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ATG Interview -- Copyright Clearance Center

Bruce Strauch

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Re: Westwood Infringement Case

by Bruce Strauch (Publisher, *Against the Grain*) <strauchb@citadel.edu>

ATG: Tell us about the coursepack lawsuits which Copyright Clearance Center is coordinating against various copy shops. How many lawsuits are there? Are others planned? Who exactly is suing and who is the lead attorney?

CCC: In the last 18 months, there have been five suits filed against various coursepack-producing and document-delivering defendants, the most recent being against: **Westwood Copies** in California; and against **Paradigm Books, Inc.** of Texas, **Paradigm Course Resource, Inc.** of Minnesota and **Notes and Quotes** of Illinois. As evidence comes to light that can form the basis for a lawsuit, we expect that there will be more cases — in fact, based on information currently in hand, we expect that there will be more during the current academic semester. We also receive more coursepacks containing infringements every week, sent to us primarily by compliant copy shops that have been placed at a competitive disadvantage by shops ignoring the law and not charging copyright fees. We're also aware that there are other publisher-brought claims against coursepack producers and document deliverers in which we play little or no role, and we expect that there will be more of those as well.

In each case, the participating publishers are determined by the evidence, usually provided by compliant competitors of the infringers (who, as indicated earlier, seek a level playing field), as well as by the ability and willingness of individual publishers to participate. So far, **Elsevier Science** and **John Wiley & Sons** have been involved in each of the cases that **Copyright Clearance Center** has coordinated over the past 18 months. Depending upon the evidence, **The MIT Press**, the **American Chemical Society**, **Sage Publications** and others have also participated as plaintiffs. Many other publishers have expressed an interest in participating as appropriate evidence turns up.

William S. Strong, Esq., of **Kotin, Crabtree & Strong, LLC**, a Boston law firm, is the attorney managing the past and present cases that **Copyright Clearance Center** has been coordinating. **Bill** is the current Chair of the Boston chapter of the **Copyright Society of the USA**.

ATG: What exactly does "coordinating" mean? How is this coming about? Is it working?

CCC: Just to provide a bit of context for the question, let us first say that one of the important aspects of **Copyright Clearance Center's** charter is to assist publishers and other copyright holders by providing copyright education and coordinated enforcement efforts on their behalf. In terms of education, we produce articles and exhibit and speak at various forums across the U.S. — including college and university campuses and at corporations — to inform people of how copyright works and how

CCC can facilitate their compliance. Our primary goal in publicizing these suits, in fact, is to educate those not directly involved.

The law provides that only the copyright holder has standing to bring suit for infringement, therefore, **Copyright Clearance Center** cannot itself participate directly in these cases since we do not, ourselves, own any of these rights. Our role as "coordinator" involves providing any support services the participating publishers need. We provide research about individual infringers, we help collect and organize the evidence, we communicate with the press, we serve as a single point of contact for compliant competitors to share information as well as for the participating publishers to communicate with each other, et cetera. **Copyright Clearance Center's** role has been welcomed by all participants in these efforts to protect copyrights and we are satisfied that we are fulfilling that part of our mission that directs us to copyright education and enforcement activities.

Copyright Clearance Center is in the business of providing Web-available, easy-to-use copyright compliance mechanisms, education about why, when and how to use them, and coordination of enforcement activities aimed at maintaining a level playing field. The "virtuous circle" of ease, education and enforcement appears to be working quite well, as measured by our clearing millions of copyright transactions online each year.

ATG: Tell us about the coursepacks with which the lawsuit is concerned. What are the contents of the coursepacks? What are the years of the articles, book chapters, etc.? Is everything current?

CCC: The coursepacks that are turned over to us contain myriad materials, of all ages, subject matter, countries of origin, authors, publishers, from all over the country. Consequently, the individual articles and book chapters that have been copied without authorization are as varied as the instructors and institutions that put them together into syllabi, including articles and chapters that we would consider to be current.

ATG: Is the issue of fair use settled in the area of coursepacks or is there a particular case that you are citing?

CCC: None of the cases that we have coordinated has yet produced any briefing of the issues or any court decision. As a result, no defendant has yet formally raised the question of fair use. This is almost certainly due, at least in part, to the fact that the only coursepack cases of which we are aware — and there are two — make clear that making multiple copies of materials for sale to students requires the authorization of the copyright holder in the materials: (1) *Basic Books v. Kinko's Graphics* (the 1991 case from the Southern District of New York), and (2) *Princeton University Press v. Michi-*

gan Document Services, Inc. (the 1997 case from the Sixth Circuit Court of Appeals). Finally, the fact that "coursepacks are different" from the ordinary circumstances that raise the question of fair use was reaffirmed, it would seem, by Congress's clear statement in last year's **Technology, Education and Copyright Harmonization (TEACH) Act** that the distance education privilege created there explicitly does NOT extend to paper or digital coursepacks.

