

**Licensing: *the sequel***

**Part 2 of 2**

**Suffolk University Law School  
&  
THE LL.M. IN GLOBAL LAW AND TECHNOLOGY**

**LEXISNEXIS  
&  
COPYRIGHT CLEARANCE CENTER**

**present  
*The Intellectual Property Lecture Series*  
*Licensing: the sequel***

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KENNEALLY: I want to turn now to Fred Haber. Fred, nice to see you, although I see you every day at Copyright Clearance Center.

HABER: Yes, indeedy.

KENNEALLY: We've heard about Fred's background, but apart from being the vice president and general counsel at CCC, he has previously worked in private practice at Weil, Gotshal and Manges in New York and as an in-house lawyer at the former parent of Macy's department stores.

So the question we've been pondering, Fred – and we'll talk about text more, I think, right now, than the music we've just been discussing – is the importance of licensing and how it has grown and changed. Perhaps you might tell people a bit about how CCC came into existence and how we've kind of grown with that change.

HABER: CCC was an answer to a legislative problem – not dissimilar to the problems we're probably going to be facing over the next couple of years – during the interminable negotiations over what became the Copyright Act of 1976, which I gather started in about 1956. No, I'm not kidding.

Sometime late in the 1960s, this newfangled machine that was showing up in people's offices called the photocopier was starting to – publishers believed – undermine the entire purpose of the industry. One thing that was always true about printers was that only they could make lots of copies of things and now suddenly, everybody could. And a lawsuit was brought by a group of publishers that went under the name of Williams and Wilkins vs. the National Library of Medicine, where the NLM was doing what today we would call doc del, document delivery.

And that lawsuit went up all the way to the Supreme Court where a decision was affirmed on a four-to-four tie vote, finding that this activity was fair use. And, as a consequence of that, the authors and publishers and a lot of users, especially of scientific materials, said

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this really isn't right. And as the legislation was moving forward towards an end point, a group of publishers and authors went to Congress and said basically, endorse something.

And CCC was created as a result of a suggestion in the legislative history that some kind of collective licensing be done for this kind of licensing, that is, mass quantities of low-value reproductions.

That's what CCC has now been doing for over 30 years. We've evolved from photocopy licensing, which we still do, and there's still a lot of it, into licensing digital uses – intranet, e-mail and even in some cases, Internet uses of intellectual property. Licensing is still the way to go.

KENNEALLY: And you pointed out when we were chatting before the program that this notion of a bridge between analog and digital uses – I had been thinking of it as a bridge that kind of you left one country behind and went to the next, but you reminded me that the other country behind us continues to exist.

HABER: Absolutely. Licensing – I've been involved with publishing and retailing for a long, long time, and long before the Internet was hitting the mass market, licensing was the way in which intellectual properties got conveyed to the marketplace. In the text world, authors were never willing – not never – were rarely willing to give up all their rights. They would license a publisher to produce a publication that would be issued under an appropriate license and there would be terms of the license that would include, as we even see today, reversions of rights so that the author could go and try and find another publisher or try and find another medium in which the materials could be published, and it was still the author who would want to retain the rights to make a movie out of the text, make lyrics out of the text, make poetry, make whatever it was that was out of the text.

And that has never changed. That's the relationship between individual creators and the people who distribute their works – in text, it's going to be publishers – who also add material to what the end production is and so you end up with some kind of, arguably, a derivative work that's a combination – outside of fiction, maybe – of publishers' contributions and authors' contributions into a product that can be sold.

But the difference today is that licensing goes one step further. It used to be that – you want me to –

KENNEALLY: Well, I was going to say – you beat me to it. I was going to say what has changed is the technology, the form factor, a phrase I love because it describes all kinds of things. The form factor of the book or the journal has now opened up into something like a laptop or a Kindle or an iPad, and this is bringing licensing one step closer.

