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Biz of Acq -- Developing Book Donation Resources

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Federal Copyright Preemption

Abercrombie said this was really a copyright issue and thus federal Copyright Act preempted state law.

"When acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S. Ct. 683 (1987). Plus 17 U.S.C. § 301 says states are prohibited from legislating in the area of copyright.

Dude photos are pictorial works of authorship and protected by the Copyright Act. See 17 U.S.C. § 191 ("pictorial ... works include ... photographs.") But the squabble is not over the use of LeRoy Grannis' photos as creative works of authorship that's at issue. The fight is over the use of dude's names and likenesses.

The mighty **Nimmer** weighs in on the issue with:

"The 'work' that is the subject matter of the right of publicity is the persona, i.e., the name and likeness of a celebrity or other individual. A persona can hardly be said to constitute a 'writing' of an 'author' within the meaning of the copyright clause of the Constitution. A fortiori it is not a 'work of authorship' under the Act. Such name or likeness does not become a work of authorship simply because it is embodied in a copyrightable work such as a photograph." 1 Nimmer on Copyright § 1.01 [B][1][c] at 1-23 (1999).

Got that? What he's saying is "me, myself & I" is a persona — an identity — a "gosh I'm special" — and owned by me separate from any photo made of me.

Whether Grannis had properly conveyed his copyright interest in the photos for \$100 each is a separate thing.

The Fifth Circuit held the same distinction between misappropriation and copyright when a record company used names and likenesses of musicians and song writers on its CD's, catalogs and posters. See *Brown v. Ames*, 201 F.3d 654, 661 (5th Cir. 2000).

Likewise the California Court of Appeal in *KNB Enterprises v. Matthews*, 78 Cal. App. 4th 362 (Ct. App. 2000) in a case involving erotic photos put up on a website for profit and without permission.

Lanham Act

Dudes also brought a claim for trademark confusion under the Lanham Act which the district court nixed. The Ninth Circuit's holding in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979) puts celebrity confusion on a par with any other commercial confusion.

As the confusion question is factual in nature it's a pretty natural jury question. *Wendt v. Host Int'l, Inc.* 125 F.3d 806, 812 (9th Cir. 1997).

Confusion factors to consider:

1. level of recognition of plaintiff in society for whom defendant's product intended

Surf historian Steve Pezman says the dudes "are considered legends in the surf community and are still highly well-known and regarded." Making it likely the dudes would be known to the Abercrombie target audience.

2. relatedness of the fame to the product

Dudes are famous because they're surfers. Abercrombie is selling "Final Heat Tees."

3. similarity of likeness used to the plaintiff

Of course it was photos of them.

4. evidence of actual confusion

Dudes submitted declarations of folks who believed dudes were endorsing Abercrombie products

5. marketing channels used

There was only one - the Quarterly.

6. likely degree of purchaser care

Surf apparel buyers could reasonably be seen by a jury as not real careful.

7. defendant's intent on selecting the plaintiff

Jury could find Abercrombie set out to feign an endorsement.

Now just when you think the district court has flubbed the whole thing, we get to the last issue.

Defamation

Dudes claimed shame and embarrassment at being in a section of the Quarterly with nude and scantily clothed models.

Can you believe they said that with a straight face?

To win this, they must show (1) libelous on its face, or (2) special damages. Libelous on its face means the viewer can figure it out without explanatory matter. Cal. Civ. Code § 45a.

Which given that they weren't nekkid or posed with the nekkid models means you'd have to tack on an explanation that the dudes while clothed in the competition photos were frequently nekkid après surf.

