

# THE © COPYRIGHT & NEW MEDIA LAW newsletter

## Editorial

With the abundance of information available on every topic, it can be an overwhelming task to stay current on any topic, whether for work or personal purposes. Sifting through free and paid content, periodicals and daily news, and print and digital formats can add burdensome complexity to the amount and quality of information we seek on any one topic. The same is true when it comes to copyright issues. A few decades ago, one could specialize in intellectual property or computer or entertainment law. Now there are specialists within specialties. For example, a lawyer may focus on copyright issues in academia or library-related copyright issues or music copyright issues. So, when it comes to copyright information, how can we sort through the plethora of sources and find what we need to perform our work functions?

The traditional press remains an invaluable tool to find news and information on copyright issues. *The New York Times*, *The Economist*, and a variety of other newspapers and magazines provide coverage of recent court cases, legislation, and other copyright-related stories on a regular basis. Setting up a news alert on Google or other internet search engines can help you stay up-to-date on copyright news on a daily basis.

Various interest groups such as the Software and Information Industry Association ([www.siiia.net](http://www.siiia.net)), the Recording Industry Association of America ([www.riaa.com](http://www.riaa.com)), the Special Libraries Association ([www.sla.org](http://www.sla.org))— provide content on the latest developments in copyright from around the world. The World Intellectual Property Organization ([www.wipo.org](http://www.wipo.org)) is a great source for news on copyright treaties as well as copyright issues being discussed in an international forum.

*GigaLaw.com Daily News* (<http://gigalaw.com>) provides internet and technology law news clips that are compiled by lawyer Doug Isenberg. A search for *copyright* in the site's search engine compiles postings on copyright-related issues including legal suits and legislation. Lawyer Barry Sookman ([www.barrysookman.com](http://www.barrysookman.com)) provides in-depth analysis of current copyright issues as well as a Twitter feed that will keep any copyright news junkie happy. Sookman's list of "interesting links" will also keep you in the loop.



Monitoring and contributing to appropriate online discussion groups may also be a timely and useful way to staying current on copyright. For example, if you belong to any library discussion lists, you will inevitably see postings about copyright and licensing issues. In addition to providing you with news, these discussion forums will allow you to ask questions about copyright, discuss news, and learn about additional copyright resources including webinars and in-person sessions.



*volume fourteen - issue three - 2010*

### *Table of Contents*

Editorial	1
Guidelines for Documentary Filmmakers	3
U.S. Court Helps Licensors Whose Works are Sold	5
What is Open Access?	7
Reviews - Print	11
Questions & Answers	12

Lesley Ellen Harris, Editor  
Copyright, Licensing & Digital Property Lawyer  
[editor@copyrightlaws.com](mailto:editor@copyrightlaws.com)

Published by:  
Copyrightlaws.com  
Farragut Station, Box 33271  
Washington, DC 20033 USA

ISSN 1206-8586

© 2010 Copyrightlaws.com. All rights reserved.

Individual contributors may retain copyrights in their contributions.

No part of this publication may be reproduced, telecommunicated to the public, or performed in public, stored in a retrieval system, or translated into any language, in any form or by any means whatsoever, without the prior written permission of the copyright holder.

The information herein does not constitute legal advice. Proper legal advice should be obtained where necessary.

For information on subscriptions, contributions and advertisements, please contact us at:

**E:** [editor@copyrightlaws.com](mailto:editor@copyrightlaws.com)

**W:** <http://copyrightlaws.com>

**F:** 202.478.0478

When you locate an online source that is compatible with your needs, consider how you will use that source. Will you check the website or blog each day? Will you subscribe to the source? Or will you follow the resource via RSS or Twitter or other social media mechanisms?

In order to stay on top of the many issues in the copyright sector, it is important to manage a system that allows you to receive stories and insight into the field. It is also important to vet your sources so that you are aware of any underlying ideologies or interests that influence which stories are covered and how they are portrayed. Taking the time to develop and maintain quality resources will assist you in keeping up-to-date and provide answers to copyright and licensing questions as those questions arise. ■

[editor@copyrightlaws.com](mailto:editor@copyrightlaws.com)

## News Brief INQUIRY ON COPYRIGHT POLICY

The U.S. Patent and Trademark Office is conducting a comprehensive review of the relationship between availability and protection of online copyright-protected works and innovation in the internet economy. Public comments are being sought by November 19, 2010.

## News Brief GEORGIA STATE UNIVERSITY UPDATE

Judge Orinda Evans of the Federal District Court (Atlanta) has ruled on the cross motions for summary judgment in the infringement lawsuit by three publishers against Georgia State University. The case centers on the use of course readings for students via e-reserves and the campus course management system.

## News Brief CANADIAN COPYRIGHT REFORM BILL

The Canadian Government introduced Bill C-32, the Copyright Modernization Act, on June 2, 2010. Second reading and referral to a legislative committee for study and discussion is expected in the Fall of 2010.

