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Coaching Copyright

Rules and Strategies for the Game

BEING A COPYRIGHT COACH

Recently, a former colleague of my wife's, a clinician at a major U.S. hospital, got in touch with me to ask a question about a diagnostic manual he had written. He was not primarily a researcher, so he was unsure about how he should deal with copyright, licensing, and publication for the manual that his hospital superiors were encouraging him to distribute. Like so many academics, he was especially concerned about attribution—he wanted to receive proper credit for his work—and he was worried that less experienced practitioners might make changes detrimental to the value of his manual. He had heard of the Creative Commons (CC) licenses and thought such a license might work for him, but he needed help to understand the CC licensing scheme and figure out how to apply one to his own work.

This situation is a nice example of “coaching” copyright. As a professor who teaches copyright in a law school, I strive for my students to gain a complete and detailed understanding of copyright law and the issues involved, and I try to proceed in a systematic way. But my position with this clinician was quite different. He did not want a comprehensive lesson in copyright law. In

fact, such a lesson would not help; it would likely confuse him and still leave him unsure about how to proceed. What my friend needed was coaching—a practical path forward that would help him achieve a specific goal. Coaching is distinguished from teaching because it is focused on a particular client's need and on obtaining a desired outcome for that client.

The clinician and I began our consultation through e-mail, and I used this initial exchange to establish some basic parameters: details about the manual in question, the kind of distribution he had in mind, and what misuse(s) he was concerned with preventing. With these basic parameters established, we sat down for a more detailed discussion. I had determined that there should be three stages to our discussion.

First, we needed to be sure that my friend was, in fact, the copyright holder in this manual. We needed to discuss the possibility that it could be considered a work made for hire and therefore owned by his employer, the hospital. I began to ask some questions about the relationship of the manual to his work, and he quickly understood that work for hire was a likely conclusion. We then discussed what further information he needed to gather to make a determination about ownership; primarily, what the hospital's intellectual property (IP) policy could tell us.

Our second area of discussion was, as I indicated above, what precise uses he had in mind for the manual. Was the distribution to be limited to a group of colleagues, or did he plan a general publication on the Internet? Did he envision some kind of academic publication in the future? What were the things he was worried about, that is, the things he wanted to use a license to protect against? Here I tried to explain how the CC provisions work, and made suggestions about which would best meet his needs. Since the initial distribution of the manual was to be quite limited, and later publication was planned, we agreed that a fairly restrictive license—author attribution, noncommercial, no derivative works—would best preserve his options for whatever next steps he might consider.

Finally, we settled on a series of steps he should take:

1. He should determine whether he or the hospital was the rights holder through examination of the hospital's IP policy and discussion with his supervisor.
2. He should register the work with the Copyright Office. I explained, only in general terms, that registration carries some advantages he might want to preserve. I also knew that some form of registration was important to him, since he had come into our conversation believing that Creative Commons offered a kind of registry that would help protect him. I explained that this was not the case, but that registration was both possible, through the Copyright Office, and advisable.
3. We discussed the practical details about how he could apply a CC license to his work, even while it was just being distributed in print

format, and how he could use the icon and code provided by CC later if he posted his manual to the Internet.

4. Finally, we talked about possible publication outlets for the manual, or an article about it, and how the steps we had developed would help preserve his options when he came to that point.

It is important to note that throughout this encounter, I wanted to gather enough information to point my friend in the direction he wanted to go. I am a strong supporter of Creative Commons and open licensing, but I did not immediately embrace his suggestion of a CC license and give a lecture about the benefits of the CC-BY license. Had I done so, I probably would have been ignored, and the encounter would have been unproductive, both for me, and more importantly, for my client. The focus had to remain on his needs and desired outcomes in order for this to be a successful coaching session.

There are two further observations I want to make, based on this short case study.

First, I want to comment on using the word *client* to refer to those who inquire about copyright issues with librarians. In general, librarians do not think of library patrons as their clients, but I suggest there are good reasons to do so, especially in the context of coaching copyright. As someone who has studied to qualify for three different professions (law, the clergy, and librarianship), I have given a lot of thought to what makes an occupation a profession. The distinguished legal scholar Roscoe Pound famously defined a profession as “a group of men [*sic*] pursuing a learned art as a common calling in the spirit of public service.”¹ Putting aside the grossly outdated assumption that only men could be part of a profession (it was incorrect even when Pound made it), the three elements of this definition—learning, organization, and public service, are all extremely important. However, there is another element that helps define professions—in almost all cases, a professional is someone who pursues public service by applying specialized learning *to the particular situations of individuals*. Professionals work one client at a time. Rather like a coach trying to adjust to a specific game situation, a professional’s thought process is to analyze, diagnose, and then advise about the unique and individual situation presented by a particular client. This aspect of professionalism is shared by both lawyers and librarians, and it is a useful reminder that whenever a library patron presents a copyright question to a librarian, her response should be calibrated to the details of the unique situation and the outcomes that the patron, or client, if you will, is seeking.

Therefore, I will refer throughout this chapter to *clients*, because this word reminds us that we must approach copyright education in libraries one person, and one unique set of issues, problems, and needs, at a time. That word also calls to mind the high standard of professionalism that is required of us, as librarians, especially when we are called upon to discuss legal questions and ramifications with a patron.

This leads to another point I should make about the story with which I began this chapter. There is an important difference between how I approach a copyright question and how most librarians should proceed. I am a lawyer, and I hold licenses to practice law in two states, although both are now inactive. The result is that I have more leeway to cross the line between information and legal advice when I talk with a client. I still have to be careful that the client understands the nature of our relationship, perhaps with *more* care precisely because, as a lawyer, I need to be very attentive to if, and when, a lawyer/client relationship is established. While librarians do not face this issue, it is still vital that our clients understand that we can offer information, and even discuss options based on the information we uncover, but we cannot advise about specific courses of action, nor can we offer our clients opinions about liability or the legal advisability of their choices.²

Librarians are frequently called upon to teach patrons about copyright. Sometimes that involves classroom sessions, often as part of a larger program of library instruction, during which basic information about the copyright law is imparted. Coaching is distinguished from this kind of teaching by its focus on an individual's specific situation. But coaching, like librarianship in general, is also distinguished from giving legal advice because, in the large majority of cases, the coach is not able to give such advice. The coach's role is focused on helping the client understand their particular situation and, based on information the coach can impart, determine a course of action that will help the individual achieve their goals. Essentially, the librarian as copyright advisor is in the same position as other subject specialists in a library; the subject specialization just happens to be copyright—and as such, provides information to clients on the same terms.

One of the best reasons for using the analogy with coaching is that to coach is to focus on strategy and risk management. Likewise, when librarians discuss copyright situations with clients, they should focus on strategy and risk management. The information that librarians can supply is best applied when it is used to figure out which of the available options are most likely to accomplish the client's goals while reducing the risk of accusations of copyright infringement. Risk, however, is a two-edged sword. When discussing risk with a client, it is important to help them assess the risk inherent in *not* pursuing their goal. These lost "opportunity costs" are very real; what is lost, for example, if a collection that could be valuable to scholars is not digitized because of fear that a few items may pose the risk of someone objecting to their inclusion? Are there ways to come to terms with that risk which do not undermine the entire project? It is only within the context of this kind of comprehensive assessment of risk, from a multitude of perspectives, that we can help clients make decisions.

KEEPING IT SIMPLE

When our clients come to us with a copyright question, they are seeking answers that are clear, understandable, and easy to put into practice. Often, they want a “yes or no” answer. In short, they want us to keep it simple. But the copyright law in the United States is not simple at all. The book published by the Library of Congress, *Copyright Law of the United States, and Related Laws Contained in Title 17 of the United States Code*, runs to over 350 pages. As this title implies, the application of the copyright law is further complicated by its interrelationship with other laws, as well as international treaties. And, like many other laws, Title 17 of the U.S. Code is structured in ways that make it unintuitive. Most, but not all, definitions are grouped in one place (section 101), while some key terms are not defined at all.³ Exceptions abound, and one must often read the entire provision of the law, plus other portions to which a provision might refer, in order to piece together an answer to a copyright question. Also, the language used throughout the code, while common in legislation, seems convoluted to most people (even many lawyers!) and difficult to map onto specific issues or situations. Finally, the situation grows and evolves through case law, which means that different contexts, circumstances, and judicial philosophies play a significant role in fully comprehending the state of the law. So how can we hope to deliver a clear and usable answer to a client who is faced with a specific situation she must address? I suggest three important techniques.

First, it is important to focus on the specific situation that concerns the client. Sometimes you will have to broaden the issue, or introduce concerns that the client has not thought of—like the ownership issue I raised with the clinician in my opening example. But a copyright consultation is still about a particular set of circumstances, and it should not be used as an opportunity to try to teach the client everything you know about copyright, or to discuss the fascinating, but unrelated, case that you just read. You should focus on what the client needs to know to make a decision, clearly explain the relevant legal concepts, discuss the options for their specific application, and restrain the urge to go off on tangents.

An analogy with coaching a sport is again useful here. For example, there is a clear difference between those times when a basketball coach is teaching her players different aspects of the game in the gym, and what is done during the game. Like young athletes, the game is moving very fast for our clients; they are caught up in a swirl of different ideas, advice, and anxieties. And like the coach during the game, we need to offer targeted, specific, and clear information—how should I defend against the next shot, who should I look for when bringing the ball down the court? These are not times for a lesson on the proper form for shooting foul shots; the need is for situationally appropriate instructions that are clear and focus on the specific dilemma at hand. You may,

and in fact, should, find opportunities to teach more expansively about copyright, but for the particular client who has a problem, it is important to focus on that problem and its solution.

WHY LAWYERS SAY “IT DEPENDS,” AND WHY YOU SHOULD TOO

Clients are frequently bemused, and often downright angry, when a lawyer says “it depends” in answer to a question. This reply is, allegedly, so ubiquitous that there are a good many lawyer jokes predicated on it. But I want to defend “it depends” for a moment, because it is an important counterbalance to my advice to keep things as simple as possible.

In most situations, when someone who is asked for legal advice or information says “it depends,” the phrase means one of two things.

First, it can often signal that the advisor simply does not yet have enough information to offer a firm answer. This situation arises because so many copyright questions are extremely dependent on specific facts and circumstances. Another common legal aphorism is “change the facts, change the answer.” There is almost no copyright question or conundrum where the advisor is given all the necessary facts at the start, and there are even fewer all-purpose answers that do not depend on the circumstantial background. This is a familiar situation for librarians, of course, since we are trained in reference interview techniques, where we have to elicit the context for the question as asked before we can answer the question as really needed. People seldom directly ask exactly what they need to know, and likewise, they rarely, if ever, provide all the important information when they describe a copyright conundrum. So the advisor must probe more deeply, often asking questions around the edges of the situation because what the client thought was relevant to an answer may be quite different from the facts that are actually needed. This is also partly a result of the law being so unintuitive.

The other thing an advisor often means when she tells a client that “it depends” is that the ultimate answer depends on the client herself—her goals, values, and tolerance for risk. A non-attorney librarian, of course, should never tell a client that the answer to his question is precisely this, or his course of action is exactly that. The truth is, however, that lawyers often cannot do that either, because the ultimate decision belongs to the client. The client must decide how important it is to do what they are seeking to do, in the context of the potential risks that have been explained to them. The client knows what she is trying to accomplish, what the institutional mission is, and how central the specific activity might be to that goal or mission. The client, and only the client, can balance the risk equation in a way that is comfortable (or, at least, less uncomfortable).

There are several reasons why a librarian should not answer a copyright question with direct advice. Avoiding the unauthorized practice of law is one. Another is respect for the general role of the librarian in all information-seeking situations, which is to provide that information from authoritative sources, not to suggest answers simply because they seem right to the individual librarian. An important additional reason is that in most situations involving copyright, the context of the decision is personal to the client, so the librarian, and even a lawyer, must respect the boundaries of the relationship.