But the opinion doesn't say that. Instead it deals with three declarations from "surf industry leaders" and says they don't ad-

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Biz of Acq — Developing Book Donation Resources

by **Paul T. Jackson** (Information, Library, and Organizational Consultant, Trescott Research, Information & Library Development) <trescott@umich.edu>

Column Editor: **Michelle Flinchbaugh** (Acquisitions Librarian, Albin O. Kuhn Library, UMBC, 1000 Hilltop Circle, Baltimore, MD 21250; Phone: 410-455-6754; Fax: 410-455-1598) <flinchba@umbc.edu>

Column Editor's Note: For libraries with limited resources, gifts are often an important source of materials. **Paul T. Jackson**, as the Library Director of a new prison library in Lapeer, Michigan, developed a library collection almost completely through gifts, acquiring 22,000+ books in three to four years time, with a budget for only 200 books per year. In this article, he shares the expertise he developed on locating and procuring free materials for his collection. **Paul** has been involved with the start-up, organization, and development of ten libraries (including archives, col-

lections, or library-related organizations). His article is taken from a book he is outlining on "Building a Library," intended for those faced with starting-up libraries. — **MF**

When I joined the opening of the brand new prison in Lapeer, MI, in 1987, as Library Director, I was confronted with the task of not only erecting the shelving but ordering and receiving enough books to keep the 500 prisoners, already arriving, with reading materials. The \$25,000 start-up money for the library disappeared and I was eventually able to order about \$3,000 worth of books, primarily expensive reference works. I needed to find sources of donations. Certain law books that were required under a 1983 consent decree were furnished by the state. But there were additional law books needed for certain types of law research that were not provided.

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dress whether average people would find it defamatory. But it doesn't give us the declarations.

Whoaaa! I mean, like, this is really shameful, man. We have to ask ourselves here, what would the Big Kahuna do?

Special damages are "all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other." Cal. Civ. Code § 48a(4)(b).

But dudes didn't lose any business.

And they weren't drummed out of Surfers for Jesus either.

But they were still in court on all the rest of it.

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Local Library Book Sales

Many unsold books are sold off by the bag or warehoused for the next sale, or given to other organizations. Often by agreement with the library another library can come in and take a van or truckload for free—sometimes because volunteers aren't able to move them or store them.

I knew the local library was having a book sale, and I was able to load up my van after the sale with some of the items left that I felt would be appropriate. The friends of the library allowed me to later go to the place where they stored books for their annual sales and pick out another load. Later on, another library found out that I would come and pick up what they didn't sell. I think I may have picked up two or three vanloads at that library. I continued to do this, and once was able to get three truckloads from a university. We brought them in, found what we wanted and sent the others to other prisons, for there were many duplicates of the "good stuff."

It is possible that a library could develop exchanges of these after the sales books, so as to make the next one more interesting. After the sale pick-ups allows one to garner interesting materials that might fill a gap or two in anyone's collection.

For our law library, we sent letters to local and district courts asking for donations from participating lawyers. We received some gifts of sets from retiring lawyers or lawyers moving in with or merging with other practices. One such gift was the entire set of *American Law Review (ALR)*, and we only had to update a few volumes.

We also sought grants from the **Prisoner's Benefit Fund** for specific materials the prisoners had requested, and updating some of the gift multiple volume sets.

By the end of the fourth or fifth year we had to turn down some offers of some donations as we were continuing to be inundated by gifts from other sources we had developed.

I suspect there are angels or corporate officers that might substitute for grants from foundations or resources like the library grants **LSCA (Library Services & Construction Act)** usually offered through the state libraries. We did use the latter and were successful twice and once again with one of the Department of Education grants. Altogether grants amounted to about \$25,000 over the course of six years. Grants were not as satisfying as gifts; they took enormous amounts of time and energy.

Bookstores

Vanloads of books seemed nice, but did not meet all of our needs. We were given the green light to solicit bookstores. I knew that while there is a demand for remainders (books that didn't sell and are given up for reselling by "remainder" houses and catalog sellers like **Barnes and Noble**), there are many books that are not returnable to the distributors.

Our contact directory was an earlier edition of this book: *Book Publishing Resource Guide*, 5th edition, by Marie Kiefer. Ad Lib Publications, Fairfield, IA, 1996.