### Looking for copyright training?

Explore the variety of online and in-person options on copyright and licensing training at:  
[www.copyrightlaws.com](http://www.copyrightlaws.com)

*Visit the new weblog:*  
[www.copyrightlaws.com](http://www.copyrightlaws.com)

## GUIDELINES FOR DOCUMENTARY FILMMAKERS

By Bob Tarantino

In May 2010 the Documentary Organization of Canada (“DOC”) released its publication *Copyright and Fair Dealing: Guidelines for Documentary Filmmakers* (the “Guidelines”). While comparable to American University’s Center for Social Media’s *Documentary Filmmakers’ Statement of Best Practices in Fair Use* (the “CSM Statement”), the Guidelines are nevertheless innovative in the Canadian entertainment law context – because they are an attempt to inform a stakeholder group, documentary filmmakers, and also an attempt to transform the debate about a complicated area of copyright law. Due to a relative paucity of Canadian case law on fair dealing, and particularly on disputes arising from film and television contexts, the Canadian entertainment lawyer is forced to extrapolate, sometimes to an unwieldy extent, from marginally applicable precedents. The Guidelines represent the possibility of breaking out of that analytical straitjacket to assist the lawyer and the filmmaker client.

Because documentary filmmakers seek to capture on film a representation of the world “as it is” (or least a representation which is as undiluted as possible), the need to obtain permission for the reproduction of copyright-protected materials in their films (often referred to as the “clearance” process) is an ever-present concern. Whether it is an interviewee wearing a t-shirt with an image emblazoned on it, a work of art hanging on the wall in the background, using a 10-second clip from a news program to illustrate a historical point or the discussion of a song snippet to contextualize a point about musicology, navigating the clearance process is an integral part of finalizing a documentary production for commercial exploitation. This article provides an assessment of the Guidelines with an emphasis on comparing the Guidelines and the impact in the United States of the CSM Statement.

### Towards the Guidelines

At least three direct sources of inspiration for the promulgation of the Guidelines can be identified.

First, and most obviously, is the CSM Statement, originally issued in 2005. A second, more diffuse, source of inspiration was a general feeling of discontent that has been expressed regarding the perceived negative impact copyright law has on the latitude documentary filmmakers are able to exercise in practising their craft. It has been stated that the clearance process, particularly for seemingly minor matters which many producers think nonsensical, consumes too much time and adds too much unnecessary cost. This results in less money “appearing on-screen” since each dollar of a film budget used to satisfy clearance requirements is a dollar not spent on shooting more film or conducting additional research.<sup>1</sup> The Supreme Court of Canada’s 2004 decision in the CCH case<sup>2</sup> provided the third source of inspiration and also functions as a fount of substantive law: the decision radically re-construed Canada’s “fair dealing” regime, envisioning it not as a truncated and circumscribed exception to copyright infringement, but as a positive “user’s right” which was to be accorded “large and liberal interpretation”.

Drawing on those motivating factors and in the absence of any prospect of legislative reform, some, including Professor Giuseppina D’Agostino (and, evidently, DOC), had concluded that creating a “best practices” statement would be a prudent way forward for the documentary filmmaking community.<sup>3</sup> Looking at the impact of the CSM Statement, D’Agostino posited that best practices documents offer the advantages of engaging and informing industry stakeholders, while additionally being a source of “soft law” which could be referenced by the judiciary and even potentially serve to pre-empt litigation by providing a starting point for negotiations.

### The Content of the Guidelines

The Guidelines strive to be a definitive handbook for use by documentary filmmakers in understanding the contours of copyright protection and how those contours interface with the creative and commercial processes in which filmmakers are enmeshed.



Thus, the Guidelines offer guidance on how to avail oneself of the “incidental inclusion” and “public space” exceptions found in Sections 30.7 and 32.2(1)(b), respectively, of the *Copyright Act* (Canada) (the “Canadian Act”), and the “fair dealing” mechanism found in Sections 29 through 29.2 of the Canadian Act. As would be expected from the name of the Guidelines, the fair dealing analysis is particularly comprehensive.

### Assessing Guidelines (and the DOC Guidelines)

Assessing the Guidelines, both their content and their likely impact, is more easily accomplished when recognizing their nature: they are not just an attempt to summarize existing law, but also an attempt to *influence* the creation of new law. This is perhaps most easily gleaned from their likely audience – though they are denominated as “for Documentary Filmmakers”, the Guidelines will probably be most avidly read by lawyers and may be of somewhat limited practical significance for producers. That is through no fault of the DOC - the topic with which the Guidelines deal is irreducibly complex. Trite as it is to make the observation, in the absence of bright line tests (for example, “reproducing seven seconds of a song is permissible”), the Guidelines are necessarily not *conclusions* but *guidelines*: they inevitably require the sort of analysis of law and fact in which lawyers specialize. So, for example, three of the guidelines require first satisfying the “fair dealing” test set out in the *CCH* case – thus the “limitations” section of guideline (2) (using copyright-protected material when documenting a newsworthy occurrence) notes that the producer must first heed the six “fairness” factors described by the Supreme Court of Canada before going on to consider the four additional points set out in the Guidelines.

