

WRITTEN SUBMISSION OF
COPYRIGHT CLEARANCE CENTER, INC.

(submitted November 19, 2010)

IN RESPONSE TO THE NOTICE OF INQUIRY
ON COPYRIGHT POLICY, CREATIVITY, AND
INNOVATION IN THE INTERNET ECONOMY
FROM THE DEPARTMENT OF COMMERCE,
THE UNITED STATES PATENT AND TRADEMARK OFFICE
AND THE NATIONAL TELECOMMUNICATIONS AND
INFORMATION ADMINISTRATION
published at 75 Fed. Reg. 61419 (October 5, 2010)

Copyright Clearance Center, Inc. (CCC), a collective licensing organization that embodies a successful, functioning market between copyright holders and copyright users for exchanging licenses and royalties related to copyrighted text materials, welcomes this opportunity to submit comments to the Department of Commerce (DOC), the U.S. Patent and Trademark Office and the National Telecommunications and Information Administration on Copyright Policy, Creativity and Innovation in the Internet Economy.

By its nature as an organization devoted to the use of licensing as a major mechanism by which copyright rightsholders protect their rights and content and through the encouragement of which the government can aid in that protection, CCC's comments focus on the DOC Internet Policy Task Force's stated intention

to identify policies that will: (1) increase benefits for rights holders of creative works accessible online but not for those who infringe on those rights; (2) maintain robust information flows that facilitate innovation and growth of the Internet economy; and (3) at the same time, safeguard end-user interests in freedom of expression, due process, and privacy,

75 Fed. Reg. at 61420, rather than on the details of technology that are discussed later in the Notice of Inquiry.

Copyright Balances Private and Public Interests, and Appropriate
Private Ordering to Protect Both Interests Should Be Encouraged

The Constitution introduced a radical balance between private and public interests when it directed Congress to recognize and protect copyrights. A government-created monopoly, in the form of financial incentives and protections for the creation and publication of written materials, was offered to private parties for limited times in order to achieve the public interest goal of

continuously improving science and culture, and therefore society. Although technology has developed without cease in the 220 years since the enactment of the first Copyright Act, the principles of that Constitutional balance have remained.

Over the history of the country, technology has repeatedly attacked the exquisite balance that copyright represents, and the government has repeatedly interceded to right that balance, sometimes on the side of rightsholders (by expanding the scope or duration of copyright) and sometimes on the side of users (by recognizing or expanding privileges, such as fair use or certain uses by libraries, the visually impaired and others). Today, abuses of rights and privileges on both sides have brought America to the point of needing the government to re-set that balance again, this time in the form of efforts to provide rightsholders with means by which to resist the inappropriate use of technology and protect their copyrighted works.

The well-known and unfortunately widespread efforts of copyright pirates to take commercial advantage of copyrighted works placed in the market by rightsholders deserve the serious attention of the government. But, while unauthorized reproduction and redistribution of copyrighted works on a mass scale – piracy – violates both the law and the social contract and requires the full force of the government to quash, infringement on a more daily scale is also a massive, growing challenge for rightsholders and likewise deserves appropriate government attention. In these cases of “routine” infringement, private ordering in the form of licenses – that is, copyright contracts between willing parties – is a valuable, widespread, and still under-used solution. Licenses allow users to get what they want and need, while also allowing rightsholders to design permissions structures to serve those wants and needs, ordinarily without intervention from the government.

In brief, CCC encourages the DOC Task Force to consider the availability of existing licensing regimes and the creation of identifiable new ones as an important tool in redressing the copyright balance.

Copyright Clearance Center, Inc., Serves Both Rightsholders and Users in a Vibrant Licensing Market

CCC is a not-for-profit corporation created by a consortium of authors, publishers and copyright users in response to the recommendation of Congress in the legislative history of the Copyright Act of 1976 that an easy and efficient means should be created to enable the exchange of rights and royalties – the “permissions process” – between willing rightsholders and willing users of text-based copyrighted materials. See, e.g., S. Rep. 94-473, 94th Cong., 1st Sess. 70-71 (1975). Congress, and those who testified in the course of the legislative hearings leading to the 1976 Act, were reacting to the “new technology” of the time, which was making widespread reproduction of text-based copyrighted materials too easy and uncontrollable and thereby undermining the Constitutional balance between private and public interests. That new technology was, of course, photocopying, the field of use in which CCC was created to issue licenses and permissions (and one, but not the only one, in which we continue to operate to this day). CCC continues to this day (uniquely among collecting societies around the world) with representatives on our Board of Directors not only from the author and publisher communities

but from user communities as well, creating and maintaining markets that have served all parties effectively and efficiently.

CCC has been successful in serving market participants (both rightsholders and users) and allowing them to complete licensing arrangements on a voluntary basis for over 30 years. CCC has grown since opening its doors in 1978 from having no business at all to, in our most recent fiscal year, over \$215 million in revenues and over \$155 million in royalty payments to participating rightsholders, while still remaining a not-for-profit organization. Today, CCC represents tens of thousands of copyright rightsholders (that is, primarily publishers and authors of in- and out-of-print books, journals, newspapers, magazines, newsletters, blogs, e-books and the like, as well as images, video and other media, and their respective agents, representatives, societies and other organizations) from around the world, each of whom, either directly or indirectly through a representative, has signed a non-exclusive agreement authorizing us to represent them. On the other side, CCC today issues two types of licenses in the text field, each voluntarily entered into by a user:

- repertory licenses which cover email, intranet and photocopy uses at tens of thousands of commercial, non-commercial and government organizations in all sectors of the economy, representing more than 25 million employees and hundreds of thousands of students (without precise identification of individual end-users or of who is using what materials, preserving their individual privacy); and
- pay-per-use (or “transactional”) licenses (sometimes called “permissions”), covering email, intranet, photocopy and many other kinds of uses, to thousands of businesses, academic institutions and government agencies, particularly covering document delivery (including interlibrary loan that falls outside the limits of Section 108) and academic coursepacks, both digital and paper. These pay-per-use licenses number in the millions annually, and we handle them both centrally at our own website and “at the point of content” online at dozens of publishers’ Web sites.

