



Technology, Disruption, and Copyright

**Interview with
Bruce Rich**

**Excerpted from
“The Future of Collective Licensing”
A CCC Town Hall, June 9, 2021**

KENNEALLY: In the rapidly developing world of AI uses and discussions, copyright issues are key.

Welcome to CCC’s podcast series. I’m Christopher Kenneally for Velocity of Content.

From Large Language Models (LLMs) to other research-based applications, AI technologies rely on millions of books, scholarly journals, and other curated publications. Responsibly using these works is a foundational part of the discussion.

On Thursday, October 12, 2023, 1000 EDT/1500 BST/1600 CEST, CCC presents a Town Hall special program on LinkedIn Live, “AI, Licensing & The Path Forward.”

CCC’s General Counsel Catherine Zaller Rowland and a panel of international legal experts including Prof. Daniel Gervais, Bruce Rich, and Carlo Scollo Lavizzari will consider voluntary collective licensing; its significance to research in many fields; and the role it can play to drive innovation in science and technology, including AI.

Voluntary collective licensing came to text publishing along with advancements in photocopying technology in the 1970s, as Bruce Rich explained for a June 2021 CCC Town Hall, “The Future of Collective Licensing – Copyright in the Digital Marketplace.”

KENNEALLY: For more than 30 years, Bruce Rich was senior partner in the international law firm Weil, Gotshal, & Manges, where he headed the firm’s intellectual property and media litigation practice. He began serving as outside counsel to Copyright Clearance Center in 1980 and continues in the dual role of advising counsel and board member. Bruce Rich is currently senior fellow at Harvard University’s Advanced Leadership Initiative.

Bruce, to really begin to dive into this, to get to the heart of our matter, which is the future of collective licensing, requires a visit to the world of 1976, a world like our own that was



in the throes of technology-driven change, one that led to a new Copyright Act and a call from Congress to facilitate workable clearance and licensing procedures.

RICH: Thank you, Chris. You're quite right. There was this roiling debate that preceded passage of the '76 act, and it centered on the proper treatment of this then-brand-new technology, which was photocopying. Education interests and others were keen on seeing the benefits of it, and necessarily, the content community felt that there was a severe risk to the unlicensed and unlimited reproduction of its work.

So the Senate and House reports that accompanied passage of the legislation came up with a constructive suggestion, which is why not create a neutral clearinghouse to facilitate what it termed workable clearance and licensing procedures? They had in mind a voluntary organization dedicated, in their words, to working out means by which permissions for uses beyond fair use can be obtained early, quickly, and at reasonable fees. This is what spawned CCC.

A task force, then, of the Association of American Publishers, in coordination with the Information Industry Association, the Authors League, and representatives of scientific societies, independent publishers, and corporate libraries came together to create CCC, which opened its doors on January 1st of 1978, which was the effective date of the '76 act.

KENNEALLY: Bruce Rich, that call from Congress notwithstanding, CCC executives faced a steep uphill climb in the quest for adoption of the licensing services, right?

RICH: It did. It's one thing to establish this great intermediary. It's another to get players joining it. And there were challenges on both sides. On the rights-holder side, CCC engaged in the strenuous and painstaking process of thrashing out, principally with scientific, technical, and medical journals publishers at the time, terms of licenses that would be acceptable to them and that would also be acceptable to users. And on the user side, it took a lot of work to get early adopters, but several corporations exhibited leadership over time, executed new repertory licenses – that is, blanket licenses – that began to provide momentum to this system coming together. But the uptake rate was really low, and the frequently offered response from prospective licensees, which is we feel like we're protected by fair use, really needed clarification.

KENNEALLY: Help us understand what is fair use, and how that applies or how it was said to apply here?

RICH: Fair use is a judicially developed, a judge-made equitable rule of reason, as it's called. It's intended to provide a limited exception to the exclusive rights which are possessed by



copyright owners to control the exploitation of their work. In the United States, there's essentially a four-factor analysis that goes into a determination of fair use.

Boiling it down very quickly, principal among these are first an assessment of the purpose and the character of the use by the user. Specifically, is it commercial or nonprofit in nature, and even more importantly, is it what we call transformative? That is, is it's taking that content and doing something different and socially productive with it, as opposed to simply slavishly making copies, for which it's expected that the copyright owner should be remunerated. The fair use doctrine also looks at the volume of taking and the substantiality of it. And perhaps most importantly, it looks at the potential harm to the market for the original work itself undertaken by the copying activity.

