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BY HAND

James F. Rill, Esq.
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
10th Street & Constitution Avenue, N.W.
Washington, D.C. 20530

Re: Copyright Clearance Center, Inc.
Request for Business Review

Dear Mr. Rill:

We represent the Copyright Clearance Center ("CCC"), a not-for-profit organization which began operations in January 1978, at the time the Copyright Act of 1976 (the "Act") went into effect. CCC was organized, and has operated, to facilitate the lawful reproduction of literary works protected by copyright in the United States.¹ The purpose of this letter is to request a statement of the Antitrust Division's enforcement intentions,

1. The genesis of CCC is found in the legislative history of the Act, wherein it was urged that workable clearance and licensing mechanisms be devised so as to accommodate both the needs of users for access to copyrighted materials and the rights of copyright owners to be compensated for the copying of their works. See Copyright Law Revision, Report No. 83, to accompany H.R. 2512, H. Comm. on the Judiciary, 90th Cong., 1st Sess., Mar. 8, 1967, at 8; Copyright Law Revision, Report No. 94-473, to accompany S. 22, S. Comm. on the Judiciary, 94th Cong., 1st Sess., Nov. 20, 1975, at 71. CCC was established in a collaborative effort among interested authors, publishers and users of copyrighted materials to achieve that balance.

James F. Rill, Esq.
May 7, 1991
Page 2

pursuant to the Division's Business Review Procedure (28 C.F.R. § 50.6), respecting a proposed new approach to licensing by which CCC -- rather than individual rightsholders -- would establish the prices at which those rightsholders' copyrighted works are licensed to users under a non-exclusive blanket license system similar to that which CCC has been operating for some years. This licensing arrangement will further CCC's ability to facilitate lawful use of literary materials through the offer of a more efficient and more market-responsive licensing mechanism than exists today.

CCC's Existing Licensing Systems

-- Transactional Reporting Service

When CCC began operations in 1978, the single licensing system that it provided was its "Transactional Reporting Service" or "TRS." Under the TRS, which is still in operation, CCC charges fees set by the copyright rightsholders (usually publishers or their representatives) each time that a user reports a use of a copyrighted work registered with CCC. CCC's authority to convey photocopy authorizations under the TRS is non-exclusive and CCC charges the rightsholders nothing to register their works in the TRS. All a rightsholder need file with CCC is a form listing the works to be registered and the fees which the rightsholder requires that CCC collect from users; these forms can be amended by the rightsholder at any time. Users, in turn, utilize one of several reporting methods periodically to report, and submit payment for, their photocopying activities. The TRS is an "honor system" -- that is, the user decides whether to report photocopying activity, and in what volume. CCC undertakes no auditing and no enforcement activities. Among the users of the TRS are libraries, corporations, individuals and government agencies. Fees collected by CCC under the TRS are subject to payment to the registered rightsholders, after deduction of an administrative charge.

This facet of CCC's operations was the subject of a Business Review Letter from the Antitrust Division dated September 1, 1977 (copy enclosed).

-- Annual Authorizations Service

CCC's experience in its formative years was that numerous publishers of scientific, technical and medical journals, among others, availed themselves of the TRS by making their works available for licensing to registered users. Yet, a fairly limited number of users actively reported photocopying activities

James F. Rill, Esq.
May 7, 1991
Page 3

under this reporting system. This was especially the case as to large industrial and commercial corporations. A number of such companies advised CCC that they would be interested in securing licenses for their photocopying activities, provided that CCC devised a licensing system that required less recordkeeping and would be administratively less cumbersome for users than the TRS. In response, CCC developed, in 1982-83, a second license mechanism -- the Annual Authorizations Service ("AAS"). The AAS eliminates the need for the user to keep track of each individual copying transaction for purposes of payment of license fees to CCC. Instead, through one of several available techniques for estimating how much copying is done by a corporation annually, and from which specific titles (each technique involving some degree of sampling of the photocopying undertaken by a given user), an annual blanket license fee is paid CCC by the user. That payment entitles the user to make unlimited copies of the licensed works for internal purposes (within certain limits prescribed in the license). The fee is recomputed annually, based on fresh sample data.

