THE ©OPYRIGHT & NEW MEDIA LAW
newsletter

Editorial

While some countries such as the U.S. lack any provision in their copyright statutes for orphan works, and other countries such as the U.K. are contemplating how to include such a provision in their statute (see www.ipo.gov.uk/pro-policy/consult/consult-live/consult-2011-copyright.htm), Canada has had an *Unlocatable Copyright Owners Provision* in its Copyright Act since 1988. The Canadian provision allows an application to the Copyright Board of Canada for the use of a work whose owner cannot be located. In order to satisfy the Copyright Board, you must convince it that every reasonable effort has been made to locate the copyright owner. Proof may include emails, phone calls, and legwork such as online and library research showing your attempts to locate the owner. If satisfied by your efforts, the Board has the discretion to issue a license to use the work. This permission is nonexclusive, subject to any terms and conditions issued by the Board, and only valid in Canada. The licenses may authorize the use of published works, fixed performances, published sound recordings, and fixed communications signals.

Examples of Licenses in Canada

In its recent *Annual Report* (for the financial year ending 31 March 2011), the Copyright Board stated that during the past financial year thirty applications were filed with the Board and eight licenses were issued. The eight licenses are listed below.

- Reproduction of the article entitled "The White Dog Feast" by Joseph Vanasse in 1907: requested by an individual
- Digital reproduction and communication to the public of community newspapers: requested by the University of Athabasca

- Reproduction of a bilingual book *New Students' Edition, Enlarged and Revised, A New Method for the Pianoforte* by James Bellack, translated by F. Raynaud and published by Whaley, Royce and Co. in 1917: requested by an individual
- Reproduction of excerpts of three musical works in a television program: requested by Société Radio-Canada
- Reproduction and incorporation, in a documentary film, of a cartoon by Stewart Cameron: requested by National Film Board of Canada
- Reproduction and communication to the public by telecommunication of a work by Sidney Clark Ells: requested by McGraw-Hill Ryerson Limited
- Reproduction of "Chaudières marine, questions et réponses" as translated by W.D. Ewart from *Marine Boilers Questions and Answers* by G.T.H. Flanagan and published in 1984 by Stanford Maritime, London, UK: requested by Canadian Coast Guard
- Reproduction and synchronization and public performance of an extract of a television series entitled *Maria del Barrio*: requested by PCF Angle Mort Film Inc.

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Orphan Works is a Global Issue

Worldwide, the scope of the orphan works issue and its solutions is debatable. Some may use orphan works and bear the risk that an owner may come forward and demand that the work no longer be used or that a licensing fee be paid. Some choose not to use orphan works at all and, instead, find alternative works. The lengthening of copyright duration in several countries from "life plus fifty" to "life plus seventy" has, arguably exacerbated the issue.

On the other hand, digital libraries, collective rights management organizations, general databases on rightsholders, and the internet, as a whole, arguably make it easier to locate owners of otherwise orphan works.

While Canada seems comfortable with its provision for unlocatable copyright owners, the U.S. and other countries struggle to find a solution that balances the interests of owners and users of copyright-protected materials and addresses the issue of orphan works. ■

Lesley Ellen Harris
Editor

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News Brief
CELEBRATE UPCOMING COPYRIGHT DAYS

April 23 has been designated "World Book and Copyright Day" as the day to promote the protection of the written word and to recognize authors and their rights. April 26 is "World Intellectual Property Day" and copyright and IP awareness day around the world. See www.copyrightlaws.com/international/happy-copyright-day-an-opportunity-to-educate/.

News Brief
CANADIAN COPYRIGHT REFORM MOVES AHEAD

Bill C-11 (The Copyright Modernization Bill) has been reviewed by the Special Legislative Committee that has now voted to send the Bill back to the Canadian House of Commons. There it will undergo a Third Reading to be followed by a vote by Parliament after which it will be sent to the Senate.

News Brief
NATIONAL ARCHIVES EMPLOYEE ADMITS COPYRIGHT INFRINGEMENT

A technician at the U.S. National Archives and Records Administration has pleaded guilty to selling unauthorized copies of movies and music using his government email to advertise and negotiate sales. Timajin Neil used his personal computers to reproduce these materials and also used his government computer to produce and store thousands of files. His scheme came to an end when he sold a $5 US DVD to an undercover agent.