EXAMPLES AND ANALOGIES

One of the steepest obstacles when helping people understand and use copyright to resolve dilemmas is the gap that many people experience between the rules and the application of those rules. I have often had the experience of walking someone through the applicable principles of copyright, and seeing all the indications that they have understood, only to discover that the last step—the way to apply those principles to their situation—is still beyond them. I have come to believe that the problem here is a lack of examples. There is a sound reason why law students are taught by reading cases. Using the case method, which was first introduced at the Harvard Law School in the 1870s by then-Dean Christopher Columbus Langdell, forces students to extract the rule or principle from the circumstances of a particular situation.⁴ The gap I am describing is thus avoided; there is no point where the rule has to be applied, because the rule has emerged, for the student, from its application. This method has been so enduring in law schools, I believe, because it helps new lawyers get comfortable handling patterns of fact, and trains them in application of the law to those facts from their very first day.

It is impractical, of course, to import the case method of teaching law into copyright coaching situations; as I have said, clients in those consultations are seeking practical, understandable direction and do not want extensive lessons on the history and development of the law. But I believe there are two reasons to keep the case method very much in mind during copyright coaching.

First, reading cases is a fantastic way for a coach to improve her knowledge and skills. Just as athletic coaches watch game films, reading cases helps the copyright coach develop a nuanced grasp of how specific facts are analyzed under various provisions of the law, and it provides a store of examples to share with clients. And that is the second reason why a copyright coach should know the case law; because analogies with similar situations that have arisen and been decided in the past help clients grasp the contours of their own position. One does not have to go into great detail about a particular case, but when the coach understands how previous decisions have been made, she can say things like, "There was an important case where the reduced size and

definition of images was treated as favorable under the third factor in a fair use analysis.⁵ That consideration also would support your fair use position.”

There is really no substitute for familiarity with case law. Learning “black letter” copyright law—that is, the body of well-established copyright laws that are no longer in reasonable dispute—is important for the copyright coach, but it is not sufficient. In many areas, there simply is no black letter rule that will resolve an issue. And, as I’ve said, black letter rules often confuse clients, even if they understand them, because they can’t see how to apply them to their situations. Knowing about cases, and applying that knowledge sparingly and in a targeted way, is the key to successful copyright coaching.

SPOTTING THE ISSUES

Issue-spotting is another skill that is heavily stressed for law students; it involves identifying which issues really need to be resolved in order for a client to move forward, as well as recognizing which issues are distractions. Our clients often stumble over the task of issue-spotting, focusing on the distractions and missing the real problems. Indeed, copyright advisors also struggle with this; it simply is a challenging task that requires a careful and methodical approach.

Over the years, I have found that one approach to copyright issue-spotting is to work through five separate questions, in a specific order. Taken in order, these questions help to identify where the problem and the potential resolution lie.⁶ Is the question whether or not a work has risen into the public domain, or is it whether a particular use of that work might be fair use? Should we focus on the application of the face-to-face teaching exception, or is our energy best spent finding the rights holder in order to ask permission? We don’t naturally pose these kinds of questions to ourselves, but confusions like these can stymie efforts to help a client accomplish her goals. To clarify any copyright situation, then, an advisor can work through the following five questions, in the order presented:

1. Is there a copyright?
2. Is there a license that helps determine this issue?
3. Does a specific exception in the copyright law apply?
4. Is this a fair use?
5. Who should I ask for permission?

If the determination on the first question is that the work involved does not have a copyright, then it is not necessary to apply the remaining questions. If there is a specific exception that will authorize the desired activity, a fair use analysis may be unnecessary. And if none of the first four questions resolve the question, seeking permission may be the best remaining alternative.

Often clients will come to us focused on one issue, and our role is to redirect their energies. They may focus, for example, on finding a rights holder from whom to ask permission, when permission may be unnecessary because the use is clearly fair use. Thinking about these questions, and working through them in order, will often help the advisor recognize the need for information that a client does not realize is relevant, and provide an opportunity to elicit that information.

We will use these five questions to organize the remainder of this chapter. It is important to note that while these questions provide a useful framework for analyzing any copyright issue, none of them are actually easy questions, and there are many possible facets to each one. We will try to unpack those facets in what follows, and will be sure to approach each of them in a way that addresses situations in which a client is concerned about protecting or sharing her own work, as well as situations where the work of someone else is being used.

THE RULES OF THE GAME

Examining Our Five Questions

As we turn to examine each of these five questions in turn, it is helpful to begin our consideration of the first question—Does the work in question have a copyright that must be considered?—from the perspective of the client who is interested in protecting her own work. The issue of whether or not a copyright exists often comes to us from someone who has created a new work, and wants to know how to “get” a copyright for it. This is an excellent opportunity to talk with the client about the proper subject matter for copyright, automatic protection, work made for hire, and the advantages of copyright registration and notice.

Automatic protection, of course, is the most fundamental issue about obtaining copyright that many of our clients do not understand. There is a long history in the United States of requiring “formalities” in order to obtain protection, so it is not surprising that, even decades after the United States did away with the last of its formalities,⁷ people still believe that some affirmative action is needed to protect a work with copyright. The idea that protection is automatic, that copyright “subsists . . . in original works of authorship” immediately when they are “fixed in any tangible medium of protection,”⁸ ought to be a comfort to worried clients, but in my experience it often is not. Creators simply worry about whether their copyright is real if they don’t “do something” about it. So it is very important to reassure clients that they *do* have protection, and have had it since the moment of creation, but it can also help to tell them that there are advantages to taking some affirmative actions related to that protection.

The most basic action a creator can take to enforce the copyright protection that he holds is to provide notice of their rights so that potential users will know immediately that the work is protected and will also know who to contact for permission to use the work. Copyright coaches should work with all creators to figure out the best form of notice to provide based on the medium of the work, but there should be very few situations where notice is impossible or undesirable. A Creative Commons license, about which we shall say more later, is an excellent form of notice, as is (if appropriate) the more traditional “All rights reserved, Kevin L. Smith, 2018.” Notice is a direct communication between the creator and users, and it can take many different forms. Creators can be creative in thinking about what rights they want to reserve and which they should share, but some form of notice about who they are, what they want for their work, and how to contact them is key to using copyright in a balanced way.

Registration has several advantages, and for many creators it can provide peace of mind as well. Since registration is inexpensive and easy—it can be done online,⁹ and the basic fee is between \$35 and \$55—it is a simple way to address a particular question that many creators have: “If copyright is automatic, how can I prove that I was the actual creator of this work?” Registration provides prima facie evidence of copyright ownership, so suggesting prompt registration to a nervous creator can help quite a bit in this situation and is much more effective than the old rumor that one should send the work to oneself through registered mail. There are other advantages to registration as well. Registration is necessary to file an infringement claim in federal court, and if it is done in a timely way,¹⁰ it also entitles the rights holder to ask for statutory damages if their work is infringed. Thus, while it is important to help a creator understand that registration is not required and protection exists whether or not the work is registered, there will be a lot of situations where advising the client to register her work will make good sense.

Both with a creator and with a potential user of copyrighted work, it is important to be careful about the scope of copyright. The “edges” of copyright protection can be unclear in many people’s minds, so this can be an important area to pay attention to as a coach. Copyright protects original expression that is fixed in a tangible medium, which means, first, that unoriginal and unfixed expression is not protected. So a purely extemporaneous lecture is not protected, although, if there is an outline or notes, the lecture itself might be protected as a derivative work if it is recorded or written down. And work that is not original, such as a compilation of pure facts like a phone book, is not eligible for copyright.¹¹ It is sometimes important to help clients understand that just because they put effort into compiling a database of facts, they sometimes cannot claim copyright over that compilation. Facts are not subject to copyright protection, and there is no copyright granted for “sweat of the brow,” although a compilation might be protectable in a rudimentary way

if the selection and arrangement of the facts is sufficiently original. It is often the case, to take one example, that a researcher will want to use data from a previous publication in her own scholarship. Extracting factual data for reuse does not implicate any copyright protection, since facts are ineligible for protection, but reproducing an entire chart or graph might, because the selection and arrangement might qualify the work for protection. The issue of reusing such a chart as a whole will have to be resolved at a later point in the analysis, when coach and client discuss fair use.

Another way in which scope arises for copyright coaches is with the person who says they have thought of a great title for a book or a song, and wants to protect that title while the work is being written. This is simply not possible, since titles and short phrases are also outside of the scope of copyright. This situation also offers an opportunity to help clients distinguish between copyright and issues of plagiarism.

A final reminder about the scope of copyright is that works created by the U.S. government are not eligible for copyright protection. This is simply a policy decision made by the U.S. Congress,¹² and for copyright coaching, it usually comes up in situations where this principle, which many clients grasp in a basic way, has to be qualified; clients need to understand that copyright might still apply to government works from other countries and to works created by state and local governments. Helping to decide if a government employee was really acting within the scope of his or her employment when they created a work, or if it might be the work of a contractor who can receive a copyright and can even transfer that copyright to the federal government, can be a difficult task. An Environmental Protection Agency report about environmental hazards, for example, is very likely the production of a regular employee and therefore in the public domain, while the photographs in a national park brochure are much more likely to be the work of a contractor and potentially protected. This issue calls for coach and client to examine the specific circumstances as closely as possible.

Whether or not a work is in the public domain is the single issue that comes up most frequently when working with this first question, "Is there a copyright?" Often clients will confuse public availability with the public domain, thinking that because they can find something on the Internet, they must be entitled to use it without restriction. A copyright coach has to be able to help clients understand the more restricted nature of the public domain. This is where dates of publication become especially important, as does the situation regarding the copyright formalities in place at the time a work was published (if it was published). Since 1978 it has been true that books published before 1923 are without question in the public domain, and, beginning in 2019, that date has begun to advance, so that, each year, works that have been published for more than 95 years will enter the public domain. Unpublished works by authors dead more than 70 years also continue to become public domain. As

for formalities, works published in the United States without any copyright notice before 1989 are public domain, as are works published in the United States between 1923 and 1963 for which the rights were not renewed, as was then required.¹³ In short, the public domain is a technical aspect of copyright law, created by the various ways in which protection fails or lapses, even though it is not specifically defined or even mentioned within the statute.

Perhaps the most important principle to remember when working with clients on the issue of whether or not a copyright exists for a particular work is that ideas are never protected by copyright; they are in the public domain. When a second work borrows only ideas from a prior work, no infringement has occurred. This is important both for the creator, who should acknowledge borrowed ideas, especially in scholarly work, but does not need permission to use them; and for users, who are free to use ideas however they see fit. Several times, I have talked with clients who believed, as teachers or mentors, that because they had suggested an idea for research to a student or colleague, they were entitled to control the resulting work. This is not true, and it illustrates the point that ideas are “as free as air to common use.”¹⁴ Ideas of all sorts, no matter how they are expressed, are entirely available to be reused and re-expressed in new ways. It is the expression that is protected, not the ideas that underlie it.

When dealing with this general question of whether or not rights exist in a particular work, it is sometimes necessary to help the client get over some misunderstanding about the scope of copyright protection. One especially common error is the idea that there is some special category of “electronic rights” that are distinguishable from the rights that are specified for all copyright holders: to wit the exclusive right to control

1. Reproduction
2. Distribution
3. Public display
4. Public performance
5. Preparation of derivative works
6. Digital broadcast of a sound recording

Note that, with the exception of the final right, none of these exclusive rights are specific to particular formats or media. There is, in fact, no such thing as “electronic rights” apart from the application of these six exclusive rights to digital media. The origin of the misunderstanding, I believe, is the 2001 decision by the U.S. Supreme Court in the case of *New York Times v. Jonathan Tasini*.¹⁵ So when a client raises this issue, often in the form of “we didn’t get electronic rights as part of the donor agreement” for a specific collection, it is important to understand how to sort out the misunderstanding.

The *Tasini* case involved freelance authors whose works were published in the *New York Times* and then, at some later date, were republished in the

Lexis-Nexis database, as part of a digital collection of newspaper articles. The authors objected to the uncompensated republication of their works, and the *Times* defended itself by asserting that section 201(c) of the copyright law, which governs the copyright that a compiler/editor has in the collective work, gave them the right to “reprint” the works “as part of a revision of the collective work.” To oversimplify a bit, the Supreme Court held that the republication in the Lexis-Nexis database, where the articles could be accessed individually and without the same context in which they appeared in the newspaper, did not qualify as a revision of the original collection. Such republication was also not mentioned in the contracts that the *Times* had with many of these freelance authors. Thus the Court found that the authors’ copyrights had been infringed; not because they had some kind of special rights over electronic reproductions, but simply because a reproduction (which happened to be electronic) had been made outside of the rights granted to the *New York Times* either by contract or by section 201(c). *Tasini* can certainly stand for the proposition that contracts should be negotiated carefully and with as much foresight as possible, but it does not expand the scope of the exclusive rights in copyright or require that agreements make specific mention of “electronic rights.”