Both retail and college book stores are a source of newer book donations for the following reasons:

1. They can deduct from tax liabilities full market value of the donation instead of (if discarded) only the cost of the item. Some mass paperbacks are shorn of their covers and

the covers scanned for barcodes and reported as returned and the books are dumped in the dumpster. In other words, it is too expensive to return, but if they aren't accounted for royalty will have to be paid.

2. Books may not be returnable to distributors, but are not selling and taking up space needed for newer titles.

3. New editions have come out and the old one takes up space and are often not a saleable item, but for some reason are not discarded nor taken off the inventory, creating a tax liability in some states.

4. Stores (Academic) may change texts when a new professor arrives, leaving old texts to be stored, sold at a loss, or dumped.

5. Shipping books back to the distributor or publisher is expensive and, while given credit, the distributors also take back credit in the form of a restocking charge (read accounting charge, as most of these are either shipped back to the publisher directly or destroyed by the retailer), enabling a donation to be more cost effective.

One can direct inquiries to individual bookstore managers. Sometimes they ask that you come get them and sometimes they will ship them, and sometimes without first notifying you which may be a problem if you rely on a warehouse and POs (Purchase Orders). Some books had arrived that we were unaware of simply because the warehouse didn't know where to direct them. We were very successful with this program. Often I would go to bookstores and locate old editions of perhaps a *Writers Market*, or a music book, directory or such things, and note them, then back at the office the next day, have our clerk write a letter to the store. I suspect that

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even though this was my own time spent, it paid for itself by not having to go through an acquisition and grant process. We were more successful with small college's bookstores than the large colleges-universities. It seems small private colleges move their bookstores frequently, if they are growing, and storage is at a minimum.

Distributors

Distributors generally have "returned for credit" hardbound books that will generally be returned to the publisher for credit against copyright fees. This does not necessarily mean they cannot be given as donations. Some of these are what are known as "hurt" items that are soiled, dog-eared, etc. and could only be resold as remainders or dumped.

There is the possibility that the distributor has come to the end of what the publisher - distributor contract calls allowance for hurt books, and there are more than can be returned for credit to the publisher. By donating these items the distributor hedges a loss. Inquiries should be directed to Customer Services.

Our success with distributors was minimal, except when I went directly to them.

Then they would allow me to take a cart and collect things I might want, they would look them over, tag their records and I was free to go with a shopping cart of materials. Sometimes they would tell me what areas I could glean from.

See below for finding or locating distributors.

Publishers

Review copies of books, music, and recordings are often available as long as those are reviewed for a publication, even if only in your internal newsletter. Academic libraries may also get review copies from professors from time to time, as their collection grows too large, but one needs to solicit that resource constantly. Some of the review books will be uncorrected proofs or advance copies.

In addition, sometimes music publishers need to clear their shelves for room for new materials and sometimes this includes song sheets, sheet music and demo recordings made for radio stations and promotions to artists. When I was brought on board at **TRO**, a music publishing group in New York (1967), I found they were overwhelmed with old song sheets and sheet music along with their respective 45 rpm demo recordings that had been hits but were no longer being marketed or promoted to artists and radio stations. In

addition, when new songs come out, the publisher had a window in which to have a recording made, and publish a certain number of the sheet music. This required producing sheet music and recordings that might never get used if promotions did not work. The printers and record presses would only do a minimum number (although that may have changed perhaps with CDs and publishing on demand,) leaving the publisher sometimes with un-used product. An example, whether a joke or serious, we had extra copies of the song, "Who can I turn to (if nobody loves me)" with the title page reading, "To Whom can I Turn?"

Often, if a library writes a convincing letter to the publisher's PR or Community Affairs director, a copy will be sent gratis. These may be review copies, advanced proofs, or demo recordings, but the letter must specify the title that one wants. Often that which is requested as well as other additional items will be sent. In addition, once you are on their mailing list, you will probably receive more.

