

Proposed Update of the Antitrust Guidelines for Licensing of Intellectual Property

Comments of Artists Rights Society

Introduction

Artists who create works of visual art are recognized as authors under the Copyright Act and enjoy the exclusive right to authorize reproduction of their works.

The Artists Rights Society (ARS) is the largest American copyright management organization (CMO) licensing the reproduction of copyrighted works of visual art. ARS currently represents more than 80,000 artist members who create both works of commercial illustration and works of fine art.

At the present time ARS successfully manages the licensing of its members' works when they are first embodied in a publication or used for purposes such as posters or images printed onto a useful article. Most illustrations and other works of commercial art are created initially pursuant to a commission from an editor or art director of a book or periodical, from the author of literary work who desires a complementary image, or from any entity needing an image for a purpose such as decoration, advertising or product packaging. Increasingly, works of fine art that are originally created for sale in the original fixation also have value in the commercial reproduction market.

These comments are not addressed to licensing of the first embodiment of a work in a publication. Rather, they are addressed to anticompetitive practices involving licensing of the right to copy works already published, herein referred to as digital reprography.

Since the invention of the photocopying machine, end-users have been able to make copies of published works or portions of such works without receiving prior approval of rights holders. While such copying is permitted in many instances as fair use, contemporary digital technology makes it extremely easy for an unlicensed end-user to engage in systematic copying that goes beyond that permitted by the fair use doctrine. American publishers responded to this phenomenon by creating the Copyright Clearance Center (CCC), an organization that offers a blanket license to commercial and educational end-users for reprographic and digital copying of nearly all works distributed by them. However, these publishers rarely hold the right to authorize copying of the images imbedded in the books and periodicals they distribute, yet they represent to licensees, through the CCC, that they actually hold such rights.

As the licensing of copyrighted images is its only function, ARS has long objected to CCC's misleading representations to licensees and has a strong interest in the failure of the current guidelines to adequately address the antitrust implications of CCC's business practices.

The Proposed Revision of Antitrust IP Guidelines Fails to Address Copyright Licensing in the Internet Era

While the 1995 Guidelines purport to address the licensing of intellectual property rights in general, they focused primarily on the anti-competitive licensing of patents. The only meaningful reference to copyrights in the 1995 guidelines is Example 1, contained in Section 2.3. This example involves a hypothetical company, "ComputerCo" that has developed a copyrighted software program for inventory management.

While, in 1995, software of the type described in the hypothetical was commonplace, such software at that time was primarily distributed in *hard copy*; that is in a medium such as a floppy or hard disk. If the disk was copied, that copy would be to another disk. While it was possible at that time to transmit data “online”, the process was too time consuming and cumbersome to be commercially practicable. The “Internet” as we know it today, was in its infancy. While networks that could transmit data through telecommunications networks began to be used in academia and the military as early as the 1970s, it was not until Tim Berners Lee invented the World Wide Web in 1991 that such technology could be used more widely. The Federal Networking Council coined the term “Internet” in 1995, the same year the guidelines were published.

It is an understatement to say that 21 years later nearly all copyrighted works are available as digital data that can be distributed using the Internet. Yet, visual artists have been completely shut out of the licensing business models built on this technology. Artists for the most part have some influence over the original digital fixation of their works, either because they create a work digitally or issue a limited, first-instance, reproduction license to a publisher who may be authorized to utilize digital distribution. However, once the work is digitized it is commonly re-used and distributed in a manner not permitted under the original copyright license.

While piracy is an existential threat to all creators and industries that depend on copyright, large companies that publish and distribute works have adjusted by offering licensed access, either through online sale of digitized versions of a single work, digital subscriptions, site licenses, or blanket licenses. **The 1995 guidelines completely ignore the anti-trust implications of these new licensing models.** And, as the world and the nation transition from a tangibles to an intangibles economy this has enormous economic implications for antitrust regulation.

Blanket Licensing of Copyrighted Images Contained in Published Works

Since photocopying technology came into widespread use in the 1950s, it has not been necessary to use a printing press to reproduce copies of published works. Initially, it was impracticable for users of photocopying machines to make large numbers of copies of entire works, and the machines were usually used to copy articles or small portions of a book for personal use. Such uses were defended as fair use when challenged by copyright owners. However after a period of inconclusive litigation, in the early 1990s systematic use by institutions of reprographic technology to make unlicensed copies was held to exceed the protections of the first sale doctrine. *See, Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994); *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

Anticipating this outcome, American print publishers established in 1978 their own CMO, the Copyright Clearance Center (CCC). The CCC was modeled on the long successful music performing rights societies that issued blanket licenses encompassing nearly all copyrighted music publicly available. Subsequent to the *Texaco* decision, universities and corporations began to accept the legitimacy of the CCC, and it has now grown into an organization with annual revenue of hundreds of millions of dollars per year. While the CCC does not publicly disclose a breakdown of its sources of revenue, it is safe to assume that nearly all of this income derives from blanket (or in the parlance of CCC “non-title specific”) licensing revenue. While CCC in its earlier years focused primarily on photocopying, its licenses now cover digital copying, including copying from the Internet.

