2011

Legally Speaking -- Righthaven: Wrong Model

Bryan M. Carson J.D., M.I.L.S.
Western Kentucky University Libraries, bryan.carson@wku.edu

Follow this and additional works at: http://docs.lib.purdue.edu/atg

Part of the Library and Information Science Commons

Recommended Citation
DOI: http://dx.doi.org/10.7771/2380-176X.5907

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.
LEGAL ISSUES

Section Editors:  
Bruce Strauch  (The Citadel)  <strauchb@citadel.edu>  
Bryan M. Carson, J.D., M.I.L.S.  (Western Kentucky University)  <bryan.carson@wku.edu>  
Jack Montgomery  (Western Kentucky University)  <jack.montgomery@wku.edu>

Legally Speaking — Righthaven: Wrong Model

by Bryan M. Carson, J.D., M.I.L.S. (Associate Professor, Coordinator of Reference and Instructional Services, Associated Faculty — Library Media Education Program, Western Kentucky University Libraries, 1906 College Heights Blvd. #11067, Bowling Green, Kentucky 42101-1067; Phone: 270-745-5007; Fax: 270-745-2275)  <bryan.carson@wku.edu>

F
tor many years, patent “trolls” have bought up patents, then used this power to file lawsuits against “infringing” companies. Officially known as “non-practicing entities” or NPEs, trolls “derive all or most of their revenue from the enforcement of patents. Patent trolls are clearly distinguishable from major research institutions, universities, and businesses that derive their revenue, respectively, from funded research, tuition and grants, and the sale of products and services. Some of the largest of these NPEs raise large funds with which to purchase the patents they seek to enforce — without any plans to turn those patents into marketable products or services. Instead, they then use these funds to enable — through direct or veiled threats of infringement — their pursuit of royalties from successful businesses."1

Now a new variety of troll has arisen in the realm of copyright. The newspaper industry has fallen on hard times, so Stephens Media LLC has come up with a new way to make money. Stephens Media (the parent company of the Las Vegas Review-Journal) has joined with attorney Steven Gibson to form a joint venture named Righthaven.2

As Bruce Strauch pointed out in his excellent April column for Against the Grain, the business model for Righthaven is to sue Websites, user forums, and blogs whose users have posted copies of articles or photographs from the Las Vegas Review-Journal. The company searches the Internet for material from the paper. When it finds items posted, Righthaven purchases the rights from the Review-Journal, registers the copyright, and files a lawsuit. Between March 2010 and March 2011, the company filed 254 lawsuits for copyright infringement.3

Not only does Righthaven ask for money, in most cases it also requests that the courts transfer the domain names under the provisions of the Digital Millennium Copyright Act.4 According to one blogger, the Righthaven model works as follows: “Most of the lawsuits filed by Righthaven are based upon the display of a single Review Journal article on the offending Website. The lawsuits allege ‘willful’ copyright infringement... Since Righthaven does not send cease and desist letters before filing suit, many of its targets have reported being taken completely by surprise. Indeed, many alleged infringers have reported that they would have voluntarily removed the newspaper articles from their Websites if they had been asked to do so.”5

The Righthaven model has resulted in many small blogs and Websites being charged large sums of money — but still less than it would cost to defend a lawsuit. 120 cases (almost half of those filed) have been settled with revenue of $420,000. This provides an average yield of around $3,500 per case.6 Recently other entities and newspapers have become involved with the Righthaven saga, including WEHCO Media and Media News Group (the parent company of the Denver Post).

The backlash against Righthaven has been swift and broad-based. Many attorneys and journalists have opposed this practice, including the Las Vegas Sun (the other major daily newspaper). The Electronic Freedom Foundation has condemned this model,7 and several anti-Righthaven Websites have been set up.8 Several recent cases have held that the postings are a matter of fair use. In April, the Internet registrar GoDaddy seized the Righthaven domain name after discovering incorrect information in their registration documents.9

Several judges have also found issues with the company’s aggressive enforcement techniques. One significant case was Righthaven v. Democratic Underground (“DU”). The DU (a major blog associated with the Democratic Party) was sued over a five-sentence extract from the paper.10 Righthaven alleged in its complaint that it would suffer irreparable harm because of this publication, and that:

• Righthaven holds the exclusive right to reproduce the Work, pursuant to 17 U.S.C. § 106(1).  
• Righthaven holds the exclusive right to prepare derivative works based upon the Work, pursuant to 17 U.S.C. § 106(2).  
• Righthaven holds the exclusive right to distribute copies of the Work, pursuant to 17 U.S.C. § 106(3).  
• Righthaven holds the exclusive right to publicly display the Work, pursuant to 17 U.S.C. § 106(5).11

However, this case didn’t turn out so well for Righthaven. During the discovery phase, the DU requested that Stephens Media produce their agreement with the Review Journal. After examining this document, DU’s lawyers sought to unseal the agreement and release its contents to the public. The Electronic Freedom Foundation supported this request, which Righthaven and Stephens Media opposed. However, Judge Rodger Hunt (D. Nev) agreed that the document should be unsealed and made public, stating: “consider[ing] the multitude of cases filed by Righthaven, on the claimed basis that Righthaven owns the copyrights to certain Stephens Media copy, it appears to the Court that there is certainly an interest and even a right in all the other defendants sued by Plaintiff to have access to this material.”12

