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Cases of Note-Copyright-To Exploit or Not to Exploit; That is the Question

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Dibiase and Thomas DiBiase are our defendants in question with their cases consolidated on appeal. The district court found in each case that Righthaven lacked standing to sue as it was not the owner of any of the exclusive rights under copyright law. In the Hoehn case, the judge found that fair use was available as a defense in the alternative.

And now we get an attempt at homespun humor. The circuit judge tells the tale of ol’ Rail-splitter Abe Lincoln telling the tale of a lawyer trying to establish a calf had five legs by calling the tail a leg. But old Abe sagely observed that calling a tail a leg does not make it so. And thus the 9th Circuit sagely notes that calling someone a copyright owner does not make it so.

Wayne Hoehn and Thomas DiBiase are our defendants in question with their cases consolidated on appeal. The district court found in each case that Righthaven lacked standing to sue as it was not the owner of any of the exclusive rights under copyright law. In the Hoehn case, the judge found that fair use was available as a defense in the alternative.

And whups! We find that Dibiase is a practicing lawyer and was once an assistant U.S. attorney. Not a good candidate for a quick settlement shake-down. He runs a blog about murders where no body is found.

And it’s fairly interesting. Check it out.

Steps Media — owner of the Review-Journal — entered into the SAA with Righthaven reserving a strict veto right on who was sued. Righthaven could not exploit the copyright in the usual ways or participate in copyright royalties. And after all was settled with a suit, Righthaven was to reassign copyright to Stephens.

Only the “legal or beneficial owner of an exclusive right under a copyright” has standing to sue. See 17 U.S.C. § 501(b); Silvers v. Sony Pictures Entertainment, Inc., 401 F3d 881,890 (9th Cir. 2005) (en banc).

In law school I always used to think it was so cool to put “en banc” in a citation. It seemed to resound with the majesty of the law.

Section 106 lists the exclusive rights: reproduce; do derivative works; sell, rent, lease, lend copies. And Silvers addresses the very issue we have here. The bare right to sue for infringement does not confer standing.

Yes, some really super legal research on the parts of Righthaven and Stephens’ in-house counsel. But, hey, it’s Vegas. You can easily see the screenplay for the movie version of this.

Righthaven points to the SAA language “all copyright requisite to have Righthaven recognize[d] as the copyright owner of the work for purposes of Righthaven being able to claim ownership as well as the right to seek redress for past, present, and future infringements of the copyright … in and to the Work.”

Now, shall we lean down from the bench, sigh, and remind Righthaven’s counsel of country lawyer Abe and the five-legged calf? Yes, let’s.

You have to look beyond the labels to the substance and effect of the contract. Stephens Media retained “the un fettered and exclusive ability” to exploit the copyright. Righthaven had no right to exploit.

And Righthaven continued to tap dance. Righthaven was given full ownership under the assignment, see? But then the SAA granted Stephens an exclusive license. So they had copyright? Right?

No. Even if they did, in granting the exclusive license to Stephens, Righthaven no longer had the exclusive rights. And only the exclusive licensee can sue for infringement. 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 12.02[C] (2012).

This whole thing was so in the news there for a while. But stop and think. Is there any real exploitation of Vegas-Journal news articles possible after the day’s issue becomes fish wrap?

So all this time and money were squandered flailing at those pesky bloggers of the new media who are making life so gosh-darned unpleasant for the stuffy, geriatric old media. 😞