This frequent confusion about electronic rights illustrates the ways in which our clients can misunderstand their own situations vis-à-vis copyright, often because of what they have read or heard about in media reports when important cases are decided. One of the most common tasks of the copyright coach is to help clients understand the true boundaries of the bundle of exclusive rights that the law grants as part of copyright. This issue of the scope of the rights can get pretty complex, and before we leave this first of our five questions, I want to consider a special area in which the scope of the exclusive rights has some unusual features.

OUR FIRST MUSICAL INTERLUDE

The application of the copyright law to music is a particularly fraught and difficult area, and we will have several occasions to address its special quirks. At this point, I want to make note of three aspects of music copyright that are particularly relevant when working with a client to consider the issue of whether a copyright applies to a particular musical work.

Musical works nearly always represent multiple copyright interests; at the very least, most musical compositions include rights held by the composer and the lyricist. These two individual bundles of rights, however, are often held together by a music publisher, either because the composition is treated as a work made for hire or by assignment. These rights, in the basic musical composition, are frequently licensed by a collective rights organization (CRO)

like ASCAP, whose name—American Society of Composers and Publishers—accurately describes the rights holders it represents. Then, of course, when a musical work is recorded in some way, the performer will also hold rights in her performance. So when coaching a client about using a recorded song, it is necessary to account for these multiple rights—the rights in the underlying composition, which may be held by one entity, usually a music publisher, but which can themselves, in theory, be held by multiple rights holders—and the rights held by the performer.

The rights held by a performer also have a unique feature that can impact coaching; there is no broad public performance right in a sound recording. The law simply excludes sound recordings from the kinds of copyrighted materials that receive an exclusive right over public performance.¹⁶ This results in the odd situation that musical performers simply do not get control over most of their public performances. So, when a radio station, for example, wants to play a CD over the air, they must clear the rights in the composition, through a CRO like ASCAP, but they don't have to pay any royalties to the performer or the record company. This is also the provision that allows covers of popular songs; the cover artist must, like the radio station, clear the rights for the composition but, again, does not need to compensate the original performer.

A further complication to this situation was added in 1995, when Congress amended section 106 of the Copyright Act to include a sixth exclusive right, which covers one specific kind of public performance for sound recordings, namely when the performance is transmitted digitally. Since that time, performers and record companies can enforce a right over digital performances, so various types of Internet radio do have to clear the rights for sound recordings (as well as for the compositions). This would also be true for the client who wants to use a popular song as background on a video that they will distribute on the Internet; they will have to consider the rights held in both the composition and the performance.

The final quirk about music copyright that belongs in our discussion about issues of scope has changed recently. For many years, sound recordings made before February 15, 1972, were simply not protected by federal copyright. In all other instances, federal copyright law preempted state protections, whatever they may be. But when sound recordings were brought into the scope of federal protection in 1972, that protection was not extended backward, and the exclusion of pre-1972 recordings from federal protection was continued by the 1976 revision of the copyright law.¹⁷ In 2018, however, this part of the law was changed by the Music Modernization Act (MMA). Sound recordings that were made before February 15, 1972, are now protected by the same right over digital performances that is described above.

When working with a client who is interested in using older recorded music, there are now two consequences of this new law that may come into play. First, the situation for digital radio services has changed. Before the

MMA was passed, the pop band The Turtles, who had recorded some hit songs in the late 1960s including “Happy Together” (1967), which were regularly played on Internet radio services, had been suing Sirius XM radio in state after state in an effort to determine if state common law protection includes a public performance right that would force Sirius to pay Flo & Eddie a fee to broadcast their performance. These lawsuits have now been mooted by the MMA and a royalty would now be required.

The other change regarding pre-1972 sound recordings that the MMA has brought about is the fact that these recordings will now begin entering the public domain according to a revised schedule. Whereas the former situation was that none of this material would become public domain until 2067, there is now a graduated schedule for these materials. Sound recordings fixed before 1923 will now enter the public domain on January 1, 2021. For recordings fixed between 1923 and 1946, the term of protection is now ninety-five years plus an additional five, for one hundred years. If fixed between 1947 and 1956, sound recordings will get 110 years of protection (95 plus 15 years). Finally, the remaining sound recording that had not previously been subject to federal copyright law—those fixed between 1957 and February 15, 1972—will enter the public domain as originally planned, in 2067.

A FEW WORDS ABOUT INFRINGEMENT

Before we turn from our first question, about whether or not a copyright protects a particular work, to our second, which deals with licenses, it seems appropriate to discuss copyright infringement. Most clients, after all, consult librarians and other experts about copyright because they are afraid that they will commit copyright infringement and face legal consequences. So a coach must be prepared to discuss how courts will assess an allegation of infringement, although the coach’s first job, of course, is to ensure that no such allegation is ever made in the first place.

Clients often begin with a very literal view of infringement, in which only literal copying is seen as potential infringement. For these clients, it is important for the copyright coach to explain that “substantial similarity” is the standard that courts use, a standard that is more inclusive than many clients expect, but also less inclusive than some fear. Courts are looking to see whether a reasonable person would find that the work accused of infringement was copied from some protected original. Is the accused work enough like the original that copying is a reasonable conclusion? It is very important to communicate this to those clients who believe they can use some original by redrawing it themselves, or by making minor alterations so as to “make it their own.” These efforts—and many people believe in their efficacy—must be evaluated under the substantial similarity standard, which tells us pretty clearly that the result of these efforts, which is to create something as much

like the original as possible, is unlikely to survive the real test that a court would use. We need to work to educate such clients that copyright protects content, not specific versions of that content, if they are substantially similar. For many of these clients, coaches need to move them through our five questions to number four, fair use, since that is where they will most likely find support for their efforts.

Another point about infringement that needs clarification is the idea of “de minimis” use. De minimis refers to a use that is so small or trivial that the law will not take notice of it.¹⁸ Sometimes clients will try to convince the coach, and themselves, that the use they want to make of an original work is de minimis, but care must be exercised with this concept. If we look at cases where de minimis has proved a successful defense, they are usually situations where the alleged infringement is not central to the new work and is something most people would fail to notice. In *Gottlieb Development, Ltd. v. Paramount Pictures*, for example, a court found that a pinball machine that appeared in the somewhat blurry background of a three-minute scene in the movie *What Women Want* was too obscure and trivial to be actionable.¹⁹ But this defense will not apply to many more straightforward uses, where fair use will be a better argument if the amount used is small and the use is educational. Also, de minimis can be unreliable. In music cases, for example, at least one court has held that de minimis simply does not apply to music sampling, while another jurisdiction has recognized the defense for the same situation.²⁰

OUR SECOND QUESTION

“Is There an Applicable License?”

Turning to the issue of licenses is the second question to consider in our ordered list: “Is there an applicable license for the copyrighted work?” In this regard, it will be helpful to begin our reflections by focusing on the needs of a client who has created a work and is anxious to understand how copyright might help or hinder her planning. For the creator, the licensing question asks her to consider how she would like others to be able to use her work, and what uses she does not want to encourage. This is an excellent opportunity to discuss what “All Rights Reserved” means in the context of a specific work. It is fine to explain that a copyright holder is vested with six exclusive rights: reproduction, distribution, public display, public performance, the preparation of derivative works, and digital transmission of a sound recording, but the meat of the discussion should be about how those rights can help or hinder the client to meet her specific goals for her work. If she has composed a new song that she hopes to commercialize, these rights are important support for that goal. If, on the other hand, she has developed educational videos that she would like teachers to incorporate into a variety of different lesson

plans, she will need to consider very carefully how she wants to convey the permissions she intends to grant to the audience for her work. This is where licensing comes in.

A license is simply a grant of permission to exercise a right that the licensor holds, and that the licensee could not otherwise take advantage of. When I tell my neighbor that he can walk across my property to get to the bus stop, I have granted a license, which can also be thought of as a promise not to sue for trespass. When a client decides not to license her work, the coach should explain that she will be solely responsible for all of the rights the law grants copyright holders, and that anyone seeking to exercise those rights will have to seek individual permissions from her or risk legal action. If she decides to sell those rights, permissions and litigation decisions will be in the hands of the new rights holder. She should also understand that uses that are outside the scope of the exclusive rights, such as private performance or display, uses authorized by specific exceptions, and fair uses, will still be available to the public. For a client who wants users to be able to do specific things with her work, or who does not want to be bothered by permission requests, a license is probably in order.

In many situations, the Creative Commons (CC) licenses will very effectively serve the needs of a client who is seeking to allow certain uses and not others. Most CC licenses include a requirement that the user attribute the original work properly, which is particularly important for many people in the United States, where the copyright law does not mandate attribution for most rights holders. Only the CC0 and Public Domain dedication licenses—which are not really licenses, but more like waivers or mere statements about copyright status—do not include this “BY” element, which is the attribution requirement in all four types of CC BY licenses. A rights holder using a CC license also has two other decisions to make, or loci of control. She can decide whether to allow only noncommercial uses of her work (the NC term in the CC BY-NC license) or to permit commercial uses as well. This is often a good time to remind the client that non-licensed uses are not impossible; they simply require specific permission requests for each potential use. The rights holder can also decide to forbid derivative works entirely (the ND term in the CC BY-ND license), or to require that any derivatives be distributed with the same license as the original (SA, for Share Alike, in the CC BY-SA license). When a CC license does not include either an ND or SA term, all forms of derivative works are permitted.

Obviously, a discussion about using a CC license is a great opportunity for coaching, since a client must consider in detail what uses are important for her work and where maintaining control will best advance her goals. It is also important for the coach to convey that licensing, including the ability to use a CC license, depends on holding rights to the work in the first place. Sometimes our clients believe that, since CC licenses convey a public benefit,

using them is an act of philanthropy to which no one could object. But it is potentially infringement to apply a license to a work that one does not hold rights to either as the creator, assignee, or subsequent licensee. CC licenses are a wonderful, powerful tool for rights holders to use to mitigate much of the fear that copyright generates for potential users, but they are not appropriate in all situations, and they don't relieve us of the need to do a careful and complete analysis of the rights situation when using the work of another.

Because licenses are a choice available to rights holders, users will often encounter licenses that affect how they can use specific materials. Consider the professor or graduate student who wants to share course materials with her class. Some of the works she wants to share may be licensed with a CC license; in that case, she just needs to verify that her use will comply with the specific terms of the license in order to proceed. Other materials she wants to use may be available on the Internet without a clear license. In those cases, she must assume that all rights are reserved until she has contacted the rights holder and been given permission. These are precisely the situations where it would be desirable for the rights holder to have considered users in advance and provided some kind of licensing statement on the website. The professor may also want to use some of her own publications, or materials found in library databases. For her own work, the professor will need to know, or find out, whether she transferred rights to a publisher and, if she did, what rights were licensed back to her. In other words, can she use her own work based on licensing language contained in her publication agreement, or must she seek permission from the publisher to use that work?

For materials found in library journal packages or databases, a license from a commercial provider will very often dictate permissible “downstream” uses. Faculty, students, staff, and, often, “walk in” members of the public are usually allowed to read articles and to download or print them under these licenses, as long as these activities are not done systematically or in bulk. Whether or not the license allows distribution to a class or to other members of a research group will vary a good deal and depends on the negotiations that took place between the library and the vendor when the resource was obtained. Of course, fair use will still apply (unless the license explicitly excludes fair use, which is a contract term no library should accept), so while addressing this question with a client, the coach may discover that she needs to move the discussion to fair use in order to fully examine the situation. If a license does not appear to permit the desired use, but does not specifically forbid it, fair use will be an option based on an analysis of the circumstances of the particular use in light of the fair use factors.

