digital Single Market, which has new exceptions for text and data mining, and in South Africa. The presence of existing market solutions — such as those offered by CCC — for education and research needs will continue to be an important factor in presenting a fair picture of how the market functions and will continue to support a business base for STM publishing. Such solutions need to be comprehensive, speedy, and reasonable in cost for research and education purposes, and efforts made by CCC to support new uses such as text and data mining through convenient licensing tools and services will continue to be important in determining how markets and laws develop.

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<sup>1</sup> Jane Ginsburg, “Overview of Copyright Law” in R.C. Dreyfuss & J. Pila, *Oxford Handbook of Intellectual Property Law* (2018).

<sup>2</sup> Mark Rose, *Authors and Owners, the Invention of Copyright* (Harvard U. Press 1993) at p.35.

<sup>3</sup> As quoted in Chapter 2 of Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton U. Press 2014).

<sup>4</sup> Paul Goldstein & Bernt Hugenholtz, *International Copyright: Principles, Law and Practice* (Oxford U. Press, 3rd ed. 2013) at p. 6

<sup>5</sup> U.S. Const., Article I, clause 8.

<sup>6</sup> Mihály Ficsor, *Collective Management of Copyright and Related Rights* (WIPO publication no. 855, 2002) at 16.

<sup>7</sup> Goldstein & Hugenholtz, *op. cit.*, § 7.7.

<sup>8</sup> Dr. Ficsor's WIPO publication (at 18-19) gives a helpful discussion of SACD (Société des auteurs et compositeurs dramatiques or the Society of Dramatic Authors and Composers [theatrical]) and SGDL (Société des gens de lettres or the Society of People of Letters [fiction and non-fiction authors]), both of which organizations are still active today. Bourget's contributions for music composers, including the creation of SACEM (Société des auteurs, compositeurs et éditeurs de musique or the Society of Authors, Composers and Publishers of Music) are discussed in the article “Performing Rights Societies in the Digital Environment” by Philippe Gilliéron (Stanford U. thesis 2006).

- <sup>9</sup> See the “outside links” section on the WIPO landing page on collective management, which includes links to CISAC (International Confederation of Societies of Authors and Composers), IFRRO (International Federation of Reproduction Rights Organizations), IFPI (International Federation of the Phonographic Industry), SCAPR (Societies’ Council for the Collective Management of Performers’ Rights), and AGICOA (Association for the International Collective Management of Audiovisual Works). URL : [https://www.wipo.int/members/en/organizations.jsp?type=NGO\\_INT](https://www.wipo.int/members/en/organizations.jsp?type=NGO_INT)
- <sup>10</sup> International Publishing Association/WIPO report <https://www.wipo.int/publications/en/details.jsp?id=4488>
- <sup>11</sup> Ficsor, *op. cit.*, at 17.
- <sup>12</sup> Tarja Koskinen-Olsson and Nicholas Lowe, Module 1 General Aspects of Collective Management [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_emat\\_2014\\_1.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_1.pdf) (part of WIPOs Educational Material on Collective Management of Copyright and Related Rights)
- <sup>13</sup> International Survey on Text and Image Copyright Levies (WIPO publication 1042-20, 2014) at 6.
- <sup>14</sup> Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market (26 February 2014).
- <sup>15</sup> Directive (EU) 2019/790 on Copyright and Related Rights in the Digital Single Market (17 April 2019).
- <sup>16</sup> Ficsor, *op. cit.*, at 74.
- <sup>17</sup> Even in the U.S., compulsory licenses exist for certain performance rights in music (in television broadcasts and in digital radio) and they are supplemented by the “mechanical” licenses for devices that play or reproduce sound — the compulsory mechanical license found in Section 115 of the U.S. Copyright Act provides that, after a song has been recorded and released for the first time, the owner is required to make licenses available (on terms controlled by the statute) to third parties that also wish to make and release a commercial recording (think of “covers” of famous songs).
- <sup>18</sup> ASCAP (American Society of Composers, Authors and Publishers) was formed in 1914; BMI (Broadcast Music Inc.) was formed in 1939.
- <sup>19</sup> Will Slauter, *Who Owns the News: A History of Copyright* (Stanford U. Press, 2019).
- <sup>20</sup> *International News Service v. Associated Press*, 248 U.S. 215 (1918).
- <sup>21</sup> Benjamin Kaplan was a professor at Harvard Law School and later at Suffolk University Law School, where the author took his copyright law class; early in his career, Prof. Kaplan was part of the legal staff that brought indictments and convictions against Nazi officials in the 1945-46 Nuremberg trials; during the 1970s, he served on the Massachusetts Supreme Judicial Court and, after retirement, was recalled to serve on the Massachusetts Appeals Court from 1983 to 2005.
- <sup>22</sup> Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia U. Press 1967), from a series of lectures delivered at Columbia; republished by LexisNexis (in conjunction with Suffolk U. Law School) in 2005 in an expanded version with contributions from other copyright professors and professionals.
- <sup>23</sup> *Id.* at 102.
- <sup>24</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff’d* by an equally divided Court, 420 U.S. 376 (1975).
- <sup>25</sup> 4 Melville B. & David Nimmer, *Nimmer on Copyright* § 13.05[E][4][c] (Matthew Bender Rev. Ed.).

