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Rumors

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Against the Grain

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APRIL 1994

Against the Grain

"Linking Publishers, Vendors and Librarians"

ISSN: 1043-2094

Legally Speaking

Attorneys' Fees in Copyright Disputes

by **Stuart I. Graff** (Schiff Hardin & Waite, Chicago, Illinois)

Leave it to lawyers to take something simple, make it complex, and then litigate it up to the U.S. Supreme Court in order to make it simple again.

As you know, the American legal system is an offshoot of the British legal system, inherited when colonists revolted against the British and established their independence in 1776. Since that time, the American legal system has achieved still greater independence from its British ancestor, with numerous differences between the American and British systems emerg-

ing over the last two hundred eighteen years. One such difference is in the award of attorneys' fees and court costs to prevailing parties in litigation. Under the "British Rule," a prevailing party is generally awarded the costs that it has incurred in litigation, and the losing party is required to pay those costs. In contrast is the "American Rule," under which each party generally bears its own litigation expenses, unless provided otherwise by statute, or unless a party has litigated a matter without a proper factual or legal basis to do so.

When it enacted the most recent version of the copyright laws in 1976, Congress created such an exception to the American Rule, which is embodied in § 505 of the Copyright Act. Section 505 provides that, in a civil suit for copyright infringement, "the court in its discretion may allow the recovery of full costs by or against any party . . . [T]he court may also award a reasonable attorney's fee to the prevailing party as part of the costs." Thus, it would seem clear that *any* prevailing party in a copyright infringement suit might be able to recover its costs, including attorney's fees, in prosecuting or defending the suit.

Such clarity has not, until recently, prevailed. In a rule established by certain of the regional courts of appeal, a double standard emerged for awarding costs and fees. In many (but not all) courts, prevailing plaintiffs — copyright owners — were generally awarded fees as a matter of course. On the other hand, those courts seldom awarded to defendants — accused infringers — their litigation expenses. To recover those

If Rumors Were Horses

Stunning news! The urbane and erudite **John Cox**, managing director of **B.H. Blackwell** has resigned effective the end of May to become President of **Carfax Publishing Company** in England. John sends us word, however, that he is still planning on coming to the 1994 Charleston Conference where he will hopefully be speaking!

Brian Cox writes that following the acquisition of **Pergamon Press** by **Elsevier** in May 1991, the Pergamon and Elsevier Science companies in the UK and the USA

have been merged under the **Elsevier Science** banner from January 1994. **Elsevier Science Ltd** covers the following imprints which will continue: Pergamon, Elsevier Applied Science, Elsevier Trends Journals, and Elsevier Advanced Technology. From March 1994, Elsevier Science has moved to new offices at: Elsevier Science Ltd., The Boulevard, Langford Lane, Kidlington, Oxford OX5 1GB England UK. Headington Hill Hall which had been the home of Pergamon Press Ltd since 1960 has become part of **Oxford Brookes University** which was the former Oxford Polytechnic.

ACRL (The Association of College & Research Libraries) is planning its Seventh National Conference on March 29-April 1, 1995 in Pittsburgh, Pennsylvania. For further information contact ACRL in Chicago. 800-545-2433 x2522 or Fax 312-280-2520.

This issue of **Against the Grain** was printed on recycled paper.

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Rumors
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Linda Crismond's new book, *Against All Odds, Case Studies in Library Financial Management* (Highsmith) has just been published. Congratulations, Linda!

VTLS, Inc. has reached an agreement with **Virginia Tech Intellectual Properties (VTIP)**, a related corporation of Virginia Tech, to buy out VTIP's interest in the company for \$2.64 million. Further, **Vinod Chachra**, president of VTLS Inc., has made a gift of his rights, title and interest in the VTLS software to the Virginia Tech Foundation. The gift will be used to establish a \$200,000 endowment for faculty and staff development at Virginia Tech's Newman Library and will also provide \$50,000 for library system upgrades.

A **Microsoft Windows™** version of **Books in Print Plus™** will be available in late 1994. **Bowker•Reed Reference Electronic Publishing** has announced. A prototype will be shown at the ALA Summer Meeting in Miami. Stay tuned.

Data Research Associates, Inc. (NASDAQ: DRAI) has announced that they have signed a Letter of Intent for the purchase of the library automation system and related assets of **multiLIS**, a division of **Sobeco Ernst & Young, Inc.**, and of certain assets of multiLIS' distributors: multiLIS Corporation, Avec Technical Services, Inc.; Multicore Library Systems, Inc.; and multiLIS Europe S.A. Data Research intends to purchase the assets for an undisclosed cash amount, subject to the execution of a definitive asset purchase agreement and other conditions.

