Against the Grain

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Questions and Answers-Copyright Column

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LEGAL ISSUES

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Cases of Note — Punctilious for Punctuation

by **Bill Hannay** (Partner, Schiff Hardin LLP, Chicago, IL) <whannay@schiffhardin.com>

If you Google the phrase "Oxford comma," you get literally a million hits, most I would think since March 13, 2017. That's when the U.S. Court of Appeals for the First Circuit in Boston — normally one of the most prestigious courts in America — handed down a preposterous decision in ***O'Connor v. Oakhurst Dairy***, 2017 U.S. App. LEXIS 4392 (1st Cir.). The decision hinged on the absence of an "Oxford comma" in a piece of employment legislation in Maine.

If this silly decision stands, it will cost Maine employers millions of dollars in unexpected overtime charges.

The statute at issue requires employers to pay overtime, unless the employment activity involves food, specifically:

> The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:
>
> (1) Agricultural produce;
>
> (2) Meat and fish products; and
>
> (3) Perishable foods.

A bunch of milk delivery drivers sued a bunch of dairies, contending that the words "packing for shipment or distribution" refer to the single activity of "packing" foods and not to delivering foods. And since drivers do not engage in "packing" perishable foods (like milk), the exemption does not apply to them, and they are owed overtime.

A U.S. magistrate rejected the drivers' interpretation of the statute, holding that the exemption clearly included distribution of food, not just "packing," and the chief judge of the U.S. District Court concurred in March of 2016. On appeal, however, a panel of the First Circuit reversed, issuing a labored 29-page opinion authored by **Judge David Barron**.

Judge Barron is a controversial figure. After graduating from **Harvard College** and then **Harvard Law School**, he briefly worked in the U.S. Department of Justice and then became a professor at **Harvard**. In 2009, he took a leave of absence from teaching and served as the Acting Assistant Attorney General in charge of the DOJ's Office of Legal Counsel.

In that position, he authored a 2010 legal opinion justifying **President Obama's** decision to order a drone strike on an American citizen who was a radical Islamic militant living in Yemen. When **Mr. Barron's** memo was made public in 2014, *The New York Times* described it as "a slapdash pastiche of legal theories — some based on obscure interpretations of British and Israeli law — that was clearly tailored to the desired result." By that time, **President Obama** had nominated him to the First Circuit. He was criticized in the Senate debate for being — in the words of Sen. Ted Cruz — an "unabashed judicial activist … disregarding the terms of the Constitution." (He was confirmed by a vote of 53-45.)

In the milk drivers case, **Judge Barron** looked at the text of the statutory exemption and concluded that the absence of a comma after the word "shipment" made the wording ambiguous. Given this ambiguity and the supposed lack of clear legislative intent as to "distribution," the court decided to err on the side of the general purpose of overtime laws which is to protect employees' health and welfare.

The use of a comma at the end of a list of items — referred to as a "serial" or "Oxford" comma — is itself somewhat controversial. **Strunk** and **White** call for its use, but — ironically — the Maine Legislative Drafting Manual expressly instructs that: "when drafting Maine law or rules, don't use a comma between the penultimate and the last item of a series." **Judge Barron** gave no weight to the latter.

The oddest thing about the opinion is that it ignores the plain reading of the conjunction "or" in the statute. To reach his result, **Judge Barron** creates an unusual sentence structure which has no "terminal conjunction." Normally a list ends with an "and" or an "or." But the First Circuit's reading has no such terminal conjunction, thus making hash of the text.

One would hope that reason and common sense would prevail in this linguistic never-neverland, but I am doubtful that enough other members of the First Circuit would want to take on the issue. I am even more doubtful that the Supreme Court would want to wade in.

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Questions & Answers — Copyright Column

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QUESTION: A government agency librarian asks about a recent report proposing an amendment to section 105 of the Copyright Act to create some exceptions that would permit government employees to own copyright in the works they create even in the course of their employment.

ANSWER: In response to an inquiry from the House Judiciary Committee about reforming copyright, the Chair of the Joint Chiefs of Staff responded asking for an exception to section 105, the section of the ***Act*** that generally provides that no copyright shall exist in works created by the U.S. Government. The concern is for faculty members at the service academies, war or staff colleges and other schools of professional military education. According to the proposal, this ban on copyright ownership is making it difficult to recruit faculty members for these institutions. Section 105 prevents

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government authors from publishing in many outlets such as many scholarly journals and university press publications since there can be no copyright in these government works. Authors or agencies that cannot own copyright cannot transfer nonexistent rights to a publisher in order to have the work published.

The recommendation of the Chair is to amend the ***Copyright Act*** to allow publishing of official works outside of the Government Printing Office to facilitate the recruitment of highly qualified faculty members. Safeguards could be in place to prevent individual authors from profiting financially from their works. The recommendation goes on to suggest that the Secretary of Defense develop regulations to specify which type of scholarly works would qualify for copyright protection.

QUESTION: A public librarian notes that the Metropolitan Museum of Art has recently announced that a huge number of its images are now available for free access and use. Is this true?