A FRESH LOOK AT THE FAIR USE CHECKLIST

By Kenneth D. Crews

The meaning of fair use in American copyright law has been a challenge since at least 1841, when Justice Joseph Story articulated the concept in a case involving the published papers of former president George Washington.[1] In his quest for some notion of allowable use of copyright-protected works, the celebrated jurist expounded on a set of variables that seemed to make good sense for the case at hand. Numerous court rulings over the subsequent years relied on the 1841 doctrine and expanded on factors that Justice Story isolated. Those factors remain the foundation of today's doctrine of fair use. We continue to give them meaning when determining how much of a copyright-protected work one may photocopy, download, cut and paste, and convert into a music video mash-up.

The Four Factors of Fair Use

The factors of fair use are today embodied in Section 107 of the U.S. Copyright Act, and they are the foundation of a fair use analysis.[2] In 1976, when Congress fully revised the Copyright Act, Congress chose to include fair use in the statutes in order to assure that it would survive and be applicable to the rapidly changing nature of expressive media. The four factors in the statute are:

- The purpose of the use.
- The nature of the work used.
- The amount or substantiality of the work used.
- The effect of use on the value of or potential market for the original work.

From a consideration of these four factors come well-reasoned decisions about fair use. In practical reality, court decisions give these factors meaning in the context of the specific case and weigh the factors in the balance in order to determine the overall "fairness" of the case. In many ways, that is exactly what individuals need to do in order to determine whether their activities are within fair use—long before a judge could ever have a chance to express his or her opinion.

The Need to Evaluate Fair Use

Although fair uses of copyright-protected works occur thousands or millions of times each day, relatively few questions are actually brought to court. Most matters are small and not worth the litigation. Other disputes are resolved or settled without judicial intervention. Frankly, an abundance of copying and sharing of works is occurring at such a low level that it is generally or pragmatically out of the reach of copyright owners. Some owners just accept it.

Nevertheless, in many of our pursuits we frequently need to evaluate whether an activity is or is not within the law. Ample resources about fair use are available for anyone who wants to learn about the factors and their meaning. Fair use also has become the subject of policy disputes in academia, the halls of Congress, and Geneva where many international treaties are negotiated. On a daily basis, most fair use decisions occur at home, and in the office, and in our educational institutions, and in our libraries. Many of those activities demand a real decision, rather than allowing it to slide unseen.

The "Checklist For Fair Use"

The "Checklist for Fair Use" is a tool intended to help individuals and institutions make a reasoned decision about fair use.[3] On the surface, the checklist is a breakout of variables and facts relevant to the four factors. It is an attempt to capture some of the circumstances and conditions that courts have identified as relevant or even important to the evaluation of each factor. The checklist is not the only resource available for understanding and applying fair use, but a look at its origin and uses will tell much about when and how one should properly use the checklist.

The original checklist for fair use was developed in 1997 while I was director of the Copyright Management Center on the IUPUI campus of Indiana University.[4] It was the first copyright office of its kind based at any university, and one of our principal objectives was to help the local and national academic community better understand the law and its importance to teaching, research, and other university pursuits. Fair use is obviously a critical part of that mix.

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We built a website that offered a range of materials explaining fair use and the factors, summarizing cases, and offering scenarios for how one might apply the law. We also had a vision of developing a checklist related to fair use. I directed the office and worked closely with my colleague Dwayne K. Buttler (now at the University of Louisville) to craft this checklist. Fair use is based on the four factors, and an increasing number of court rulings were articulating on the meaning of those factors and singling out relevant facts and circumstances.

Our first goal in giving the checklist shape was to review the court decisions and other relevant and influential materials to isolate the facts that are appropriate for consideration with reference to each of the four factors. An obvious example is that the statute itself says that the first factor is the purpose of the use, and the statute further specifies that the nonprofit educational purpose is part of the consideration. That was a clear and simple fact that would arise in a given context and be relevant for consideration and weighing in the balance of the first factor. Also straight from the statute are the references to research, scholarship, criticism, comment, and news reporting.

Some variables have been developed by courts. For many decisions, a transformative use is pivotal in the evaluation of the purpose factor. Similarly, copyright law has little to do with giving credit to the author, yet courts have recognized that when a user does credit the author, it indicates the good faith of the user's intent, and good faith tends to weigh in favor of fair use. Regarding the second factor, or the nature of the work, a series of cases have allowed less fair use if the work is unpublished. Some courts have allowed less fair use for highly creative works such as art or music. Conversely, if the work is published or nonfiction, the courts tend to be more generous with fair use. The list of variables identified in the court cases can be lengthy. Yet, certain variables arise frequently; certain variables are particularly influential; and certain variables are especially germane to uses in the higher education context we were seeking to serve.