Mary Ann Liebert, Inc. have just published *The Author's Guide to Biomedical Journals: Complete Manuscript Submission Instructions for 185 Leading Biomedical Periodicals* (\$175, 0913113511). This impressive spiral bound book consists of the unabridged instructions for each of the 185 leading U.S. and overseas biomedical journals.

The United Kingdom Serials Group (UKSG) has announced their 17th Annual Conference, to be held April 11-14, 1994 at the University of Manchester Inst. of Science and Technology, Man-

chester, England. For further details and booking information, contact: **Jill Tolson**, UKSG Administrator, 114 Woodstock Road, Witney OX8 6DY, UK. Tel 0993 703466. Fax 0993778879. Email uksg@uk.ac.bham.

EFSG (European Federation of Serials Groups) has also announced their **Third European Serials Conference**, scheduled for September 25-27, 1995 at the Polytechnic University of Valencia, Spain. For further information contact **Jill Tolson** at the address above.

The Society for Scholarly Publishing is planning their Sixteenth Annual Meeting in San Francisco, CA, June 8-10. The charming **Nancy Hammerman** of **Sage** is the meeting chair. For further details contact SSP at 303-422-3914; Fax 303-422-8894. Internet: 5686814@mcimail.com.

John Perry Smith (see our interview with him, this issue, page 18) just got back from an Aretha Franklin concert where they sat next to the Trump family (The Donald Himself, Marla, Baby Tiffany, and the two daughters from the previous marriage). Hmmm. . .

Joyce Ogburn and **Edna Laughrey** have worked long and hard on an **ATG Readers' Survey** which you should be getting shortly! Please FILL IT OUT! Tell us what you think! And we almost forgot to say thanks!

Gilles de La Rochefoucauld (Aux Amateurs) and his wife **Sylvia** have just returned to Paris from a two-week vacation in other parts of Europe. We miss his contribution in *ATG* this issue, but hope it will be back in June, right Gilles?

Matt Nauman (Blackwell North America) is quite a skier. He and his family just went skiing this past weekend and he didn't fall down one time (did you, Matt?). Anyway, some people have all the snow! Even if they aren't in the Northeast. At least someone has had some fun in this weather. Oh yes, I forgot to mention **Phil Greene** (EBSCO) who just got back from snow-mobiling (that's right, Batman) in Yellowstone with his family for a winter vacation. He says of all the trips he has ever taken, this was the most unbelievable! Wow!

Eleanor Cook (Appalachian State)

is the new editor of **ACQNET**. Read her column **Firehose** (page 48, this issue). Congratulations, Eleanor! And getting back to *Firehose*, Eleanor wants to start something new with it — contributions from people about issues on the Internet. She says that ideas and contributions are welcome!

More big news from Western N.C. **Eleanor** also writes that **Appalachian State University** has a new online system and it is **Innovative Interfaces**.

Okay. A lot of people got stranded in LA for a day when they couldn't go North because of the big snowstorm. Some people were annoyed. But one was really ecstatic. Who and why? It was **Gary Herald** (Ambassador Book Service). Gary got tickets to *Seinfeld* and got to join 100 of the cognoscente at a three-hour taping for the half-hour show! Sounds good to me! Until the next day when it took him thirteen hours to get home to the 14th snowstorm and 52nd inch of snow to fall this winter in his neck of the woods!

Ran into **Virginia Rodes** on the exhibit floor in LA. She was wearing a beautiful blue stone ring and looked her usual smiling fabulous self. Things seem to be going well at **Biosis** for her!

And also ran into **Dara Touma** (once of **M.E. Sharpe**) and now with Millbrook which publishes children's books. She looks as great as always.

Not to mention **Dimi Berkner** (Berkner Associates). Dimi loves San Francisco and is setting up her consulting practice. Congrats, Dimi! Write us when you can!

And the fabulous **Herman Pabbuwe** has been promoted to President of **Wolters Kluwer** in Amsterdam. **Franz van Eysinga** is President of the whole shlemiel. Congrats to both of them! Will you still dance, Hermann, or will you become even more dignified?

The Librarians Yellow Pages was recently mailed free to subscribers of *ATG*. If you have comments about this, please let us hear them, okay? Also, read our interview with **Raissa Fomerand**, the librarian/creator of the *LYP* in this issue, page 46.

And **Joe Sollitto** is now working with the *LYP* among other things in his hectic life. Great, Joe, and we all hope to see you sometime soon!