The Guidelines are thus positioned to inform producers, but that is better viewed as a subordinate function. More importantly, they are best-suited to providing a framework or starting point for discussions and debates about fair dealing among producers’ counsel and E&O insurers’ counsel – and, more broadly, academic and policy-level discussions. That is no small thing: in the absence of the Guidelines, such discussions are necessarily unbounded, drawing on a hodge-podge of cases, textbooks, and counsel’s own store of knowledge and agendas, and are

often overwhelmed by the more voluminous materials available for the United States’ “fair use” regime, which is often of only marginal assistance in the quite different “fair dealing” context. The Guidelines will not displace the need for clearance review by legal counsel, but because discussions between producers’ and insurers’ counsel often seem to proceed along what seems a tightrope strung over a crevasse of liability, the ability and value of the Guidelines to act as a true “guideline” in giving structure to those debates should not be underestimated.

That being said, an objective assessment of the content of the Guidelines also means accepting them for what they are: a pro-active, sometimes even aggressive, producer-favorable interpretation of fair dealing law. By their nature the Guidelines are not a critical document – in seeking to provide some semblance of certainty to its nominal audience of producers, the document does not spend much time on ambiguities. For instance, the equivocal nature of the statutory requirement that the inclusion of a copyright-protected work be *both* incidental *and* not deliberate is not addressed; similarly, the question of what constitutes “public space” is not interrogated (is a sculpture located in a shopping mall situated in “public space”? What about a sculpture located in the open, but privately-owned, plaza in front of an office building?). Because of the aforementioned dearth of Canadian case law on the matter, the Guidelines are often forced to construct legal arguments with an amalgam of U.S. cases, Canadian trial-level decisions, academic commentary and Copyright Board of Canada (an administrative tribunal) decisions.

### The Reception of the Guidelines

What are the prospects for the reception of the Guidelines in the Canadian entertainment law community? The experience in the United States with sectoral “best practices” guidelines for intellectual property use, and in particular the treatment of the CSM Statement, may provide some indication. Efforts at promulgating “fair use” guidelines in the United States have been the subject of considerable scholarly treatment, and not everyone is convinced that such guidelines are an ideal approach to navigating the complexities of fair use.

*(Continued on Page 10)*

**U.S. COURT HELPS LICENSORS WHOSE  
WORKS ARE SOLD**

By Lesley Ellen Harris

In copyright parlance, there is a distinction between a license and an assignment of copyright. A license is permission to use a copyright-protected work, and the creator or legitimate owner of the work remains the owner of it. For example, if I license a photograph to you, you have permission to use the photograph according to the terms and conditions of the license. However, you do not become the owner of the photograph and therefore cannot sell the photograph to someone else. If I assign the copyright in the photograph to you, then you become the owner of the photograph and may use that photograph in any manner, including reselling or licensing or assigning it to others.

Even in a situation when a copyright owner purports to license her work, the license may in fact be interpreted by a court as an assignment, depending upon the wording used in the license agreement. In other words, using the term license does not by itself determine whether an agreement is a license or assignment. As with any contract, an interpretation of the overall contract and its terms and conditions determines its effect.

***Vernor v Autodesk***

In the 2008 U.S. district court decision in *Vernor v Autodesk*, the district court reviewed a software license from Autodesk to a third party and ruled that it was in fact a sale. This was based on the fact that there was a lump sum payment, as opposed to a royalty payment, and because the Autodesk software did not need to be returned to Autodesk. In that decision the court held that Vernor was the owner of a particular copy (that he acquired from a third party) rather than a true licensee. As a result, Vernor could lawfully sell his copy of the Autodesk software under the U.S. copyright first sale doctrine (see discussion below). This was notwithstanding a clause in the license stating that the first sale doctrine did not apply.

**Decision Overturned**

This decision was recently overturned. On September 10, 2010, the U.S. Court of Appeals for the Ninth Circuit considered and, ultimately, strengthened the position of copyright owners who license their works that are in turn sold to others.<sup>1</sup> The Ninth Circuit court disagreed with the district court that the lump sum payment and the absence of a requirement to return the software were determinative of whether the agreement was an assignment or a license. The court reviewed three precedent cases that it considered binding on the issue of whether an agreement is an assignment or a license, and it then formulated a rule. In its analysis the Ninth Circuit concluded:

We hold today that a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions.