In light of those principles, the Association of American Publishers determined to bring a test litigation seeking to establish in the corporate setting in the United States the principle that the systematic reproduction of copyrighted journal articles by for-profit corporations in furtherance of their business interests was not protected by the fair use doctrine. That was especially the case where an entity such as CCC, which provides a readily available source for permissions, is available. And the test litigation defendant was then *Texaco*, which declined to take one of these comprehensive repertory licenses to cover its internal copying.

KENNEALLY: Certainly, in the life of this organization, CCC, the *Texaco* case really was a watershed moment, Bruce. Chief Judge Jon Newman supported strongly the publishers' argument that CCC had established this new paradigm for permissions when it began offering those photocopying licenses.

RICH: That's absolutely right, Chris. *Texaco* constituted the first of really a series of fair use determinations by the courts, the outcomes of which turned pivotally on CCC and its unique role in the copyright marketplace. Quite remarkably, CCC found itself meaningfully shaping copyright jurisprudence, beginning with the *Texaco* case. Let me give you a sample from how the Court of Appeals – Jon Newman, you mentioned, the Second Circuit Court of Appeals – analyzed this and CCC's central role.

They wrote, “though the publishers still have not established a conventional market for the direct sale and distribution of individual articles, they've created primarily through the CCC a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying. Since the Copyright Act explicitly provides that copyright holders have the exclusive rights to reproduce and distribute copies of their works, and since there currently exists a viable market for licensing these rights for individual journal articles, it is appropriate that potential licensing



revenues for photocopying be considered in a fair use analysis.” That was really the critical framework for going forward.

KENNEALLY: And it’s a changed world, of course, from 1995, Bruce. We’re all working today, as we speak, on laptops and smartphones, and photocopiers have been overtaken as disruptive technologies. But the *Texaco* case continues to really matter a great deal in the digital workplace and the digital marketplace.

RICH: It does. It’s fair to point out, of course, that the jurisprudence, including fair use, is still being worked out and will probably for generations. But your point is exactly right. As a legal precedent, *Texaco* paved the way for far broader license acceptance by Fortune 100 and other corporations. No longer could they argue that they had this binary choice that *Texaco* put forward, which is either buy subscriptions for every employee or forego making uses that could be termed, like research uses, socially productive.

As the *Texaco* case established, there’s really a third option, which is really a win-win for copyright law – continue to make the desired copies in return for licenses, whether one by one from the rights-holders or in bulk through a market intermediary like CCC. The payoff has been that today, some 76 of the Fortune 100 companies are CCC licensees, and more than 50,000 entities operate under what is now called the Annual Copyright License.

In sum, it’s really no exaggeration, Chris, to suggest that the license programs that have been continuously developed and implemented by CCC have rationalized copyright law, minimized repetitious fair use disputes, and enabled lawful commerce in copyrighted works to proceed in myriad market settings.

KENNEALLY: I have to ask you to look back on the tremendous change – 1995, 2021. It’s a dramatically different world, a different workplace, a different home environment. Just everywhere we look, we have been transformed by our digital tools. I wonder, though, as an attorney, somebody who studies these things, how do you feel about the lasting impact – something like this – I know legal decisions are all about precedent and sort of maintaining over time. But it really is remarkable that something tied to a photocopier, which has faded into our memories, really has made itself felt today in 2021.

RICH: Yeah, it is remarkable and highly unusual. And a modest organization in terms of its public profile, which CCC has deliberately been – it demonstrates that in a field as fraught with potential disputes, line-drawing, the complexity of what the concept of fair use means, the deep expense of litigation – the ability to bring parties together to be a good-faith marketplace intermediary and to provably show through license programs that work and that have significant uptake, and importantly are reasonably priced in the marketplace, can have this lubricating effect on copyright law and can really make solutions work, and



as I indicated, minimize fair use disputes. It's not to say they won't exist or that CCC or CCC-type licenses can solve every problem. That's simply not the case. But with this experiment that began with the modest suggestion in the House reports to the present, it really has been a remarkable positive story both for copyright law generally and for the role that CCC has contributed to it.

KENNEALLY: All right. Well, Bruce Rich, again, thank you so much.

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