When working with a teacher who wants to use materials in a class, licenses can be part of a more comprehensive strategy for evaluating use. When there is uncertainty, several options are available—the teacher can use licensed works, consider fair use, substitute CC-licensed materials when

possible, or ask for permission. Obviously, this is exactly the kind of situation where using our five questions, in their proper order, will be very helpful. To give a concrete example, I worked with a number of professors who were trying to move a course they had taught in a face-to-face classroom to an online environment, where it was intended for an audience of the general public. In the classroom course there were lots of illustrations in the lecture slides, which were authorized by a specific exception in the copyright law (17 U.S.C. §110(1)). But when the situation changed, and the class was no longer face-to-face, we had to look at the relationship between licenses, fair use, and permission. It was often difficult to find a rights holder for the images, so permission could only be sought sporadically. Fair use was certainly an option, but it depended on the specific use of the particular image. In many cases, licenses were the best option; we would seek to replace the image with an illustration either from a commercial image database where the license allowed, or we would seek a comparable picture that was licensed under a CC license. By seeking CC-licensed works, or other openly licensed materials, we were able to resolve quite a few problems.

As this discussion has indicated, it is often the case that a license is created by a contract that is primarily directed to a different purpose. Libraries license databases, for example, in order to offer a wide variety of resources to their patrons. But those licenses may also contain licensing language that seeks to control the uses that library patrons, such as faculty planning a course, can make of materials found in the specific resource. These contracts can be problematic, since the library often has no way to exercise control over, or even communicate the terms of the license effectively to, library patrons. From the perspective of the copyright coach, however, this is a reminder to look deeply into the source of the material that a client hopes to use in order to see where there might be a license that would clarify the situation. Another such situation arises when the client has created something using a software tool, and wants to exercise her copyright in some way. Occasionally, the license by which she obtained the software tool could dictate some terms of use that relate to the product created with it. This is becoming less common, but it is one more place where attention to licenses is important for the copyright coach.

The “publication agreement” is a special instance of this situation, in which a contract that intends to accomplish one thing—authorization to publish a journal article, for example—also creates a license that dictates the terms of use for other situations. In the digital environment, the licensing terms in a publication agreement have become vitally important as reproduction and distribution have become easier, and authors continue to feel ownership over their own works even after they have transferred copyright. Once it is signed, the publication agreement serves as an attempt to control this sense of ownership and to limit the ways an author can exploit the affordances of digital technology; that is, to compromise with the Internet and retain some level of

the control that publishers exercised in the print era. Thus, many authors who wish to use their own work in new ways, such as in a learning management system like Blackboard, Moodle, or Desire2Learn, or by depositing it into an institutional or disciplinary repository, are confronted with some complex and problematic terms. Generally, these licenses depend on distinctions between versions of the article, distinctions about types of distribution, and embargos. Embargos, of course, are simply periods of time that must elapse after commercial publication before the author is permitted by the license to make specified uses of her work. The distinctions between forms of distribution can be harder to comprehend. They often allow distribution through a personal or individually maintained website, but not, for at least some versions, in a repository. Unfortunately, the technological infrastructure at many universities renders this distinction hard to apply, if not meaningless. So this is another point where the copyright coach may be called upon to help clients understand and apply licensing terms that impact potential uses, in this case of the client's own work.

From a copyright perspective, the distinctions between different versions of an article can be the most misleading ones. Publishers frequently divide the uses they are licensing back to authors based on whether the version used is the "preprint," which usually means the initial version before peer review, the "post-print" or final submitted manuscript, which is the version as revised after peer review, and the final published manuscript. The distinction between pre- and post-peer review generally makes sense to scholarly authors, but the difference between the final manuscript and the published version is often slight, and difficult for authors to understand. Publishers wish to maintain exclusivity over the "version of record," which has page numbers and is the version others will most often cite, but the difference between this version and the manuscript that the author sent in are quite often superficial. Thus, the coach will have to work to help authors understand this license term within their publication contracts. Also, it is important to understand that this distinction between versions does not indicate separate copyright in the different versions. Copyright protects content, and unless the different versions are substantially dissimilar, which is unlikely, one copyright protects all of them. Copyright is very flexible, and can be transferred or licensed in a wide variety of ways. With these publication contracts, the usual situation is that copyright is transferred in its entirety, but selected rights, often defined in terms of these different versions, are licensed back to author. Thus, the versions do not reflect different "bundles" of rights, but only the terms of particular licenses related to the overall copyright bundle at issue with a particular article.

Before we turn from licensing in general to special issues related to musical performances, we should acknowledge one other type of license that all of us encounter frequently: the terms of service (TOS) associated with many websites, especially various types of social media platforms. Most of us

recognize that these TOS licenses are extremely complex and tend to limit our rights, as well as compromise our privacy and restrict our remedies against the platform proprietor. Such terms of service arise occasionally for the copyright coach, especially when a client wants to use some service that is intended for personal use in a classroom or other educational setting. As with all licenses, these situations require close attention to the terms presented and a careful examination of how the circumstances of the use mesh with those terms.

A SECOND MUSICAL INTERLUDE

Licensing is another area, like the kind and scope of rights that exist, in which music offers some unique situations, and requires the careful attention of a copyright coach. More than any other kind of copyright subject matter, music has developed a complex licensing culture, which is enshrined both in the law and in practice. An effective coach should be able to discuss compulsory licenses, blanket performance licenses, and the distinctive licensing practices related to so-called “grand” and “sync” rights.

The copyright law creates a number of compulsory licenses, which are licenses that are mandated by the statutory law. A rights holder cannot refuse these licenses, but usually is compensated for them according to a statutory scheme. Musical performance is perhaps the area most impacted by these compulsory licenses, which we already discussed when talking about the scope of the public performance right for music. Readers will recall that there is no general right over public performances for performers, so that musical covers can be made without authorization from those performers. But composers, lyricists, and publishers do have rights that are implicated by covers and all other public performances of their compositions. So, in order to foster experimentation and innovation in musical performance, a compulsory license for these rights in compositions was created in the law. This license created by law originated at a time when performances on player pianos and jukeboxes were becoming common, and it supported those businesses, which is why it is sometimes referred to as a “mechanical license.” It also supported the radio industry, which used the mechanical license to gain authorization to broadcast compositions, and was not, and still is not as of this writing, obligated to compensate those who hold rights in the sound recording.

The compulsory performance license for sound recordings is created by section 115 of the copyright law and, for copyright coaches, it means that clients who want to use a musical recording for purposes other than digital broadcast, can pay a set fee to one of the performing rights organizations (PRO), such as ASCAP or BMI (Broadcast Music International). There is no need to seek permission from the music publisher as long as the fee is paid to the correct PRO; that is, the PRO that licenses that publisher’s or composer’s

catalog. And, as has already been explained, there is also no need to seek permission from, or pay a fee to, the performer of the musical recording. For these transactions, the combination of a mechanical license for the composition, and the absence of a public performance right for the performance, simplifies matters considerably, as it was intended to do for various performance-based industries. The situation is complicated, however, by some of the quirks about music copyright discussed previously, including the digital broadcast right that performers now hold.

Performance rights organizations like ASCAP and BMI also offer blanket licenses for public performance of the music in their catalogs. With such a license, a music venue or a college campus can permit a wide variety of musical performances. By purchasing annual licenses from all the major PROs, a campus will gain the needed authorization, especially when considered in conjunction with the performance exceptions that we will discuss later, for its orchestras and bands, as well as for faculty recitals, student performances, and even visiting musical acts. Many questions that come to a copyright coach about musical performances can be answered by examining these licenses; they will eliminate problems in many situations, but their exact terms need close attention. For instance, the recording of musical performances is often permitted under these blanket performance licenses, but the specific parameters of that authorization may vary. Likewise, the licenses usually allow the broadcast of those recorded performances, but are quite restrictive about the venue for those performances. A campus-owned radio or cable TV station is probably permitted, but interpretations vary significantly on whether broadcasting a recorded performance on the college's YouTube station is permissible or not. This is an area for careful attention to details, and the coach may find it necessary to consult with the campus's general counsel or some other campus official who handles licensing.

Licenses in general are only effective for the specific rights to which they refer, such as public performance, and the specific terms and conditions they impose. In the case of public performance licenses, there are two significant gaps in the standard blanket license terms, which the copyright coach needs to be aware of. These performance licenses *do not* license the right to use sound recordings or other musical recordings in conjunction with a stage production or as part of a video. These two potential uses are licensed separately, and are referred to as "grand" rights and "sync" rights, respectively. So if a client wants to make a video using the song "It's Time" by Imagine Dragons as the soundtrack, the coach will need to direct her to the publisher or composer, since these entries usually continue to handle sync rights. The same is true for grand rights, if the client wants to use the music for a stage production.

To summarize and complete this picture of music licensing on a university campus, it might be helpful to look at multiple use situations for a specific song, and "It's Time" will work as well as any other. If the client wants to sing

that song as part of a vocal recital, or wants to have the campus jazz ensemble perform it, only the blanket performance license is needed for authorization. The same is true if the CD is played at a party or dance. If the song is being used in a video or in a stage production, separate licensing of those sync or grand rights is required. Furthermore, if the performance of the song by Imagine Dragons is being broadcast on the Internet, a separate license covering the performer's right over digital transmission may be needed, and can be obtained from an organization called SoundExchange.

Music licensing is very complicated, as I am sure this quick attempt to summarize the issues has shown. It is an area in which the copyright coach must be sure to make careful distinctions for the client, and be realistic about his or her own capacity in the area. For projects that are highly visible, especially if they are not clearly related to the core teaching mission of the institution, referring the client to the campus counsel or to an outside counsel may well be the smartest strategy a copyright coach can adopt.

THE THIRD QUESTION

Do Any of the Specific Exceptions in Copyright Help?

In the text of the U.S. copyright law, the enumeration of the exclusive rights in section 106 is immediately followed by a brief section that codifies fair use. The remainder of chapter one, and the largest part of the law, are the specific exceptions, which usually constrain the scope of one or more of the exclusive rights, or explicitly permit some activity, often on the part of a specified group of users. These exceptions are a vital part of copyright's balance of private rights and the public good. Without them, copyright would fail in its constitutionally required purpose to "promote the progress of science and the useful arts."

These specific exceptions—all of the exceptions to copyright except for fair use—are very important in coaching situations, although they are sometimes overlooked. If a client's desired use of copyrighted material falls within the scope of a specific exception, they gain a degree of confidence that is seldom available when one relies on fair use. The exceptions tend to work like checklists where, if each condition is met, reliance on the exception can be very reassuring. Fair use, of course, is not a checklist but a balancing of factors used to analyze particular circumstances, so a decision about fair use is much easier to disagree on and to challenge. This may be why there is so much less litigation related to specific exceptions than there is over fair use. Fair use is immensely useful, but also subjective. So if—and it can be a big if—a client's desired use can be encompassed by the scope of one of these exceptions, that is an excellent direction for the coach to suggest.

There are fifteen sections detailing the specific exceptions in the copyright law (17 U.S.C. §§108–122), and those exceptions range from the quite simple to the extremely complex. Some, like the rules for rebroadcasting television programming on cable, seldom arise in copyright coaching situations. In the remainder of this section, I want to look at several of the specific exceptions that are most often useful to clients who are seeking to resolve a copyright question. But fair warning is due; these exceptions are very technical, and contain fine distinctions and complicated explications of the circumstances in which they apply. In what follows, I will examine section 108, the exception that allows libraries and archives to make copies for preservation and for lending to others, in considerable detail. I hope this will be a useful illustration of how the exceptions work, but readers who are not librarians, or who don't coach regarding library or archival uses, may wish to skim over the rest of this section.

There are usually three elements that make these particular exceptions specific. They always refer to some particular right or rights within the bundle of exclusive rights; they authorize defined activities, that is, the permitted uses of the specific right; and they authorize an identified group as the only users who are allowed to take advantage of the exception. So a copyright coach who has reached this question with a client needs to determine if the client is part of the authorized group, if the right they want to exercise is the one identified in the exception, and whether the activity falls within the scope defined by that exception.

Section 108 is the first of the specific exceptions, and it is a good place to start, since these three elements of an exception are clearly visible in it. Section 108 is often called the “library exception,” and this title helps identify who the users are for whom the exception has been created. Those allowed to exercise the exception must be employees of a nonprofit library or archive, and the exception is only to the rights over reproduction and distribution. Thus, no one can rely on this exception for a public performance or to create a derivative work, for example. Within these fairly strict limits about who is authorized, and which rights are being excepted, the subsections go on to detail specific activities that are “not infringement” even though the enumerated rights in section 106 might suggest otherwise.²¹

There are two kinds of activity that fall within the scope of the section 108 exception: the preservation of materials held in a library or archive, and making copies one at a time to give to users. The provisions about preservation allow the library or archive to make three copies and distinguishes between how to do so for published and unpublished works. In both cases, the library or archive must have owned the original from which copies are being made and, if the material has been published, the library must also determine by “reasonable effort” that “an unused replacement cannot be obtained at a fair price.” There is no definition of a “fair price,” so this will be a judgment call on

the part of the client. Note that, for the purpose of making and distributing preservation copies under this subsection, one must only look for an “unused” replacement; in other places within this exception the required search may have different parameters.

