



True Confessions of a Copyright Wimp

By Joanne Dugan

A friend recently pointed out to me the phenomenon of the TLA—the Three Letter Acronym. Have you noticed it? Everywhere you go, complex concepts are boiled down to three letters: IPO, EPA, NYC, NBA. During the past year, many firm librarians have been faced with a TLA even scarier than the IRS: namely, the CCC. CCC stands for Copyright Clearance Center, and many of us fear that mishandling it can lead to a CEM (Career-Ending Move). Based on the messages posted to law-lib, I thought it would be useful to recount my firm's encounters with the CCC, how we analyzed the issues, and why we ultimately knuckled under ... I mean, obtained an annual licensing agreement.

At the outset, let me emphasize that this is **not** an endorsement of CCC. Dealing with CCC is not mandatory and is only one avenue for complying with copyright law. Despite increasing pressures from publishers, fair use continues as a viable concept. Libraries also can fulfil their copyright obligations by purchasing multiple subscriptions, obtaining copyright permission directly from publishers, and using online services whose fees already include publishers' royalties.

The CCC is a not-for-profit corporation established in 1978 in response to the passage of the 1976 *Copyright Act*. Its goal is to make copyright enforcement and compliance easier for both publishers and consumers. It serves as an agent for publishers and authors (the "rightsholders") who have registered their works with the organization, collecting royalties from consumers of the registered works and distributing the

money to the various rightsholders. In theory, the CCC benefits consumers as well as rightsholders by providing one-stop shopping for copyright permission. In reality, the CCC is less benevolent.

Background at Pierce Atwood

I am the librarian for a firm of 92 lawyers based in Portland, Maine. When I began this job in 1994, the firm already had a copyright policy in place. Spurred on by the *Texaco* decision (*American Geophysical Union v. Texaco*, 802 F.Supp. 1. S.D.N.Y. 1992; aff'd 37 F.3d 881 [2nd Cir. 1994]), the firm had recently reviewed its copying policies and made several changes. The library added multiple subscriptions of popular publications that were the most likely targets for illicit copying. A written copyright policy was added to the firm's policy manual. Most significantly, an account had been opened with CCC's Transactional Reporting Service, which is CCC's pay-as-you-go product. TRS users report their copying to CCC and

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periodically submit payment for copies made. In 1994, this record-keeping was done on paper, with a log sheet that was submitted monthly. The firm paid \$100 per year as a registration fee. The TRS system is still available, and significant improvements have been made. The yearly registration fee is no longer required, and all transactions can now be done through CCC's Web site (www.copyright.com).

All was quiet on the copyright front for the next few years. Our TRS reporting gradually slowed to a trickle and then stopped completely. No, I did not become a copyright scofflaw during that time. The rapid growth of electronic research made photocopying less and less frequent. Where I used to spend a significant part of my worklife travelling to the local law school or medical library to copy articles from law reviews and other journals, I now relied more and more on Westlaw, LEXIS, and CARL Uncover. These services included publishers' royalties in their fees. I got a couple of calls from CCC wondering why I was no longer reporting

any copying to them, but they seemed satisfied with my explanation.

Impact of the LeBoeuf Lamb Settlement

Then in March 1999, news of the LeBoeuf Lamb settlement appeared. As most law librarians know, LeBoeuf is a large national law firm based in New York. It settled a threatened copyright infringement suit by paying an undisclosed amount to the Copyright Clearance Center and purchasing annual licenses from the CCC. This was not the first time a business had made payments to CCC as a result of copyright litigation, but it made me sit up and take notice for a couple of reasons. First, the case involved a law firm, not a huge multinational corporation like Texaco. The publishers involved were publishers I deal with. Second, the copying that got them in trouble was for use within the firm. There had been no flagrant flouting of the laws by including copyrighted materials in press kits or on a Web site.

Third, the action against LeBoeuf was coordinated and pursued by the CCC rather than by the specific publishers involved. The original reports of violations had come to CCC, which then acted on behalf of the publishers. This changed my perception of CCC from a passive facilitator of copyright compliance to an aggressive prosecutor of copyright infringement.

Shortly after the LeBoeuf settlement was reached, I began noticing copyright issues everywhere. The newspapers were full of articles about the *Digital Millennium Copyright Act*, the *Sonny Bono Copyright Term Extension Act*, and the *Uniform Computer Information Transactions Act (UCITA)*. A colleague in California seemed astonished that my firm did not have an annual license agreement with CCC and that our use of the TRS had decreased (well, OK, stopped) rather than increased during the past few years. CCC's aggressive stance was the talk of the town at the AALL Annual Meeting in D.C.

Subtle Pressure?