<sup>26</sup> 60 F.3rd 913 (2nd Cir. 1995).

<sup>27</sup> Final Report on the National Commission on New Technological Uses of Copyrighted Works (July 31, 1978); 192 pp. Printed copies are now hard to find; a version formatted for online viewing is online at: <http://digital-law-online.info/CONTU/contu-toc.html>

<sup>28</sup> CONTU Final Report, p 89-103 ff. See also: “Circular 21, “Reproduction of Copyrighted Works by Educators and Librarians” Available online at: <https://www.copyright.gov/circs/circ21.pdf>

<sup>29</sup> “Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law” (1961) p. 26. Available at: [https://www.copyright.gov/history/1961\\_registers\\_report.pdf](https://www.copyright.gov/history/1961_registers_report.pdf).

<sup>30</sup> See Circular 21.

<sup>31</sup> CONTU Final Report, Appendix A, pp. 100-101.

<sup>32</sup> H.R. Rep. No. 94-1733, at 72.







# History of CCC and Relevance to Texaco Case | by R. Bruce Rich

Copyright Clearance Center is the rare organization that can be said to have been formed at the right place and at the right time to fill a pressing societal need. To be sure, CCC's history is one marked by challenges that have at times tested the viability, efficacy and durability of its mission. In the end, however, its story is one that bespeaks the great ability of diverse communities of interest, bound together by an overlapping set of objectives, to devise a solution that serves their various needs — in the process, benefiting society as a whole.

The soil from which CCC emerged is the domain of copyright law, a body of jurisprudence that embodies a set of precepts that dates

back to our nation's origins (and even earlier, see Mark Seeley's essay above). Copyright's core objective is to stimulate the widest possible dissemination of information and resulting public education by conferring on authors of creative expression for limited periods of time a set of exclusive rights to exploit their works. Throughout its history, copyright law has been little understood by the general public; among those more knowledgeable, its proper contours have been the subject of regular debate. This uncertain state of copyright is perhaps unsurprising, since "information yearns to be free" — an impulse that comes into conflict with copyright's premise that the nation's storehouse of knowledge, as captured in books, works of art and cinematography, music, and myriad other forms of expression — is best stocked by incentivizing the authorship of such works (as supported by their publishers, producers and distributors).

The pressure-relieving "safety valve" of copyright law is the fair use doctrine. This judicially developed "equitable rule of reason" was conceived to provide a limited exception to the exclusive rights of copyright owners to control the exploitations of their works. The prototypical invocation of this doctrine has been in instances in which a user has borrowed a limited amount of an author's expression and made productive use of it by adding creative expression of her own for purposes of comment, criticism, news reporting, parody, or the like. Conversely, uses that have added nothing to the original expression — that merely copied it — generally have been regarded as falling outside fair use parameters.

A roiling debate preceding passage of the Copyright Act of 1976<sup>1</sup> (which replaced its 1909 predecessor and, with some modifications, remains the governing federal copyright statute) centered on the proper treatment of copying enabled by then-recent photocopy technology, most particularly in the educational setting. Indeed, in 1975, an equally divided Supreme Court failed to clarify the application of the fair use doctrine to photocopying undertaken by the National Institutes of Health and the National Library of Medicine.<sup>2</sup> The House and Senate Reports accompanying the enactment of the 1976 Act recommended formation of a neutral clearinghouse to facilitate "workable clearance and licensing procedures," a voluntary organization dedicated to "work[ing] out means by which permissions for uses beyond fair use can be obtained easily, quickly, and at reasonable fees."<sup>3</sup> So CCC was born.