ANSWER: Yes, it is true. The **Met** has a policy called Open Access that allows one to access and use 375,000 of its images for either noncommercial or commercial purposes. According to the **Met**, it has worked in collaboration with the **Creative Commons (CC)** to promote the sharing of these images via the **CC's** model licenses. The images may be accessed through the **Met's** website. When searching, click on "Public Domain Artworks" under "Show Only." One may also browse the images on the **CC** website under "Metropolitan Museum of Art." For a helpful FAQ about the use of the **Met's** images, see *http://www.metmuseum.org/about-the-met/policies-and-documents/image-resources/frequently-asked-questions*.

QUESTION: A school librarian asks whether a student may use a portion of a movie or a music recording for a class project such as a website, a video or to incorporate into a PowerPoint presentation.

ANSWER: The simple answer is yes. Section 110(1) of the ***Copyright Act*** permits the performance of portions copyrighted works in a nonprofit educational institution. The ***Act*** envisions that the performance will occur in a classroom or similar place that instruction occurs. Logically, in this digital age, those portions must be reproduced to place them on a website, on a slide or in a video, in order to facilitate the performance.

Any difficulty occurs when the student then posts the presentation containing the portions of copyrighted works on the web so that others may access it and enjoy the performance. At that point, the student has published the work and, depending on the type of work, the amount and substantiality of the work that is used, the effect on the market for the work (the fair use factors), the student may need permission from the copyright owner. If the work is made available only on Blackboard or other password-protected course management system or site, there is less problem than if the work is simply posted on the web.

QUESTION: An academic librarian asks about the closing of Tate Publishing Company and what happens to the copyrighted works of the 40,000 authors in their portfolio.

ANSWER: **Tate** operated as a Christian vanity press, with authors paying about $4,000 for the publication of their books. The publisher indicated that if there were sufficient sales of a work, about 2,500 copies, the publishing costs would be refunded to the author. On January 17, 2017, Oklahoma-based **Tate Publishing** announced that it was closing. Prior to the closing, there had been many complaints against the company with more than 150 complaints filed with the Oklahoma Attorney General and about 95 filed with the **Better Business Bureau** over the past three years. Several months before it closed, **Lightning Source** and **Xerox**, which leased printing equipment to **Tate**, sued **Tate** for $1.7 million. There were also additional suits against the company and a pending U.S. Department of Labor investigation. For additional information, see *http://www.victoriastrauss.com/2016/06/16/tate-publishing-enterprises-slapped-with-1-7-million-lawsuit/*.

When **Tate** closed, its website was changed to add additional information aimed at assisting its authors. Its website contains the following statement: "Our primary commitment at this time is to find a new home for all authors and artists we represent, and ensure that each one has the best possible opportunity for success." Authors were given an option to terminate existing contracts for books not yet released. The website contains an option that will release to the author the digital files of that author's work for a $50 fee. Several other publishers have offered to help **Tate** authors.

Critics of the publishing industry point out that pay-to-publish publishers are also being negatively impacted by changes in the industry itself such as direct online publishing. Authors are becoming more perceptive, and they are less likely to sign up for expensive package deals to publish, market and service their works. This trend affected **Tate's** bottom line since its income was not based on the sales of authors' works but on payments from authors.

QUESTION: A college faculty member asks when he obtains permission to publish something on the web once, what further rights does he have?

ANSWER: When one seeks permission to reproduce or perform a copyrighted work, the permission is limited by what was actually requested. For example, if the faculty member asks only to publish the work on the web, that is exactly what is granted. If there was no date restriction, then it may remain on the web. Typically, permission might be restricted to making the work available on password-protected sites so that the faculty member's students and colleagues have access to the work, but not others. In this question, it appears that there were no restrictions on posting the work on the web.

For example, such permission would not include the right to set the work to music, to produce a motion picture script based on the work, to sell copies, publish an edited version of the work, etc.

QUESTION: A university librarian asks about distributing copies of an article to workshop participants. Many of the participants are not authorized users for campus resources. What type of authorization is needed in order to distribute the article to participants?

ANSWER: It is possible that this distribution is a fair use. If the workshop is offered by an educational institution or by a professional librarians or faculty group, the reproduction and distribution may well be a fair use. There are other options, however.

(1) The librarian may seek permission to distribute copies of the article and pay royalties through the **Copyright Clearance Center**. (2) The librarian may contact the publisher directly for permission and pay royalties if requested. (3) In lieu of distributing the article, the presenter could send the bibliographic information to participants and ask them to read the article in advance and/or bring a copy with them. (4) Lastly, the librarian could simply provide the URL to participants who would then make their own copies under their own institutional licenses.

QUESTION: A public librarian asks whether permission is needed to use Google Map images.

ANSWER: Use how? This question does not contain enough information to provide a complete answer. A person, who accesses and copies a map online for an upcoming trip, is using the map as it was intended. Projecting the map to a class in a nonprofit educational institution would not require permission. Reproducing the map and distributing it to the members of a class for use likewise would require no permission. It is not clear what other uses the librarian might envision.

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The Ithaka survey was mentioned recently in the **ACI Scholarly Blog** index,curated by a great team of experts led by the awesome **Pat Sabosik**. Check it out!

http://scholar.aci.info/?utm_swu=5857&utm_campaign=List%20Subscription%20Email&utm_medium=email&utm_source=sendwithus

Here's another recent survey courtesy of **Charlie Rapple** of **Kudos**! This one is a survey of authors' current sharing behaviors, and

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