



**DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
National Telecommunications and Information Administration**

Docket No. 130927852-3852-01

Post-Meeting Comments of the Library Copyright Alliance Concerning the Department of Commerce Green Paper, *Copyright Policy, Creativity, and Innovation in the Digital Economy*

The Library Copyright Alliance (LCA) welcomes this opportunity to submit post-meeting comments relating to the Department of Commerce’s Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy. LCA consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel.

I. Bouchat v. Baltimore Ravens

Since the December 12 meeting, the U.S. Court of Appeals for the Fourth Circuit issued an important fair use decision in *Bouchat v. Baltimore Ravens* that confirms our concerns that an online platform for “high-volume, low value uses” could interfere with the exercise of fair use rights.¹ Bouchat sued the Baltimore Ravens and NFL Enterprises for the

¹ *Bouchat v. Baltimore Ravens*, Nos. 12-2543, 12-2548, 2013 WL 6617327 (4th Cir. Dec. 17, 2013).

incidental uses in three videos and an exhibit at the Ravens' stadium of the "Flying B" logo employed by the Ravens in their first two seasons. The court had little difficulty finding that the uses were fair because they were highly transformative. Nonetheless, the court did note that the district court had "made no findings regarding the existence of a licensing market for historical logos."² In the absence of market data, the court concluded that the fourth fair use "factor standing alone is neutral."³ In other words, it is possible that in a different case where the rights-holder did license his copyrights via an online platform for incidental uses such as those in this case, the existence of such a platform could tip the fourth factor, and conceivably the fair use calculus, against the user.

The Fourth Circuit made clear that fair use was critical to the harmonization of copyright with the First Amendment:

Our analysis under § 107 is confirmed by the Supreme Court's explication of the underlying interests that inform copyright law and its relationship to the First Amendment. While copyright law rewards the owner, "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." As a result, Congress has attempted over the years to balance the importance of encouraging authors and inventors by granting them control over their work with "society's competing interest in the free flow of ideas, information and commerce."⁴

(Citations omitted.) Fair use is a central part of achieving copyright's balance of interests.

Absent any protection for fair use, subsequent writers and artists would be unable to build and expand upon original works, frustrating the very aims of copyright policy. For creation itself is a cumulative process; those who come after will inevitably make some modest use of the good labors of those who came before.⁵

² *Id.* at *15.

³ *Id.*

⁴ *Id.* at *9.

⁵ *Id.*

(Citations omitted.)

The Fourth Circuit continued to note that fair use “is crucial to the exchange of opinions and ideas.”

It protects filmmakers and documentarians from the inevitable chilling effects of allowing an artist too much control over the dissemination of his or her work for historical purposes. Copyright law has the potential to constrict speech, and fair use serves as a necessary “First Amendment safeguard[]” against this danger. ... As a result, fair use must give speakers some reasonable leeway at the margins. As the Supreme Court has noted, the “considerable latitude for scholarship and comment” secured by the fair use doctrine protects the core value of free expression from excessive litigation and undue restriction.⁶

(Citations omitted.)

The Fourth Circuit observed that requiring the licensing of the right to use preexisting works would unduly restrict the work of historians and documentarians.

Were we to require those wishing to produce films and documentaries to receive permission from copyright holders for fleeting factual uses of their works, we would allow those copyright holders to exert enormous influence over new depictions of historical subjects and events. Such a rule would encourage bargaining over the depiction of history by granting copyright holders substantial leverage over select historical facts. It would force those wishing to create videos and documentaries to receive approval and endorsement from their subjects, who could “simply choose to prohibit unflattering or disfavored depictions.” Social commentary as well as historical narrative could be affected if, for example, companies facing unwelcome inquiries could ban all depiction of their logos. This would align incentives in exactly the wrong manner, diminishing accuracy and increasing transaction costs, all the while discouraging the creation of new expressive works. This regime, the logical outgrowth of Bouchat’s fair use position, would chill the very artistic creation that copyright law attempts to nurture.⁷

(Citations omitted.) This passage demonstrates the dangers of encouraging licensing regimes that would supersede fair use.

⁶ *Id.* at *10.