Although the CCC purports to represent authors, users and publishers, the majority of its board of directors has always been either sitting or retired executives of CCC member publishing companies. Through the vehicle of CCC, publishers jointly determine not only blanket royalty rates and conditions, but also which right holders will be entitled to royalty disbursements. ARS is unaware that any

disbursement of *blanket* licensing revenue has ever been made to an ARS member rights holder, even though ARS member copyrighted images are embodied in the vast majority of books and periodicals covered under the CCC annual, blanket license.

While the music performing rights societies on which CCC was modeled have been subject to antitrust consent decrees for decades, CCC as it exists today has never been subjected to scrutiny by antitrust regulators. In September, 1977, the CCC requested and received a DOJ business review letter. This review took place before CCC had issued any licenses and before the rights of its members had been successfully established through litigation. This original DOJ business review letter apparently was limited to title-specific licensing by CCC in which the copyright holder, individually, and on a title-by-title basis established the royalty fee. This type of license is known as the TRS license and relies on users to keep track of and report the titles they copy and pay the fee set by the copyright holder for each copy of each work reported. After deduction of its administrative fee CCC remits the royalty revenue received to the publisher rights holder. To ARS' knowledge, none of its member artists has ever received a royalty payment for the images embodied in a work subject to a TRS license.

The 1977 letter did not address broader, collective licenses that cover the entire catalogue of CCC licensed works.

In August of 1993 CCC received a second favorable business review letter from the Antitrust Division of the Department of Justice. This letter covered a second type of license, granted in connection with CCC's "Annual Authorization Service," known as the "AAS license." According to the DOJ letter, "[t]he AAS is a nonexclusive blanket license authorizing users to make unlimited copies of any work in CCC's library, or of specific works in that library, for one annual fee."

Under an AAS license the fee for each user is calculated from a formula that approximates a summation of the fee for each work involved, multiplied by the estimated number of copies made of each work covered by the license. In its 1993 letter the DOJ states that it "understand[s] that... [the CCC] proposal envisions that after receiving authorization from its member copyright holders, [CCC] *will discontinue the AAS and instead negotiate annual fees directly with users for nonexclusive blanket licenses permitting unlimited copying for internal use of copyrighted materials from CCC's library of protected works.*" (Italics supplied.) Under this system the CCC itself sets the license fees, not the individual rights holder, making the CCC's licenses blanket licenses comparable to the music licenses issued by ASCAP and BMI. The DOJ letter observes that this blanket licensing system will have a pro-consumer effect in that it provides "the means to discipline sometimes inflated prices set by individual copyright holders, thus leading to lower overall annual fees."

The analysis in the 1993 DOJ letter concludes that since the CCC will continue to offer title-specific licenses with royalties set by the rights holder and because "recent rapid changes in technology" are likely to provide other licensing mechanisms in competition with the CCC, "it is unlikely that CCC could successfully raise license fees significantly or restrict the availability of such materials."

At the time of the 1993 business review letter, the CCC had not yet grown into a significant force in the licensing world because the litigation that would enable its rapid growth had only recently concluded. To our knowledge, there has been no subsequent review of the CCC's licensing practices. 23 years later, the CCC has grown into an extremely large business, and is the only place an institutional user can go to get a comprehensive blanket license authorizing digital reprographic use of nearly all works published by major publishers. With regard to the issuance of comprehensive blanket licenses, the CCC is the only game in town. Other services, such as Lexis-Nexis consolidate works on a title by title basis and offer online access to collections or libraries of works. However, no entity provides a comparable alternative for large institutional users such as corporations and universities.

ARS and the CCC

ARS agreements with its members authorize it enter into a royalty sharing agreement with the CCC. If that were to happen ARS would then divide the royalties received to its individual members according to an estimate of market share similar to the system used by the performance rights music collecting societies. Over the last 13 years ARS has attempted to open discussions about the share of CCC blanket licensing royalty income that is attributable to its artist members. However, CCC has consistently refused to discuss sharing its royalty pool with ARS. Other artists' rights advocates have met with the same silent treatment.

A large portion of ARS' library of licensable works of visual art consists of works of European artists who are members of visual artists collecting societies in their home countries. ARS has reciprocity agreements with these European counterparts. These reciprocity agreements mandate that blanket license royalties received by each national CMO will be remitted to the CMO representing artists within its territory. The national CMO then apportions the remitted royalty payments to its individual artist members. This system currently works well within Europe because each EU country has a visual arts CMO that receives a percentage share of blanket license revenue collected by an umbrella CMO that issues to users a comprehensive blanket license for all content in published works. The umbrella CMO then distributes a share to the subsidiary society representing each category of rights holders: publishers, writers and visual artists. However, because the CCC is the only American equivalent to European umbrella CMOs and refuses even to discuss sharing its licensing revenue with visual artists, ARS is unable to reciprocate with its European counterparts. This means that not only are American artists unable to receive royalties from digital reprographic use of their works in the U.S., but for the most part they do not receive copyright royalty income for use of their works in Europe and other jurisdictions with the same system.