Just got an article from the December 2, 1993 *Jewish Weekly News* on **Ken Schoen** and **Jane Trigere** who run **Schoen Books** in Easthampton, MA (see their ads in earlier issues of *ATG*). According to the charming article, Schoen and Trigere own one of only a handful of bookstores selling scholarly, out-of-print Judaica. The article also includes a picture of the attractive couple among all their books. Check it out!

Research Publications International has been awarded the **Kodak Gold Star Quality Award** for significant improvements in microfilm camera, printing and production processes during 1993. RPI is headquartered in Woodbridge, Conn., and is a member of **International Thompson Publishing Group** of the Thompson Corporation. Congratulations to **Ann Hartman**, RPI's president and CEO and a truly fabulous woman!

University Publications of America is now the distributor in North and South America for **K.G. Saur** research collections. UPA and K.G. Saur are affiliates within the **Reed Reference Publishing Company**.

Pam Cenzer (U. of Florida) writes that she liked **Rumors** on the front page better (what did the rest of you think?). She also sends information on the *Chicago Journal of Theoretical Computer Science* which is an electronic, peer-reviewed, high quality journal scheduled to premier in April 1994 from **The MIT**

Press. The Press has worked closely with the MIT Libraries and researchers from the University of Chicago to develop the new journal. Billed as "a vision of a new relationship between publishers and libraries," the journal will be edited by **Stuart Kurtz**, **Michael O'Donnell**, and **Janos Simon** at the University of Chicago. Some pretty interesting stuff. As a library subscriber, the information which I have says you have permission to: "store the Journal on any file server under your control, and make it available online to the local community to print or download copies; print out individual articles and other items for inclusion in your periodical collection; place the Journal on your campus network for access by local users or post article listings and notices on the network to inform your users of what is available; print out individual articles and other items from the Journal for the personal scholarly use of readers; print out articles and other items for storage on reserve if requested by professor, student, or university staff; share print or electronic copy of the Journal with other libraries under standard interlibrary loan procedures; convert material from the Journal to another medium (i.e. microfilm/fiche/CD) for storage." Wow. All this for \$125 (institution). For further information contact: Circulation Department, MIT Press Journals, 55 Hayward Street; Cambridge, MA 02142-1399.

The February 21, 1994 issue of *The Scientist* contains an articles by **Franklin Hoke** entitled "Scientists Press for Boost in Federal Library Funding." The article includes comments by **Ann Okerson** (ARL) and **Albert Henderson** (new editor, *Publishing Research Quarterly*). Under discussion is journal pricing and

the need for increased library funding as well as print and electronic resources. There is more than enough debate. Worth a read.

The Board of Directors of the **American National Standards Institute** (ANSI) has confirmed the appointment of **Sandra Koodin Paul** as a member of ANSI's Executive Standards Council for a three-year term starting January 1, 1994. This Council coordinates overall national and international standardization activities of the Institute. Congratulations, Sandy. Do you eat ice cream according to the standards?

Readmore, Inc., has announced the development of **BAR-PRO™**, a generic program for production of barcodes for serials applications. This program provides customized barcodes that can be used for any library application and on any local library system. For further information, contact Judy Schott, 800-221-3306.

CARL Corporation has just announced that **Bibliomation, Inc.**, a consortium of 43 public and academic libraries located in Western and Northeastern sections of Connecticut, has selected the **CARL System** for its integrated library system. Bibliomation is the second Connecticut network to migrate to the CARL System.

I refuse to be stereotyped when I'm not watching! But did YOU see **LA Law** on 2/24/94? I hear that a librarian who met all of the stereotypes fainted every time the wrong word was said in her presence! And read on about another type of librarian in **Karen Schmidt's Plus ca change** (this issue, page 16).

We would like to thank
Ambassador Book Service
and **The Book House**
for their generous contributions!
Thanks go as well to **Ballen Booksellers**,
Franklin Book Company, and **Sage Publications**.

We don't have **Acquiring Minds** this issue. **Joyce Ogburn (Yale)** tried her darndest but she has been laid up with a bad back. Get better, Joyce!

Marcia Tuttle (UNC-CH) will be heading to England and Wales in April. Have a great time, Marcia. Watch for our interview with Marcia in a future issue of ATG!

Karen Schmidt (U. of Illinois, Urbana-Champaign) and **Katina**, not to mention **Lyman Newlin** have been working hard on an interview with the Lyman for *Against the Grain*. We were hoping to have the interview in this issue but — well — sometimes it's hard to get Lyman to finish a sentence — plus he's got so much to tell us about his full life in bookselling. Look for our interview with Lyman in the June issue of ATG!

