



**Hearing Before the
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
United States House of Representatives**

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Copyright Issues in Education and for the Visually Impaired

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Chairman Coble, Ranking Member Nadler, and Members of the Subcommittee:

Thank you for the opportunity to appear before you today to discuss copyright issues in education, and specifically about how voluntary market-based solutions can efficiently meet the needs of users, creators and other copyright holders. My name is Roy Kaufman, and I am Managing Director of New Ventures at Copyright Clearance Center, Inc. (CCC). CCC is a Massachusetts-based, not-for-profit licensing hub and rights aggregator, which was founded by authors, publishers and content users in response to issues that arose in the legislative process leading to the Copyright Act of 1976.¹

Introduction

CCC has been a centralized licensing solutions provider since the effective date of the current Copyright Act, January 1, 1978, enabling efficient, lawful access to copyrighted materials. We represent more than 600,000,000 rights, primarily text works, under agreements with more than 12,000 rightsholders. These rightsholders range from individual authors and author estates, to literary agents, local newspapers, media companies, blogs, society publishers, universities, and large and small publishers of all kinds of text-based materials, many of whom in turn represent the interests of an even larger body of creators and employees.

Additionally, we broker the rights of counterpart collective organizations from more than 30 other countries, who also represent millions of creators and publishers. We license reuse (such as emailing, online posting and photocopying) of copyrighted works to more than 1,200 US domestic academic institutions, and to more than 35,000 business organizations in the US and 180 other countries, covering millions of students, faculty, researchers and staff, as well as knowledge workers, managers and other employees.

CCC's mission is to "make copyright work for everyone." We accomplish this mission largely by developing products and services that smooth the inevitable market friction over the differences between compensable and non-compensable uses of copyrighted works, especially written works. All of our solutions are voluntary, opt-in, market-driven, and non-exclusive.

¹ See, e.g., S. Rep. No. 94-473, 94th Cong., 1st Sess., at 70-71 (1975).

CCC, directly and through its partners, brings rights to use the copyrighted works of US creators to markets around the world, and is a net “importer” of revenues into the US for reuse of published materials. Our users and rightsholders include residents of every US state, and in the last ten years, we have distributed more than \$1.4 billion in royalties. For each of the past five years, we have been named by eContent Magazine to its list of 100 companies that “matter most in the digital content industry.”

We were formed to enable efficiency in copyright clearance for corporations, government organizations, and academic institutions, so as to avoid the need for those users to contact multiple publishers/authors to make payments for photocopies. Today, as in 1978, we provide for efficient “micro-licensing” under the supervision of a Board of Directors comprised of users, publishers and authors. Last year alone, we issued 750,000 individual licenses for the reuse of content, and through repertory (or “blanket”) licensing, authorized many millions more digital and paper reuses.

While CCC represents rights of many types of creators into many different markets, CCC has been especially successful in offering products and services on behalf of rightsholders who create text-based works for educational, scientific and research markets. These works include journals and academic books created by professors, scientists, learned societies, commercial publishers, and university presses. In many cases, these works are created by academics, for academics. As such, we are uniquely aware from a market perspective of the tensions between the Constitutional purpose of copyright on the one hand (expressed in Article I as “promot[ion] of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their respective Writings”), and the language of Sections 107 and 108 of the Copyright Act. We are also aware of the power of market-based solutions to further all of the purposes of copyright and reconcile these tensions.

Our experience shows that voluntary market-based licensing solutions can go a long way towards solving many of the difficult challenges facing stakeholders with respect to copyright and educational reuse. In this regard, we offer two examples of ways in which market-based licensing solutions have accommodated the needs of users and creators, and bridged the gap between copyright exceptions and appropriate compensation for works of creative expression.

Example 1: Interlibrary Loan, Fair Use, Sections 107 & 108 and Developing a More Efficient Marketplace

First is an example of how licensing can provide a superior, more efficient and more cost-effective service to academic libraries with respect to the sharing of documents.

