PRINCE, HACHETTE, AI & THE CHANGING WORLD OF COPYRIGHT LAW
A brief overview of recent U.S. and foreign copyright developments of interest to law libraries.
BY KIM NAYYER

PASSPORT NOT REQUIRED: INTERNATIONAL RELATIONS IS NOT JUST BETWEEN NATION STATES
Key points and best practices to help international law library and knowledge management teams within global firms better serve their international lawyers’ and department operations’ research needs.
BY TRINA MORROW, TIMONIE GREEN & KIRSTY CHU

FCIL RESEARCH QUESTIONS: FROM THE BENCH, BAR & LAW LIBRARIANS
Frequently asked foreign, comparative, and international law research questions and how to approach them.
BY LOREN TURNER

FCIL RESEARCH FOR BEGINNERS: TOP TIPS FOR GETTING STARTED WITH CONFIDENCE
An introductory guide on conducting foreign, comparative, and international law research.
BY JENNIFER DIXON & JANET KEARNEY
UP FRONT

7
MEMBER PROFILE
Meet Harris O. Crooks, Director of Knowledge & Resource Services at Stroock & Stroock & Lavan, LLP.

8
TRENDING
Highlights from the 2023 AALL State of the Profession report.

10
NEWS & NOTES
2023-2024 AALL membership renewal, and important 2023 dates.

LEADERSHIP

26
Q&A PERSPECTIVE
Get to know your 2023 AALL Executive Board candidates.

34
LEADER PROFILE
Jean L. Willis discusses the future of the profession and how AALL helped her succeed in her career.

TECHNOLOGY

48
FCIL TECH
The search for case dockets and documents around the world.
BY RACHEL GREEN, CAITLIN HUNTER, SHERRY LEYSEN & LYNN McCLELLAND

COMMUNITY

52
VOICES ACROSS THE SPECTRUM
Reflections on law librarianship, ideas for advancing the profession, and tips for a better work-life balance.
BY TREZLEN DRAKE

BUSINESS EDGE

54
REFERENCE DESK
Navigating the AALL Annual Meeting.
BY RYAN METHENY, MICHELLE TROVILLO & SCOTT VANDERLIN

LEADER PROFILE
Meet Harris O. Crooks, Director of Knowledge & Resource Services at Stroock & Stroock & Lavan, LLP. In the age of shrinking budgets and the ever-increasing importance of the global community, what is the role of the FCIL librarian within the law library? Advice from Aslihan Bulut & Teresa M. Miguel-Stearns.

GALLAGHER AWARD CELEBRATES OUTSTANDING ACHIEVEMENT IN LAW LIBRARIANSHIP
Joyce Manna Janto, Keith Ann Stiverson, Gail Warren, and Carol A. Watson recognized for service to the profession.
BY GREG IVY

JOSEPH L. ANDREWS AWARD CELEBRATES ACHIEVEMENTS IN LEGAL LITERATURE
The Role of Citation in the Law: A Yale Law School Symposium and Empirical Legal Research Services receive the 2023 Joseph L. Andrews Legal Literature Award.
BY RICHARD LEITER

AALL HALL OF FAME
Introducing the 2023 AALL Hall of Fame inductees: Sara Galligan, Barbara Gontrum, Ellen McGrath, and Jean M. Wenger.
BY KAREN SELDEN
The current pace and scope of activity in copyright arenas is dizzying. In the U.S., as well as globally, much has happened or is in the midst of happening with potential impact in areas important to libraries, such as controlled digital lending (CDL) and artificial intelligence (AI). Whether invested in copyright issues or not, law librarians are being tested in their efforts to keep abreast of legislative and jurisprudential developments while also following relevant advocacy and innovations that push the already porous boundaries of copyright law and practice. The goal of this article is to offer a brief summary on select recent U.S. and global copyright developments and activities of interest to libraries.

**Fair Use, Fair Dealing**

**UNITED STATES**

Many people in legal information work are familiar with the concept of fair use in U.S. copyright law. Fair use is arguably the most well known of the limitations the U.S. Code establishes on the exclusive rights copyright law offers to those who hold copyright in works. A fair use of a protected work is one that someone else is legally allowed to make without having to seek permission from the copyright holder. Analysis of whether a use is fair requires reference to the four-factor test codified in §107 of the Copyright Act: (1) the
purpose and character of the use; (2) the nature of the work itself; (3) the relative amount and substantiality of the portion of the work used; and (4) the effect of the use on the market for the original work. All four factors are assessed on the facts. For the last three decades, the first factor has dominated many analyses, with the transformative nature of the use being the basis for determining whether its purpose and character support a fair use finding. A transformative use is described as one that adds new expression, meaning, or message to the work.