The Ninth Circuit court outlined some of the "significant transfer and use" provisions in the agreement that led it to conclude that it was a license and not an assignment. First, Autodesk retained title to the software. Second, the agreement significantly restricted transfer by the user: the license was stated to be nontransferable; Autodesk's written consent was required for any transfer or lease of the software; and the software could not be transferred outside the Western Hemisphere.

Third, the agreement imposed "notable use restrictions": use outside the Western Hemisphere was restricted; modifying, translating, or reverse engineering the software was prohibited, as was removing or defeating any proprietary or copy-protection device. Fourth, the agreement also provided for termination of the license in the event of unauthorized copying or failure to comply with other license restrictions.

Vernor argued that whatever restrictions (even if "significant") Autodesk had imposed by the language of the agreement, Autodesk had not been enforcing them so they should not be determinative of whether the agreement was a license or assignment. The argument had been successful in the district court but was rejected by the Ninth Circuit.



## First Sale Doctrine

The first sale doctrine in section 109 of the U.S. Copyright Act provides that "... the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."

According to the Ninth Circuit, because the third party from whom Vernor purchased the software had been granted a license rather than an assignment, that party had never itself become an owner of the software. For this reason, it had no authority under the first sale doctrine to sell the software to Vernor. Likewise, because the third party, as a nonowner, could not have passed any title in the software to Vernor, Vernor could not lawfully sell the software to his customers.

It was Vernor who brought the case before the courts, in the form of a declaratory action, hoping for a judgment that would hold the agreement between Autodesk and the third party to be an assignment rather than a license, even though it was characterized as a license. The implication of such a judgment would have been that the third party would have had the right to sell to Vernor. The consequence of that outcome would have been that Vernor's subsequent sales of the software would be noninfringing under the first sale doctrine.

## Conclusions

An implication of the Ninth Circuit ruling is as follows. Where a copyright owner transfers a legitimate copy of the work, whether software or another type of work, and does not require its return, the agreement is not necessarily an assignment. The person who acquires the copy of the work does not own that work, and the first sale doctrine is not available. Although this case focused on computer software, the decision could apply to other copyright-protected works. ■

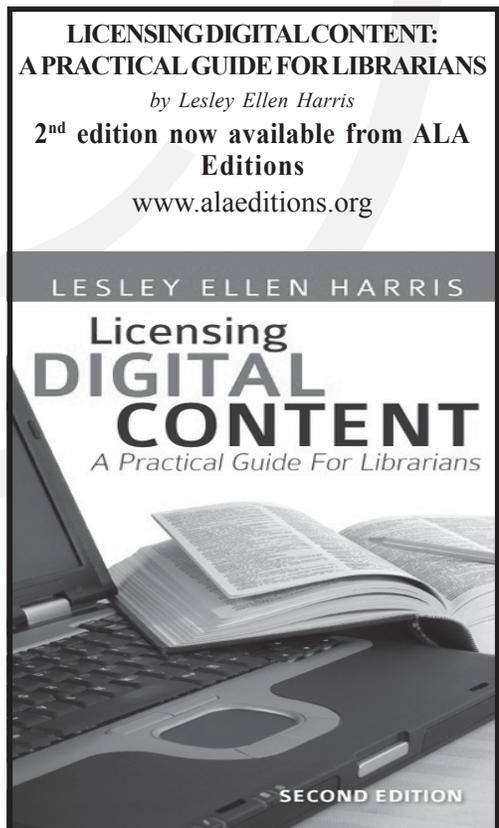
<sup>1</sup> Decision at [www.ca9.uscourts.gov/datastore/opinions/2010/09/10/09-35969.pdf](http://www.ca9.uscourts.gov/datastore/opinions/2010/09/10/09-35969.pdf).

## News Brief U.S. EXEMPTIONS FROM PROHIBITION AGAINST CIRCUMVENTION OF TECHNOLOGICAL MEASURES

On July 27, 2010, the Librarian of Congress announced six classes of works that are now exempt from the prohibition against circumvention of technological measures that control access to copyright-protected works. Details at [www.copyright.gov/1201/](http://www.copyright.gov/1201/).

## News Brief EMI RECORDS V UPC

The Irish High Court recently decided that it was just and proportionate to grant an injunction against the internet service provider, UPC, requiring it to implement a graduated response solution to reduce illegal music file sharing. However, the court did not grant the order because it lacked the jurisdiction to do so. This case provides a good discussion of the graduated response solution. See [www.scribd.com/doc/39104491/EMI-v-UPC#fullscreen:on](http://www.scribd.com/doc/39104491/EMI-v-UPC#fullscreen:on).



## WHAT IS OPEN ACCESS?

By Sanford G. Thatcher

The simplest answer is that open access (OA) is a method of electronic publishing that allows anyone with an internet connection to gain access to an entire published work online at no cost to the user.