HABER: Yes. I think the big evolution – and the reason that there's so much anxiety out in the world about licensing, especially in the text area – is the idea that no longer do you buy a book and it's yours and you can use it to prop up the short leg on the desk and you can use it to do all kinds of other things with it – hopefully you read it – you're now getting

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something that you acquire under license. That is, when you buy something for your Kindle – and the language we use is, you buy something for the Kindle – what you're getting is a license. They're still trying to figure it out. Amazon, obviously, is figuring out how strongly they want to enforce the license, but it is now a license transaction.

And I think the whole difference in today's world versus as recently as 20 years ago is that all this licensing that took place in the text industry, which continues to take place today, has now gone one step further. It's no longer behind the scenes. It's now going right to the end user and the end user is very uncomfortable with that because, classically, the end user's rights were regulated by copyright, and now they're being regulated by private ordering, which is what licensing is. It's a form of contract. Obviously, most end users in text don't believe it's a contract that you get to negotiate, but it's a contract and it means that there are terms other than 300 years of copyright history that regulate the relationship between, now, the author and the publisher and any other intermediaries and the reader, the end user.

And that has made for a lot of complication. I'm sure Mark's going to talk to us about how science publishing is different from other kinds of publishing because of the greater involvement of the publisher, but the reaction that licensing has now taken hold in all kinds of text materials, including reading a novel, is I think what gets everybody upset.

And I think though, that it's – in that sense, it's irretrievable. We're not going back to the old days and I think what you're seeing is things like –

M: Sorry about that, buddy, but –

CUSHING: Interestingly enough, I just want to interject is that when I was in LA last week – I was in Los Angeles for the American Film Market – I did meet with an agency that does buy rights and one of the complications for these literary agents that are trying to sell subsidiary rights are – let's say it's an animated film. With the e-rights, if the film companies do not want the book companies – the literary property companies – to allow for the downloading of the animation, so there's now sort of a greed factor that's come into the issue of the subsidiary rights and what can be transferred to the Kindle. This isn't a music issue, but it's another digital licensing problem that I think is going to come up more and more.

KENNEALLY: Right. And Fred, you were talking about this migration, it sounds like, from copyright law to sort of contracts binding people under various ways. Is there a back and forth on that right now?

HABER: I don't think there's a back and forth at the level of an individual transaction because, inevitably, there can't be. But I do think that what we're seeing is an evolution in licensing law and contract law where all of society is sort of saying, well, the same way that we reached an accommodation with copyright – and there were certain expectations in copyright that evolved from the Statute of Anne down to today – I think there's gradually

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becoming an evolution in what people expect to be an appropriate contract and an appropriate license.

If you were to buy a license from Amazon to read a book on your Kindle and it only allowed you to read it on Tuesdays, I think that there'd be all kinds of anxiety on the Internet about, who do they think they are that they can regulate when I read this book? And I think what we're evolving to is some kind of expectation that what existed in the copyright regime is going to come to be what's expected in the consumer market in a licensing regime.

I think it's why you're also seeing things like Creative Commons be acceptable. The Creative Commons folks, while those of us associated with the IP industries look at them as being some kind of aliens, I think the reality is that they have adopted licensing as a mechanism by which to do that which they think copyright used to do, which is that some things don't need protection and you should be able to give away your protection, and one way to do that is you issue a license to the world. "Here, you can have it."

They're running into all kinds of problems with that. I don't think that it's administered extremely well. Part of that's because there is nobody at Creative Commons to administer it. It's a one-horse operation. It has a lot of lawyers who do a lot of volunteer work and then say, "I'm all done. I wrote my contract. See ya." But I think it's another way that licensing is being recognized as a mechanism by which people can order their IP lives.

KENNEALLY: And one of the things that drives the discomfort is this notion the digital world is changing all of this, but finally, Fred, copyright law has responded to technology throughout its history.

HABER: It has. You go back, and those of us who made it through copyright classes in law school, we were introduced to, copyright as one of the first statutes adopted by the first Congress back in 1790. And you go and you read it and it's four paragraphs long. It's not a book as the current copyright law is. But it came down to, well, text and maps are all that deserve protection. And there was other stuff then that today is protected by copyright that they didn't think was necessary to cover.