We were very successful in receiving advanced proofs, and sometimes when requesting older editions, we would receive the current one instead. Some publishers, from whom we had received many works, eventually changed policy, perhaps because of mergers, and changing demands, and would reject our requests. On balance we did quite well for both the general and the law library. Some single volume law books and pocket books that had not been updated for some time were also available.

Publishers' information can be found here: *World Publishing-Industry*. (May 23, 2002). (3 June 2002). <http://publishing-industry.net/>. Publishing 2000. *Publishers Directories- Electronic Links Page*. (3 June 2002). <http://www.geocities.com/ResearchTriangle/Node/2992/publishing/pubdirectory.html>.

This above link includes an E-journal directory as well [see magazines p.83].

Catalog, Dealer/Distributors and Book Clubs

Publishers of book catalogs, such as **Publisher's Central Bureau**; **Barnes and Noble** and **Book Clubs** will often send donations of books which have been returned because smudged, damaged or mis-bound, and are not re-sellable. Rather than destroying these (required to avoid royalties) they are often anxious to find a source to send them as donations. Again, for the same reasons cited above, giving these as a gift allows them to deduct the gift from taxes as well as avoiding the royalty payments. I would suggest here that a consortium work on this as my experience at the prison was that one day I received three pallets full of 15 to 20 duplicates of perhaps 50 titles of returned hardbound books. It was an enormous task to sort and reship these to other prisons, when a central pick-up place might have worked better.

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2002 Charleston Conference - Issues in Book and Serial Acquisition

Call For Papers, Ideas, Conference Themes, Panels, Debates, Diatribes, Speakers, Preconferences, etc. ...

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The Conference Directors for the **2002 Charleston Conference** include — **Rosann Bazirjian**, Chair (Penn State University) <rvb9@psu.edu>, **Barbara Dean** (Arlington County Public Library), **Stuart Grinnell** (Ambassador Books and Media) <bookman@iquest.net>, **Ramune Kubilius** (Northwestern Health Sciences Library) <r-

kubilius@nwu.edu>, **Heather Miller** (SUNY-Albany) <hm766@cns.vax.albany.edu>, **Jack Montgomery** (Western Kentucky University) <jack.montgomery@wku.edu>, **Marietta Plank** (Chesapeake Information and Research Library Alliance) <mplank@deans.umd.edu>, **Vicky Speck** (ABC-Clio) <vspeck@abc-clio.com>, **Katina Strauch** (College of Charleston) <strauchk@earthlink.net>, **Michael Young** (SUNY-Albany) <youngm@albany.edu>.

Send ideas by June 30, 2002, to any of the Conference Directors listed above.

Or to: **Katina Strauch**

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Charleston, SC 29424
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Internet: <strauchk@cofc.edu>

Magazines

Many trade magazines are considered "Controlled Circulation" publications. They receive this designation as a means of reducing their mailing costs, and are expected to offer a certain number of their total circulation free. A library requesting a free subscription of a CC publication will often receive one if there are copies allocated that have not yet been called for by others.

There is a publication entitled *Standard Periodicals Directory* (SPD) by **Oxbridge Communications Inc.** found at this site: <https://www.mediafinder.com/secure/product1.cfm#spd>. It is available on CD-ROM so that searching for controlled circulation publications could be a lot easier, although at a cost of about \$1300. While not indexing CC publications, information in each publication's entry regarding the fact of being a CC magazine is included. From that, one could pick magazines that one wanted, or those in a category, see if they were CC and request a free subscription. Using methods above for books it might be possible to get a dated copy of the SPD or SPD CD-ROM.

I have successfully outfitted several libraries, including the prison library, with many appropriate magazines from the controlled circulation groups. You can find listings of these from their sites:

Kendall Hanson. *Major Publishers Meta Site Of Links*. (3 June 2002). <http://tradewriter/freeservers.com/majorpub.htm>

Here you can find links to trade journals from different groups that publish multiple journals and magazines including **Reed Business Information** (formerly **Cahners**); **CMP Media**; **BPI Publications**; **Crain Business Journals**; **Penton Publications**, et al.