It turns out that the copyright “assignment” is being made solely for the purposes of the litigation, which DU and Righthaven argue makes it invalid and “a sham.”13 The agreement reads in part as follows:

Stephens Media shall retain (and is hereby granted by Righthaven) an exclusive license to Exploit the Stephens Media Assigned Copyrights for any lawful purpose whatsoever and Righthaven shall have no right or license to Exploit or participate in the receipt of royalties from the Exploitation of the Stephens Media Assigned Copyrights other than the right to proceed in association with a Recovery.... Stephens Media shall have the right at any time to terminate, in good faith, any Copyright Assignment (the ‘Assignment Termination’) and enjoy a right to complete reversion to the ownership of any copyright that is the subject of a Copyright Assignment....”14

This agreement makes Stephens Media the real party in interest, even though Stephens has not been filing the lawsuits. The Electronic Freedom Foundation maintains that assignment purely for the purpose of litigation is invalid.15 The Stephens Media agreement is troublesome for another reason. It does not assign all Review-Journal articles. It assigns

continued on page 57

56  Against the Grain / June 2011  <http://www.against-the-grain.com>
only those articles that Stephens Media finds to have been used. The pertinent language reads as follows:

Stephens Media shall assign (at the times stated) to Righthaven, pursuant to the procedures set forth in Section 7: (a) any copyrights owned by Stephens Media that Stephens Media desires to be the subject of Searching (the “Searching Decision”), with each such respective assignment to occur within a reasonable time after Stephens Media makes each respective Searching Decision, (b) any copyrights owned by Stephens Media that Stephens Media considers (the “Material Risk Conclusion”) a material risk of infringement (with each such respective assignment to occur within thirty (30) days after Stephens Media makes each respective Material Risk Conclusion, and (c) within thirty (30) days of having respective Infringement Notice, each and every Infringement Copyright that exist during the Term (the “Assigned Infringed Copyright(s)”).

In a separate case, Judge Hunt also dismissed a Righthaven domain name seizure against Thomas DiBiase, noting that “Congress has never expressly granted plaintiffs in copyright infringement cases the right to seize control over the defendant’s Website domain.” As the Electronic Freedom Foundation noted:

[T]he threat is utterly improper. The country’s most popular online destinations, like the New York Times, Amazon and Yahoo!, have faced copyright infringement allegations based on their ordinary operations. But no one would imagine that a plaintiff alleging copyright infringement against those companies would be entitled to domain-name transfer as a copyright remedy if infringement was established. Consider the Drudge Report, one of many sites that Righthaven sued. Its domain name is estimated to be worth well into the millions of dollars. Transfer would confer a lottery-sized jackpot on the plaintiff and cause catastrophic harm to the defendant — a result that Congress did not and could not have intended when it crafted the copyright damages scheme. Moreover, seizing an entire Website based on a tiny portion of content, even if that content were infringing, necessarily violates the First Amendment.

A recent case demonstrates Righthaven’s model and the procedure of these lawsuits. Wayne Hoehn, an insurance agent in Bowling Green, Kentucky, posted an article to the Website Madjack Sports. The article dealt with unions and sports, and the post included discussion and commentary on the article. In fact, Hoehn’s answer to the complaint stated that: “Hoehn’s use of the work in a discussion forum was for educational purposes, namely to stimulate commentary and criticism, and had no actual or potential effect on the work’s potential market…. The copyrighted work was an informational piece intended to stimulate discussion, and Hoehn’s use of it furthered this goal.”

Since Wayne Hoehn and I both live in Bowling Green, I naturally had to interview him about the case. I spoke with Mr. Hoehn on February 23, 2011. He gave me the factual background of the case, noting that he did give credit to the paper and the author of the article. Again, Mr. Hoehn reiterated that the purpose of the posting was political commentary and discussion, a purpose that is supported by the fair use principles (and, I would argue, the First Amendment).

Mr. Hoehn noted that “It’s really odd in these days when they have share buttons and email…. It’s equivalent to having a recipe and sending it to your mother.” After all, the Review-Journal’s interface actually encourages people to share its articles.

Righthaven did not send a “cease or desist” request to either Mr. Hoehn or the Website owner. Instead, they immediately filed a case in the U.S. District Court for the District of Nevada. Their attorneys then “offered” to settle the case. According to Mr. Hoehn, he could have settled for around $2,500 to $3,000. However, he decided to fight the case “as a matter of principle.” Mr. Hoehn stated that: “I’ll cost me more in the short term, but it will save some money in the long run for going through this stuff in the future.” He contacted the Electronic Freedom Foundation, which put him in touch with anti-Righthaven attorney Marc J. Randazza.

On February 2, 2011, Mr. Hoehn’s attorneys filed a motion for summary judgment on the grounds that the use was transformative and protected under the fair use doctrine. After Righthaven opposed this motion, Mr. Hoehn filed another brief, relying heavily on the decision of Judge James Mahan in Righthaven v. Center for Intercultural Organizing (hereinafter “CIO case”), which is discussed extensively below. Finally, based on the results of the Democratic Underground case, Mr. Hoehn’s attorneys filed a motion to dismiss for lack of subject matter jurisdiction.