Taking up this congressional invitation, a task force of the Association of American Publishers, with the cooperation of the Information Industry Association, the Authors League of America, and representatives of scientific societies, independent publishers and corporate libraries, created CCC, which opened its doors on January 1, 1978, the effective date of the 1976 Copyright Act. The hope was that CCC, which was organized as a not-for-profit entity under New York law, would be able to work collegially with the various communities of interest, and would bring to the market of corporate and other librarians, as well as users of copyrighted materials more broadly, copyright licenses acceptable to rightsholders and users alike that would avoid costly and disruptive litigation over proper fair use boundary-line drawing.

There arose at the outset the need to ensure that the newly formed license clearinghouse steer clear of antitrust concerns. Because the new entity would be acting as a licensing agent to users on behalf of numerous individual rightsholders, it was essential that the licenses it offered would not give rise to claims that it was improperly foreclosing competition between and among individual publishers and authors over the prices and terms for licensing the photocopying of their works. Such concerns had long plagued the music performing rights organizations ASCAP and BMI; CCC and its founders were intent on avoiding that.

To minimize such concerns, it was determined that CCC would offer a transactional license (traditionally called a “permission” in the publishing industry) that enabled registered users to make photocopies from, typically, scientific, technical and medical (“STM”) journals by paying the permissions fees set by each rightsholder individually. This plan was presented in advance of implementation to the Antitrust Division of the U.S. Justice Department under the Department’s Business Review clearance procedures and received the requested guidance that such a license format would not raise antitrust concerns.

The transactional license as implemented, while well intended, nevertheless proved cumbersome and ultimately infeasible as a standalone basis for CCC’s licensing business. Users wishing to make photocopies from journals participating in CCC’s service were advised by way of disclosures appearing on the mastheads of physical copies of journal issues of the per-page permissions fee established by the publisher. The users were required to remit fees reflecting their photocopying activity to CCC under a copying honor system. In turn, CCC was contractually committed to pass along those royalty payments to the appropriate publishers, net of operating expenses. What CCC soon came to realize was that far too few publishers and other rightsholders were placing their works into the system; far too few users were availing themselves of it; and the costs of transacting with, and administering, this form of license were threatening CCC’s long-term viability.

Subsequently, David Waite, CCC’s inaugural President, working with a Board of Directors reflecting the diverse communities of interest served by the organization, devised a new form of license designed to overcome at least certain of the shortcomings of the early transactional license. This new license bundled together a repertory of copyrighted works to be made available to corporate users for internal photocopying within prescribed limits at a single, predetermined fee. Preserving rightsholder pricing autonomy, the fee reflected an amalgam of the individually determined prices set by each participating rightsholder for the photocopying of its works, multiplied by statistically determined numbers of copies being made of each work.

Alas, even with this new license offering, obtaining broad buy-in from both publishers and users proved to be a slow process. Most publishers were accustomed to handling permissions internally; notwithstanding the essentially unmonitorable nature of most corporate and other photocopying activity, ceding license authority to CCC was for many a major conceptual undertaking. For their part, corporate users generally did not perceive significant risk in *not* taking a CCC license. A combination of the lack of visibility of internal photocopying activity, a total absence of enforcement initiatives, and ill-defined fair use parameters combined to create major hurdles in the path of broad license adoption.

The process of overcoming these obstacles was accretive and multifaceted. On the rightsholder side, CCC engaged in a painstaking process of thrashing out with key STM publishers the terms of the licenses to be offered corporate and other users. On the user side, following considerable efforts, several corporations exhibited leadership and executed the new repertory license, providing much needed momentum to licensing other users. But the uptake rate remained low, and the frequently offered response — “we feel we are protected by fair use” — necessitated clarification.