Interlibrary loan (“ILL”) operates at the intersection of two limitations on the exclusive rights of copyright owners: Section 107 (Fair Use) and Section 108 (Reproduction by Libraries and Archives). Interlibrary loan is an old phrase that has been repurposed for a new use: in this context, it means not the delivery of physical objects owned by one academic library and shipped to another library, but the practice of copying (digitally or on paper) individual articles, chapters and excerpts from textual works in the possession of one library and then delivering the copies for use in other, unaffiliated libraries.² Belying its name, this form of interlibrary “loan” does not anticipate that the borrower will return the copy.

There are two ways in which libraries will typically engage in this form of interlibrary loan without the payment of a copyright fee. First, under Section 108 of the 1976 Copyright Act, “lending libraries” are allowed to deliver articles at the request of “borrowing libraries” without permission of the copyright holder, so long as the articles do not substitute for a “subscription to or purchase of such work.” The Congressionally-formed National Commission on New Technological Uses (CONTU) developed guidelines that have come to be known as the “Rule of 5” to establish what constitutes a use that falls short of substituting for a “subscription to or purchase of” a journal.³

² The phrase interlibrary loan technically encompasses two very different types of activities; the lending of physical objects such as books for eventual return, and the delivery of copied materials. CCC’s testimony only concerns the latter.

³ See Final Report of the National Commission on New Technological Uses of Copyrighted Works (“CONTU”) (1978). At the time of CONTU, unlike now, articles were typically sold in bundles known as subscriptions, and were not sold individually online, as there was no online. Today, most articles (as well as most journal subscriptions) are purchased in online formats and it is increasingly common for librarians to purchase individual articles in lieu of, or in addition to, subscribing to journals. This is especially true for corporate libraries, but also occurs with academic libraries.

Under the “Rule of 5,” the borrowing library tracks the copies it receives from other libraries of a given journal’s articles and pays no copyright fee for borrowing up to five articles from the past five years of a journal. Libraries that determine for themselves that they have exceeded this limit typically pay a copyright fee through the publisher, through a document delivery provider, or through CCC. Second, some libraries take the position that a number of copies may be borrowed pursuant to fair use, usually for articles published more than five years ago (and therefore beyond the scope of the “Rule of 5”). Using these exceptions, virtually all libraries engage robustly in this form of ILL, as borrowers, lenders, or both. However, as has been documented by the library community, even with these legal accommodations, ILL has proven to have serious limitations.⁴

In 2009, representatives from the California State University System approached CCC to assist it in relation to its ILL practices. Although Cal State was spending in excess of \$1 million annually to borrow articles through ILL, typical ILL deliveries took 5-10 days. As a result, by the time the materials arrived, the requestor no longer needed them in more than 50% of the cases, effectively doubling the costs for “useful” ILL.⁵ Cal State approached CCC to see if we could fix the problem for the benefit of the university, its libraries and library patrons. Our response was that we thought we could and that, to do so, we needed to create a market-based solution with the cooperation of publishers of the materials most in demand at Cal State’s ILL desks.

As a result of this outreach, CCC developed a pilot program with multiple libraries at Cal State, the State University of New York, and scientific publishers. The publishers set article prices designed to meet this new market, and CCC developed a technology solution that would enable an academic library to get a copy of an article within 5-10 minutes, rather than 5-10 days. The success of this pilot led to a service we call “Get It Now.” Get It Now also enables the article to be sent in a

⁴ For example, an Association of Research Libraries report concluded in 1992 that “[m]any patrons, dissatisfied with the limitations of our interlibrary loan services, avoid using them if possible.” <http://www.arl.org/storage/documents/publications/maximizing-access-dec94.pdf>

⁵ Although copyright fees are not paid for ILL, processing requests can be costly for borrowers and lenders. See, e.g., website of the University of California, Santa Cruz (“Though we provide ILL services to eligible UCSC patrons at no charge, the cost of an interlibrary loan transaction can range from about \$20 to \$50.”). <http://library.ucsc.edu/services/borrowing/interlibrary-loan-faq> (last visited on November 16, 2014)

digital format directly to the requesting student, researcher or faculty member. Get It Now does not supplant ILL or limit any user's rights under Sections 107 or 108, but instead complements them. There are times when a library may choose to wait the 5-10 days it may take to obtain a journal article via ILL borrowing. But, if the patron needs it in 5 or 10 minutes, Get It Now can provide a cost-effective, high-quality PDF of the article directly from the publisher, 24 hours a day, 7 days a week. And, in many cases, the total all-in cost is lower than that of ILL "borrowing."

