February 1996

Cases of Note

Anne F. Jennings
Sinkler & Boyd

Jack G. Montgomery
University of Missouri

Follow this and additional works at: <https://docs.lib.purdue.edu/atg>

Part of the [Library and Information Science Commons](#)

Recommended Citation

Jennings, Anne F. and Montgomery, Jack G. (1996) "Cases of Note," *Against the Grain*: Vol. 8: Iss. 1, Article 15.
DOI: <https://doi.org/10.7771/2380-176X.1869>

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: Anne Jennings (Sinkler & Boyd) <jenningsa@cofc.edu>
Jack Montgomery (University of Missouri, Columbia)
<MONTGOMERY@law.missouri.edu>

*As we approach the next century and move further into the electronic age, we believe that copyright and intellectual property law will become even more important than it is today for librarians and those associated with the information industry. There are many issues that we feel we all must keep abreast of. We welcome your contributions and input to this new section of **Against the Grain**. Please let us know what you would like to see in these pages in the future. If there are questions that you would like to see answered here, please send them in to one of us. Thanks. — AJ & JM*

Cases of Note

Religious Technology Center v. Netcom Online Communication

Column Editor: Anne F. Jennings
(Sinkler & Boyd) (jenningsa@cofc.edu)

Who is Liable for the Posting of Copyrighted Electronic Data?

**Religious Technology Center and
Bridge Publications, Inc. v. Netcom
Online Communication Services, Inc.,
Dennis Erlich, and Tom Klemesrud d/b/
a Clearwood Data Services**

In the June issue of *Against the Grain*, p.54 (v. 7, #3, p. 54), we first informed you of the pending action brought by Religious Technology Center as a representative of the Church of Scientology and holders of the copyrights to the published and unpublished works of the late L. Ron Hubbard, church founder, against Arnaldo Lerma, Digital Gateway Systems, *The Washington Post*, Marc Fisher, and Richard Leiby in which the plaintiff (RTC) attempted to block publication of excerpts of Church documents. As we go to press, Judge Leonie M. Brinkema has issued two opinions in this case, the first dismissing RTC's claim against *The Post* and awarding attorney's fees to the defendant and the second reaffirming a previous order which required RTC to return to the defendant Lerma all documents seized as a part of the litigation process. Lerma is a former church member who published portions of its religious texts on the Internet. In the next issue of *Against the Grain* we will bring more information on these rulings.

The above-referenced suit is just one of a series of complaints filed by RTC in an effort to prevent electronic dissemination of what they declare are "secret documents". On November 27th, a district judge in San Jose, California issued the first ruling of its kind addressing the issue of liability in a copyright case wherein items have been "published" over the Internet. This matter involves Dennis Erlich, a former Scientology minister and present vocal critic of the Church. Mr. Erlich's pulpit is now a Usenet newsgroup on which he posts portions of Hubbard's writings and other Church records. Erlich gains access to the Internet through a bulletin board service owned and operated by defendant Klemesrud who in turn has a agreement with defendant Netcom for Internet service.

This, as you may realize, is an extremely complicated matter, the first of its kind, wherein the plaintiffs seek to hold defendants Netcom and Klemesrud liable for allowing Erlich to post electronic data, transferred through fiber optic mechanisms, jointly liable for copyright violations. In a Summary Judgment opinion issued November 21st, District Court Judge Ronald M. Whyte, for the Northern District of California, found that an online service can be held liable in such an instance. The ruling

does not mean that Netcom is liable, but rather that plaintiffs' have sufficient cause to make a claim against the defendants and plaintiffs' claims can proceed.

Briefly, plaintiffs, when they became aware of Erlich's postings, initially attempted to convince him to discontinue putting the Hubbard documents on the Internet. When those efforts failed, they contacted Klemesrud and Netcom. Netcom responded that it would be impossible to pre-screen Erlich's postings and that if they were to essentially kick Erlich off of the Internet, they would also have to discontinue service to all Klemesrud's subscribers.

On June 23, 1995, the District Court heard Netcom's Motion to Dismiss which it treated as a Motion for Summary Judgment. Summary Judgment is granted when a party demonstrates that there is no genuine issue of material fact relative to a claim. A "genuine issue" is one in which sufficient evidence supports the likelihood that a reasonable juror could find in favor of the party opposing the motion.

Plaintiffs' argument asserting Defendant Netcom's liability on the issue of infringement is that although Netcom was not the

continued on page 48

Sidebar

by Anne F. Jennings

(Sinkler & Boyd)

<74313.3336@compuserve.com>

Two other recent cases which have come to the attention of copyright watchers include **Frank Music Corp. and The Harry Fox Agency et al. v. CompuServe**, a class action alleging copyright infringement on the part of the online service which allowed users to download protected songs. The other matter stems from a suit initiated by writer **Leon Arden** against the producers of the movie **Groundhog Day** starring **Bill Murray** and **Andie McDowell** which, he alleged was based on his 1981 book **One Fine Day**.