The AAP assumed leadership of test litigation seeking to establish that systematic reproduction of copyrighted journal articles by for-profit corporations in furtherance of their business purposes was not protected under the fair use doctrine — especially where there exists a readily available source for securing permissions to engage in that conduct. The litigation’s legal objective was paired with

the explicit goal of legitimizing CCC as a sensible, and cost-effective, means of having one's copyright cake and eating it too — that is, of affording corporations desiring access to timely STM journals but unwilling or unable to buy multiple subscriptions to fulfill corporate-wide demand instead to secure licenses from CCC permitting the copying of excerpts from such works as lawfully were in the user's possession (whether by subscription or document delivery). The precedent eventually established accomplished these twin objectives. It also constituted the first of a series of fair use decisions the outcomes of which turned pivotally on CCC and its unique role in the copyright marketplace. In short, CCC found itself meaningfully shaping copyright jurisprudence.

The test case was brought against Texaco, which had declined to take a license from CCC, relying on its modest reporting under the transactional licensing service and, as to the rest of its use, the fair use doctrine. Texaco mounted a vigorous and sophisticated defense, which at its core argued that research and development activities at major corporations would be ground to a halt were employees of such entities barred from making convenience copies from STM journals in aid of their research, including, in the case of the *Journal of Catalysis* that was used as the exemplar during the trial, to avoid the risk of damage to the original if brought into testing labs. Both the federal trial and appellate courts rejected this plea, recognizing that the “dominant purpose” of Texaco's use was “a systematic institutional policy of multiplying the available number of copies of pertinent copyrighted articles by circulating the journals among employed scientists for them to make copies, thereby serving the same purpose for which additional subscriptions are normally sold, or . . . for which photocopying licenses may be obtained.” In other words, Texaco's use was not transformative of the works copied in ways supported by the fair use doctrine.<sup>4</sup>

Fair use cases essentially entail weighing four (albeit non-exclusive) statutorily enumerated factors,<sup>5</sup> the first of which — the purpose and character of the use — was found to cut against Texaco's practices for the reasons just discussed. The fourth factor — entailing an assessment of potential harm to the market for the original work — is generally regarded as the most important element to be weighed in a fair use balance. Here, the appellate court found less than compelling the publishers' evidence of actual or potential lost subscription sales to the journals copied from. Critically, however, it recognized the importance to journal publishers of permissions income derived from authorizing the making of copies of individual journal articles. What is more, in a major precedential breakthrough, the appeals court rejected Texaco's “circularity” argument, a long-festering roadblock to infringement recoveries premised on the notion that a complaining copyright holder cannot prevail in a factor four market harm argument merely by asserting that he was willing to license the putative fair use. Were such an argument, as such, to prevail, arguably every factor four evaluation would be made in the rightsholder's behalf.

Here is where CCC's existence and license offer broke new legal ground. The appeals court's analysis is set forth in some detail below:

*Though the publishers still have not established a conventional market for the direct sale and distribution of individual articles, they have created, primarily through the CCC, a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying. The District Court found that many major corporations now subscribe to the CCC systems for photocopying licenses. 802 F. Supp. at 25.... Since the Copyright Act explicitly provides that copyright holders have the “exclusive rights” to “reproduce” and “distribute copies” of their works, see 17 U.S.C. § 106(1) & (3), and since there currently exists a viable market for licensing these rights for individual journal articles, it is appropriate that potential licensing*

*revenues for photocopying be considered in a fair use analysis.*

*Despite Texaco's claims to the contrary, it is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier. This notion is not inherently troubling; it is sensible that a particular unauthorized use should be considered "more fair" when there is no ready market or means to pay for the use, while such an unauthorized use should be considered "less fair" when there is a ready market or means to pay for the use. The vice of circular reasoning arises only if the availability of payment is conclusive against fair use.<sup>6</sup>*

The combination of Texaco's non-transformative use, the established market harm to publishers' permissions markets, as well as the Court's finding that Texaco had copied journal articles in their entirety (thereby awarding fair use factor three — amount and substantiality of copying — in the plaintiff publishers' favor), resulted in Texaco's being held liable for copyright infringement.<sup>7</sup> A component of the relief afforded the publishers as part of the confidential settlement after the appellate decision was the requirement that Texaco take a repertory license from CCC for several years but which its successor has retained to this day.