At the time of this writing, the most recent U.S. Supreme Court fair use opinion is in the 2021 *Google v. Oracle* case, where the majority concluded that Google’s use of Oracle’s Java application programming interface (API) to develop the Android operating system was a fair use: its purpose and character was transformative in that it expanded the use and usefulness of smartphones.

Another opinion will come soon, following up on the October 2022 oral arguments in *The Andy Warhol Foundation for the Visual Arts v. Goldsmith.* Andy Warhol created a series of images of the musician Prince from a photo portrait Lynn Goldsmith had made in 1981. A magazine had licensed the photo for use as a reference for an artist to produce a cover image of a 1984 issue. In 2016, another image from Warhol’s series appeared in a new issue of the magazine to commemorate Prince’s death. Goldsmith sued, asserting that the 2016 use infringed her copyright in the photo. Warhol Foundation defended Warhol’s whole series of images as transformative and fair use. Reversing the U.S. District Court for the Southern District of New York’s (S.D.N.Y.) judgment, the Second Circuit ruled that the District Court erred in holding that Warhol’s images were transformative. A different artistic intent or portrayal from that of the copyright holder was not enough to transform the purpose or character of the work. The question Warhol Foundation presented to the Supreme Court rested on the first factor and transformative-ness. Interventions from the bench suggest, however, that the Court is open to considering other aspects, such as market impact, the fourth factor. At the time of this writing, the decision is under reserve, with some observers forecasting yet another enunciation of transformative as fair, and others anticipating a shift away from the centrality of transformativeness. Library communities are interested in the outcome not only for the future of fair use, but also because of its potential impact on another case in which fair use is a central issue, *Hachette v. Internet Archive*, discussed more fully below.

**CANADA**

As in some other Commonwealth countries, Canada’s analogous legislative framing is fair dealing and lists several allowable purposes as a threshold question. Back in 2004, in the landmark decision *CCH v. Law Society of Upper Canada*, the Supreme Court of Canada significantly shifted fair dealing’s interpretation, showing both the threshold and the fairness analysis to be more flexible than previously thought. *CCH* dealt with an Ontario bar association library’s document delivery fax service (in the print era) of reported cases to lawyers throughout Ontario who didn’t hold those reporter series in their firms or local bar libraries. The court ruled that, although headnotes and other editorial content of the reported cases were proprietary to the publishers, the library sending a copy of a full case to lawyers was a fair dealing for an allowable purpose. The Court set out several factors that can demonstrate fairness once a proper purpose, like research and private study, is established. The Court’s refined test recognized that the purpose of fair dealing is to ensure a proper balance between the exclusive rights of copyright holders and the user rights of the public to access those works. In 2012, the Court refined this balance in several copyright cases issued together, clarifying that the fair dealing balance must consider the perspective of the ultimate user of the materials, not only the one that does the copying.

In 2021, fair dealing reached the Supreme Court of Canada again, in *York University v. Canadian Copyright Licensing Agency (Access Copyright)*. The facts and issues in the case were about the fairness of limited educational copying in an institution’s preparation of course
materials for students. Ultimately the Court ruled that the copying was not covered and so York University did not violate an agreement with a copying clearance collective. While a fair dealing analysis therefore was not necessary, the Court took the opportunity to point out errors in the way the lower courts approached the user rights balance. The Court reiterated its 2004 and 2012 pronouncements that fair dealing must balance just rewards owed to content creators with public access to a robust public sphere of creative works, and that the perspective of the ultimate user—here, the student—must be considered in balance with that of the copyright holder.

**SOUTH AFRICA**

A multiyear legislative amendment process in South Africa seems to be nearing completion, and fair use looks to be on the near horizon. In September 2022, the country’s National Assembly passed the Copyright Amendment Bill and the Performers’ Protection Amendment Bill. From there, the bills were remitted to the National Council of Provinces for concurrence. At the time of this writing, the relevant committee just concluded three days of public hearings on the bills and adjourned for consideration. This stage of the amendment process comes on the heels of a 2022 decision of South Africa’s Constitutional Court, *Blind SA v. Minister of Trade, Industry and Competition*, which required permissibility of format-shifting for compliance with the constitutional rights of persons with disabilities.