After ALA Midwinter, **Christian Boissonnas (Cornell)** and his family went to Oakland where they married their son David off. Christian writes that the weather was warm and beautiful and that a good time was had by all. The treat of the party was grandson, **Brendan David Dunlap**, who was perfect and tried to ignore all the adults.

Kathy Miraglia spent a month in Texas visiting her sister and doing other family stuff. We are looking forward to her work on ATG in the **On the Street** column in the future. If anyone else is interested in working on this, please contact either Kathy or Katina.

Charles Getchell (Wake Forest University) reports that **Jill Carraway** has succeeded **Barbara Salt** as Acquisitions/Collection Management Librarian. Jill was most recently Automation Librarian as well as Women's Studies Bibliographer.

In the November 1993 ATG, we reported that the Cuban poet **Eliseo Diegos** had won the International Literary Prize, "Juan Rulfo." ATG has to report in this issue the death of Senor Diegos on or about March 1, 1994. This news courtesy of **Bertha Alvarez** (President of Scripta Distribucion y Servicios Editoriales in Mexico City) and **Lyman Newlin** (Book Trade Counselor).

Basch Associates announces the following upcoming seminars: May 27, Chicago, IL; June 6, Cambridge, MA; June 17, New York, NY; and June 20 Silver Spring, MD. For further information: 312-787-6885 or fax 312-787-6779.

Just ran across an incredibly useful book, *The Home Office and Small Business Answer Book* by **Janet Attard** (Holt, 1993), chock full of all kinds of practical information. Another interesting book, just received on approval, *Doing Business on the Internet* (Van Nostrand Reinhold, 1994).

Sometimes we don't say thank you. *Choice* magazine is celebrating its 30th anniversary this year. What would we do without it? This group of hard-working people work daily to produce a selection tool for all of us out here in the trenches. Congratulations to *Choice* and to **Pat Sabosik**, Editor and Publisher!

Still love **Dialogue, the Business of Publishing**, done in fall, winter and spring by **Helmut Schwarzer** (Yankee Book Peddler). The fall/winter, 1993 issue includes a lead article called, "Harpies, Sharpies, Rascals & Rogues: Some Lunatic, but Profitable Fringes of Publishing." This is a "portrait gallery" of some of the "practitioners, not the practice, that have given this branch of publishing [subsidy or co-operative publishing] a bad name." Fascinating, historical, informative and at times funny. For a copy contact the Marketing Department of YBP. ☞

Legally Speaking from page 1

expenses, prevailing defendants often had to show that the plaintiff's suit was frivolous, or was initiated in bad faith. One court explained the reason for this difference:

The purpose of [this double standard] is to avoid chilling a copyright holder's incentive to sue on colorable claims, and thereby to give full effect to the broad protection for copyrights intended by the Copyright Act.

Fogerty v. Fantasy, Inc., 984 F.2d 1524, 1532 (9th Cir. 1993). As a result of this double standard, a prevailing defendant's opportunity to recover litigation expenses was circumscribed and depended upon where the plaintiff filed the litigation.

A unanimous U.S. Supreme Court recently overturned the double standard and held that the prevailing party —

whether plaintiff or defendant — is entitled to its attorneys' fees and other litigation costs without demonstrating either bad faith by its opponent or that the litigation was frivolous in nature. *Fogerty v. Fantasy, Inc.*, No. 92-1750 (March 1, 1994), reported at 1994 U.S. LEXIS 2042. The Court also reaffirmed that the award of fees under § 505 is within the discretion of the courts, so that fee awards are not required in every case.

In reaching its conclusions, the Court observed that § 505 did not require courts to treat plaintiffs differently than they treated defendants. As the Court observed, "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious infringement claims." 1994 U.S. LEXIS at *3. In so holding, the Court recognized that there is a public interest in promoting and protecting not only the creative endeavors of copyright owners, but also the efforts of those who may be wrongly accused of infringement.

One question remaining after the Court's decision will be whether courts will now award attorneys' fees to prevailing defendants as readily as they awarded fees to prevailing plaintiffs in the past, or whether awards to plaintiffs will become the exception rather than the rule. Looking to the practice of courts that had previously rejected the double standard is of little help. Certain courts required the prevailing party to show its opponent's bad faith or other evidence that suggested that a fee award would act as a deterrent to inappropriate litigation. Other courts required no showing of bad faith at all, making it just one of many factors related to the use of litigation to serve the underlying purposes of the copyright laws — promoting creativity by providing the broadest possible exclusive markets in which copyright holders could commercialize their works. See generally 2 P. GOLDSTEIN, COPYRIGHT § 12.3.2.2 (1989). The Supreme Court in *Fogerty* alluded to such approaches, but it is not likely that any single approach to attorneys' fee awards