While this access may cost nothing, it does not necessarily come entirely free of all encumbrances. If the published work is protected by copyright, what the user may do with it—besides reading it—may be restricted in a number of ways corresponding to the exclusive rights that copyright provides to the owner. For example, the user may not prepare a derivative work or include substantial portions in a work the user creates if doing so cannot be justified as “fair use.” OA thus restricted is termed “gratis,” signaling that no financial cost to the user is involved but that various reuses require permission from the copyright owner.

OA that removes one or more of these additional legal impediments beyond the economic cost to the user is called “libre.” OA is libre if some reuse can be made that cannot be justified as fair use alone and would otherwise require getting permission from the copyright owner. (For more on the gratis/libre distinction, see [www.earlham.edu/~peters/fos/newsletter/08-02-08.htm#gratis-libre](http://www.earlham.edu/~peters/fos/newsletter/08-02-08.htm#gratis-libre)).

### Green and Gold OA

OA comes in two main varieties known as Green and Gold. Green OA refers to authors making their works available through either institutional or personal websites. An institutional site may be a university’s general or library-run website or a professional society’s disciplinary-specific website.

Authors using such sites may post their works in any number of different forms, from early drafts to the final versions as published. Early drafts are often called “pre-prints.” Versions that have been peer reviewed and revised, but not yet subjected to a publisher’s processing involving formatting and copyediting, are sometimes called “post-prints.” The versions as published are termed variously as “versions of record” or “archival versions.” These versions and “post-prints” are both frequently described as “final” versions, which can lead to confusion.

In an effort to bring more clarity to this terminology, the National Information Standards Organization (NISO) in cooperation with the Association of Learned and Professional Society Publishers (ALPSP) recently issued a white paper titled “Journal Article Versions” recommending standardized language according to the following categories: Author’s Original; Submitted Manuscript Under Review; Accepted Manuscript; Proof; Version of Record; Corrected Version of Record; Enhanced Version of Record. The white paper is at [www.niso.org/publications/tp](http://www.niso.org/publications/tp).

### Gold OA

Gold OA refers to publisher-provided OA, regardless of whatever business model a publisher may use to support OA. By arrangement with the author, sometimes requiring payment of a fee either directly or indirectly by the author to the publisher, a publisher makes a work available online at no cost to any user. If it is an article in a journal, the entire journal may be OA or else just the individual article. The latter is known as “hybrid” Gold OA publishing where only certain articles are made freely accessible in this fashion.

For Gold OA, of course, only versions of record are provided. In contrast, Green OA encompasses the full range of versions identified by the NISO standards. Most often Green OA takes the form of the “Accepted Manuscript” because most publishers not using a Gold OA approach are wary of having the “Version of Record” posted by the author as this, if practiced by too many authors, might interfere with the market for subscriptions, which is known as “toll access” (TA) to contrast this model with OA. Many publishers’ policies on what authors may post are described in a database named SHERPA/RoMEO at [www.sherpa.ac.uk/romeo](http://www.sherpa.ac.uk/romeo).

Among the leading Gold OA publishers are the Public Library of Science (PLoS), BioMed Central, BioOne, and Hindawi. Oxford University Press has experimented with both full Gold OA and hybrid Gold OA. Not all publisher-provided OA is dependent on external funding, however, whether from authors, foundations, government, or other sources.



Over the past decade many new journals have been founded to do OA publishing, and some of them are funded in such a way as to require no payments outside the institution sponsoring the journal at all. The Directory of Open Access Journals (DOAJ) listed 5,452 OA journals as of September 2010 and reportedly is adding new journals at the rate of three per day. See [www.doaj.org](http://www.doaj.org). In addition to these OA journals, much publishing is now done more informally through OA institutional repositories (IRs). The Registry of Open Access Repositories (ROAR) provides up-to-date information about the growth of IRs that support OA. For a summary of business models currently in use in OA publishing, see [http://oad.simmons.edu/oadwiki/OA\\_journal\\_business\\_models](http://oad.simmons.edu/oadwiki/OA_journal_business_models).

### **Green OA**

Green OA publishing may be either gratis or libre. Because many authors are mainly concerned about maximizing distribution of their published research and do not think much about how it might be used by others, few bother to grant libre access. Even if they gave more thought to it, they would likely have trouble getting the permission from publishers necessary to have their works provided OA by an institutional repository. The success of Creative Commons (CC) in promoting the use of licenses that decrease the necessity for direct permissions is gradually moving more OA away from gratis toward libre, though full libre OA (which would be equivalent to dedicating a work to the public domain) is still rare. Many CC licenses insist on attribution, and one of the popular CC licenses used by academics reserves to authors the right for “commercial” uses—though the definition of what constitutes “commercial” is subject to ambiguity.

Gold OA is largely gratis, not libre, as publishers desire to maintain control over subsidiary rights.

### **OA Advocates**

Historically, OA has become an attractive alternative primarily in the arena of scientific, technical, and medical (STM) journal publishing. In STM publishing, the costs of the TA subscription model have had the greatest impact upon library budgets.