Under the AAS, individual rightsholders establish in advance the prices at which they are willing to license their works to corporate users. The process by which CCC arrives at a user's total license fee factors in those prices (albeit in varying ways depending upon the sampling method selected by the user), such that the license fee payable by a given user represents an aggregation of the individual prices established by each rightsholder as applied to the statistically estimated frequency with which its works have been copied. In turn, CCC distributes money to participating rightsholders under the AAS based on statistical estimates of actual usage and in accordance with the prices established by each rightsholder. As in the TRS, CCC, by contractual arrangement with the rightsholders, deducts from distributions sums needed to administer the license system.

Our firm informally discussed establishment of the AAS with Michael Harmonis of the Division (General Litigation Section) in 1982-83, and it was then concluded that more formal Division review as to establishment of that license system was not warranted. Similarly, at the time that CCC first sought to reach an agreement with a foreign Reproduction Rights Organization ("RRO")² that wanted to participate in the AAS but, consis-

2. CCC has for a number of years undertaken to obtain authorizations from foreign authors and publishers, thereby enabling CCC licensees lawfully to copy works published abroad.

(continued...)

James F. Rill, Esq.
May 7, 1991
Page 4

tent with that RRO's domestic practices, desired to set a uniform price within the CCC systems for all works of all rightsholders represented by that RRO (the RRO for West Germany), CCC again contacted the Division (first Mr. Harmonis and then Carolyn Mark of the Foreign Commerce Section), and it was again concluded that more formal review of this manner of participation in the AAS was not required.

Limitations of the Annual Authorization Service

Some 125 large, for-profit corporations have become licensed under the AAS, a significant move in the direction of offering major users of copyrighted materials a convenient mechanism for complying with the copyright law. But the AAS has shown itself to have important limitations. For one, it is an expensive system for CCC to administer. Since license prices are derived from data elicited from each corporation as to publication-specific copying activity, and entail an often complex system of sampling, review and projections by expert econometricians, the transaction costs involved in establishing license fees on a user-by-user basis are very high. While this cost has been offset by the fees obtained from particularly large corporate users who copy intensively, even as to such large-scale users, CCC's costs of operation in relation to the fees garnered on behalf of rightsholders are disproportionately high. With respect to prospective corporate licensees who engage in lesser levels of photocopying and thus who would pay relatively lower license fees, the costs of the license process have been such that, as a practical matter, CCC has been unable to pursue license arrangements with many such prospective licensees.³

More fundamentally, market forces are not operating as well as they should in establishing the prices at which CCC offers licenses to users. From the user's standpoint, it is the "bottom line" that matters -- that is, the aggregate license fee for access to the works that CCC licenses. Under the present system, that "bottom line" is simply the product of the discrete

2. (...continued)

This process has been undertaken through counterpart RRO's. At present, RRO's for nine countries have signed agreements with CCC enabling the licensing of works from those nations by CCC.

3. We note that CCC's manner of arriving at license fees is unique among RRO's. The license fees obtained by CCC's international counterparts are either established by statute or determined by negotiations between the RRO's and users.

James F. Rill, Esq.
May 7, 1991
Page 5

pricing determinations of hundreds, even thousands, of rightsholders. The license, once calculated and presented, becomes a take-it-or-leave-it proposition. CCC has no authority to negotiate with those users who may believe that a particular overall price is not fair and reasonable. Indeed, under the AAS, because any individual rightsholder's "contribution" to the total license price presented to a user is relatively small and because CCC takes no role in reviewing or negotiating the price set by rightsholders, that rightsholder is free to set its price at a level that has little relationship to market demand either for its own works or for the overall license. This inflexibility in the way CCC's total license fees are determined has inhibited CCC's ability to enter into, and maintain, licensing arrangements with various corporations.

Additional concerns emanate from the annual variations in AAS fees to individual users that result from the very nature of a survey process. Year-to-year swings of 20 and 30 percent or more -- up or down -- have not been uncommon. While the fee variations may be statistically defensible, users faced with such swings generally have difficulty accepting the explanation for these variations and have repeatedly requested that CCC establish license fees that offer greater year-to-year predictability.