The CompuServe suit alleged that the defendant, an online service provider, is responsible for violations to the copyrights of more than 900 songs, including the hit **Unchained Melody**, by allowing service subscribers to upload and download various sound recordings to and from the CompuServe databases and that CompuServe facilitated such violations of the copyright law. On November 7, 1995, settlement was reached in this matter wherein CompuServe agreed to pay \$568,000 to the Harry Fox Agency which will then, after first deducting the costs of litigation, divide the monies among those music publishers whose songs were the subject of this claim. The settlement agreement was not an admission of guilt by the defendant and all parties have reserved their rights according to copyright law.

A brief blurb in the entertainment section of the Charleston (*Post & Courier*) newspaper recently reported that a suit claiming copyright infringement against the producers of the movie **Groundhog Day** by **Leon Arden** has been dismissed. Apparently, in 1981 Mr. Arden published a book entitled **One Fine Day** wherein the main character is trapped in a day that repeats itself. District Court Judge **Denny Chin** allowed that although both the book and the movie were based on similar concepts or ideas, ideas are not copyrightable, and the law has sought to strike a balance between protecting original works and promoting further creativity. 🌿

Cases of Note

from page 47

source of the postings, it nevertheless, as a participant in the chain of transmission, should be held responsible, either directly, contributorily and/or vicariously. The Court's findings were as follows:

1. As to Direct Liability:

According to 17 USC sec. 504(c), a finding of direct liability requires intent or a particular state of mind. Netcom, unlike Prodigy, America Online or CompuServe, does not create or control the content of the information available to subscribers and it does not monitor messages or postings. However, Netcom admits that it is possible to reprogram its system to look for particular words or postings by particular individuals. Netcom also admits that subsequent to plaintiffs' notification of Erlich's alleged infringement, Netcom made no effort to institute such a program.

A violation of copyright must consist of the creation of works of authorship in a fixed medium of expression. A prior finding in **MAI Systems Corp. v. Peak** established that loading data from a storage device into RAM constitutes "copying" and therefore "fixation" according to the Copyright Act.

Netcom asserts that no affirmative action was made on its behalf to copy the materials, that it did not initiate the copying and its system operates without human intervention. As such, the court found that plaintiff's theory, if upheld at trial, would lead to "unreasonable liability." It would not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement was nothing more than setting up and operating a system that is necessary for the function of the Internet. Therefore, Judge Whyte found that Netcom cannot be held directly liable.

2. As to Contributory Liability:

The defendant Netcom may still be held contributorily liable for infringement. For this to occur, the plaintiff must establish that the defendant, "with knowledge of infringing activity, induces, causes or materially contributes to the infringing conduct of another." Because Netcom was given notice of an infringement claim before Erlich completed his infringing activity and allowed his messages to remain on its system and be further distributed to Usenet servers, the court found that plaintiffs had succeeded in raising "a genuine issue of material fact as to their theory of contributory infringement."

3. As to Vicarious Liability:

A defendant can be found vicariously liable for the actions of a primary infringer when said defendant has the right and ability to control the infringer's acts AND when it receives direct financial benefit from the infringement. Both elements must be con-

sidered; however, knowledge is not an issue when proving vicarious liability.

Judge Whyte determined that there was a genuine issue of fact as to whether Netcom was able to exercise control over subscribers, including Erlich, but plaintiffs failed to provide evidence of financial benefit and, as a result, their claim of vicarious liability was not supportable.

In defense of its Motion, Netcom offered two arguments to the court. The first was that plaintiffs' theory "contravenes the First Amendment" (emp. added), subjecting all Internet users to liability. (Netcom admitted that the First Amendment defense was actually made for the purpose of supporting its claim of fair use.) The other argument was fair use. The court's findings as to Netcom and the four fair use factors were:

1. The purpose and character of the use issue weighed in favor of Netcom because it "does not itself provide the files or solicit the infringing works."

2. The nature of the copyrighted work was not important to the claims by plaintiffs because Netcom's purpose in posting the works was different from plaintiffs' use of the works.

3. The court also found that the amount & substantiality factor was not valid in that defendant had no alternative other than to post the entire message or to not post at all as pre-screening postings is not feasible.

4. The courts have found the fourth factor, the effect on the potential market value, to be the most important issue, although all must be considered together. Netcom asserts that to find the defendant liable on this matter, the postings must fulfill the demand of individuals who seek to follow Hubbard's teachings. Because of the widespread distribution capabilities of the Internet, of which there are more than 25 million people worldwide who have access, the court found that a genuine issue of evidence existed to support the possibility of infringement which could have an ultimate effect on the market for plaintiffs' works. Therefore the court denied Netcom's claim of fair use as a matter of law.

In summary, the findings of Judge Whyte were:

1. As to direct and vicarious liability, defendant's Motion for Summary Judgment was granted and those allegations were stricken from plaintiff's claim.

2. As to contributory negligence, the court found that plaintiff's had raised a genuine issue of fact based on the law, and as a result, Netcom was not entitled to Summary Judgment on that issue.

It should be noted that had Netcom succeeded in either of its defenses, First Amendment rights or fair use, it would have prevailed and Judge Whyte would have granted the Motion for Summary Judgment in its entirety. 🌿