It has forced them to allocate an ever larger percentage of their funds for materials acquisitions to STM journals with consequent negative results for purchases of other types of materials—scholarly monographs being among the most seriously affected. Not surprisingly, academic librarians and their associations in the U.S. and throughout the world have been leaders in the movement for change, with OA coming to the fore as the most prominent alternative.

The Scholarly Publishing and Academic Resources Consortium (SPARC), which has branches both in the U.S. and Europe, was established specifically to encourage the development of nonprofit journals as an alternative to commercially published TA journals, and it has been a leading advocate of OA. It sponsors what is probably the single most useful source of ongoing information about OA developments, the monthly newsletter prepared by Peter Suber. For information about SPARC and this newsletter, see [www.arl.org/sparc](http://www.arl.org/sparc).

### **Outside the U.S.**

Politically, the forces advocating OA have had more success in foreign countries than in the U.S., but a major breakthrough came with the legislation in 2007 mandating deposit of every “Accepted Manuscript” reporting research funded by the National Institutes of Health in its PubMed Central website within twelve months after publication: [www.ncbi.nlm.nih.gov/pmc/about/intro.html](http://www.ncbi.nlm.nih.gov/pmc/about/intro.html). A new bill known as the Federal Research Public Access Act (FRPAA) is now under consideration in the U.S. Congress to extend mandatory deposit to every federal government agency with a research budget exceeding \$100 million (which would include the National Science Foundation (NSF) but not the National Endowment for the Humanities (NEH)) and limit the embargo period to six months.

Various public statements have been made about OA beginning with the Budapest Open Access Initiative in February 2002, followed by the Bethesda Statement on Open Access Publishing in June 2003 and the Berlin Declaration on Open Access to Knowledge in the Sciences and the Humanities in October 2003. Corresponding to the historical origins of the OA movement, these have focused on journal publishing and mainly on STM publishing.



## Monograph Publishing

Only recently has attention begun to be paid to OA for monograph publishing. One early advocate of this expanded focus was the Association of American University Presses, which addressed the issue of monographs in its Statement on Open Access in February 2007: [www.aaupnet.org/aboutup/issues/oa/statement.pdf](http://www.aaupnet.org/aboutup/issues/oa/statement.pdf). It has been university presses that have been at the forefront of OA monograph publishing ever since the National Academies Press took the pioneering step of posting all of its books online beginning in the mid-1990s. Other American university presses including California, Michigan, Penn State, and the now defunct Rice have experimented with different models; in Canada the way has been led by the University of Athabasca Press; and in Europe a consortium of university presses under the umbrella of Open Access Publishing in European Networks (OAPEN) has been making significant strides. Even some commercial publishers are beginning to experiment, notably Frances Pinter at Bloomsbury Academic in England.

## Funding Models

Key to the success of Gold OA publishing long term is finding a funding model that will be sustainable. Various approaches are being tried. The magnificent Stanford Encyclopedia of Philosophy, supported initially by foundation grants, is aiming to create a permanent endowment. Many publishers ask authors of accepted articles to pay fees, which can range from a few hundred dollars to several thousand. (Many will also grant hardship waivers to authors, especially from underdeveloped countries.)

Some publishers of hybrid journals grant authors at universities whose libraries subscribe to these journals the privilege of publishing their articles OA, with some restricting how many authors can avail themselves of this privilege in any given year. Foundations like the Wellcome Trust in medicine include coverage of OA fees in their grants to authors for research. A number of universities have begun creating funds for their faculty to draw upon in paying OA fees, and a coalition of several have formed as the Compact for Open-Access Publishing Equity.

Some leading advocates of Green OA such as Stevan Harnad believe these efforts to be misguided, viewing them as an impediment to the rapid spread of OA that they think can best be achieved through author self-archiving. Others worry about the proliferation of the “Accepted Manuscript” rather than the “Version of Record” and the damage this may do to the integrity and authority of scholarly publishing. So far, most of the experiments in funding have focused on STM journal publishing, though there are experiments under way in most every field now. (The American Folklore Society has one of the most comprehensive experiments under way now in cooperation with Indiana University’s library: [www.afsnet.org/?page=OpenFolklore&hhSearchTerms=open+and+access](http://www.afsnet.org/?page=OpenFolklore&hhSearchTerms=open+and+access).)