The result of a review of the law and compilation of variables is simply what the document says—a checklist. It is an organized list of elements to consider and that reflects how those variables have in fact appeared in court rulings, in the statute itself, and in other influential works (such as congressional reports). The checklist tool is not mechanical and it is not a mysterious decision-making device. It is first and foremost a tool intended to guide users through relevant variables and remind users that in a full and robust evaluation of fair use there might be additional points to consider before making a decision.

The Efficacy of Checklists

Checklists in general have gained significant attention recently. A new study advocates the important role of checklists for use by physicians. In the extreme, a tool that reminds a doctor to evaluate certain variables might be a lifesaving step. Checklists have been a mainstay for airline pilots as they assess each step before locking up the passenger jet and rolling down the runway.[5]

Checklists have found their way into other legal realms beyond copyright. Jennifer Murphy Romig of Emory University School of Law has written a review of *The Checklist Manifesto*, evaluating the book's lessons for the law. She concludes, "Whether applied to individuals or teams, and whether applied for a competitive advantage within one organization or at the level of policy across an entire profession, checklists appear to be enormously promising. *The Checklist Manifesto* is a call for all professionals to take a closer look at their processes and outcomes and their strengths and weaknesses, and to open themselves up to the possibility that rigorously applying checklists could make a real difference in improving outcomes." She further adds that in the legal context, "the consistent use of well-constructed checklists can help lawyers improve outcomes on behalf of clients. . . ."[6]

Checklists have become a recommended tool in the publishing world. At the 2012 Digital Book World Conference and Expo, two executives in the world of book publishing led a program titled, "The Checklist: How a Simple System Can Radically Improve Your Process and Your Products." According to the program description: "A well-made checklist is neither a to-do list nor a process description: It's a tool for preventing critical errors at critical steps in the workflow; an aid to cooperative work among partners and colleagues; and a way of highlighting mission-critical items within the mass of details."[7]

(Continued on page 10)

LIBRARIES AND ARCHIVES AT SCCR 23

By Paul Whitney

On 3 December 2011 seven library and archive associations issued a press release stating their delight at the progress made on copyright limitations and exceptions (L & Es) at the twenty-third meeting of the Standing Committee on Copyright and Related Rights (SCCR) of the World Intellectual Property Organization (WIPO). While this press release marked the conclusion of eleven days of SCCR deliberations in Geneva, it arose from years of preparatory work by library and archive associations and activists, and signaled the continuation of a process to gain a consensus on the first treaty on L & Es for libraries and archives.

As a member of the Canadian Library Association (CLA) Copyright Committee, I had the privilege of attending eight days of the SCCR meeting. Coincidently I am also a member of the International Federation of Library Associations and Institutions (IFLA) Governing Board which, under the leadership of Winston Tabb, has led the library presence at past WIPO meetings along with Teresa Hackett of Electronic Information for Libraries (EIFL). The World Blind Union (WBU) has been the lead advocate at WIPO on the concurrent initiative to achieve a treaty on L & Es for the benefit of the print disabled.

Welcome to WIPO and SCCR 23

Although I have been immersed in copyright for the past fifteen years of my career, this was my first direct exposure to WIPO. The SCCR meetings take place in the dominant WIPO high-rise located in the United Nations (UN) quarter of Geneva. The main assembly room is a microcosm of the UN General Assembly, with Member States' delegations seated in alphabetical (French language) order in a quarter-circle-shaped section in front of a raised stage where the SCCR Chair, flanked by WIPO staff, directs the proceedings. The registered NGO representatives sit in a back row, and from time to time they are called on by the Chair to make three-minute interventions on the subject under discussion.

An overview agenda for the eleven days of meetings is issued in advance, although it is subject to change. This means that NGO attendance fluctuates significantly over the week and a half as the subject of delegates' deliberations changes.

The SCCR 23 agenda addressed three key strategic areas: limitations and exceptions for the print disabled (three days building on the previous work done on the issue in SCCRs 21 and 22); libraries/archives (three days marking the first formal deliberations on the issues); the broadcasting treaty (one day marking over ten years of consideration of the matter without resolution!). In addition, time was set aside for procedural discussions on the preparations for an upcoming audiovisual diplomatic conference.

