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Demonstrating DUE DILIGENCE

What's this all about?

For over thirty years Zood has sought to demonstrate 'due diligence' when releasing photos or footage to publishers, broadcasters, museums etc., who wish to make use of "orphan" assets – ie. when provenance cannot be fully certified, copyright cleared and a licence paid for the specified use.

In other words, where we cannot clear an asset that a client specifically needs to use, we employ a range of methods that would satisfy a court that we have done everything possible to locate the copyright holder. Failing that, the client is informed of the risk, advised and weighs whether to proceed or not (with the necessary disclaimers), or use a substitute researched by Zood.

With the advent of steamy debate over the use of 'orphan works' (see our paper, below), the status of 'due diligence' has been brought into question and attempts to quantify what constitutes 'reasonable' effort to establish who owns rights in the asset are becoming established.

The BBC recently estimated that it would take 8.5 hours per hour of broadcast footage to clear rights for iPlayer – and that is when they are in full possession of copyright information! How much longer would be required where the copyright holder is not (fully) identified (ie. for the vast majority of archived photos and footage) is anyone's guess. Even where the total number of research hours required is not excessive, the periods of waiting for responses to enquiries almost certainly will be.

In the USA, 'Fair Use' might be cited in order to protect the publisher or broadcaster from legal challengers or copyright claimants. Four principals guide whether fair use applies:

1. The purpose and character of use, which includes whether the use is of a commercial nature.
1. The nature of the copyrighted work.
2. The percentage of the portion used in relation to the copyrighted work as a whole.
3. The effect of the use upon the potential market for or value of the copyright work.

A recent ruling has led commentators to conclude that "The single most important point is whether the second use is transformative. Even if a plaintiff

wins on all the other fair use factors, the plaintiff will still be hard-pressed to overcome a determination of transformative use” since “A finding of a transformative nature plus a lack of market harm will invariably lead, as these cases hold, to a finding of fair use”. However, publishers in the US are currently more litigation-shy than ever, following other important and costly rulings against them, and so would be well advised to avoid employing Fair Use as a place to hide from copyright!

In the UK, **‘Fair Dealing’** applies only to private study, criticism and reporting of a news event. Broadcasters, publishers and museums should therefore be very wary of stretching a court’s patience with a Fair Dealing defence!

Why should I care?

All Zoid clients take the greatest care to ensure correct clearance and licensing and we work ‘diligently’ on their behalf to ensure that rights are properly cleared.

But there are instances where a client has strong grounds for wishing to use (or re-use in a new edition, for example) a precise image. Licencees now need to be more vigilant in licensing than ever and be prepared to replace assets when advised of either a **legal** or a **financial** argument to do so. The temptation remains that “the author must have what he wants” regardless of the peril in which this places the publisher.

Equally, the financial argument to extend rights or relicence without careful checking and ‘due diligence’ is fraught with risk.

Add to these the inevitable outcome of growing regulation in licensing and it becomes clear that “exercising due diligence” will come at a higher price (research overhead) than previously recognised.

Conclusion

Zoid’s advice is to avoid any dependence on ‘due diligence’ when licensing or re-licensing. Where assets can be replaced with intelligently researched alternatives, then significant time, risk and money will be saved by Zoid clients.

Other Zoid papers:

[Copyright and IP + Due Diligence, Orphan works and Cheap Stock](#)

- [Zoid white paper 090323](#)

[Taking Care of Orphans](#)

- [Zoid white paper 090717](#)

Please call me on +44 20 7267 9990 if you would like to discuss any of the above

[Richard Philpott](#)

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