My paranoia was complete when I received a call from a CCC representative in August. This was essentially a sales call touting the CCC's Annual Authorization License, but in my sensitive state I had no trouble reading a threat into it. The packet of information I received as a follow-up to the phone call reinforced my impression of subtle pressure. The cover letter noted that "litigation for unauthorized use of copyrighted material by companies has been shown to be favorable towards the publishers ... [the CCC annual license] affords protection from litigation because our nearly 10,000 rightsholders agree not to pursue claims against CCC licensees. With so many other companies in your industry licensed already, it is especially important to manage your exposure." Other materials in the packet noted that, among other things, an annual license would "address 'whistleblowers' who are increasingly responding to publisher's [sic] advertisements for information on infringement" and "demonstrate respect for copyright compliance [both the American Association of Publishers (AAP) and the Association for Copyright Enforcement (ACE) have stated that they will neither initiate nor support litigation against CCC licensees]."

An Expensive Solution

I decided to talk to my firm's administration and our intellectual property lawyers about whether and how we should change our approach to copyright. (It's a good thing I did. It turned out that CCC had sent an additional letter to the firm's managing partner, despite the fact that all contact prior to this point had been through the library. CCC did not earn any points with me with this move.) After several meetings and memos, the firm ultimately decided (to my mixed chagrin and relief) to purchase an annual license from CCC. This was an expensive decision. CCC charges \$156 per attorney, plus a 25% administrative fee in the first year. Although the CCC literature suggests that strict adherence to transactional reporting would probably cost more, I feel certain that we are paying a premium for the annual license. Publishers' royalties are

the least of my worries. CCC's own literature makes clear that it is selling litigation insurance: if you pay us we won't pursue you for copyright infringement, and your annual license can be used as evidence of a pure heart if you are sued by copyright holders who are not part of our network. The fact that the risk CCC is insuring us against is one largely of its own making leaves a bad taste in my mouth. Worse still is the little voice whispering to me that if I had been more conscientious about using the Transactional Reporting Service, the firm would have been in a better position to tell CCC to take a hike when it began rattling its saber.

What You Get for \$156 Per Attorney

Aside from CCC's promise not sue, what else do you get for \$156 per attorney per year? Frankly, not enough to justify the price tag. There's no question that CCC is the largest single network for copyright permission in the country. Nevertheless, its coverage is hardly complete. Even with publishers who have registered their products with CCC, the loopholes abound. For instance, our firm subscribes to BNA's *Daily Environment Report*. We have been getting it in paper and routing it to our environmental attorneys. Needless to say, this is not an ideal situation, since the timeliness of such a publication, which is its major selling point, has largely dissipated by time it gets to the last person on the routing list. With the Annual License Agreement, I expected to be able to send each attorney a copy of the summary and table of contents and provide copies of specific articles as requested. By my reading of *Texaco* and the CCC license, this is exactly the sort of use my \$156 per lawyer is buying. I double-checked, and sure enough, the *Daily Environment Reporter* is included in the list of titles covered by the CCC license. However, two months later when I want to switch to the electronic version of the *DER*, BNA informed me that the CCC license covers only its print products and that it does not extend to electronic publications. Well, great. I went back and looked at my license. Sure enough, it's limited to hard copies only. In other words, as my library, like most other law libraries in the country, migrates

more and more toward electronic publications, the coverage of this gold-plated license will grow smaller and smaller.

Other License Limitations

The library's newspaper clipping service provides another example of the limits of the CCC license. My firm represents clients throughout the state of Maine. The library subscribes to every daily paper in the state and the library staff scans each paper for articles of interest to our patrons. Although the CCC counts major national papers like *The New York Times* and the *Wall Street Journal* among its titles, it understandably does not have contracts with every local paper in the nation. A Q&A sheet included in the packet of materials I received from the CCC addresses this issue: "Q: What if some of the publications I often use are not currently registered with CCC? A: CCC is continually adding to its repertory of registered works, but there may be instances where the works you wish to photocopy are not registered with the CCC. In those cases, you should contact the CCC and we will work with the rightsholders directly to obtain photocopy permissions for you." I told the CCC rep I was working with about my need to have permission from the major Maine papers. She told me that the *Bangor Daily News* and *Kennebec Journal* would be added "soon." I told her the single most important paper for us was the *Portland Press Herald*. No one had requested that CCC contact the *Press Herald* before, and she promised she would start the process. To date, none of these papers has been added to the stable of registered titles. I spoke with the person in charge of copyright at the *Press Herald* in November. Not only had she not been contacted by the CCC, she didn't know what the CCC was!

So what is my final analysis of the whole Copyright Clearance Center issue? In a nutshell, an annual blanket license buys you some litigation insurance. But as for the actual rights you obtain for your \$156 per attorney, there's not much there there.

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