The significance of the *Texaco* case cannot be overstated. As a legal precedent, it paved the way for far broader license acceptance by Fortune 100 and other corporations. Today, some 76 of the Fortune 100 companies are CCC licensees and more than 50,000 entities operate under what is now called the Annual Copyright License.

As importantly, CCC's core mission was validated by the decision. No longer could fair use proponents make the facile argument that they faced a binary choice of buying subscriptions for each employee or foregoing socially productive (albeit slavish) copying of copyrighted materials. As *Texaco* established, there is a third option, which is a win-win for copyright law: continue to make the desired copies, in return for licenses, whether one-by-one from the rightsholders or "in bulk" through a market intermediary like CCC. It is no exaggeration to suggest that the license programs that have been continuously developed and implemented by CCC have rationalized copyright law, minimized repetitious fair use disputes, and enabled lawful commerce in copyrighted works in myriad market settings.

Evidence for this proposition is found in tests of fair use of copyrighted books and journals in other institutional settings. The "coursepack" cases involved publisher challenges to university and copy shop practices entailing sales to college students of bound course anthologies consisting of chapter-long (or longer) excerpts of multiple copyrighted works — without payment of permissions fees to the publishers. Federal courts in New York and Michigan rejected the copy shop defendants' fair use claims.<sup>8</sup> The appellate court ruling in the Michigan case in particular adopted *Texaco's* analysis in similarly rejecting the defendant's circularity argument, there citing evidence supplied by CCC as to its established licensing procedures authorizing the defendant's competitors to duplicate coursepacks. As in *Texaco*, the claimed Scylla or Charybdis between fulfilling professors' and students' academic needs and foregoing use of academic readings in the classroom was demonstrated to be a false choice. CCC instead served as the solutions provider, lubricating this copyright market with a workable license solution.

During the same period that critically important legal precedents were being established, CCC took steps to refine its repertory license significantly to improve its market acceptance. While the first form of repertory license ameliorated the transaction costs

associated with a system of per-use licensing and payment, its pricing methodology led it to be viewed by a number of corporate users as too opaque and costly. It also unintentionally encouraged publishers to “game the system” by setting prices for their contributed works that, while only forming a component of the overall price of the bundled license offering, would afford them disproportionately large shares of the distributions made by CCC from license receipts.

The long-term solution came in the early 1990s in the form of a modified repertory license, still in use today, but extended from internal photocopying authorization to include internal digital uses as well, such as sharing by email and intranet postings. This license similarly aggregates the rights in numerous copyrighted journal articles and other textual materials (including newspapers) and similarly enables corporate users to make unlimited internal copies of excerpts from such materials. But in contrast to its predecessors, the pricing of the new license was to be set by CCC, using its best judgment as to market demand by customer segment and existing and ongoing measurements of nature and intensity of actual usage.

It was clear at the development stage that this move away from individual rightsholder price-setting not only would require buy-in from both rightsholders and users (more about which below), but also would raise potentially more challenging antitrust concerns. CCC sought to minimize the prospect that this ceding of pricing authority to CCC would subject CCC to a claim that it was serving as a means of artificially coordinating the pricing of photocopy permissions that would otherwise be set by individual rightsholders. Accordingly, before CCC launched the revised repertory license, it went back to the Government to secure similar assurances to those it had obtained at the outset of its operations.

This process took some time and was the subject of careful consideration by the Antitrust Division. On its face, this new form of license appeared to be similar to the blanket licenses that have been offered in the music performing rights sector by ASCAP and BMI. Those licenses have been the subject of repeated antitrust attack and fairly extensive resulting government regulation in the form of antitrust consent decrees. Necessarily, the Government lawyers wanted to understand why and how CCC’s new license offering would be *procompetitive* in contrast to ongoing concerns over the music industry licenses. CCC, through its outside counsel and a retained economist, were able to convince the Government that, by enabling CCC to set prices reflecting market conditions, the new license would actually *reduce* prices to users as compared to the existing repertory license; that the license would be administratively more efficient in reducing the required number of user surveys of copying activity; and that users would retain a variety of licensing options from which to choose, including CCC’s transactional license as well as competing market alternatives for securing permissions.

On the publisher front, CCC established a governance procedure designed to assuage concerns over delegation of pricing authority to CCC. A Rightsholder Committee consisting of those CCC Board members (authors and publishers) or their designees who were affiliated with participating rightsholders was empowered to approve the prices to be set by CCC under its repertory license offerings.

