COACHING COPYRIGHT

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Preface

WHEN THE IDEA OF A BOOK TITLED "COACHING COPYRIGHT" was first suggested to us, we were skeptical about the title. But as we thought about it, we realized that coaching, whether one thinks of athletic coaching or the use of the word in corporate or professional contexts, was very appropriate to the situation we were being asked to address. Coaching requires a very practical approach to solving problems in specific and definable situations. Copyright education, too, is best when placed within a specific context. When librarians are asked to assist with copyright questions that arise in an educational context, coaching is exactly the approach they need to take.

This book, then, is intended to provide a practical guide for the person called upon to serve as a "copyright librarian," or, indeed, anyone who is confronted with copyright dilemmas. Rather than focusing on an abstract explication of copyright law, it focuses on coaching as a framework for addressing specific copyright problems and issues, and on techniques for teaching about copyright to various audiences.

The structure of the book is dictated by this approach. The first part of the book consists of two chapters that provide general overviews of the topic of copyright coaching. The first chapter examines what it means to be a copyright coach, explicates a framework that such a coach can follow when confronted with a specific issue, and lays out the legal and practical considerations, in a condensed way, that need to be considered at each step of that framework.

In the second chapter, Jill Becker and Erin Ellis place the idea of coaching in general, and coaching copyright in particular, firmly in the context of library instruction, as well as in the ACRL's "Framework for Information Literacy in Higher Education." They discuss coaching as a high-impact practice that positions learners in an ideal space for understanding the nuances of copyright.

The second and longer part of this book continues the emphasis on practical applications, with eight case studies written by specialists in library instruction and in copyright. Laura Quilter's initial chapter is a catalog of helpful techniques for "hooking your audience on copyright," and this is followed by two chapters on specific techniques that can help convey important copyright topics: Anne Gilliland describes storytelling as an effective method, and Ana Enriquez describes role-playing as a successful approach. The next four case studies address specific audiences and contexts. Merinda Kaye Hensley focuses on opportunities to work with undergraduate research journals, and Anali Perry discusses her efforts in working with instructional designers. The next two chapters demonstrate approaches to helping administrators come to terms with copyright on campus: Stephanie Davis-Kahl and Karen Schmidt write about a liberal arts college context, and Carla Myers writes about the university context. The book closes with a report by Will Cross on a research study conducted to assess the effectiveness of an LIS class on legal issues, which includes assessments of specific instructional techniques, as well as a brief glimpse of what the future of coaching about copyright and other legal issues for librarians might look like.

KEVIN L. SMITH

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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

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