The two preservation-oriented subsections in section 108 also include a rather ambiguous provision that restricts the distribution of preservation copies that are in digital format, which cannot “be made available to the public in that format outside the premises of the library or archive.” Many library and archive employees seem to focus on how the “premises of the library” are defined, so this may be an issue that a coach will need to discuss. But it is also worth considering who exactly constitutes “the public.” Based on language used to define who is eligible to use the section 108 exception in the first place, it seems likely that according to the current language, the faculty and staff of an institution are not considered “the public” for the purpose of these rules.²²

When a coach is helping someone navigate these two provisions, which allow making and distributing copies of materials, another issue is the “trigger conditions” that define the *published* material that may be copied. These conditions, which restrict the copying to materials that are damaged, deteriorating, lost, stolen, or obsolete, often raise the issue of what formats, exactly, are obsolete. Currently, people want to know if VHS tape is obsolete. The section itself tells us that a format is obsolete when the equipment needed to render it perceptible is no longer manufactured or reasonably available. This is an evaluation that institutions or communities of practice must make for themselves, since no central authority will declare a work obsolete. In the case of VHS tape, the issue seems to be very much undecided, but it is useful to observe that most VHS tapes, especially those that get heavy use, are certainly deteriorating.

As we progress further into section 108, the emphasis moves to making copies for users. This is the provision that underlies interlibrary loan practices, and all applications of it require that single copies which are made become the property of the user who requested them. In other words, libraries cannot use this provision to increase their collections or to build a library of copied materials “just in case” someone asks for them.²³ Copyright coaches should be aware of a couple of observations about these copies that are made and distributed to users who request them. First, library clients are often surprised to learn that, under subsection (e), they can make complete copies of works in their collections for a user. They must determine first, however, that a copy is not available at a fair price. Notice that here the law does not say “unused,” so the user must presumably settle for any fairly priced copy before the library or archive can copy an entire work for them. Also, the provisions that authorize copies for users all require that a warning notice be displayed “at the place where requests are made,” which today likely means on the library or archive’s

website. The text for this warning notice is specified in the Code of Federal Regulations, at 37 C.F.R. 201.14.

Finally, a coach helping a client understand these “copying for users” provisions of section 108 needs to address the role of the CONTU Guidelines. Virtually all librarians will know that there is a “rule” that says that a library or archive may not copy more than five articles from the same journal in a single calendar year. Like many things we all think we know, this is not strictly correct. First, the CONTU Guidelines were negotiated over forty years ago and do not reflect our current information environment. Also, the so-called “rule of five” is not really a rule; it is part of a set of guidelines which do not have the force of law, but which were an effort to define a provision in the law that says that interlibrary loan copying should not be systematic or a substitute for library subscriptions (see subsection 108(g)). It is at most a strong suggestion, not a rule. Finally, an accurate version of this suggestion is that a library should not request more than five articles from the most current five years of a particular journal title. That is, it is not any five articles from a journal title, but only articles from the most recent five years; older articles do not need to be counted. This guidance applies to the borrowing library, which makes sense since that is the institution that is able to decide when the number of interlibrary loan requests indicates that a local subscription is needed. So for libraries that choose to follow CONTU, it is the borrowing libraries that need to keep track of requests for the purpose of this rule, while the lending libraries that are actually making the copies need only have reason to believe that the borrowers are following this guidance.

One final aspect of section 108 that a coach should keep in mind when discussing the exception with a client is the remission of liability contained in subsection 108(f)1. That provision simply states that neither libraries nor archives, nor their employees, are liable for potential infringement committed by users who use unsupervised copying equipment provided by the institution, as long as that equipment has a copyright warning displayed on it. Unlike the warning required earlier in section 108, the text of this warning is not specified, so it can be pretty general, perhaps simply that the use of the machine—photocopier, scanner, and so on—is subject to the provisions of the U.S. copyright law and users are responsible to act accordingly. Copyright coaches should be sure that librarian or archivist clients understand the need for this warning, and should have it placed on all unsupervised equipment that can be used by patrons to make copies. It is also important not to police such equipment. The well-intentioned tap on the shoulder of a patron who seems to be copying too much can be problematic, since the librarian cannot know at a glance if the material is in the public domain, or is even being copied by permission, and trying to advise patrons in this way might actually create liability because it undermines the unsupervised nature of the machine.

FIRST SALE AND THE PERFORMANCE EXCEPTIONS

After this rather lengthy exposition of section 108, I hope the reader is more familiar with the structure of the specific exceptions and their application, so we can now treat several other exceptions more briefly.

The doctrine of first sale, found in section 109 of Title 17, acts like a boundary on a couple of the exclusive rights. That is, one way to understand first sale is as a limitation of the reach of the rights holder's control over distribution and public display. In fact, in other countries, what we call first sale is often called the doctrine of exhaustion because a simple exposition of the limitation is to say that the right over distribution is "exhausted" after the first lawful sale of a copy. For this reason, the new owner is free to redistribute that particular copy in any way. A lawfully obtained copy can be resold, lent, rented, or given away, but it may not, under the doctrine of first sale, be used to make additional copies, offered as a public performance of the work, or prepared as derivative works. First sale only applies to specific copies that have been lawfully obtained, and it only limits distribution and public display rights. After a first sale, the distribution right is exhausted and public display (of that copy) is permitted in defined circumstances. This doctrine thus authorizes a limited scope of otherwise infringing activities, and only for individual copies of a work. But its authorization is general—anyone can take advantage of it and, after the U.S. Supreme Court decision in *Kirtsaeng v. John Wiley*, all lawfully obtained copies are subject to first sale, regardless of where the copies were manufactured or originally obtained.²⁴

An example of a situation where first sale is important to a copyright coach might arise when an individual or library is concerned about whether or not a personally owned copy of a book or video may be put on reserve or otherwise loaned out by a library. The answer, of course, is that it can be, since under first sale the owner may distribute the work in whatever way he or she wishes. First sale underlies all library lending activities, at least of print and analog materials. This is also the exception that permits used textbook sales for students, as well as the entire industry that sells secondhand books, videos, and records. Perhaps because it is so pervasive, first sale does not often arise in coaching situations, although it can be important to reassure clients about distributions that might seem outside normal practices, or in regard to materials that were obtained in unusual ways. Donated materials, for example, are certainly subject to first sale and are available for loan as long as there is no contractual provision to the contrary in any donor agreements.

First sale also allows the public display of copyrighted materials as long as the display is made only to people who are at the same place as the copy that is being displayed. So displays of books and paintings in libraries and museums

are allowed because of this provision of the copyright law, but a digital display is not; doing that kind of display must rely on some other exception if it is permissible.

This restriction reflects a more general limitation on first sale; it clearly applies to print and analog copies of copyrighted materials, but its application to digital works is very much in doubt. In *Capital Records LLC v. ReDigi, Inc.*, a recent lawsuit challenging a service that was intended to facilitate the resale of digital music files, a judge in the Southern District of New York issued an order that held the doctrine of first sale could not apply to digital works, because all transfers in the digital environment involved copying.²⁵ Noting that whenever a digital file is transferred from one device to another, a new copy is made, Judge Richard Sullivan concluded that first sale, which has always been applied to transfers of the same copy, simply has no role in the digital realm. The Second Circuit Court of Appeals upheld this decision, and the logic that the court uses, while extremely literalistic, seems compelling. So copyright coaches need to be careful to warn a client who wants to transfer her thinking that relies on first sale into the area of digital works. For e-books, to take one example, any ability to lend digital files will depend on the terms of a contract between the vendor and the institution, not on the doctrine of first sale.

A very common issue that arises in copyright coaching is that of public performances of various types. Of course, when the performance involves musical works, and the institution has a blanket license from ASCAP and/or other performance rights organizations as described previously, some of these questions will be answered at an earlier stage in our framework for analyzing a copyright problem. But often the performance is outside the scope of such a license, or the institution has no license, so the coach must look next at the performance exceptions in section 110 of the copyright law.

When the question involves a performance in a face-to-face classroom, which is covered by subsection 1 of section 110, the coach's primary job is usually to convince the client to relax and accept that the law means what it says. Essentially, no permission for public performance is required if the performance (such as a film showing, recital, or reading) is part of a teaching activity that occurs within some form of instructional space. The language here is very broad—"teaching activity"—and clients often want to hedge this with rules of their own, such as the assumption that the law must only mean classes that are part of regular instruction, for example. But that is not the language in subsection 110(1). Since such requirements are imposed on online performances in subsection 2, it is clear that Congress was making a distinction, so it seems pretty certain that any form of teaching activity, not just formal parts of a curriculum, fall within this exception. Thus, no permission is needed for a very wide range of performances in such in-person teaching. Campus club activities, for

example, probably can show films without permission, while a film screening that is purely for entertainment should be licensed. The coach will need to help clients recognize the wide scope of this exception, evaluate the particular activity in question, and then decide if the place where the performance is to take place qualifies as a “classroom or similar place devoted to instruction.”

The parallel exception, in subsection 110(2), which is intended to authorize some performances that are transmitted to students over digital networks, is much more restrictive and quite difficult to apply.²⁶ As if to remind us that the specific exceptions work like checklists, where each element of the exception must be met in order to take advantage of the authorization it provides, subsection 110(2) imposes approximately a dozen different requirements for someone wishing to transmit a performance to online students. Some are either policy or technical requirements that the institution must meet, while others must be attended to by the individual instructors. For example, an institution must have copyright policies in place, as well as a secure network that is capable of authenticating users. The transmission must be part of the regular, mediated instruction of an accredited nonprofit educational institution or a government agency. The transmission must be restricted to enrolled students, and “reasonable technological measures” must be taken to prevent even authorized recipients from retaining or retransmitting the digital files. And instructors must pay careful attention to what they wish to transmit, since the exception normally does not allow entire works to be performed, only “reasonable and limited portions” of them.

The complexity of this performance exception has led to a couple of different reactions. Some institutions simply despair of being able to take advantage of the permission that Congress was trying to offer. Others have created some helpful guidance for instructors and schools to follow in order to ensure compliance with all of the requirements. The checklists offered by Louisiana State University (<https://www.lib.lsu.edu/services/copyright/teach/index>) and by the University of Texas at Austin (<https://guides.lib.utexas.edu/copyright/teachactchecklist>) are fine examples of these latter strategies, and may help some coaches realize that, in the right situation, subsection 110(2) can assist clients to achieve their goals for the use of copyrighted content.

The four specific exceptions discussed so far—the library exception, the doctrine of first sale, and the performance exceptions for face-to-face and online teaching—are the ones that a copyright coach in educational settings will need to discuss most often with clients. But there are others, so coaches should be prepared to look to other exceptions when the client’s needs dictate. Among these remaining exceptions that deserve quick mention is subsection 110(4), which is another performance exception that covers a general range of nonprofit performances that are not being transmitted. When a client is looking to offer a performance outside of traditional educational contexts,

110(4) might be useful depending, of course, on the circumstances. Section 112 authorizes copying when necessary for other exceptions, including 110(2), so that a client will have some parameters within which to work when she needs to make ephemeral copies in order to teach online with a performance. Another rarely needed but potentially useful exception is found in section 120, which governs the use of photographs taken of architectural works. Buildings are subject to copyright, so photographs of a protected building are potentially derivative works that are within the ambit of control of the rights holder. But section 120 dramatically limits that control, in order to allow the photographer to make many traditional uses of the photograph. Finally, section 121 authorizes the copying and distribution of copyrighted works for use by people with visual disabilities. This can be exercised only by authorized entities, but the district court in the *HathiTrust* litigation held that libraries are such entities for the purposes of section 121, so this is something that a coach working with library clients needs to be aware of.²⁷ Indeed, all of these exceptions may come in handy in a copyright coaching session, and deserve more or less detailed attention from the would-be copyright coach.