Global Status of L & Es: Some History

Concern had been mounting through the last decade that the delicate balance between the interests of copyright owners and the users of copyright-protected content was being lost due to the strengthening of copyright-owners' rights implemented through changes in legislation, often prompted as a result of trade agreements. Specific concerns with WIPO were raised when it was noted that WIPO's proposal for a model law to assist developing countries implement their initial copyright legislation was totally silent on the need for user L & Es. In response to concerns raised by NGOs and associations, WIPO began the process of considering the global status of L & Es by commissioning a study on library and archive L & Es in Member States' copyright legislation. The resulting study[1] demonstrated that the inclusion of L & Es in Member States' copyright legislation was patchwork at best and distinctly absent in many southern hemispheric and underdeveloped countries. With the support of a number of Member States, agreement was reached to have SCCR consider L & Es in three areas: the print disabled, libraries and archives, and education.

Soft Law vs. Hard Law Approach

Representatives from several influential countries have proposed that a "soft law" approach to L & Es (i.e., a nonbinding statement of general intent) is preferable to a "hard law" or binding treaty approach as it will be far easier to achieve. The associations representing the print disabled and libraries and archives have rejected this suggestion, noting that broad statements of intent will not provide sufficient impetus to ensure a globally consistent legislative approach to what should be guaranteed user rights.

TLIB Version 4.1

In preparation for the SCCR 23 deliberations, a working group of librarians and archivists (with assistance from copyright experts) prepared a draft treaty on library and archive L & Es—i.e., TLIB[2] now in version 4.1.

The Africa Group had earlier proposed treaty language which combined some clauses from an earlier draft of TLIB with new sections on the print disabled and education—in effect promoting a combined single treaty on L & Es. During SCCR 23 other documents were introduced (as listed below; all searchable on the WIPO site by SCCR number), meaning that all of the areas identified by the TLIB process were "on the agenda" with the addition of new sections on the right to translation which was introduced by Egypt and legal deposit introduced by the U.S.:

- The Case for a Treaty on Exceptions and Limitations for Libraries and Archives: Background Paper by IFLA, ICA, EIFL and INNOVARTE presented by Brazil (document SCCR/23/3);
- Objectives and Principles for Exceptions and Limitations for Libraries and Archives," presented by the United States of America (document SCCR/23/4);
- The Proposal on Limitations and Exceptions for Libraries and Archives," presented by Brazil, Ecuador and Uruguay (document SCCR/23/5).

SCCR 23: Some Conclusions

The conclusions for SCCR 23 summarized the areas for "future text-based work" at SCCR 24 as follows. Delegations identified eleven common topics for discussion, namely: 1) preservation, 2) right of reproduction and safeguarding copies, 3) legal deposit, 4) library lending, 5) parallel importations, 6) cross-border uses, 7) orphan works, retracted and withdrawn works and works out of commerce, 8) limitations on liability of libraries and archives, 9) technological measures of protection, 10) contracts, 11) right to translate works.

There was agreement that the WIPO Secretariat would produce a compilation document of SCCR 23 delegates' proposals and commentary on library and archive L & Es; also included in this compilation will be any corrections submitted by SCCR 23 delegations to the WIPO Secretariat by the deadline of 29 February 2012.

This compilation document will be titled: "Provisional working document containing comments on and textual suggestions towards an appropriate international legal instrument (in whatever form) on exceptions and limitations for libraries and archives"(short-form identification:SCCR/23/8 Prov).

Concluding Highlights

The highlight of SCCR 23 for me was seeing the progress made on Library L & Es and the support they received from many countries' delegations. This is clearly a cause for celebration, but with the clear eyed understanding that there is much work still to do and nothing is assured. I should also note the pleasure I derived from hearing an NGO delegate (on the broadcasting treaty) recount that one piece of advice he had been given in coming to Geneva was "not to piss off the librarians." Words to live by!

A Print Disabled Afterword

Delegate deliberations on L & Es for the print disabled began at SCCR 21 in November 2010. This resulted in the preparation of a November 2011 document drafted by the SCCR Chair, reflecting input from Member States, and entitled "Proposal on an international instrument on limitations and exceptions for persons with print disabilities" referred to as The Chair's Text[3] This document/draft treaty was addressed by Member States at SCCR 23, and a working document was produced reflecting all comments made by delegates. Library and archive representatives have been very attentive to the deliberations on L & Es for the print disabled for a variety of reasons:

- Any resulting L & Es will be of utility to libraries and archives, many of which serve the print disabled.
- The pace and process of these deliberations may serve as a predictor of how the library and archive L & Es will proceed.
- Print disabled L & Es language may establish precedents that are applicable to library and archive L & Es.