The advent of the Internet and digital technology, with their powerful enabling force, has created continuing challenges in ensuring the lawful reproduction of copyrighted material. In the guise of transformative uses, entities as large as Google have successfully invoked the fair use doctrine to fend off challenges to their unauthorized digital scanning of what can be massive quantities of copyrighted works to create databases accessible by researchers and others.<sup>9</sup> In the Google Books case, the scanning without



permission of literally millions of books was legitimized on the premise that the social value provided to, among others, academic researchers, by enabling online index searching of the massive quantities of information contained in these works, outweighed the potential harm to the publishers in terms of lost book sales. Missing from this analysis was a recognition that there exists a viable derivative licensing market in which book publishers would license the right to integrate their works into these very types of informational databases. CCC is the ideal licensing vehicle for such transactions.

Another example of ongoing efforts to rein in massive unlicensed digital uses of copyrighted content involves the digital era incarnation of university coursepacks. CCC has actively supported publishers' efforts via this litigation to preserve a viable academic publishing market.

Georgia State University (GSU), not unlike many other institutions of higher education, has mistakenly assumed that copy activity that has long been held to be infringing when undertaken in the analog world — in the context presented, paper course pack creation — is somehow legally benign when it takes place digitally. At GSU, faculty has for more than 15 years provided students with electronic course packs created by scanning originals and posting them to course web pages. No permissions fees have been paid, university-wide, in consideration of the countless thousands of works so copied.

In 2008, Cambridge University Press, Oxford University Press and Sage Publications, supported by AAP and CCC, brought suit against GSU and its trustees challenging these practices. Some 12 years and two trips to the federal court of appeals later, the litigation has finally come to an end.<sup>10</sup> The bottom-line takeaway is a repudiation of the notion that sweepingly broad unlicensed taking of published material is legally permissible simply because its intended use is educational. To the contrary, it is now judicially established that, especially where permissions to make digital copies are available, as through a CCC license, there is a strong presumption that such unlicensed uses will be copyright infringing.

The GSU litigation thus reaffirms CCC's crucial role as market intermediary — in this setting, as offering both repertory and transactional licenses authorizing digital exploitations of the type engaged in by GSU — as well as recognizes the low per-student cost were GSU to take an institution-wide license of the type numerous other colleges and universities have availed themselves of.

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<sup>1</sup> The text of the current copyright law may be found at 17 U.S.C §§ 101 et seq.

<sup>2</sup> *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975).

<sup>3</sup> See S. REP. No. 94-473, at 82 (1975).

<sup>4</sup> *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1 (1992), *aff'd* 60 F.3d 913 (2d Cir. 1995) (emphasis added).

<sup>5</sup> See 17 U.S.C. § 107.

<sup>6</sup> *Texaco*, 60 F.3d at 930-931.

<sup>7</sup>The Court held that the second fair use factor — the nature of the work — favored Texaco insofar as the journal articles were primarily factual in nature.

<sup>8</sup>*Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381 (6th Cir. 1996) (en banc).

<sup>9</sup>See *Authors Guild v. Google, Inc.*, 804 F.3d 202(2d Cir. 2015) (“Google Books”).

<sup>10</sup>*Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *vacated sub nom. Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014), *remanded to Cambridge Univ. Press v. Becker*, 371 F. Supp. 3d 1218 (N.D. Ga. 2016), *aff'd in part, vacated in part sub nom. Cambridge Univ. Press v. Albert*, 906 F.3d 1290 (11th Cir. 2018), *remanded to Cambridge Univ. Press v. Becker*, 446 F. Supp. 3d 1145 (N.D. Ga. 2020).