FAIR USE

There is a real sense in which the five-question framework acts as a kind of funnel, guiding many of the issues that a coach is presented with toward fair use. Copyright coaches will find themselves at this point fairly often, after determining that there is a copyright to be considered, that no license determines the issue, and that the desired use does not fit within the scope of any specific exception. Fair use, which is listed first among the exceptions in the copyright law (section 107), is often the catch-all for questions that cannot be resolved by the first three steps, and it seems that this is intentional. Lawmakers in the United States have repeatedly chosen to leave most educational uses to the fair use analysis, rather than to create additional specific exceptions. Because there are relatively few court decisions regarding fair use in educational settings, we are forced to work by analogy when we look at cases. Mastering the fair use analysis remains vital for anyone hoping to coach copyright in educational settings.

The actual statutory instructions for a fair use analysis are surprisingly brief; section 107 is only a half-page long in the Copyright Office's publication of the law, and thus is one of the two shortest of the exceptions to the exclusive rights.²⁸ Depending on how one looks at it, this brevity may belie the importance of fair use, or it may actually explain why it is so important, and so frequently litigated. Fair use was originally judge-made law, and it is still intended to grow and adapt itself to changing conditions. It is short because the four fair use factors are intended to guide users and courts through a

fact-driven analysis that depends on the specific circumstances of the use in question. The provision is short because almost everything about the analysis depends on those circumstances.

For almost anyone setting out to be a copyright coach, the four fair use factors should be very familiar: (1) the purpose and character of the use, (2) the nature of the original work, (3) the amount and substantiality of the portion used, and (4) the effect of the use on the market for or value of the original work. Although there are certain routinized ways of pursuing the analysis of these factors that courts have developed, they really just identify the specific kinds of information that should go into a determination about whether or not a use is fair.

But before we look at how these factors work, we should pause and consider the examples that the statute provides for the sorts of uses that might be fair use. Specifically, section 107 says that “*fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.*” So the first thing a copyright coach should do when talking with a client who is asking about fair use is find out what, precisely, they want to do with the material they would be borrowing. Our courts have been very clear that these examples are not automatically fair use; a full analysis of the four factors is still necessary. Looking at how courts view them, one might say that these typical uses create a rebuttable presumption of fair use; if a use fits into one of those categories, there is a thumb on the scale in favor of fair use, but a full analysis of the factors can overbalance that thumb. In any case, knowing the intention of the user is vitally important, both for assessing the role of these examples and for thinking through the first factor in the full analysis.

The basic application of the four fair use factors by our courts has become rather mechanical over the years, and there are a few basic questions that courts tend to ask regarding the factors. For the first factor—the nature and purpose of the use—the normal starting place is whether or not the use is commercial. Courts have sometimes said, and occasionally still say, that a commercial use is presumptively not fair use, although the Supreme Court has rejected this presumption.²⁹ The other traditional consideration here is to look at those examples quoted above. If a court can squeeze the use into one of the exemplar purposes, the chances are good that the first factor will favor the user (normally the defendant) in the fair use argument, although, as I have indicated, this weight given to the examples from section 107 can be counterbalanced.

Most important to the analysis of the first factor, at least since the 1994 Supreme Court ruling in *Campbell v. Acuff Rose Music*, is a court’s perception that the use is, or is not, transformative. We will discuss the notion of transformation in more detail shortly, but here we should note that when a use is found to be transformative, the odds that it will be held to be fair use increase

dramatically. Nevertheless, courts continue to acknowledge, often citing a footnote from *Campbell*, that non-transformative uses may still be fair use.

If we put the issue of transformativeness to the side for a moment, the remaining fair use factors are also often subject to a rather mechanical analysis. The second factor, which is about “the nature of the original work,” usually asks whether or not the original has been published, and where it is located on the continuum from factual to highly creative works. An earlier Supreme Court case, *Harper and Row v. Nation Magazine* 471 U.S. 539 (1985), indicated that the unpublished nature of the original work weighed strongly against the possibility of fair use, but that conclusion was explicitly reversed by Congress in 1992 when a line was added to section 107 stating that no such presumption should be applied. And the issue of fact versus creative seems to generate more heat than light, since it is possible to argue from both directions about many works. Is a work of history creative or merely factual? Which words best describe educational materials? Unfortunately, debates like this dominate discussions of the second factor, which has the potential to be very important for fair use, but in practice usually carries little weight.³⁰

The third factor, regarding the amount or substantiality of the portion used in relation to the original, is also treated in summary fashion by many courts. Often the third factor is tied to the first, when courts pose the question of whether the amount of a work used is appropriate to the purpose. As we will see, this relationship takes on even greater import when we consider transformative uses. For now, we should note that there really is no bright line percentage, number of words, or length of a segment that one can rely on and be “within” fair use. Clients often come to a coach with a strong notion that only 30 seconds of music or only 500 words of text can be fair use, but the coach must firmly disabuse clients of this idea. The amount that will be acceptable as fair use will always vary based on the overall circumstances of the use. It should be clear that borrowing even 30 seconds of a song would be treated with great suspicion if it were used without permission in a TV commercial, while the use of much more than that in a parody or other attempt to comment on the song will receive a more favorable hearing. The ongoing case over electronic reserves, brought by publishers against Georgia State University and defended by that school as fair use, is a good example. The judge in the case found that the use was not transformative, and held that a maximum of 10 percent or one chapter was allowable. The Eleventh Circuit Court of Appeals rejected this bright line rule, while agreeing that the use was not transformative. Nevertheless, in a subsequent decision, the district court judge did not venture too far from her original percentages, although she was a bit more flexible, because the nature of the use is such that a larger amount would surely impact the issue of market harm.³¹ Thus, it is important that the third factor always be kept in context, and evaluated in light of the other factors.

The fourth factor, which looks at the potential market harm or loss of value for the original work if the use is permitted, is probably the most difficult and contested factor. At one time this was certainly considered the most important factor, but that has changed some since the ruling in *Campbell*, when the Supreme Court held that all of the factors should be evaluated and weighed in light of the purpose of copyright law.³² Approaches to this part of the fair use analysis still diverge widely, however. Some courts will look at all potential markets, and hold that there is harm whenever a rights holder might have realized licensing revenue. Other courts look only at actual sales of the original, or only at markets that are traditionally exploited by the particular type of rights holder. Courts not only disagree about which markets are relevant to the assessment of market harm, but they are also split over how deeply they will consider potential harm versus a real, documented loss of revenue. Sometimes a court will ask what would happen if the use in question were to become general; a question that usually tilts the fourth factor away from fair use and is really quite unrealistic in many instances. With this amount of volatility in the fourth factor analysis, the coach really must discuss the amount of risk carefully with the client and try to evaluate the client's tolerance for such risk.

These traditional questions in the fair use analysis take on a different character when the court examines the issue of transformation, as most have done since the *Campbell* decision. That analysis, as has already been suggested, begins with the first factor, since it is fundamentally about the nature of the use and the new work that has been created, but it has a significant impact on a court's consideration of all of the fair use factors. The basic question that courts ask is whether or not something new has been created through the challenged use, with a different purpose, meaning, or message. Sometimes the new thing is a changed work, such as the parody song that was at issue in *Campbell*, or the collage artworks being evaluated in *Cariou v. Prince*.³³ In other instances, what is new is the purpose to which the original has been turned. For example, in *A.V. v. iParadigms*, the Fourth Circuit held that student essays being submitted to the TurnItIn anti-plagiarism service were repurposed to such a degree that there was transformative fair use even though no changes were made to the original texts themselves.³⁴ Finally, courts have found that creating new meaning can also be a transformative fair use, as in the case of images from Grateful Dead concert posters that were used, without license, in a published book recounting the history of the band. In finding that the use was fair, the Second Circuit held that new meaning was created when the posters ceased to be concert advertising and became, instead, "historical markers."³⁵

In all of these cases, once the courts held that the use was transformative, the other factors were analyzed in light of the transformative purpose. The creative nature of the original became less important, arguably because the

use itself was so creative or transforming. The amount of the work used was evaluated in light of the purpose, so that the question was not, objectively, “was a little or a lot used?” but rather, “was the amount used appropriate to the purpose, and was neither too much nor too little to have the transformative effect?” Finally, the discussion of market harm becomes much less important, since courts generally do not find that the rights holder is entitled to control any market for transformative works.

The fair use analysis in general is very friendly to educational use, and non-profit educational use will almost always at least sway the first factor in favor of the user. The preference for transformative uses is particularly beneficial for scholars and teachers. When parts or excerpts from protected works are incorporated into teaching materials or new scholarship or teaching, they are very often transformed by being subjected to criticism and comment. When assessing a potential transformative fair use, the coach and client should work through three questions: Does the incorporated material help me, the user, make *my* new point? Will it help my readers or viewers to understand *my* new point? Is the amount used appropriate, and is neither too much or too little, to make *my* point? It should be clear that these questions, which are fundamental to analyzing transformativeness, are also essentially questions about good pedagogy. In short, the more the incorporated material serves the purposes of good teaching or good scholarly analysis, the more likely it seems that it is also transformative fair use.

Coaches and clients should embrace this advantage for nonprofit educational and scholarly uses, but they should not abuse it. Not all uses at a school or university are automatically transformative; the questions should be asked and answered in good faith.³⁶ And it is important to remember that a use might be fair use even if it is not transformative. In that case, the other fair use factors become more important, and the coach should guide the client through the issues of the nature of the original, the amount used, and the possible market harm very carefully. To repeat, what is essential here is a responsible and documented analysis of the particular facts and circumstances surrounding the specific use. There are no shortcuts in fair use, but when it is used responsibly, it is an immensely beneficial provision that was specifically designed to help teachers, researchers, and scholars.

Fair use is vitally important for good copyright coaching; it is the go-to play that helps our clients navigate the “game” they are involved in. It is very complex, but it is also the point where most of the situations we encounter will be resolved. To become comfortable coaching about fair use, there is no substitute for reading cases, learning all the different situations where fair use has been evaluated, and seeing how courts apply the parts of the analysis to the particular facts before them. In this section, I have added more citations to my discussion of fair use than in other parts of this chapter; this is so coaches can easily find and read the cases. Another valuable resource is the

catalog of fair use cases provided by the Stanford University Copyright and Fair Use Center.³⁷ A similar catalog has recently been created at the U.S. Copyright Office, called the Fair Use Index.³⁸ These will help coaches see the overall shape of the field before them and point them to cases that they should read in detail as they encounter particular circumstances. Also, there are multiple resources that can help the coach become more familiar with how to think about fair use and which can also serve as places to refer clients, so that the latter can develop the facility to make those good faith, fair use judgments that are the key to navigating so many copyright situations. I particularly like the materials at the Columbia University Copyright Center, including the Fair Use checklist.³⁹ I must note, however, that this checklist is not an infallible determination about fair use; it is merely a guide to thinking about fair use and a way to document that thought process. The checklist, and all of the other resources now available to copyright coaches in the academic world, are useful ways to improve one's thinking about fair use, but they can only act as guides; they do not replace thoughtful assessment of the facts and situations that confront the specific client.

YOUR LAST RESORT

Asking for Permission

Asking permission is a last resort only because it comes at the end of the framework for thinking through a copyright issue. After the coach and client have determined that there is a copyright protecting the work in question, that no license supports the planned use, that no exception does either, and that relying on fair use is outside of the client's comfort level, the question that remains is "who can we ask for permission to use this work?" Permission has a significant advantage in this schema, since it can cover any planned use and it provides a degree of certainty that can be lacking at other stages. In fact, sometimes a client will seek assistance specifically for finding a rights holder to ask for permission, and it may be determined to proceed in this way even if there might be other options. I once worked with a student who wanted to write a play based on several of the short stories of Ernest Hemingway. As I listened to him describe his project, I began to talk with him about transformative fair use. But the young man was adamant that he wanted permission from the Hemingway estate, because of his respect for Hemingway. While I do not agree that relying on fair use is disrespectful, my client was very determined, so we set about seeking permission for his creative endeavor. I will return to this story as we continue to unpack the process of permission.