OA monograph publishing has relied mainly on the revenues generated by the sale of print-on-demand or PDF versions. Thus it is still exposed to the vagaries of the marketplace, whereas OA journal publishing is held hostage to the vagaries of university and foundation funding. The reliance on an endowment seems the safest approach of all, but the effort to create an endowment is also probably the most challenging among the alternatives so far tried. ■

By Sanford G. Thatcher  
 Director Emeritus, Penn State University Press  
 Frisco, TX USA

[sandy.thatcher@alumni.princeton.edu](mailto:sandy.thatcher@alumni.princeton.edu)  
[www.psupress.org/newsSandyThatchersWritings.html](http://www.psupress.org/newsSandyThatchersWritings.html)

*The author wishes to thank Peter Suber for his astute and helpful comments on the first draft of this article.*

**In 2010, The Copyright & New Media Law Newsletter is entering into its 14th year of publication.**

**If you would like back volumes of this newsletter in print or PDF for the years 1997 - 2009, email: [editor@copyrightlaws.com](mailto:editor@copyrightlaws.com).**

(Continued from Page 4)

Best practices guidelines which aim to set standards for very broad spheres of activity (such as “education”) tend to have the effect of distorting the substantive content of positive law and giving false comfort regarding the “authoritativeness” of the guidelines. However, there seems to be an emerging consensus that best practices guidelines which are narrowly focused on an industry subset (such as “documentary filmmaking” within the broader sector of “filmmaking”) can be constructive initiatives – because the (comparatively) limited number of stakeholders allows for informed participation and consensus-building. The CSM Statement appears to provide an example of such efforts in action.

The CSM Statement was released in 2005, authored by five film organizations who were advised by a legal advisory board consisting of two professors and three practicing lawyers. The CSM Statement was embraced by a number of organizations which produced or licensed documentary films, including the Public Broadcasting Service and the CSM Statement even sparked “quiet meetings with insurance brokers, some of whom believed that the Statement might provide a tool by which they could offer differentiated insurance policies”.<sup>4</sup>

According to Aufderheide and Jaszi, “all major insurers of documentary film now routinely accept fair use claims that a lawyer asserts are backed by the [CSM Statement].”<sup>5</sup> Within two years of the release of the CSM Statement, “the four [insurance] companies most used by U.S. documentary filmmakers—AIG, MediaPro, ChubbPro, and OneBeacon—all announced programs to cover fair use claims”, in each case with reference to compliance with the CSM Statement.<sup>6</sup> By any measure, that level of acceptance is an impressive accomplishment, and is presumably the sort of impact which the publishers of the DOC Guidelines hope to achieve. Realizing a similar result in Canada, i.e., obtaining a similar level of public affirmation from E&O insurance providers, will likely require diligent and concerted effort by organizations such as DOC, producers’ counsel and E&O insurers’ counsel – and the DOC Guidelines, like the CSM Statement, can function as the critical first step in that process. ■

Bob Tarantino  
Barrister & Solicitor  
Heenan, Blaikie LLP  
Toronto, Canada

[btarantino@heenan.ca](mailto:btarantino@heenan.ca)  
<http://heenan.ca>

<sup>1</sup> The DOC Guidelines state that up to 27% of a documentary film’s budget is made up of clearance costs (see Kirwan Cox, “Censorship by Copyright: Report of the DOC Copyright Survey” (November, 2005)).

<sup>2</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 [“CCH”].

<sup>3</sup> See Giuseppina D’Agostino, “Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to UK Fair Dealing and US Fair Use” (2008) 53 McGill LJ 309 at 355-357 [“*Healing Fair Dealing*”].

<sup>4</sup> See Pat Aufderheide, “How Documentary Filmmakers Overcame their Fear of Quoting and Learned to Employ Fair Use: a Tale of Scholarship in Action” (2007) 1 International Journal of Communication 26 at 34.

<sup>5</sup> Pat Aufderheide & Peter Jaszi, “Fair Use and Best Practices: Surprising Success”, *Intellectual Property Today*, October 2007, cited in Rebecca Tushnet, “User-Generated Discontent: Transformation in Practice” 31 *Colum. JL & Arts* 497 at 498.

<sup>6</sup> *Ibid.*

**Copyright consultations** are available  
from:  
**Lesley Ellen Harris**, Barrister & Solicitor

Let Lesley help you:

- Develop your Copyright Policy
- Manage your use of print and digital/licensed content
- Educate those in your enterprise about copyright compliance

Consultations on Canadian, U.S. and international copyright issues.

Able to assist within all budgets.

[contact@copyrightlaws.com](mailto:contact@copyrightlaws.com)

## REVIEWS

## PRINT

**THE SOUL OF CREATIVITY, Roberta Rosenthal Kwall: 247 pages; \$24.95 US; (Stanford University Press, Inc., 1450 Page Mill Road, Palo Alto, CA 94304-1124, [www.sup.org](http://www.sup.org))**

*The Soul of Creativity* addresses an area of copyright law which in the U.S. is not always given due discussion. It addresses the area of “moral rights” which commonly has two branches. Moral rights encompasses the right of paternity, the author’s right to have his name associated with his work, remain anonymous or to use a pseudonym. Moral rights also encompasses the right of integrity, which protects the reputation of an author from modifications to his work that may be harmful to the author’s reputation as an artist. As academic and author of *The Soul of Creativity*, Roberta Rosenthal Kwall, points out, “American copyright law rewards economic incentives almost exclusively and lacks adequate moral rights protections.” That is the premise of Kwall’s book which leads to a discussion on this issue and an education in general in the area of moral rights.