CCC now has millions of articles available within this service from many of the world's leading commercial and non-commercial publishers, and nearly 300 academic libraries have adopted the Get It Now service, with new institutions coming on board each week. This is just one example of how users and publishers, working together, have been able to improve educational outcomes, improve use of materials, ease administrative burdens on institutions and still reward creators and publishers for the reuse of their materials through collaboration. Better, faster, more cost-effective.

Example 2: Electronic Use in the Classroom, and Easing Compliance in the Digital Migration

As mentioned above, CCC was created at the suggestion of Congress in order to help clear photocopy permissions. As the result of several important judicial precedents, it is well established that when print photocopies of copyrighted works are made for student use, copyright fees must generally be paid.⁶ Historically, these print copies were bound and sold to students in what are known as "course packs." The courts cited in footnote 5 recognized that depriving copyright owners of revenues for reuse of materials in the markets for which the materials were created (academic and classroom use) would have a severe impact upon the ability of such publishers to continue to publish new works, to the detriment of the entire academic ecosystem.

⁶ See, e.g., Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996) (en banc); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (1991); see also American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994) (photocopying in a commercial setting). Obviously this rule has its own exceptions, including but not limited to matters such as reuse of public domain works.

In the late 1990s copies of individual items of content as well as course packs began to migrate online. Moreover, unlike printed course packs which were generally prepared by on- and off-campus commercial copying operations, these online course packs were increasingly prepared for uploading and then posted by faculty or specific library staff. These digital course packs, electronic reserves and other online uses have changed how the students access content, but the content that they use (materials published largely for academic use), and the manner in which it is used (reading, studying, marking paper copies) have stayed largely the same. In short, this new generation of copying is consumed by the same market – academic institutions – and serves the same purpose; educating students.

In the earliest days of this shift, CCC was approached by academic libraries and asked to help make digital academic copyright clearance more efficient, as we had already done for printed course packs and for print and electronic reuse by businesses. We initially responded to this library demand by offering licenses for electronic reserves on a per-work or “transactional” basis. Then, as a result of more library requests, CCC – working with publishers and representatives from more than 50 institutions of higher education – created a repertory (“blanket-style”) license to cover print and electronic reuse by students, faculty, staff, distance learners, and other affiliates of the institution. As electronic use has become more widespread and interchangeable with print, over 150 academic institutions have purchased this repertory license from CCC (and have paid license fees that CCC distributes to the rightsholders), and many more have continued to clear print and digital uses on an as-needed transactional basis.

However, one increasingly common and disturbing result of this migration to digital copying has been that some academic institutions, who routinely as a matter of business practice and copyright law cleared permission for reuses in print format, are no longer doing so for electronic reproductions. An ongoing litigation examines this phenomenon, pitting the concerns of academic publishers on the one hand against strongly argued positions of fair use.

In that case, Georgia State University (GSU), with more than 30,000 students, 100 fields of study, and 250 degree programs offered through eight colleges, abandoned its prior policy of seeking permission for reuse of copyrighted material for course packs and stopped paying publishers altogether for academic copying of academic materials in electronic formats, even for multiple chapters used over

multiple years. The GSU case,⁷ which was brought by three academic publishers, including two university presses, is still pending in the courts.