Finally, CCC is actively pursuing licensing opportunities in relation to other categories of users of copyrighted materials (for example, academic institutions and governmental bodies) and with respect to other modes of reproduction than photocopying (for example, electronic storage, dissemination and retrieval of copyrighted materials). It has become apparent to CCC that a licensing system such as the AAS simply lacks the flexibility and market responsiveness necessary to meet the needs of such users and in such areas. For instance, the photocopying practices of a given university might entail significant numbers of copies annually -- but without a budget to match. And relying on the individual pricing decisions of hundreds (perhaps thousands) of publishers who do not and cannot have in mind the overall fee consequences to that university is unlikely to result in a blanket license fee that the university will find reasonable. Further complicating such negotiations in particular is the issue of fair use under Section 107 of the Copyright Act. Whereas CCC, in blanket license fee negotiations with a university, could attempt to deal on an overall basis with fair use considerations, that factor cannot be satisfactorily addressed through a process whereby each publisher makes its own

James F. Rill, Esq.
May 7, 1991
Page 6

fair use determinations as a part of the pricing of its works -- which is what now occurs under the AAS.⁴

The Proposed New License

The foregoing considerations, among others, have led CCC to develop a new licensing approach which it believes will meet the needs of various categories of users for access to copyrighted materials at fair and reasonable prices while at the same time promoting widespread compliance with the copyright law, to the benefit of the many rightsholders CCC represents. The proposed approach involves CCC's being authorized by rightsholders, on a non-exclusive basis, to negotiate blanket license agreements with users at fees agreed upon between CCC and such users. The resulting license, like the present AAS, would afford the user access to the works licensed by CCC for purposes of making unlimited copies for internal use of the licensed works. Such a license process would offer the significant advantage, among others, of reducing the transaction costs now entailed in the data-intensive process of arriving at license fees. It would, as well, enable CCC to offer licenses to a far wider array of users at negotiated price levels reflecting the market value of the bundle of rights conveyed.

Under the proposed licensing system, CCC envisions distributing to rightsholders the monies it collects based, to the extent feasible, on the usage of rightsholders' works, as determined through appropriate (but hopefully minimally costly and intrusive) sampling or other estimating techniques.

The non-exclusive nature of the license means that rightsholders, as they do today, would retain the ability to license rights to use their works through other means. Accordingly, users wishing to obtain permission to photocopy or electronically convey materials via methods other than CCC's licensing systems would have a number of options. These include: securing direct licenses from rightsholders (for example, through permissions departments of publishers); utilizing so-called document delivery services; or subscribing to services that offer on-line or CD-ROM based or microfiche or other access to copyrighted materials. A number of such services are now in active opera-

4. Under the AAS, each publisher is free to prescribe a "non-reportable copying allowance" to be factored into the prices it establishes for the photocopying of its works. In practice, the allowances that have been established have varied from zero to more than 50 percent.

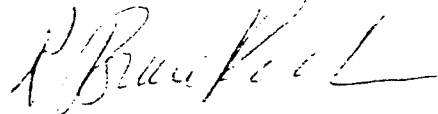
James F. Rill, Esq.
May 7, 1991
Page 7

tion, serving corporate, university and other users. Others are in their developmental stages. While CCC believes that its proposed method of licensing will offer significant efficiencies that will make it an attractive alternative to those with which it will be competing, the fact is that CCC's license will be competing in the marketplace with such other licensing mechanisms.

We would be pleased to supply the Division with such other information as it may find helpful in reviewing this request. Since many of CCC's ongoing and future licensing initiatives are dependent upon CCC's ability to implement the new licensing approach, the earliest possible response from the Division will be appreciated.

Given the non-public and confidential nature of these business plans at this point in time, we would appreciate the Department's agreeing not to disclose this communication, or any subsequent communications on this subject, to third parties, pursuant to Freedom of Information Act requests or otherwise, without adequate prior notification to us.

Very truly yours,



R. Bruce Rich

Enclosure
RBR:hf