(Continued on page 9)

DERIVATIVE WORKS, USER-GENERATED CONTENT, AND (MESSY) COPYRIGHT RULES

By Daniel Gervais

The shift from a one-to-many entertainment infrastructure to a many-to-many infrastructure has deep consequences on several levels. It has made possible fan fictions, mash-ups, remixes, and collages, all distributed worldwide via the computing cloud. And it is not just entertainment. Blogs have transformed the access to, and arguably the nature of, information. How does copyright cope with this change?

Three Categories of User-Generated Content

Let us begin by identifying what we are talking about. Fortunately, the taxonomy of "user-generated content" (UGC) for the purpose of determining how copyright applies is fairly easy to establish. Basically, there are three types of UGC: user-authored content; user-copied content, and user-derived content. The first type, *user-authored content*, is similarly easy. Take your vacation pictures. You are free to copy, upload, perform, and/or make available that "content" on any basis, including free and unrestricted use, imposing conditions for free use (such as those found in Creative Commons licenses), or licensing it commercially.

User-copied content is not inordinately complicated either. Copying an entire work is an infringement unless it can be considered fair use/dealing or covered by another specific exception. The ratio or amount used is also relevant. If only a short excerpt is used, a quotation "right" might exist: the copying may not be substantial enough to constitute an infringement.

The third category of UGC, *user-derived content*, is by far the most complicated. It forces us to answer some of the hardest questions a copyright lawyer might face. Let us first define the concept. User-derived content is content that was created using parts of one or more pre-existing protected works that are then transformed, adapted, or recast in some way. Three questions must then be answered. First, where is the border between copying and derivation? Second, where is the border between derivation and inspiration? Third, should certain forms of derivation be authorized as fair even if they infringe copyright?

At What Point Does UGC Begin to Infringe?

The notion of derivation emerged with the recognition that something protectible lay beneath literal copying. Again, I am not talking here about uploading a song or commercial video to a third-party server. That is copying. I am talking about content that is modified or otherwise reused to create something new.

Everyone understands that copying a novel and changing a few words infringes the rights of the author. But what happens when the work is translated? Is that a copy? What if the novel is used to create the screenplay for a movie? What if it is recast as a parody? For example, one can write a novel about a country founded on a racist and male chauvinist ideology without infringing Margaret Atwood's *The Handmaid's Tale*. But what if the novel begins with a staged terrorist attack blamed on Islamic extremists? What if the country is named Gilead? At what point does one begin to infringe?

Defining Derivative Works in the U.S. and Canada

In the United States, the Copyright Act gives copyright holders a right to prevent the making of derivative works. Those works are defined very broadly. First, the statute contains a list of "named derivatives" (translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, and a work consisting of editorial revisions, annotations, elaborations, or other modifications). Second, it contains an open-ended notion including any "work based upon one or more pre-existing works" and any other form in which a work may be recast, transformed, or adapted.

In Canada and countries with a British copyright history, the derivative right is structured differently. For example, the Canadian Copyright Act provides rights (a) to convert a dramatic work into a novel or other nondramatic work;

(b) to convert a novel or other nondramatic work of an artistic work into a dramatic work, by way of performance in public or otherwise; (c) to make a sound recording, cinematograph film or other contrivance by means of which literary, dramatic, or musical work may be mechanically reproduced or performed; and (d) to reproduce, adapt, and publicly present a literary, dramatic, musical, or artistic work as a cinematographic work.

The Canadian statute does seem narrower. However, that may only be an illusion. The real issue is the interface between reproduction and adaptation/derivation. Courts routinely accept that one may *copy* a work without making a literal copy. In the United States, courts look for substantial copying. They developed tests such as the (in)famous abstraction/filtration/ comparison test for computer program copying, which looks for protectible elements in the first work and compares them to the second.[1] A similar—though somewhat reversed—test was applied in Canada.[2]

Reproduction and Derivative Rights: Complete Overlap?