The Court of Appeals for the Eleventh Circuit recently unanimously overturned in its entirety a decision of the District Court for the Northern District of Georgia which was largely in favor of the university, and directed the District Court to reanalyze the facts of the case under a framework for fair use laid out by the Court of Appeals. The Court of Appeals decision was accompanied by a concurring opinion by one of the judges. As the concurring opinion makes clear, at stake in the GSU case is more than where to draw lines in case by case analysis, but rather the disturbing market harm caused by practices such as those at GSU.⁸ If entire courses are offered using materials without compensation to creators, fewer works will be created. In this respect, the majority opinion agreed that GSU's practices risked "severe market harm" to academic publishers.⁹

While the final outcome of the case is unknown, what is most relevant to today's discussion is that, at the time of the lawsuit, GSU could have purchased a repertory license from CCC for an annual license fee of \$3.75 per student. This license would have granted GSU friction-free permission to use millions of works in, among other things, electronic reserves, print and electronic course packs and other paper and digital formats, and would have authorized reuse by all of the university's administrators, faculty and students. We know the license is appropriate for the academic, research and administrative needs of academic institutions; we built it with them for them.

⁷ Cambridge University Press v. Patton, Nos. 12-14676 and 12-15147 (11th Cir., October 17, 2014), opinion at <http://media.ca11.uscourts.gov/opinions/pub/files/201214676.pdf>. CCC and the Association of American Publishers, recognizing the long-term negative effects on the market for scholarly works of the GSU policy, and after settlement discussions failed, provided financial support to the plaintiff publishers.

⁸ "[T]his case arises out of a university-wide practice to substitute 'paper coursepacks' (the functional equivalent of textbooks) that contained licensed copyrighted works with 'digital coursepacks' that contained unlicensed copyrighted works. This was done for the vast majority of courses offered at GSU and, as will be seen, it was done primarily to save money." Id. at 116 (special concurrence of Judge Vinson) (quotation marks and emphasis in the original).

⁹ "[B]ecause Defendants' unpaid copying was nontransformative and they used Plaintiffs' works for one of the purposes for which they are marketed, the threat of market substitution is severe." Id. at 111 (majority opinion); see also id. at 93, n.31 (majority opinion).

We note this, not to denigrate the role of fair use in the educational setting but, rather, to observe that fair use line-drawing is inevitably complex and uncertain. At least to the extent that fair use is to be determined on a case by case basis, fair use does not lend itself to bright-line rules regarding page and chapter counts. How much of the work was used qualitatively as well as quantitatively? What is the intended market for the work? What is the potential market harm?

Our experience indicates that there are other means of “making copyright work.” These involve sitting down with creators and users, determining the rights needed, the rights available, and the fair pricing for the rights and uses, taking reasonable (and differing) conceptions of fair use boundary lines into account. With this in mind, CCC has created multiple, easy to use, reasonably priced license mechanisms meeting the needs of academic institutions. In all, more than 1,200 colleges and universities participate in one or more of these license programs. Our newest, aggregated license, which encompasses online uses of the type GSU has been engaging in, *costs less annually per student than one small pizza*, enables faculty to focus on the important business of teaching, and spares administrators, faculty, and librarians from needing copyright expertise in order to do their jobs. Market-based solutions require different options for different customers, and we have delivered those options in the past and will do so in the future.

Conclusion

Licensing does not supplant fair use and statutory limitations such as Section 108. Fair use will not and should not disappear merely because a copyright holder offers to license a use of its work, or because a user accepts such a license. For licensing to work, rightsholders need to offer value, which means in part providing licenses for rights that go beyond a reasonable notion of what is allowed pursuant to statutory exception. Increasingly, it also requires providing services that compliment copyright licenses, such as delivering content along with such licenses as CCC does with Get It Now.

We urge Congress, as it considers the consequential issues before it, to take account not only of the “first principles” of copyright law that should guide sound policy-making, but also to recognize the potential for voluntary, opt-in, market-based solutions of the type CCC has developed that meet the reasonable needs of users, while helping promote the creation of works of authorship that further the

Constitutional purposes of copyright – the “promotion of Science and the useful Arts.”

Thank you again for the opportunity to testify today. CCC looks forward to working with the Subcommittee as it continues to explore these important issues.

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