⁷ *Id.*

The Fourth Circuit added that “the NFL may not arouse sympathies in the way that a revered artist does, but the consequences of this case reach far beyond its facts. Society’s interest in ensuring the creation of transformative works incidentally utilizing copyrighted material is legitimate no matter who the defendant may be.”⁸

Finally, the Fourth Court stated that “the uses here were not only transformative, but also -- take your pick -- fleeting, incidental, de minimis, innocuous. If these uses failed to qualify as fair, a host of perfectly benign and valuable expressive works would be subject to lawsuits. That in turn would discourage the makers of all sorts of historical documentaries and displays, and would deplete society’s fund of informative speech.”⁹ Ubiquitous licensing of “high-volume, low value uses” would pose a direct challenge to the *Bouchat* court’s finding that “fleeting, incidental, de minimis, innocuous” uses must be fair and therefore not subject to permission or payment.

II. Digital Preservation

In the filed comments, and in the meeting itself, some rights holders repeated the myth that because digital materials do not suffer the same kind of physical wear and tear as printed paper copies, the first sale doctrine and other copyright limitations, *e.g.*, library preservation, are far less important than before and can be recalibrated or safely surrendered in license terms. One need only consider recent advances of digital technologies to understand that the preservation of all materials is necessary. Websites come and go, documents disappear from websites, hyperlinks get broken, files become corrupted and storage media become obsolete. As a study just released at the University of British Columbia illustrates, digital materials are subject to risks of loss, corruption, and destruction

⁸ *Id.*

⁹ *Id.* at 15.

just as profound, if not more so, as those that face older formats. The study found that 80 percent of scientific data from a random sample of studies were lost over two decades because of old email addresses and outdated storage devices.¹⁰ The researchers tried to collect data from 516 studies made between 1991 and 2011. They found that although complete data sets were available in the year of publication, the ability to access the data dropped by 17 percent per year. According to the lead investigator, Tim Vines, “much of these data are unique to a time and place, and is thus irreplaceable, and many other datasets are expensive to regenerate. The current system of leaving data with authors means that almost all of it is lost over time, unavailable for validation of the original results or to use for entirely new purposes.” Vine stated that scientists should upload their data to public archives before agreeing to publish their findings.

This study highlights the importance of libraries acting decisively to preserve digital materials.¹¹ Many publishers simply do not have the financial incentive, or the institutional stability, to preserve digital materials for decades, let alone centuries. Moreover, because of their commitment to intellectual freedom, libraries collectively seek to preserve all of our cultural heritage, not just materials with potential economic value. The copyright system must encourage this preservation through exceptions that allow preservation and “contractual override” provisions.

Likewise, libraries must be encouraged to preserve our cultural heritage expressed through websites. Many libraries have long recognized the importance of preserving

¹⁰ Julie S., *80 Percent of Scientific Data Gone in 20 Years*, Headlines & Global News (Dec. 20, 2013), <http://www.hngn.com/articles/20083/20131220/80-percent-of-scientific-data-gone-in-20-years.htm>.

¹¹ See also Jennifer Howard, *Born Digital, Projects Need Attention to Survive*, Chronicle of Higher Education (Jan. 6, 2014), http://chronicle.com/article/Born-Digital-Projects-Need/143799/?cid=at&utm_source=at&utm_medium=en.

websites, and have website archiving projects underway.¹² Website archiving by academic and research libraries is a transformative fair use.¹³ In countries such as the UK, where seeking permission and paying licenses for “high volume, low value uses” is already the norm, web archiving lags far behind what is available under fair use in the United States.¹⁴ Copyright and generic “terms of use” provisions should not interfere with this significant work.

A more recently identified digital preservation problem is “link rot” – where a link in a webpage, or a URL cited in a document, no longer functions. A recent study found that more than 50% of the links in U.S. Supreme Court opinions no longer resolve to working websites.¹⁵ In response, a coalition of more than thirty law libraries has created a tool to help ensure the continued functioning of URLs in academic journals and other sources.¹⁶ It is essential for our cultural, scientific, and legal future that libraries continue to rely on fair use to preserve linked references without waiting for a licensing regime or a special exception.