It is easy to see that if "copying" is defined very broadly, the notion of derivation has very little work to do. In fact, a number of scholars have argued that there is an almost complete overlap. I find this difficult to reconcile with a well-known statutory interpretation canon according to which legislators are not supposed to put useless words in statutes. Admittedly, however, as digital technology progresses, it has become harder to see the lines that separate the two rights (reproduction and derivation). If this were only a matter for *professional* authors, publishers, producers, and users for whom dealing with complex copyright issues is an unpleasant but usually bearable burden, the problem might not seem so pressing. However, my focus is UGC and tens of millions of internet users who might like to know (and possibly change?) the rules.

Delineating Reproduction vs. Derivative Rights: A Few Pointers

So, how can one delineate the borders of the reproduction and derivative rights? A few pointers might be useful. First, we know that the concern (visible in the example of a novel from which only a few words have been changed) is that an unjustified prejudice to a copyright holder can be caused by an appropriation other than a full literal copy.

It also seems clear that the derivative right implies a *modification of the form* of the adapted (or primary) work, so that courts might consider limiting the reach of the reproduction right in cases where the form is changed (language, format, etc.). It is similarly clear that the U.S. statute cannot be taken too literally, because every new work is "based upon" something else, and that something else is almost always one or more pre-existing works. *Based upon* is best understood as a concept requiring proximity between the first work and the new, derived work.

Reproduction and derivation overlap in what can (and cannot) be protected. Ideas cannot be protected by copyright—only expression is. We also know that copyright protection emerges independently of any formality (such as registration) as soon as an *original* work of authorship has been created. Indeed, originality is the international standard for copyright. We might want to ask, therefore, whether what was taken from a work is what made it original. Originality results from *creative choices* made by the author: choices resulting from the use of skill and judgment that were not dictated to the author by the form, the tools, or the possible function of the work. If two equally (technically) qualified authors would, using the same tools, have created virtually the same work, there is no room for originality. For example, when two persons are tasked with producing a phone book, the result likely will be an alphabetically organized list of names with addresses and phone numbers.

Even if infringement is present, fair use and fair dealing may be used to allow parody, such as Alice Randall's *Wind Done Gone*, a book in which she recasts the famous American novel *Gone with the Wind* (1936) by Margaret Mitchell from the viewpoint of the slaves.[3] In a more controversial case, fair use has been used to allow Google to display search results even if they include thumbnails of protected images.[4]

Parody (and fair use) only take us so far in the realm of UGC, however. Are we to treat all UGC users who don't create parodies as pirates? Applying a "harm to the market for the work" test (as in the fourth fair use criteria in the US statute) as the main reason for the derivative right to exist would make more sense. Licenses might apply, of course. In fact, allowing for the licensing of derivative uses (to other authors) is arguably the main role that the derivative right plays, and this could become a much bigger role if applied to mass uses.

For example, YouTube might obtain on behalf of its users the right to make available derived content, but within parameters to be determined in the contract with major music or audiovisual right holders (film or TV companies). This "private ordering" of culture (defining in advance by contract what can be done with content) may be problematic. UGC and art that "copies," including "mainstream" appropriation art such as Jeff Koonz's, is an important phenomenon. This cultural development should not be stopped, though it may need to be reined in when it exceeds acceptable boundaries. Another approach is the exception considered in the recent copyright reform efforts in Canada. This approach is not a license to upload anything to social sites, but a limited right to create new works by transforming existing works in cases where (a) a licensing transaction is not reasonable and (b) there is no demonstrable impact on the market for existing works.

Finding the Balance

There will be cases, and courts should tread with utmost caution not to interfere with cultural developments, even those they may consider undesirable. Yet that cannot be a license to interfere without legitimate reason with reasonable market expectations of copyright holders. The coming years will be key in finding that balance. ■

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[1] See Computer Associates International Inc. v. Altai, Inc., 23 U.S.P.Q.2d 1241 (U.S. 2nd Cir. N.Y., 1992).

[2] See Delrina Corp. v. Triolet Systems Inc., (2002), 58 O.R. (3d) 339, 17 C.P.R. (4th) 289, 23 B.L.R. (3d) 231 (Ont. C.A.) [Delrina], additional reasons at (2002), 22 C.P.R. (4th) 332 (Ont. C.A.), leave to appeal to S.C.C. refused (2002), [2002] S.C.C.A. No. 189, 21 C.P.R. (4th) vi (S.C.C.).

[3] Suntrust v. Houghton Mifflin Co., 252 F. 3d 1165 (11th Cir. 2001), opinion at 268 F.3d 1257.