ATG: Does this suit deal only with print and not electronic information? Why or why not?

CCC: The case against **Westwood Copies** is about photocopying because that is the form of infringement in which that organization engaged. The other cases that **Copyright Clearance Center** has so far coordinated were also about photocopying being done by the respective defendants.

ATG: Are professors aware of what's going on? If so, are they sympathetic or not?

CCC: We do not ourselves directly know whether professors are aware that some of the copy shops that they engage to produce coursepacks for them are infringing upon the rights of copyright holders. Some of the compliant copy shops who contact us suggest that the professors are indeed aware of that. We imagine that most professors, who for the most part are copyright holders themselves, would be sympathetic to the claim by these publishers that these defendants are engaged in infringement that is unfair both to the copyright holders and to the compliant copy shops that do abide by the law.

ATG: Is the coursepack phenomenon only American or is it broader?

CCC: As you know, American higher education is somewhat different than higher education in other countries, particularly in the number of institutions and students involved and in the fact that higher education is a more readily available option in the US. As a result, we imagine that coursepacks may be a somewhat greater issue here than elsewhere. Nevertheless, we are aware that publishers and **Copyright Clearance Center**-like organizations have brought suits against copy shops in other countries for activities similar or identical to the subject matter of these cases. Offhand, we are aware that this has happened in Canada, the United Kingdom, Italy, and, we believe, Australia. We are also aware that more thorough piracy — photocopying of entire books — occurs in many countries, particularly in East Asia, South America and Africa, and that copyright holders have brought suits and criminal actions against infringers in those places.

ATG: How do you set a price for an article in a coursepack or for anything (a paragraph, a photograph, etc.) in a coursepack?

CCC: **Copyright Clearance Center** does not set those prices. Individual copyright holders who participate in our transactional programs

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set those prices based on business considerations known to them alone. We then post the prices provided by the copyright holders on **Copyright Clearance Center's** Website, and collect money from the users for return to the copyright holders (net of our expenses). As a small aside, those prices and permissions available on our Website enable people seeking clearances to do so very quickly and conveniently.

ATG: *Post Tasini have the plaintiffs written seamless contracts that give them all rights to their products?*

CCC: First, **Copyright Clearance Center** has no knowledge of the individual contracts that publishers enter into with writers and other creators, nor could we readily obtain that knowledge from the tens of thousands of publishers who participate in our programs or the hundreds of thousands of writers and other creators who submit their materials to publishers. (Among other things, the terms of those contracts would be competitively sensitive and therefore unlikely to be shared with us). Second, however, it is important to be aware that most of the materials on which the plaintiff publishers have brought suit in these **Copyright Clearance Center**-coordinated cases have been articles in scientific, technical and medical (STM) journals, including many professional materials. The STM publishing industry has traditionally been different from the publishing fields that use freelancers like Jonathan Tasini, simply because the economics of journal publishing are

different. As a result, STM publishers have for many years obtained the entire copyright from the writers who produce the articles. Therefore, STM publishers have been acting well within the scope of their rights, and so have probably not been affected in any major way by the Supreme Court's decision in the *Tasini v. New York Times* case.

ATG: *Given that we hear that there is copyright piracy all over Asia, are you just suing who you can sue? Are other RRO's suing in other countries?*

CCC: As noted above, publishers and RROs (as well as authors, and associations of authors and publishers) are quite active in other countries in efforts to stem both copyright infringement and more substantial copyright piracy. In many of those countries, we are also aware that the governments themselves make arrests, seize infringing materials and prosecute the infringers criminally. However, **Copyright Clearance Center's** coursepack business is nearly 100% focused on the United States and so are the infringers whose coursepacks are sent to us. 

Added Note: On March 3, 2003, it was announced by Copyright Clearance Center that a settlement had been reached between the plaintiff publishers and Westwood Copies. The settlement required payment by the defendants of unspecified damages and agreement to comply fully in the future.

Actions against Custom Copies of Gainesville, Florida and Paradigm of Illinois and Minnesota and Notes & Quotes of Texas are still pending.

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