In the CIO case, Judge James Mahan granted summary judgment in favor of the defendant on fair use grounds. This case arose after the CIO posted an article in its entirety on their Website. “The disputed article discusses whether police in the Las Vegas area were targeting minorities. Defendants, an Oregon nonprofit organization dedicated to helping immigrants become aware of immigration-related issues in the United States, posted the article in its entirety on their Website, purportedly to educate the public about the issues contained therein.”

The CIO claimed that the fair use provisions of 17 U.S.C. § 107 allowed this article to be posted. Many people think of fair use as an exception to copyright law, but in reality it is an affirmative defense. In other words, the defendant tells the court that “I did violate the owner’s exclusive rights, but I was entitled to do so.” Thus in the CIO case, it made sense for the defendants to claim fair use. The language of § 107 reads as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by or other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include —

1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2) The nature of the copyrighted work;
3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4) The effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The four factors listed above are the basis of the fair use doctrine. When analyzing the use of a work, it is important to always look at all four of these factors. The “purpose and character of the use” involves asking whether the use is for the purpose of making money. The “nature of the copyrighted work” deals with the material itself. The use is more likely to be fair if the work is non-fiction or factual. It is less likely that the use is for literary, or creative work will be fair, although even then comment, criticism, teaching, and scholarship may provide a reason to use portions of a copyrighted work.

“The amount and substantiality of the portion used” does not lay out a specific amount. The amount must be “reasonable” (whatever that means!). There are many myths about this provision. For example, some people claim that there is a specific page limit. Others believe that using a single chapter of a book is always fair use. These myths are not true. The amount that is “reasonable” is the amount that is necessary to use for the particular context.

continued on page 58
Copyright Act’s §101, as pointed out by a recent article in the John Marshall Law School Review of Intellectual Property Law.

Righthaven’s misguided attempt to monetize news via copyright enforcement is now clearly under attack. Judge John Kane, who is hearing the Righthaven cases in Colorado, wrote in Righthaven v. Brian D. Hill that the Righthaven business model “relies in large part upon reaching settlement agreements with a minimal investment of time and effort.... The purpose of the courts is to provide a forum for the orderly, just, and timely resolution of controversies and disputes. Plaintiff’s wishes to the contrary, the courts are not merely tools for encouraging and exacting settlements from defendants cowed by the potential costs of litigation and liability.” When Righthaven sought to voluntarily dismiss this case, Judge Kane ruled that the dismissal would be unfair and prejudicial.

The Righthaven model is based on fear and intimidation. Yet this is clearly the wrong model for the beleaguered newspaper industry. Instead, many newspapers are now erecting pay walls, forcing would-be readers to subscribe online just as they did in print. The New York Times will now allow readers to access up to 20 articles per month before being asked to pay. A subscription service is available for readers who intend to read lots of articles. The Daily O’Collegian at Oklahoma State University has erected a pay wall for readers who are not affiliated with the institution. While these attempts to lure the genie back into the bottle may yet turn out to be futile, at least newspapers are experimenting with new business models in an attempt to save their core business — without resorting to copyright claims.

So many cases have ruled against their claims that Stephens Media has now been forced to hire an expensive litigator. However, this expense will eat up much of the quick profits that Righthaven has made. Along with the ensuing judicial backlash, Righthaven’s model is turning out to be problematic. According to Eric Goldman, director of the High Tech Law Institute at Santa Clara University Law School of Law, Righthaven’s business model is the wrong way:

Their model assumes lots of quick settlements, and their profit/loss projections may not have anticipated just how many — and how hard — defendants would fight back in court. I wouldn’t be a bit surprised if Ms. Cendali’s fees in this case end up being many multiples of the maximum damages that Righthaven could possibly hope to get from Pahrump Life. That’s hardly a path to riches for Righthaven.
Legally Speaking Endnotes
4. 7 U.S.C. § 512(c).
11. Opsahl, Kurt. (2011, April 18th). Why Right-

havin's Copyright Assignment Is A Sham – And Why It Matters. *Electronic Freedom Foundation*. http://www.eff.org/deeplinks/2011/04/why-right-
haven-s-copyright-assignment-sham-and-why
haven_v_dem/2-10-cv-01356_93.pdf
14. Strategic Alliance Agreement between Righ-
haven LLC and Stephens Media LLC (January 18, 2010), at http://www.eff.org/files/node/righ-
haven_v_dem/79-1.pdf.
15. Opsahl.
16. Strategic Alliance Agreement.
haven_v_db/2-10-cv-01343-RLL-PAL-Order.pdf.
haven-domain-name-claim
21. Telephone Interview with Wayne Hoehn, Bowling Green, Kentucky (February 23, 2011).
26. CIO case at 2.
27. CIO case at 4.
28. CIO case at 5.
29. CIO case at 5.
31. 2 Live Crew case at 856-857.
32. CIO case at 5.
33. CIO case at 7.
34. CIO case at 7.