[4] See Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007). www.law.vanderbilt.edu

[5] See Rogers v. Koons, 960 F.2d 301, 305-06, 314 (2d Cir. 1992).

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Prior to the plenary consideration of the Chair's Text and at the request of the Chair, World Blind Union (WBU) representatives met with representatives of the International Publishers Association (IPA) in a side meeting to explore possible alternatives to the treaty proposals. This reflects the IPA position that collaborative problem solving between the parties is preferable to a binding treaty. At the end of these meetings and the delegates' deliberations on the Chair's Text members of the WBU were clearly distressed by not just a lack of progress but by what they subsequently described as a loss of gains made at the SCCR 22.

In addition to their position that collaborative solutions were preferable to treaty requirements, the IPA representatives argued that commercial availability and rightsholder consent must take precedence over treaty-generated alternate format reproduction– or importation-rights and that "trusted intermediaries" (the agencies permitted to execute L & Es on behalf of their qualified users) must be narrowly defined and regulated. These issues will no doubt be front and center as the deliberations continue at SCCR 24 in July 2012. ■

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[1] Kenneth Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archive,* www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192.

[2] Treaty Proposal on Limitations and Exceptions for Libraries and Archives, www.ifla.org/en/node/5856.

[3] See www.wipo.int/meetings/en/doc_details.jsp?doc_id=188547.

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The Checklist Function: Neither Formula nor Calculator

A checklist may have different functions in different settings, but a checklist is clearly not a formula or a calculator. It is instead a tool for helping decision makers consider and evaluate relevant steps and variables. In that regard, a checklist is especially compatible with fair use. Fair use is not mechanical. Fair use has no equations or defined answers. Fair use is about an evaluation of the variables as applied to the factors and a weighing of the persuasive strength of those factors to reach a conclusion about the appropriate scope of fair use.

In order to arrive at conclusions that are well informed and well reasoned, the checklist helps ensure the user will in fact consider relevant elements of the fair use determination. In the years since developing the checklist for fair use, it has been widely adopted at colleges, universities, schools, companies, and other organizations throughout the country. Some users have employed the version exactly as originally produced in 1997. Others have modified it to meet local needs. In the end the checklist should assist users making a thoughtful evaluation of the four factors.

The checklist alone of course does not tell the whole story. Not all of the variables will be relevant in any given case. Moreover, some variables will be more persuasive or carry more convincing heft in some situations and as a result one factor might be more influential than another. Courts do exactly the same thing. One should therefore use the checklist in conjunction with other general reading about the meaning of the factors and how courts evaluate and apply them.

Although I have been immersed in evaluating fair use for many years, I find myself occasionally reaching for the checklist for my own needs. In one recent project, I was using a reproduction of an artistic image. I was working with a student on a project and saw the checklist as an effective way for me to document my own exercise of fair use, and a meaningful way to help the student to learn about and apply about fair use. We reviewed our circumstances and marked the relevant boxes of the checklist. We evaluated overall the persuasive strength of the different facts and factors. We felt sufficiently confident that the use of the image was within fair use.

We then pondered one more question: What else could we reasonably do to be even more confident that our use was indeed fair? The checklist helped us answer that question. By looking at the boxes that were not checked, an unmarked box about credit to the source of the image stood out. We had shortcut the credit and could do better. Used in this manner, the checklist helped us reach a reasoned conclusion about fair use, and it helped us review and strengthen our case for fair use—an ideal deployment of the fair use checklist. ■

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[1] *Folsom v Marsh*, 9 F.Cas. 342 (1841).

[2] U.S. Copyright Act, 17 U.S.C. § 107 (2012).

[3] The checklist and related materials are available from the website of the Copyright Advisory Office of Columbia University: http://copyright.columbia.edu.

[4] Kenneth D. Crews, "The Copyright Management Center at IUPUI: Brief History, Dynamic Changes, and Future Demands," *Indiana Libraries: Journal of the Indiana Library Federation & the Indiana State Library* 19 (1 November 2000): 13-15.

[5] Atul Gawande, *The Checklist Manifesto: How to Get things Right* (New York: Metropolitan Books, 2009).

[6] Jennifer Murphy Romig, "The Legal Writer's Checklist Manifesto," *Legal Communication & Rhetoric: JALWD* 8 (Fall 2011): 93-107. Available at: www.alwd.org/LC&R/CurrentIssues/2011/pdfs/romig.pdf.