Kwall, Professor of Intellectual Property Law and the Founding Director of the Center for Intellectual Property Law and Information Technology at DePaul University College of Law, has written a book aimed at academics, legislators and others who want to learn about moral rights. Public awareness of moral rights is in fact a large component of this book. However, equally important to the author is the discussion as to why this European concept has not grown to a great degree within U.S. copyright legislation, despite U.S. international obligations to include moral rights. Kwall argues for its inclusion in U.S. law. She states, “the United States is out of step with global norms by not recognizing more substantial authors’ rights.” One chapter is devoted to explaining why moral rights protection fosters the objectives of the Copyright Clause in the U.S. Constitution.

Kwall has a positive attitude throughout her book, purporting to reform U.S. copyright law to recognize moral rights on a broader basis, arguing that economic incentives is just one underlying basis for copyright in the U.S. and creativity must also be recognized.

Kudos for Kwall for explaining the complex nature of moral rights and for presenting it in ways that the concept may be more fully embraced in the United States. This book is an accessible, interesting discussion of an important subject. The book informs the U.S. intellectual property community about an area of copyright which is important in much of the world, and also helps those outside the U.S. to understand the current U.S. position on moral rights.

## News Brief

**REPORT ON LEGAL IMPLICATIONS OF  
NEWS AGGREGATION**

The Berkman Center for Internet & Society published a white paper that discusses hot news misappropriation and copyright infringement claims against news aggregators. The paper also provides “best practices” for using online third-party content. See [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1670339](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670339).

## News Brief

**THE STATE OF RECORDED SOUND  
PRESERVATION REPORT**

The U.S. Council on Library and Information Resources and The Library of Congress recently published this report. The report discuss various relevant intellectual property issues. See <http://www.clir.org/pubs/abstract/pub148abst.html>.

## COPYRIGHT QUESTIONS & ANSWERS

*Question: A visitor loaned our museum library some slides for the museum to digitize. Who owns the copyright in the slides, and who owns the copyright in the digitized copies of the slides?*

**Answer:** A loan does not constitute a transfer of rights. The visitor presumably owns the copyright in the slides, unless he transfers ownership in a signed agreement. Before digitizing the slides, ensure that the visitor does in fact own the copyright in the slides and does not just own the physical slides. Generally, the person/entity who digitizes slides will own the copyright in them (this is assuming the digitized versions are copyright-protected.)

*Question: Is it legal to use someone else's recipe and publish it in a book or blog if you credit the author of the recipe?*

**Answer:** A recipe may be protected by copyright if it is more than a mere listing of ingredients.

For example, instructions on how to prepare and cook ingredients may be protected by copyright. The list of ingredients or ideas in the recipe are not protected, just the words used to express the ideas. So you may not copy the recipe per se (even if you credit the author), but you could create a similar recipe using your own words.

*Question: John Doe, a staff newspaper photographer, takes a photograph as part of his employment. John Doe dies in 1955. Is the newspaper's copyright in the photograph still valid in 2010, or did it expire in 2005 or 50 years after Doe died?*

**Answer:** It depends on which country you are in. For example, in Canada, the duration of an employment work is based upon the life of the author, not the employer. In the U.S., the duration of copyright for an employment work is 95 years from the date of publication or 120 years from the date of creation, whichever expires first.

*Email your questions to: [editor@copyrightlaws.com](mailto:editor@copyrightlaws.com) or post them in the Qs & As section of the weblog: [www.copyrightlaws.com](http://www.copyrightlaws.com).*



## SUBSCRIBING IS EASY...

**Mail this form with a check or money order to:**

**Copyrightlaws.com  
Farragut Station, Box 33271  
Washington, DC 20033 USA**

**OR SUBSCRIBE AT:  
[www.acteva.com/go/copyright](http://www.acteva.com/go/copyright)**

Name: \_\_\_\_\_

Institution: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ Province/State: \_\_\_\_\_

Country: \_\_\_\_\_ Postal/Zip Code: \_\_\_\_\_

Tel.: \_\_\_\_\_

Email: \_\_\_\_\_

How did you hear about this newsletter: \_\_\_\_\_

*I'd like a 2011 subscription to  
The Copyright & New Media Law  
Newsletter*

**\$ 149.00 U.S.** Institutional Print  
Subscribers in North  
America

**\$ 189.00 U.S.** Institutional Print  
Subscribers outside North  
America

**\$ 99.00 U.S.** Add On Licence for Print  
Subscribers only: Intranet  
Licence for PDF Newslet-  
ters and Alerts

**\*NEW\***  
**\$ 199 U.S.** PDF/Intranet Subscription  
Only

Canadian subscribers, please add  
13% HST to the subscription fee.