We also license uses of images, video and other media through our transactional services.

Unlike similar organizations in other countries, CCC operates without any special government direction, regulation or support (such as a statutory license). Rather, each rightsholder and each licensee who participates in CCC’s programs does so voluntarily and in furtherance of respect for the copyright balance after making an individual decision regarding copyright protection (for rightsholders) or fair use (for U.S. users), fair dealing (for U.K., Canadian and other users) or other privileges. That is, the system does work: appropriate licenses are a remarkably powerful form of market solution to copyright issues and should be encouraged – even celebrated – by the government.

Licensing is a Necessary Component of any Public Copyright Policy

Although licensing as the basis for relationships between copyright rightsholders and users cannot address all the questions that the Notice of Inquiry has raised (particularly to the extent that those questions are focused on particular uses of technology), CCC believes that licensing and the promotion of licensing, which includes education about copyright compliance for the vast preponderance of users who want “to do the right thing” in furtherance of the copyright balance (even if they are not consciously aware of it), are necessary components of any policy positions and global consensus to foster creativity and innovation online that the DOC Task Force is seeking to develop and encourage. The government should of course continue to exert substantial efforts, including application of criminal law, to end the massive commercial exploitation of others’ works without authorization that is alluded to in the Notice of Inquiry. However, at the same time, the unauthorized use by individuals and organizations of others’ copyrighted materials at more ordinary, every-day levels is better addressed by both individual and collective licensing, making due accommodation for traditional privileges such as fair use. This long-time province of private ordering between parties should be encouraged by the government through education and positive efforts to promote licensing in appropriate circumstances, with little more government intervention required than the availability of the civil courts.

Two circumstances may suffice as examples.

First, the federal government itself can set an example at home and abroad, as has been done by national governments of many other countries, by entering into appropriate licensing arrangements, similar or identical to those entered into by commercial entities, for its widespread use of the copyrighted works of others in circumstances where the government is acting as an ordinary employer, tenant or provider of goods and services to the public, thereby directly (and publicly) respecting, and indirectly protecting, the rights of copyright holders to the benefits of the copyright balance. Without a doubt, federal government agencies most likely acquire copyrighted content through purchases and paid-up subscriptions of the materials they need; and yet, like most private organizations, those agencies almost certainly proceed to use those materials beyond the scope of their original licenses – through sharing and redistribution. However, unlike many prominent private organizations, those government agencies do that sharing and redistribution without taking on the additional licenses required by law to do so. Setting an example, by uniformly ensuring that it is respecting the copyrights that the Notice of Inquiry suggests that it wants to protect, would help the government make the case that protection of copyrights is neither difficult nor unusual. And making it clear (by showing the way) that compliance is not difficult can help support the government’s public case that mass infringers and pirates are in fact doing something that is not merely a matter of degree (which is a harder case to make clearly) but a matter of kind (that is, what the pirates do is unlike that which people ordinarily do who act under licenses).

Second, at colleges and universities, the government can help to encourage the creation of broad licenses to use others’ copyrighted materials in the academic space. Nascent efforts to develop licenses for students and faculty to use music, text, images and multimedia – that take due

account of fair use while still respecting rightsholders' creative efforts – have been slowed by the huge breadth of needs, desires and sheer numbers of both the users and the rightsholders involved, the special circumstances of the academic endeavor, and the reluctance of anyone to “go first”. A targeted government effort to organize and encourage both sides to develop appropriate license structures would create a market for rightsholders to receive some return on their works and for users, especially student users, to learn the value of the copyright balance. Teaching students about that value will help encourage them to consider self-supporting careers of creativity and innovation in the creation of copyrightable works, to the ultimate benefit of the vibrant society envisioned by the Founders in the Constitution; at the same time, teaching about that value will help address the market demand for “free” use of others' works that is at the root of so many of the problems implicitly described in the Notice of Inquiry.

A number of organizations like CCC, variously rooted in the responsible rightsholder or responsible user communities, have already begun both education efforts and academic-market-organizing efforts in the interest of copyright but are facing tremendous headwinds. The government – without the expenditure of huge sums of money but perhaps with (i) vocal encouragement, (ii) the very public taking of licenses for its own uses whenever appropriate, and (iii) small subsidies (of time or money) for pilot projects and the like – can step forward in a public way and encourage the private markets built around licensing to do their work.

Conclusion

Successes in government efforts like these license-oriented examples to alleviate “more routine” infringement will help begin to redress the copyright balance that is at the foundation of the Notice of Inquiry, and, by isolating them and making them easier to identify, possibly even in connection with the larger commercial piracy efforts discussed there. Strategies to build on these successes ought to be included among those proposed by the DOC Task Force in its planned report.

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