The Copyright Amendment Bill also proposes to expand exceptions available to libraries and educational institutions and to provide new fair use rights, long seen as missing from South Africa’s copyright law. If the bills become law, observers will be interested to see how the fair use provision is interpreted and applied in practice. Whereas the name of the right clearly borrows from the U.S. rule’s name, the details of the section and the expansive criteria somewhat resemble those provided in Canada’s law and jurisprudence. The framing of the library exceptions also gives some reason to speculate that, in addition to usual practices like interlibrary loan, educational copies, and document delivery, nonprofit libraries may explore activities like controlled digital lending.

**Controlled Digital Lending**

**USA, EU, AND CANADA**

On one level, controlled digital lending (CDL) is an implementation of what libraries have done for decades: use digital means to lend items in their holdings to users in a way that doesn’t proliferate copies. A digital format may enable a print-disabled library patron to access the text, or it may enable housebound users to borrow the book from their libraries. These functions are consistent with the interpretative principle of technological neutrality explicit in EU law and reaffirmed by the Supreme Court of Canada as recently as 2022 in *SOCAN v. ESA*, Canada’s most recent copyright opinion.

A 2018 white paper outlines the specific parameters, copyright compliance, and risk mitigation measures for CDL in the U.S. The essential feature is that a library can never have more copies available for loan than it owns, whether the loan is of the print or a digitized version of the item. Also, the loan must be controlled, so the borrower cannot make or download a copy or remove a technological protection. In 2022, a publication inspired by the 2018 white paper outlined comparable measures for the Canadian legal environment.

A recent early stage ruling in a U.S. case may confound library CDL initiatives, at least for the moment. On March 24, 2023, a U.S. District Court (S.D.N.Y.) ruled on cross-motions for summary judgment in *Hachette Book Group v. Internet Archive*, granting Hachette’s motion. Internet Archive (IA) has a large collection of digitized books and makes titles available to the public through a version of a controlled process. People who access digitized books on IA may be prompted to purchase their own copy through IA’s affiliate, Better World Books, once the access or loan period expires. During the early months of the COVID-19 pandemic, IA lifted the controls to create what it called the National Emergency Library (NEL). Hachette and three other publishers (Hachette) sued IA for willful mass copyright infringement in digitizing the print books for its primary CDL program and in distributing the multiple copies in its NEL program. IA asserted its digitization was transformative.
On the question of copyright ownership, in just a handful of years, the global conversation has proposed a range of owners of any copyright in AI outputs—from AI algorithms themselves, to the software owners, to the creators of training data, to the operator of the generative AI program, to no one at all.

In addition, corresponding infringement questions arise: When AI is trained on content from the web, does the inclusion of copyright-protected content amidst that training data infringe copyright? Who is the infringer, how is evidence of infringement obtainable from the black box of machine learning algorithms, which domestic copyright framework should govern the situation, and what might be an appropriate remedy?

A few recent developments may turn out to be pacesetters, outliers, or something in between. In December 2021, the Canadian Intellectual Property office allowed an IP lawyer, Ankhit Sahni, to register a copyright in a work he says was jointly done by himself and his AI painting app, RAGHAV. About a year earlier, in November 2020, India’s Copyright Office had recognized co-authorship in Sahni and RAGHAV in the same work. (It rejected a companion application to register copyright solely in the name of RAGHAV.) Whether these registrations will stand is yet to be seen. In any event, policy changes may overtake Sahni’s exploration of registrability. Like other countries, both India and Canada recently launched consultations and policy reviews addressing generative AI and copyright.

On February 21, 2023, in respect of a human-created literary work that contained AI-generated images, the U.S. Copyright Office wrote that copyright subsists in the work, but not in those images. Then on March 16, 2023, the Office issued a public guidance clarifying that it intends to treat registrability of works that contain AI-generated material on a case-by-case basis, with the determinative issue being whether the traditional elements of authorship are the product of a human or a machine. Also in March, the Office launched a new Artificial Intelligence Initiative, a series of listening sessions over the spring, to examine legal and policy issues implicated with different kinds of works.

With all this activity in just a few years, and much more that can’t fit into this article, observers are understandably reluctant to forecast outcomes. What does seem certain, whether in respect of AI, CDL, fair use or fair dealing, or other issues, is that this is an area to watch.

Thank you to R. Max Alter, Cornell JD ‘24, for his research assistance.

*On May 18, 2023, the Court issued its opinion. The majority concluded that “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes ..., weighs in Goldsmith’s favor.” Although the limited fair use assertion was not successful in this case, my take is that the opinion does not necessarily chill nonprofit library activities. Warhol’s impact—positive, negative, neutral—on library activities and the interaction of licenses and fair use no doubt will be discussed in the weeks to come.*