¹² See, e.g., Web Archive Collections – Web Archiving (Library of Congress), <http://www.loc.gov/webarchiving/collections.html>; The Columbia University Human Rights Web Archive, <http://hrwa.cul.columbia.edu>.

¹³ Association of Research Libraries, et al., CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 26 (2012) available at <http://www.arl.org/fairuse>; Jonathan Band, A NEW DAY FOR WEBSITE ARCHIVING 2.0, <http://www.arl.org/storage/documents/publications/band-new-day-for-archiving-2.0-23feb12.pdf>.

¹⁴ Mark Ballard, *UK prepares to launch internet archive without internet access*, COMPUTER WEEKLY (Dec. 11, 2013), <http://www.computerweekly.com/news/2240210795/UK-prepares-to-launch-internet-archive-without-internet-access> (“The archive was held up by a decade of negotiations between publishers and the [British Library](#), meaning that regulations permitting the library to perform its first archive copy of every UK website were not passed until April this year, more than 20 years since the World Wide Web took off and 10 years since Parliament passed a law making it possible.”).

¹⁵ Jonathan Zittrain et al., *Perma: Scoping and Addressing the Problem of Link and Reference Rot in Legal Citations*, (October 2013), Harvard Public Law Working Paper No. 13-42, available at <http://ssrn.com/abstract=2329161>.

¹⁶ See Perma.cc, <http://perma.cc> (last visited Dec. 27, 2013).

In short, digital resources are not immortal. In fact, they are in formats that are more likely to cease to exist, and must be transferred to new digital formats repeatedly as technology evolves. They require extensive, highly specialized preservation and curation using constantly evolving methods and technologies. This means that the libraries charged with this work require robust applications of flexible exceptions such as fair use so that copyright technicalities do not interfere with their preservation mission.

III. Remixes

Libraries play an important role in the creation of remixes. Many libraries – both public and university – operate centers typically referred to as media commons,¹⁷ information commons,¹⁸ or digital commons,¹⁹ where the public, students and faculty are taught, among other activities, how to create multimedia projects using state of the art technologies. There is a growing recognition that an educated person in the Twenty-First Century must be “literate” in multimedia technology for purposes of communicating in academic, business, professional, and political settings. Many of the multimedia projects developed by students and faculty incorporate preexisting material such as clips of news broadcasts or films. These remixes comfortably fall within fair use, and no statutory amendment is needed to allow these centers to continue to operate.

¹⁷ See Media Commons, <http://mediacommons.psu.edu/>

¹⁸ See David B. Weigle Information Commons, <http://wic.library.upenn.edu/wicabout/>.

¹⁹ See DC Public Library Digital Commons, <http://www.dclibrary.org/digitalcommons>.

IV. Collective Rights Organizations

In our opening comments, we cautioned the Task Force about licensing schemes that rely on collective rights organizations (CROs) to collect fees from users and distribute them to rights-holders. The comments cited a recently published article about CROs that “reveal[ed] a long history of corruption, mismanagement, confiscation of funds, and lack of transparency that has deprived artists of the revenues they earned.” On December 20, 2013, Professor Michael Geist provided yet another example of a failed CRO. The Educational Rights Collective Canada (ERCC) was formed in 1998 to collect royalties for educational copying of broadcast programs.²⁰ The ERCC asked the Copyright Board of Canada (CBC) to put an end to its tariff, acknowledging that in its fifteen years of operation it has never distributed any money to rights-holders and it is \$830,000 in debt. According to Professor Geist, “the debt was largely accumulated in trying to create the tariff in the first place.” Professor Geist concludes that “the ERCC was simply a bad idea in which millions was spent by both sides to decide on royalties worth a fraction of expense....” The Task Force should avoid recommending the creation of similarly expensive licensing infrastructures that benefit intermediaries at the expense of users and rights-holders.

We are happy to answer any questions the Internet Policy Task Force may have.

Respectfully submitted,



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²⁰ Michael Geist, *Copyright Collectives Gone Mad: How the ERCC Spent Dollars to Earn Pennies* (Dec. 20 2013), <http://www.michaelgeist.ca/content/view/7036/125/>.