Basically, "the visual arts. Nah. Maps? Maps are important, but everything else, no protection." Over the 19<sup>th</sup> century, you got all this evolution towards, what are we going to do about drawings? What are we going to do, when the time came, about photography? What are we going to do about music and about other things that can be recorded?

Thomas Edison threw a huge wrench into all of copyright law because he kept inventing stuff that allowed people to use things in ways that couldn't be controlled by the rights holder. And that continues in the 20<sup>th</sup> century with software and cable casting and satellite casting and lord knows what else.

But I think that kind of evolution, which took 300 years to get to today, is going to probably take more like 30 years before consumer expectations and law together catch up

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with the technology, counting probably from the mass marketing of the Internet in about 1995. And 2025 is not that far away, but I think, by then, we're going to have sort of tried to figure out how this should work. Again, this is about licensing going all the way to the end user.

KENNEALLY: Well, not to argue with you, but 2025 sounds to me like a long time from now and I'm thinking it's going to happen a lot sooner. Thank you, Fred Haber.

Finally, Mark Seeley. Mark, welcome.

SEELEY: Thanks.

KENNEALLY: Mark is a senior vice president and general counsel at Elsevier based in Boston, Massachusetts. He joined Elsevier's science and medical publishing division in 1995 as general counsel and from '89 to '99, he was with the Reed Elsevier USA legal department. He leads an organization of 14 lawyers in Europe and America supporting Elsevier's business globally. He is chair of the Copyright and Legal Affairs Committee of the International Association of Scientific, Technical and Medical Publishers, STM.

Mark, as a major player in the STM space, you can tell us just how big Elsevier is in a moment. It is quite hefty. You are in the business now not simply of producing content, but of what people call in the software industry, solutions. And I think that kind of encapsulates what the change has been for you in the last 10, 15 years. And contrary to what Fred was saying, I think it's the speed of the change that is the hardest thing to grasp. What do you think?

SEELEY: Yes, I think that's true. I think starting off at Elsevier in '95, we were still relying almost exclusively on print journal subscriptions and book sales that were done through distributors and resellers of one kind or another, not very much direct interaction with actual users and researchers or consumers. And a little bit more than 10 years later, the world is really quite different. Our company is very engaged with direct discussions and direct contract negotiations with customers and also working a lot with researchers and research institutions about some of those solutions that you mentioned, Chris, looking to see what information on surgical techniques would actually be really helpful in a particular hospital setting under certain conditions with respect to Medicare funding for certain techniques. So it's that kind of information flow which is really new.

You asked a question about whether or not licensing is really different in connection with a more solutions approach as opposed to traditional content licensing. I'm not sure that it is fundamentally in terms of for written contracts. I do think that one of the issues that we deal with now on the solutions side is that increasingly, it's not a unilateral play. We are actually partnering with in some cases medical equipment vendors, with hospitals and teaching hospitals, nursing programs. So there's much more going on in terms of partnering, which is happening in that space, than was the case with respect to traditional licensing of journal and book content.

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KENNEALLY: Right, because people's notion isn't they're going to get the information in the library any longer. They're going to get it when they're actually at the task.

SEELEY: That's right. Which, by the way, scares the heck out of our insurers.

(laughter)

KENNEALLY: With regard to Elsevier, you've had to address the challenge that the digital revolution has presented, particularly with regard to the subscription model. And again, going back to the world in 1995, it was the library buying the content, they wanted the archive, it was going to be on the shelf till doomsday. Now, we're 2010 and that has changed completely.

SEELEY: I think one of the critical things that we realized early on with respect to making that transition from analog to digital is that actually, we had to give a lot of assurance to that traditional library customer that such things as archival access was going to be accommodated and was going to be dealt with. And there were other things we had to do in addition to really give assurance to the library customer that their primary purpose in buying a lot of this material to sort of have as an archival base for their institution, to really have a collection on board, was really honored and taken into the digital environment.