Before we turn to issues involved in finding the correct rights holder, we should briefly consider how to ask for permission. Clients often worry about the format of the request and the response. Do they have to send a formal

letter to the copyright owner, or can an e-mail request suffice? Must the reply be a signed letter? How should it be recorded, if at all? Since in most cases the client will be seeking a nonexclusive license, which means a license that allows her to do what she asks for but does not preclude others from being given the same permission, the license does not actually have to be in writing. Chapter 2 of Title 17, which governs the ownership and transfers of copyright (and so bears study by any copyright coach), tells us that a transfer or exclusive license must be done via a signed document. By implication, a nonexclusive license does not have to be a signed piece of writing at all. Nonexclusive licenses can be verbal, or even implied by law or by the actions of the licensor. While this gives our clients some room for informality, however, I always advise that clients obtain some form of written confirmation of the permission they are seeking. An e-mail, properly stored and retrievable when evidence of the license is needed, is fine for most purposes. Although it is possible to record a license with the Copyright Office, to do so requires either a signed document or a sworn affidavit and, again, in most cases is not necessary.⁴⁰

The most important part of any request for permission to use a copyrighted work is the scope of the license that is sought. Care should be taken that the proposed use is described as fully as possible. Permission is only helpful, after all, if the use the client wants to make of the work is fully covered by what the rights holder has granted. Often the rights holder will depend on the request to define the scope of permission, so coaches should work with clients to provide a full description of the use. It is important to include who the audience for the use will be and whether there will be commercial gain, simple cost-recovery, or no charge at all associated with the use.

In my opinion, it is also important to be persistent when asking for permission. Sometimes a first message to the rights holder may go unanswered, or may be answered with a knee-jerk “no.” This happened with my young man seeking to use some Hemingway short stories; our first request was summarily refused, and my client was devastated. We tried again, however, putting strong emphasis on the academic and noncommercial purpose of the use. To our relief, this second request was granted; apparently we had simply needed to be very clear about what was intended, and a little bit stubborn.

In some cases, persistence means asking the same rights holder repeatedly until one gets a reply, or even considering an alternative pathway to make the request. When there are several potential rights holders due to inheritance or joint authorship, for example (more about these possibilities shortly), it might be wise to try a different person or entity. Sometimes, of course, there will simply be no reply from the rights holder. I always recommend trying to contact the rights holder at least three times, but at that point the potential returns are definitely diminishing. Eventually it can become clear that permission will not be forthcoming, so it is necessary to reenvision the project, possibly using different materials that are in the public domain or openly

licensed, or to revisit fair use. The knowledge gained about the unwillingness of a rights holder to reply to a request for permission may, after all, strengthen the reliance on fair use somewhat because it indicates the absence, or failure, of any licensing market. And courts have been consistent in holding that a request for permission in the first place does not undermine future reliance on fair use.⁴¹ In all cases, of course, requests for permission should be polite and respectful; they should also be directed to the right person, insofar as due diligence in searching has yielded results. We now turn to this issue of finding the correct rights holder.

Copyright is owned immediately by the creator of the work, except for works that are made for hire; in those cases, the employer of the creator, which is often a corporation or other institutional body, owns the rights in the work from the moment of creation. If the rights holder is an individual, her rights will pass by inheritance when she dies. Recall that copyright always outlives the creator, since the term of protection is the life of the creator plus seventy years. Rights do not dissolve away early, even when there are no obvious heirs. The law defines heirs in nearly every situation, even if a will left by the rights holder does not. So, a client seeking permission must assume that rights persist until the end of the copyright term, and should search for rights holders accordingly. In the case of my student client and Ernest Hemingway, we knew we needed to locate a literary executor, and that is who ultimately gave us the permission my client needed. In other cases, permission might be sought from a surviving spouse, children, siblings, or even the parents of a creator. Each situation will be different, and it is sometimes necessary to start with what you believe is the most likely rights holder, and politely ask in the request to be referred if the person addressed does not, in fact, hold the necessary rights. Book or journal publishers, of course, are often the rights holders because the rights have been transferred to them, and these organizations usually have identifiable contacts for permission, although sometimes it can be hard to get an answer from a publisher, especially when no licensing fee is contemplated.

Work that is made for hire is the big exception to the rule that copyright vests immediately with the creator. When a work falls within the definition of work made for hire (defined in 17 U.S.C. §101), the law recognizes the employer, not the creator/employee, as the rights holder from the moment of creation. Subsection 201(b) of the copyright law simply creates the legal fiction that the employer, in work made for hire situations, is the “author” of the work. So as a client prepares to seek permission, he may need to know the circumstances under which a work was created. Was the creator acting within the scope of her employment when she authored the work? Or perhaps she was as an independent contractor, in which case some very specific information—or a direct query to the creator—may be needed to determine who the rights holder is. In some of these cases, it will be pretty clear that something is

a work made for hire, while in others it may be necessary to ask and hope for referrals when needed.

A very common situation, of course, arises when the creator is an academic and the coach and client must decide whether the work they are interested in is owned by the scholarly author or by her institution. In this case, I believe that it always makes sense to start by asking the academic author. In a great many cases, universities have specific policies that disclaim work made for hire; that is, the policies say that, at least for traditional scholarly works like monographs and journal articles, the authors hold the rights (which, of course, they often assign to publishers) despite the work made for hire rules in the copyright law. For this reason, coaches will do best to recommend starting with the author, since that is the person who is most likely to know the policies of her own institution and to also know, of course, if she has assigned the rights to anyone.

There are exceptions to this general advice to start with the creator of a work when the work is a form of scholarship and the author is employed by a college or university. Many institutions claim ownership over data, for example, since the institution is often responsible to a grantee or government agency for the integrity of the data and the conclusions drawn from it. Likewise, institutions may claim rights in measurement scales, psychological assessments, standards, and similar materials created by their faculty. But while these exceptions to any broad assumptions about academic policies regarding work made for hire add some complexity, they do not change the basic advice to start with the creators and let them guide your inquiry, since they are best placed to understand the situation.

Of course, if the creator is an employee of the U.S. federal government, the inquiry should not have gotten to this point, since any work created within the scope of that employment will be in the public domain. If a refresher on this point is needed, please review the discussion under the first question in our framework.

One of the most common authorship situations that must be understood when considering who to ask for permission is that of joint authorship. The principle here is simple and very important; when a work is created by two or more people, each of the creators holds an equal share of the rights, and each one can exercise those rights without consulting the others (although they must account to the other creators for any profits). It doesn't matter if one author did 90 percent of the work and the other did only 10 percent; each of them will hold a 50 percent share in the rights. Practically, the important point for dealing with a jointly created work is that each author is entitled to grant permission for a use. This is part of what it means to say that each author can exercise his or her rights independently of the others. Permission from one author is sufficient, even if the work in question was written by five people working together. It is sometimes sensible, in cases where it is practical, to get

permission from all or from as many creators as possible. Doing so reduces the potential for difficulties later on, since everyone who could raise an objection has already agreed to the proposed use. But as a matter of law, it is not necessary; permission from one rights holder in a jointly authored work is legally sufficient.

The most common situation for joint authorship, of course, is the scholarly article written by several people, who can sometimes form quite a crowd. A reminder about this situation may be in order here. In most cases, the rights in these articles have been assigned to a publisher, so it doesn't matter if there are seven authors or seventy; the publisher will be the entity with which to begin the process of obtaining permission.

Sometimes asking permission is a straightforward task, and sometimes it is simply impossible. But it can also be circuitous, leading client and coach through several discoveries and changes of direction. I was once working with a professor who wanted to use a short excerpt from a book written by a colleague in an online class he was teaching. On his behalf, I went to the author who was, as I say, another professor at the same institution, and asked his permission, since his name was listed as the copyright holder on the title page of the book. This author told me he was happy to let his colleague use the excerpt in the way I had outlined, but he asked me, as a courtesy, to inform his editor at the publishing house. When I spoke to that editor, she was surprised and unhappy since, according to her, the contract between the publisher and the author, while it did leave copyright in the author's hands, designated the publisher as the sole agent by whom permission could be granted. The author had either not understood this, or he had forgotten. In any case, the publisher's representative was less than pleased by the situation, although in the circumstances, where I had already spoken with the author/copyright holder, the publisher did not raise any objection to the use. I recount this story simply to illustrate that the search for permission sometimes depends on information that simply is not available, at least at the start, and thus it can take some unexpected turns.

RESOURCES

The tools that can help a copyright coach track down the person or entity from whom permission should be sought are, unfortunately, neither common nor comprehensive. The process of searching, which often fails and then has to move in a different direction, will actually be quite familiar to librarians who do reference work; it is necessarily iterative and can be quite frustrating. Usually the coach will start with whatever source the client used to locate the material she wants to use. Books and articles offer an easy place to start, since they normally supply both the author's name and the publishing house, although, as my previous story indicates, that may not be the end of the search. For online

resources, various methods for finding metadata will be needed, depending on how the resource is structured and presented. Google searching, of course, can be quite fruitful. Our colleague librarians, of course, who are specialists in specific subjects at issue, can really help guide these searches. When looking for the rights holder of an image, reverse image searches using Google or an application like TinEye may help the coach find other instances of the same image and therefore offer more possibilities to locate metadata.⁴²

Beyond these general resources, there are a few databases that can help with specific types of materials. The records of the U.S. Copyright Office, naturally, hold a lot of information. Unfortunately, they are complicated and difficult to search, and only a small percentage of the records are searchable online, though the office is working continuously to increase the number that are digitized and the quality of retrieval. So those records, at copyright.gov, are usually a good place to begin. The Stanford database of copyright renewal records, although limited to monographs, will also sometimes help a coach determine who the most recent rights holder was.⁴³

More specifically, the Harry Ransom Center at the University of Texas, Austin, maintains two databases that can be quite helpful when seeking rights holders. The WATCH file (Writers, Authors and Their Copyright Holders) is a good first stop when looking for a literary estate or other rights holder for twentieth-century literary figures. It was the WATCH file that led my young dramatist client and me to the literary estate for Ernest Hemingway.⁴⁴ The Ransom Center also offers a database to help people who are looking for copyright holders and who discover that a company they were looking for is no longer in business. This database, called Firms Out of Business (FOB), lists known successors in interest for defunct companies that held copyrights. Since this can be a difficult problem when seeking a rights holder, FOB is a very useful resource.⁴⁵

Sometimes all of these resources still don't yield the name or contact information of a rights holder, or else a putative rights holder who is contacted by the coach or client simply does not respond, even to multiple inquiries. These situations are the result of "orphan works," which are works still protected by copyright, but for which there is either no known rights holder or no practical source of permission. The situation around orphan works is very complicated and, like so much in copyright, depends heavily on the circumstances of individual works. Some resources that can help a copyright coach understand these situations are found on the Copyright Office website where there is a study of the problem, some proposed legislation that was introduced into Congress several years ago but not adopted, and a more recent (2015) report on "Orphan Works and Mass Digitization."⁴⁶ There is also an excellent article on "Solving the Orphan Works Problem for the United States" by David Hansen, Pamela Samuelson, and others that can help a coach contextualize the problem and understand the alternatives.⁴⁷

The key point about orphan works has already been made in our discussion about an unresponsive rights holder; when faced with a true orphan work, where obtaining permission is simply impossible, that fact provides an additional data point for the fair use analysis. Thus, when the coach and client hit this apparent dead end, they should push their analysis back to fair use and reconsider its possible application. Now that they know that market harm is less likely, since there is no one to grant permission or collect a licensing fee, a borderline argument for fair use may swing in a more acceptable direction. This decision belongs to the client, of course, since he will be the party at risk, and his level of risk tolerance (or that of his institution) must be determinative. Unless and until Congress acts to resolve the problem, however, the client should at least be given the facts about the potential impact of orphan work status on the consideration of fair use.

A BRIEF NOTE ABOUT CIRCUMVENTION

In 1998, Congress adopted the Digital Millennium Copyright Act (DMCA) in an effort to update the copyright law for the digital age. While its relative success is a matter for debate, one aspect of the law has created an additional consideration for copyright coaches but does not fit neatly within our framework—the anti-circumvention rules now found in 17 U.S.C. section 1201.⁴⁸ This provision forbids “circumventing a technological measure that effectively controls access to a [copyright-protected] work.” In other words, it makes it an act of infringement to copy or otherwise gain access to a work by breaking a digital lock, including various types of digital rights management. Copying a DVD that is protected by the Content Scramble System (CSS) is a common example of the kind of circumvention of technological protection measures that the DMCA is intended to prevent. There are numerous exceptions, however. For instance, the librarian of Congress is directed by the law to declare, every three years, certain “classes of works” for which circumvention will be permitted, in order to mitigate the potentially draconian impact of the law on socially beneficial uses of copyrighted materials. In fact, one of the exceptions that has persisted through several rounds of this triennial rulemaking permits exactly the kind of activity mentioned above—copying CSS-protected DVDs when the purpose of the copying is to use short segments of a film or video for certain types of educational activities.