As a Consequence of Inadequate Antitrust Enforcement the CCC is Able to Mislead its Licensees

CCC marketing materials and its website clearly imply that its "annual copyright license" covers virtually all content in the publications it licenses. Its website states that the "coverage provided by the annual license" permits licensees to "photocopy articles," "scan paper copies of works", "distribute copies internally," and "download and print portions of electronic works", among other representations. This clearly implies that the visual content – which is often a very significant portion of a publication – is covered under the license. CCC's promotional materials directed at higher educational users state that the CCC Annual Copyright License "provides content users campus-wide with the copyright permission they need in a single multi-use license." CCC's online databank of publications contains works in which visual art is indisputably an indispensable component. For example, the database includes 4,476 books with Picasso in the title, almost all of which include reproductions of copyright-protected Picasso works. The American artist, Frank Stella, is listed as the subject of 53 books in the CCC data base. These books contain images of Stella's works as a key component. ARS is authorized by both the Picasso estate and Frank Stella as the licensing agent for reproductions of works protected by their copyrights. Yet, the CCC refuses to enter into any discussion with ARS involving the sharing of royalty received for the works of these artists nor do they make any payment directly to the artist.

The CCC also purports to license medical publications. Medical journals tend to be copied disproportionately to their actual paid circulation. This is because subscriptions to such journals are very expensive, and journal articles are widely circulated within medical institutions such as hospitals and research centers by a central library with a subscription providing only a single hard copy, or a limited number of digital copies. So, for these very expensive publications the CCC license has a disproportionately larger value than for mass market periodicals. Medical illustration is an indispensable

part of the content of such publications. There is little value to physicians and scientists if the accompanying illustrations are not included in the licensed journal. CCC returns considerable royalty revenue to publishers of scientific and technical journals. But, not a cent is returned to visual content rights holders.

Antitrust Implications of CCC's Treatment of Artists

The history of antitrust regulation of CMOs, as reflected in regulation of the music societies, has focused almost solely on the use of the inherent monopoly power of these societies vis á vis the licensees who pay royalties pursuant to blanket licenses. Indeed, the 1993 DOJ business review letter to the CCC reflects this perspective and bias. It appears to be based on the assumption that the abuse of monopoly power is limited to those who have no other practical place to obtain permission to use copyrighted works other than a CMO.

However, the CCC's monopoly power clearly is being used in a *different* way. To date, licensees have not objected to CCC's monopoly power as radio broadcasters chafed at the monopoly pricing practices of ASCAP in the 1930s and 1940s. However, ASCAP and its sister music society, BMI, represent both authors *and* publishers of music. And, individual songwriters have historically controlled ASCAP's board and benefited greatly from the royalty income generated from music licensing. This is vastly different from the abuse of CCC's monopoly power.

For at least 13 years CCC has refused any discussion of sharing blanket licensing revenue with visual artists. Yet the CCC is the only game in town. And, it has the deep pockets necessary to litigate any efforts by non-publisher rights holders to share in the publisher's take. The share that rightfully belongs to visual artists is either partially distributed instead to the corporate publishing companies that control the CCC. Or, it is more likely retained by the CCC.

Works of visual art always are created by individuals, not organizations. Each one of the thousands of professional artist members of ARS is the sole proprietor of their business. As such, they must not only draw, paint and sculpt, but must personally handle every aspect of maintaining their livelihood. They personally procure their supplies, rent studio space, market their works and manage their own accounting and tax responsibilities. Most importantly, they must manage the formalities of the copyright system that are necessary to secure a stable livelihood, including registration, licensing and enforcement. With a very few exceptions, they are among the lowest paid professional workers in our society. Individually, they lack the resources to litigate their rights in the federally preempted field of copyright law not to mention protect themselves from the anti-competitive practices of gigantic publishing companies in an increasingly consolidated industry.

Like its artist-members, ARS as an organization is a small fish swimming in a sea of sharks. It simply lacks the resources to engage in large scale civil litigation, whether in the area of copyright infringement or antitrust law. Therefore, ARS and its members are especially reliant on the agencies of the federal government for protection from the predatory behavior of large companies that use their vast market power to divert rightfully earned copyright licensing royalties from lawful rights holders into corporate bank accounts.

For these reasons, ARS respectfully suggests that the 1995 IP Antitrust Guidelines are woefully inadequate and the proposed revisions fail to address its urgent concerns.

Submitted by Bruce Lehman, counsel

On behalf of the Artists Rights Society, Dr. Theodore Feder, President
65 Bleecker Street
New York, N.Y. 10012

Contact:

blehman@iipi.org

(202) 262-0262