# About the Authors

**Lois F. Wasoff** is an attorney specializing in publishing law. Her work has focused on copyright law and policy, contractual, legal and business issues related to the development and distribution of content in traditional and electronic media for the trade, educational and scholarly markets, and international considerations related to these areas. Before starting her own practice, she held senior in-house positions at Houghton Mifflin Company and Simon & Schuster. After leaving Houghton Mifflin in 2002, she worked with many companies, trade associations and non-profits, including among others [CrossRef](#), the [Association of American Publishers \(AAP\)](#), the [American Academy of Arts and Sciences](#), [Macmillan](#), [Reed Elsevier](#) and [Copyright Clearance Center](#). In the course of her career, she served on a number of publishing industry boards and working groups related to copyright, including as Chair of the Copyright Committee of the AAP, as a member of the AAP Task Force on Distance Education, as a member of the Ad Hoc Committee on Licensing and Fair Use, as Chair of the New England Chapter of the [Copyright Society of the U.S.A.](#), and as a member of the Section 108 Working Group established by the U.S. Copyright Office. She has been a frequent speaker at symposia sponsored by the [International Publishers Association \(IPA\)](#) and other industry groups. Wasoff is the author or co-author of contributions to a number of publications, including (with Mark Seeley) a chapter in “Academic and Professional Publishing” (2012), the “WIPO Guide on the Licensing of Copyright and Related Rights” (2004) and “An Unhurried View of Copyright, Republished (With Contributions From Friends)” (2005), and the author of a scholarly article entitled “If Mass Digitization is the Problem, is Legislation the Solution?” (Columbia Journal of Law & Arts, 2012). She began her legal career when she graduated from New York University School of Law in 1975 and was an associate first at Milbank, Tweed, Hadley & McCloy and then at Cowan Liebowitz & Latman.

**Mark Seeley** consults on science publishing and legal issues through [SciPubLaw LLC](#), and presents and comments regularly on publishing, licensing and copyright issues including recently on privacy and scholarship ([NISO webinar](#)) and on copyright, innovation and the life sciences ([US PTO conference](#)). He retired in December 2017 from his position as Senior Vice President & General Counsel for [Elsevier](#), the leading publisher and information provider in science and health (\$3b annual revenues, 7,000 employees globally), and which is part of the [RELX](#) group (which also includes [LexisNexis](#)). Seeley served on the Copyright Committees of both the [International STM Association](#) (from 2004-2016 as chair) and the [Association of American Publishers](#). He is co-author (with Lois Wasoff) of a chapter on copyright and other legal issues in a Chandos/Woodhead (now Elsevier) book, “Academic & Professional Publishing” (2012). Currently Seeley serves on the Board of Directors for [Copyright Clearance Center](#), and is a member of the [Copyright Society of the USA](#) and the [Society for Scholarly Publishing](#). He is admitted in Massachusetts and New York. Seeley teaches international intellectual property law as adjunct faculty at Suffolk University Law School in Boston. He attended Thomas Jefferson College, Grand Valley State University, Michigan, USA (B.Ph., Literature); and Suffolk University Law School, Boston, Mass., USA (J.D., cum laude). Seeley lives in Worcester, Massachusetts and is an active supporter of several local cultural institutions including by serving as a Corporator for [Music Worcester](#).

**R. Bruce Rich** was a senior partner in the international law firm Weil, Gotshal & Manges LLP, where he headed the firm’s intellectual property and media litigation practice for more than 30 years through 2019, when he retired. He began serving as outside counsel to [Copyright Clearance Center](#) in 1980 and continues in the dual role of advising counsel and Board member. During his tenure at Weil, Rich led a transformation of the practice to address issues presented by the advent of the Internet and the emergence and explosive growth of digital commerce. He successfully litigated leading cases in the copyright, trademark, First Amendment and antitrust fields, a number of which have helped shape the legal landscape. Rich has lectured and taught actively in his fields of expertise, and in 2018 delivered the annual [Horace Manges Copyright Lecture at Columbia Law School](#). He serves as Chairman of the Board of Directors of [EL Education, Inc.](#), a not-for-profit educational reform organization that seeks to improve the quality of K-12 public education through training teachers in schools and school districts nationwide to achieve with their students strong academics, critical thinking skills, collaborative and participatory learning, and character development. The organization’s focus is on working with underserved populations of students. During 2020, Rich has been a Fellow at Harvard University’s [Advanced Leadership Initiative \(ALI\)](#), where he has been focusing on his interests in educational reform. He will continue as a Senior Fellow in the ALI program during 2021. Rich earned his A.B. from Dartmouth, where he was elected to Phi Beta Kappa and was awarded the Colby Government Prize for a demonstrated commitment to public service. He holds a law degree with honors from the University of Pennsylvania.



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