The issue of circumvention cuts across all of the steps in our framework for considering a copyright issue, so wherever the analysis lands when working with a particular client, the coach will need to ask an additional question—does this use involve disabling or circumventing any technological protection measures? When it does, the coach can guide the consideration of several options. First, look at the exceptions to the DMCA that are currently in

force—they are published in the Code of Federal Regulations—and consider whether any of them authorize the use. If the client will be depending on a specific exception in the copyright law, the coach should also look at 17 U.S.C. §112. This section provides authorization for certain types of ephemeral copies that are needed to take advantage of some of the specific exceptions, in spite of anti-circumvention rules. Of course, if the analysis has reached the point of asking for permission, a license or grant of permission will permit the necessary copying, so the anti-circumvention rules will not be a problem.

Finally, if the client is relying on fair use, it will be necessary to consider how that fair use interacts with the anti-circumvention rules. Unfortunately, there is no clear guidance for this consideration. By the express terms of section 1201, it seems that anti-circumvention rules do not apply if the use for which the circumvention is necessary is a fair use.⁴⁹ Some courts have taken this path, holding that for a circumvention of technological protection measures to be a violation of section 1201, the underlying use must also be infringement. Fair uses, of course, are not infringement. But other courts have applied the anti-circumvention provision without regard to any “nexus” with copyright infringement. As long as this split among U.S. courts persists, coaches will need to discuss the anti-circumvention issue carefully with clients. If the fair use case is very clear, and the use is localized and noncommercial, a client may feel safe relying on fair use to also permit circumvention. But uses that are likely to catch the attention of potentially litigious rights holders, such as those that involve widespread distribution, might require more caution. It is possible that a client would be well advised to consider seeking permission because of the risk of violating the prohibition on circumvention, and only return to fair use if the search for a rights holder is unsuccessful and indicates a lowered risk.

CONCLUSION

We have taken quite a long path through the framework of five questions for analyzing any copyright issue. As I said at the beginning, these questions each seem straightforward, but none of them is easy. At each stage, painstaking analysis is needed to help a client find the best option. The five-question framework provides the copyright coach with a game plan, but every game, of course, is different. The game plan still requires careful attention by the coach and client to specific circumstances, developing situations, and individual goals. And it requires practice. The would-be coach needs to practice with this game plan on several levels. Coaches should practice reading cases, especially about fair use, in order to understand the nuances of how courts think about copyright and then balance the different incentives for creation. Coaches need to practice discussing facts with potential clients in order to become adept

at eliciting the right information from the client to address each question. Finally, and above all, the copyright coach must practice thinking in terms of the game plan we have built, since it provides a structured approach to copyright issues that can help the copyright coach achieve success in this work.

I want to close with a reminder. Clients often come to us quite stirred up about copyright issues. Usually they are deeply engaged in a project and have been brought up short by a sudden concern over some potential copyright violation. They may joke with us about going to jail, but it is clear that quite often they genuinely fear the potential consequences of getting things wrong. Yet at the same time that we work with these nervous clients, we are well aware that thousands of copyright-related activities are taking place in our libraries and on our campuses that never come to our attention, and never result in complaint, litigation, or liability. As we seek analogies from copyright case law, we cannot fail to notice that very little of it arises from an educational context. The entertainment and technology industries are where the money is, and thus where copyright conflict is generated. By and large the stakes, in the broadest view of things, are simply not that high, even though they may be very high indeed for the individual clients we work with. I believe that the five-question framework is an important and useful way for a copyright coach to assist those who come asking for help. But we need to recognize that, while we must work with our clients to resolve their specific issues, some perspective is required. Working in education, we are simply not in the vortex of copyright risk; indeed, we are often favored actors in the courts and in Congress. So we need to help our clients, and ourselves, to maintain a balanced perspective on risk and liability, while still striving to do what they believe is the right thing, ethically and legally.

NOTES

1. Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 5 (West, 1953).
2. It is worth noting that, to the best of my knowledge, no action has ever been taken by courts or state bar associations to discipline librarians for the unauthorized practice of law. The need for care is borne not from fear of such liability, but out of our professional commitments as librarians.
3. The standard way to cite a legal provision is by the number of the title within the U.S. Code, followed by the section number. The copyright law is Title 17 of the code, and the definitions section of it, for example, is cited as 17 U.S.C. §101. All sections of the copyright law cited for the remainder of this chapter will be in this form, in the text.
4. See the interesting discussion from the Harvard Law School about the distinction between the case method and the case study method at <https://casestudies.law.harvard.edu/the-case-study-teaching-method/>.
5. Referring to *Kelly v. Arriba-Soft*, 336 F. 3d. 811 (9th Cir. 2003).

6. These five questions are fairly common among copyright specialists. I first learned to employ them from Peggy Hoon, who was, at that time, the scholarly communications librarian at North Carolina State University, and is now director of copyright policy and education at the Louisiana State University Libraries. Hoon offers a version of these questions at <https://www.lib.lsu.edu/services/copyright/teaching/5steps>. Another version, based on work I did with my colleague Lisa Macklin from Emory University, is found in several places, including this site from Kansas State University: <https://www.k-state.edu/copyright/docs/CopyrightFramework.pdf>.
7. Notice ceased to be required for copyright protection as of March 1, 1989.
8. This is the language used in 17 U.S.C. §102(a).
9. At U.S. Copyright Office, “Registration Portal,” <https://www.copyright.gov/registration/>.
10. Registration of a published work is timely if it occurs within three months of publication, while a rights holder in an unpublished work can seek statutory damages if registration occurred prior to the act of infringement. See 17 U.S.C. §412.
11. The Supreme Court ruled on this specific matter in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).
12. The policy is enacted by 17 U.S.C. §105.
13. This brief discussion summarizes the major ways that works rise into the public domain, but it is an oversimplification. For a fuller treatment of these various rules, one of the best resources is Peter Hirtle’s chart on “Copyright Term and the Public Domain,” at <https://copyright.cornell.edu/publicdomain>.
14. The phrase comes from an 1918 Supreme Court case, *International News Service v. Associated Press*, 248 U.S. 215 at 250. The entire sentence is worth noting here: “The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”
15. 533 U.S. 483 (2011).
16. See the details of 17 U.S.C. §106(4), where sound recordings are not included in the subject matter to which the public performance right applies.
17. This situation is again the result of an exclusion from protection. Section 301 of the current copyright law preempts state common law protections, but there are some specific exceptions, which include pre-1972 recordings, as explained in subsection 301(c).
18. “De minimis” is derived from a longer Latin maxim, “De minimis non curat lex,” which can be translated as “The law does not concern itself with trifles.”
19. 590 F. Supp. 2d 625 (S.D.N.Y. 2008).
20. Compare *Bridgeport Music, Inc. v. Dimension Films*, 410 F. Supp. 2d 625 (6th Cir. 2005) with *VMG Salsoul v. Ciccone*, 824 F. 3d 817 (9th Cir. 2016).
21. The language used in each of the specific exceptions is “notwithstanding the provisions of section 106.”

22. Subsection 108(a) tells us that libraries and archives that wish to use the exception must be “open to the public,” or at least allow outside research to have access to their collections. This use of the word “public” seems to clearly indicate that it does not refer to the regular users of the facility, including the faculty and students at the university served by the library or archive.
23. On the other hand, it should be noted that the two preservation portions of 108, subsections b and c, do permit copies to be made for the purpose of deposit into another library or archive. So one of the three permitted reproductions can be placed in the collection of a different institution, which naturally serves the interest in preserving especially rare or at-risk materials.
24. See 568 U.S. 519 (2013).
25. See the Memorandum and Order granting partial summary judgment by Judge Richard Sullivan, March 30, 2013, available at <https://ia800604.us.archive.org/12/items/gov.uscourts.nysd.390216/gov.uscourts.nysd.390216.109.0.pdf>.
26. This subsection was amended in 2002 by the Technology, Education and Copyright Harmonization Act, also known as the TEACH Act. So reference is often made to the TEACH Act, as in the checklists mentioned below, but the legal requirements created by that act are found in subsection 110(2) of Title 17.
27. See the *Authors' Guild v. HathiTrust* case (755 F.3d 87 (2d Cir. 2014)) for language indicating that libraries are allowed by law, and are even encouraged, to make copies for the blind and visually disabled.
28. “Copyright Law of the United States,” Circular 92, U.S. Government Printing Office, 2011, p. 19.
29. In *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), for example, the Supreme Court held that a commercial parody of a famous song was a fair use. In fact, most well-known fair use decisions do involve commercial uses, for the simple reason that those are the uses most likely to provoke a lawsuit. So the presumption that commercial uses cannot be fair use is clearly erroneous.
30. See the article by Robert Kasunic, “Is That All There Is? Reflections on the Nature of the Second Fair Use Factor,” *Columbia Journal of Law & the Arts* 31, no. 4: 101–41. This article is also available at www.kasunic.com/Articles/CJLA%20Kasunic%20Final%202008.pdf.
31. This case was originally *Cambridge University Press, et al. v. Patton, et al.* and is designated 1:2008cv01425 in the federal courts system. The name of the case has changed to *Cambridge University Press et al. v. Becker, et al.* because of a change in the leadership of the Georgia Regents. A second appeal in the case is pending before the Eleventh Circuit at this writing, after the district court judge ruled a second time when the case was remanded back to her by the appeals court.
32. See Neil Weinstock Netanel’s article “Making Sense of Fair Use.” at <https://law.lclark.edu/live/files/9132-lcb153netanelpdf>.

33. 714 F.3d 694 (2d Cir. 2013).
34. 562 F.3d 630 (4th Cir. 2009).
35. *Bill Graham Archive v. Dorling Kindersley, Ltd.*, 448 F.3d 605 (2d Cir. 2006).
36. It is worth noting that the copyright law, in subsection 504(c)2, exempts employees of a nonprofit educational institution or library from the greatest part of the potential liability for copyright infringement—statutory damages—when they had a good faith belief that the use in question was fair use. Thus, an honest evaluation is important and serves the interests of the client even in a situation where a court ultimately decides that the decision about fair use was incorrect.
37. Stanford University, “Copyright and Fair Use Center,” <https://fairuse.stanford.edu/case/>.
38. U.S. Copyright Office, “Fair Use Index,” <https://www.copyright.gov/fair-use/>.
39. Columbia University, “Copyright Advisory Services,” <https://copyright.columbia.edu/>.
40. The detailed requirements for recordation are found in 17 U.S.C. §205.
41. See, for example, *Campbell v. Acuff Rose Music*, discussed above, and *Bill Graham Archive v. Dorling Kindersley*.
42. TinEye can be found at <https://www.tineye.com/>.
43. Stanford Libraries, “Copyright Renewal Database,” <https://exhibits.stanford.edu/copyrightrenewals?forward=home>.
44. The WATCH file is found at <http://norman.hrc.utexas.edu/watch/>. It is perhaps worth a word to finish the story of the student who wanted to write a play based on several Hemingway short stories. We did obtain permission, and the student wrote a powerful work as his senior honors project at Duke University. He kindly invited my wife and I to the opening night, and afterwards he asked me what he needed to do to move this work from a student project to a commercial enterprise, which serves as a reminder for coaches that clients sometimes change their vision for a proposed use partway through a project.
45. University of Texas at Austin, Harry Ransom Center, “Firms Out of Business,” <http://norman.hrc.utexas.edu/watch/fob.cfm>.
46. See U.S. Copyright Office, “Orphan Works,” <https://www.copyright.gov/orphan/>.
47. David R. Hansen, Kathryn Hashimoto, Gwen Hinze, Pamela Samuelson, and Jennifer M. Urban, “Solving the Orphan Works Problem for the United States,” *Columbia Journal of the Arts* 37 (2013), <https://academiccommons.columbia.edu/catalog/ac:169934>.
48. The DMCA, 12 Stat. 2860 (1998), amended half a dozen provisions of Title 17 and added several additional sections. For additional information, see https://www.copyright.gov/reports/studies/dmca/dmca_executive.html.
49. See 17 U.S.C. §1201(c).