Copyright Infringement ON THE DOCKET

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Court cases involving copyright infringement by cultural heritage institutions are extremely rare, which makes two recently settled suits all the more interesting.

In *Pearse-Hocker v. Firelight Media* and *Pearse-Hocker v. USA,* Anne Pearse-Hocker, a professional photographer, sued over the use of three of her photographs that she had contributed to the collections of the National Museum of the American Indian (NMAI). The museum had given permission to a production company, Firelight Media, to include the photographs in its documentary *We Shall Remain: Wounded Knee.*

Fair Use and Photo Attribution

The case against Firelight Media was settled first, on October 14, 2010.[1] The "Stipulation of Dismissal" says nothing about the terms, merely that each side is responsible for its own legal fees. An earlier document, though, suggests that the parties had "reached agreement as to the monetary term of settlement."[2] One would love to know whether the amount of settlement was symbolic or substantial.

In its initial answer to the complaint, Firelight admitted that

> . . . the photograph numbered N44622 is shown at approximately minute 63 of the film for a duration of approximately seven seconds, that the photograph numbered N44926 is shown at approximately minute 64 of the film for a duration of approximately 16 seconds, and that the photograph numbered N45215 is shown at approximately minute 65 of the film for a duration of approximately 7 seconds.[3]

But Firelight also asserted among its defenses that this use was a fair use. Whether the *Documentary Filmmaker's Statement of Best Practices in Fair Use* would agree is open to discussion.[4] In any event, Firelight Media now acknowledges on the movie's website that three uncredited photos by Anne Pearse-Hocker appear in the film.[5]

> Firelight, like many of our users, may not have understood the difference between the permission given by the *repository* and the permission it needed from the *copyright owner.*

The judgement in the *Pearse-Hocker v. USA* case was entered in June 2011, and it is more informative.[6] The museum (which, as part of the Smithsonian, is a unit of the U.S. government—hence "United States" as the defendant) agreed to pay Pearse-Hocker $40,000. In addition, it had to provide her with a digital copy of the 15 photo contact sheets in the collection, from which she could select 100 images to be provided to her at high resolution. According to the NMAI's current price list, 100 reproductions could normally cost up to an additional $7,500.[7] Finally, the director of the museum, Kevin Glover, had to send Pearse-Hocker a letter acknowledging her generosity in donating the photos to the museum. However, the museum did not have to return the collection of photos to Pearse-Hocker, which was one of the demands in her original complaint.

Who Retains License?

The museum did not admit that it had violated any laws or contracts, but it is hard to determine what defense it might have used if the case had proceeded to trial. Its *pro forma* response to the amended complaint hinted that it would have argued that Firelight Media's use was a fair use and that it had a license from Pearse-Hocker to copy the material for Firelight.[8]

Whatever defense the Smithsonian might have mounted would seem to have been weakened immeasurably by its accepting a confusing and self-contradictory deed of gift with Pearse-Hocker.[9] Pearse-Hocker's deed of gift states: "I hereby also assign and transfer all copyright that I possess to the National Museum of the American Indian, subject only to the conditions which may be specified below." What conditions were specified below? "I do not, by this gift, transfer copyright in the photographs to the Smithsonian Institution"! Why have a deed with two conflicting sections?

In addition, the deed granted to the museum "an irrevocable, non-exclusive, royalty-free, license to use, reproduce, display, and publish, in all media, including electronic media and on-line, the photographs for all standard, educational, museum, and archival purposes." Many would argue that providing copies for non-profit documentaries on PBS is part of the standard educational mission of the museum. Yet this interpretation could be in conflict with the next sentence of the deed, which states that "requests by people or entities outside the Smithsonian to reproduce or publish the photographs shall be directed to the donor." If the NMAI felt

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that only for-profit uses should be referred to the donor, it should have made this clear in the deed.

Lessons Learned

Although cases that are settled before trial are of limited value, there are lessons that a cultural heritage repository can take away from these cases. First and foremost is the need to respect and follow the terms in a deed of gift. Sometimes deeds require practices and procedures that are outside of the ordinary, but that just means that our workflows have to be such that anomalous items are consistently identified or that we should never agree to such practices if they are likely to be hard to follow consistently.