[7] The conference program and description are available at: www.eiseverywhere.com/ehome/24240/36095/?&.

REVIEWS

DIGITAL

Copyright Myths: Copyright Basics and Common Misconceptions Debunked, FREE, 15 pages, PDF (Graphic Artists Guild, www.graphicartistsguild.org/resources/copyright-myths/.)

Code of Best Practices in Fair Use for Academic and Research Libraries, FREE, 32 pages, PDF (Association of Research Libraries, www.centerforsocialmedia.org/libraries.)

Have you ever puzzled over differing comments or opinions on copyright issues or tried to determine whether fair use could be used for certain copying? If you have, the resources listed above will be helpful in sorting out your confusion about these matters. Each one of these titles provides a current and comprehensive look, written in easy to understand language, at the copyright issues faced by both users and creators of copyright-protected works. You should note that neither document provides legal advice; rather they are both explorations of various copyright issues.

Copyright Myths is written by and for graphic artists, but it is a general document that translates well to other media for both users and creators. The Graphic Artists Guild (GAG) has done a terrific job of capturing the myths and misinformation about copyright that come up over and over again. Answers to twenty-one of the most common copyright myths are provided, and topics covered include registration, several sections on infringement, using internet resources, public domain material, and more. For example: *I found a picture with no name on it. If it doesn't have a name or a copyright symbol, that means it is not copyrighted and I can use it for free*; and *As long as I don't make money on it, it's OK and isn't an infringement of copyright.* Answers are presented in an easy to understand and often light-hearted way. This will be a well received and informative document for all.

Fair use, one of the topics also covered in *Copyright Myths,* is the primary focus of the *Code of Best Practices* (the *Code*). For the *Code*, a survey was conducted with sixty-five librarians in academic and research institutions across the U.S. This survey determined that although fair use was recognized as a valuable tool, there was not clear agreement on how and when to claim fair use when reproducing copyright-protected works. To facilitate our clearer understanding and application of fair use, eight scenarios involving common and current practices in the utilization of fair use when dealing with copyright-protected material are examined in the *Code*. Each of the eight scenarios contains a detailed analysis organized by the following headings: *Principle*, describing the main principle (or the how and why) according to which fair use applies; *Limitations*, articulating the limitations (or restrictions) to be applied to the particular type of usage to ensure that the case is strong; *Enhancements*, proposing systematic/continuous procedures or specific actions to strengthen the case. For example, the first topic deals with "supporting teaching and learning with access to library materials via digital technologies," and the principle is given as follows: *It is fair use to make appropriately tailored course-related content available to enrolled students via digital networks.* Eight limitations to consider in order to validate use of those materials are outlined: e.g., ensuring only registered students have access to the materials; ensuring the materials are available only for a time period required for teaching purposes. Two enhancements are proposed to make the case for fair use stronger: e.g., prompting instructors to outline briefly the pedagogical purpose of the materials used.

The *Code* is a good discussion document. Although prepared for specific situations occurring in academic and research libraries, it may be a valuable educational document for others, both to read and use to practice (by also analyzing, along with the document's guidance, the scenarios given) identifying situations when fair use may be applied to copyright-protected materials. ■

COPYRIGHT QUESTIONS & ANSWERS

Question: I have interviewed a person by telephone, which I recorded, and I am editing his comments for inclusion in a newsletter article I am writing. Do I need permission to edit his comments or include them unedited?

Answer: Generally, the first person who fixes a work, including in writing or by an audio recording, has copyright in that work. Assuming your interviewee was not reading his answers and they were shared in a conversation, you would own the words in the conversation since you first recorded/fixed them. As the owner of the interview, you may use it as you wish (at least for copyright purposes). However, from a practical perspective, at the beginning of the interview (once the tape recorder is on), let the interviewee know that you are recording the interview and will use it in a newsletter article.

Question: My organization has published an e-book that they want to distribute broadly and for free. Should we include a copyright notice on the e-book?

Answer: Yes, you could include something to the following effect: © XXX Company 2012. This e-book may be freely reproduced and distributed without further permission from XXX Company. However, permission is necessary to adapt the e-book in any manner. (And hyperlink XXX Company so that people may email you either with questions or permissions' requests to adapt the e-book.)

Email your questions to: editor@copyrightlaws.com or post them in the Qs & As section at www.copyrightlaws.com.