KENNEALLY: But that raises its own questions, because you might have a client for a certain period of time, then they no longer subscribe. What happens to what they had purchased or licensed, to go back to Fred's comments earlier? Or what happens if something, God forbid, blows up all of Reed Elsevier's service? You have to address those kinds of challenges.

SEELEY: We did. What we had to do is we had to sort of identify and define what that particular customer's collection involved by year. A lot of the content that we're talking about, of course, is journal content, so people are subscribing to a particular year or a multi-year volume of journal content. So we needed to assure them, as part of this process of moving to the digital environment, that what they purchased through the license option of that content would remain available to them to look at and review and work with their research community for, even if they actually cancelled their contract and were not continuing to subscribe to content. So the whole post-termination access was a very important bridge to go from analog to digital.

Finally, on the archiving question, we also partnered with a couple of organizations around the world including the Royal Library in The Hague, which has a complete copy of not only Elsevier's content but probably 80 percent of the rest of the STM publishing community, and also private entities like a U.S.-based company called Portico. And basically, they have the kind of nuclear option archive, so they have a separate archive which is kept separately and to which customers can have access if in fact there is some type of nuclear accident that happens.

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So there are conditions under which they have to be – the archivist has to be satisfied that they can no longer gain access through the normal route and therefore it gives them a route to that content that's held in that archive.

KENNEALLY: And when we chatted about this before the program, you were telling me that there is, of course, a more difficult challenge. You had one that still remains to be resolved, and that is around pricing. It's critical to you because the licensing is a revenue generator. It's critical to the libraries and the subscribers and your other customers because their resources may be at capacity at this moment and they're looking to be able to drive down cost because the digital copy may seem of less value to them than the printed copy. Talk about how you're wrestling with that.

SEELEY: Well, not well, I think.

KENNEALLY: Sorry to hear that.

SEELEY: The irony is that most pricing for most institutions for most of this content is still largely based on what those institutions were spending on print collections in the pre-digital environment. I think one of the issues that we have again from the analog to the digital is predictability, is certainty. It's clarity about not only what rights are going to be there and what people will be able to do in the future, but also the price that they've become used to paying for that content, the value that they ascribe to that content.

Frankly, you can make arguments – and I think I would make arguments – that the electronic version of journals, which people subscribe to now, are a huge and really remarkable improvement over the content when it was available in print form only. The STM publishing industry has put together an excellent system through something Lois Wasoff knows a bit about, CrossRef, by which all links and references can be linked and clicked to to another article. So the reality is is that the universe is really one collective and linked-together site. That's a kind of research value that would be impossible to do in the print environment.

KENNEALLY: And in fact, there's another example that I believe you participate in, which I've spoken with some of the people involved. It's called Research for Life and this is an opportunity for researchers and others in developing countries to be able get access to content that they might not otherwise. And think about it today with satellite technology and the rest of it. You can be in a world where a telephone line would never reach you, electricity would never reach you, but you can have that Internet connection right there and if there's a disease to be addressed or a crop failure or anything like that, you can get the information you need immediately. And that Research for Life partnership is making that happen.

SEELEY: These are a couple of programs that are run with various U.N. agencies and they specialized in the agriculture environment and health sciences. And I think we've been involved with a number of these programs for a while now. We're beginning to do some studies now and to do some evaluation of the effect of these programs, and actually, one of

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the things that we're starting to see is that the amount of research that's actually coming out of these markets, which were all identified by United Nations agencies as being particularly on the low end of the development scale, but we've identified the amount of research that's now starting to come out of those markets as having increased very significantly over the past five or 10 years.

That, I think, is very satisfying. I think it demonstrates that science is not a one-way, unilateral path of developed world to the developing world, that there is important research coming the other way. And I think it demonstrates the kind of positive network effect there.

KENNEALLY: Right. And I believe the presumption we're making that licensing is about money is, in that case, sort of disputed, because you're making that material available at little or no cost to these researchers.

SEELEY: Correct.

KENNEALLY: Well, Mark Seeley, thank you very much.

END OF PRESENTATION