Second, and just as critically, we must make sure that the terms in the deed are as clear as possible. The fact that the Smithsonian accepted a deed of gift with not one but two self-contradictory sets of mandates is certainly puzzling.

Third, this case reminds us that running a repository involves taking risks. We run the risk that users might steal collection material or that dirty documents caked in lead dust or mold might injure staff or patrons. We particularly run risks when we duplicate materials for patrons. It is an essential part of our service, but one that must be managed by knowledgeable practice and procedures.

Lastly, I would argue that the case illustrates the danger that common permission practices hold for our patrons. Because the case against Firelight Media did not get very far, we do not know the shape of its fair use defense. I suspect, however, that Firelight, like many of our users, may not have understood the difference between the permission given by the *repository* and the permission it needed from the *copyright owner*. And it may not have understood that both were needed for its use of the photographs.

The museum's invoice stated that "[p]ermission is granted for the use of the following imagery, worldwide, all media rights for the life of the project."[10] Only on the back of the form, in small type, near the end, is it explained that it may be necessary to secure the permission of the copyright owner as well. By providing only one of the permissions that users need, we may in the end be misleading them. When making reproductions for patrons and granting permissions, repositories should be crystal-clear about what they are doing.

As with most lawsuits, I suspect that this was a difficult experience for everyone. Pearse-Hocker will be lucky if her $40,000 cash payment covers her legal fees in the case. The museum is out that same amount of money, as well as its time and expense in defending itself. Most of all, this case reminds us about the importance of working with donors so that a disagreement never reaches this stage. ■

Notes

This article is an edited version of two postings by Peter Hirtle on the Librarylaw blog at http://blog.librarylaw.com.

1 "Stipulation of Dismissal," Pearse-Hocker v. Firelight Media, Inc. 1:2010cv00458. Eastern District Court of Virginia, 14 October 2010. *http://dockets.justia.com/docket/virginia/vaedce/1:2010cv00458/253436/*

2 "Plaintiff's brief in support of her second unopposed motion to amend the scheduling order and extend the time to serve Rule 26(a) expert discolsures," Pearse-Hocker v. Firelight 1:2010cv00458. Eastern District Court of Virginia, 1 October 2010. *http://docs.justia.com/cases/federal/district-courts/virginia/vaedce/1:2010cv00458/253436/22/*

3 "Defendant's Answer," Pearse-Hocker v. Firelight 1:2010cv00458. Eastern District Court of Virginia, 22 June 2010. *http://docs.justia.com/cases/federal/district-courts/virginia/vaedce/1:2010cv00458/253436/8/*

4 "Documentary Filmmakers' Statement of Best Practices in Fair Use" (Washington, D.C.: American University School of Communications Center for Social Media, 2005). *http://www centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use*

5 *http://firelightmedia.tv/project/wounded-knee/#more-256.*

6 "Stipulation for entry of judgment," Pearse-Hocker v. USA. 1:2010cv00269. U.S. Court of Claims. 16 June 2011. 1:2010cv00269. *http://docs.justia.com/cases/federal/district-courts/federal-claims/cofce/1:2010cv00269/25085/34/1.html.*

7 *http://www.nmai.si.edu/searchcollections/contact/reproduction.aspx?subject=purchase_item_images.*

8 "Defendant's answer." Pearse-Hocker v. USA. 1:2010cv00269. U.S. Court of Claims. 25 August 2011. *http://docs.justia.com/cases/federal/district-courts/federal-claims/cofce/1:2010cv00269/25085/18/.*

9 See Exhibit B in "Complaint." Pearse-Hocker v. USA. 1:2010cv00269. U.S. Court of Claims. 30 April 2010. *http://docs.justia.com/cases/federal/district-courts/federal-claims/cofce/1:2010cv00269/25085/1/.*

10 Exhibits C and D in ibid.