You may also be aware that many e-journals are available on-line free. This usually takes some searching, but lists of e-journals are available on the Internet and at the Internet Public Library; www.ipl.org, a **University of Michigan** site.

Conclusion

Using these resources, I was able to build a prison and prison staff library of 22,000+ volumes in little more than three-four years with not much more than \$3000 a year in book budget (enough for perhaps 200 books/year.) Successful grants helped, but by and large the enhancement and revolving of the collection relied on the above types of donations.

In closing, for those libraries that rely substantially on gifts, I shouldn't mention the archive/library I worked with (in 2000-2001) that bought two of one book for \$50,000 each. Happy hunting. 🐾

And They Were There

Reports of Meetings — Trends and Traditions featured at SALALM, 2002

by **Christine Mueller** (Ibero Catalog Librarian, University of New Mexico, Albuquerque NM 87131-1496; Phone: 505-277-8391) <cmunm@yahoo.com> or <cmueller@unm.edu>

Column Editor: **Sever Bordeianu** (University of New Mexico) <sbordeia@unm.edu>

47th Annual SALALM, 2002 — "Trends and Traditions in Latin American and Caribbean History"

Cornell University, Ithaca, New York, June 1-4, 2002

Report by **Christine Mueller** and **Sharon Moynahan** (University of New Mexico)

"Trends and Traditions in Latin American and Caribbean History" was the theme of the Forty-seventh meeting of the **Seminar on the Acquisition of Latin American Library Materials (SALALM)**, June 1-4, 2002. Sponsored by the Latin American Studies Program and the University Libraries of **Cornell University** in Ithaca, New York, the conference was the annual opportunity for members to meet, share ideas and to socialize in the beautiful green rolling splendor of upstate New York. The Statler Hotel, part of Cornell's School of Hotel Administration, proved an excellent venue, and Cornell librarians **David Block** and **Cecilia Sercan** are to be congratulated for their excellent local arrangements and a conference which was as enjoyable as it was informative.

An initial full day of meetings provided committees and regional consortia opportunities to plan and complete projects and explore new opportunities. Further committee meetings throughout the conference punctuated an excellent program of panels and discussions planned by this year's president, **Denise A. Hibay** of the New York Public Library. At the Opening Session, after a gracious welcome by University Librarian **Sarah E. Thomas** and **Debra A. Castillo** of the Latin American Studies Program, the José Toribio Medina Award for excellence in bibliography was awarded to **Gayle Ann Williams** of the **University of Georgia**. This year's two **Enlace** participants, recipients of travel awards to encourage participation by Latin American librarians, were introduced. They were **Elda Mulholland** from the Pontificia Universidade Católica do Rio de Janeiro who spoke about a library network in Brazil and **Victor J. Cid Carmona** from El Colegio de Mexico who discussed digital libraries in Mexico. Also introduced was the President's first time attendee travel grant winner, **John Storm** of **Brigham Young**

University. The participants were then thoroughly entertained by a fascinating and scholarly keynote address. **George Reid Andrews**, a **University of Pittsburgh** historian, explored "Black History in Latin America, 1900-2000." After focusing on the themes of racial democracy, effective mobilization and what it means to be Black or to try to be Black in society, he ended his presentation with the sound of comparsas, the rhythmic drumming of Uruguay. The audience was rocking by the time they left for the opening of the book exhibits.

Salalmistas look forward to the extensive exhibits which feature **SALALM** members and visitors. The conference provides an opportunity for the face-to-face contact that keeps materials purchases and blanket order plans functioning smoothly. Exhibitors came from all over Latin America (Mexico, Argentina, Uruguay, Bolivia, Peru, Brazil, Chile, and more), Europe and the United States. Book dealers are active members in the organization and serve on various committees and the Executive Board.

Many panels addressed the concerns of today's Latin Americanist librarians, and future librarians. **Pamela Graham's** (**Columbia University**) panel "New Traditions and Old, Innovations in the Training of Latin Americanists" featured presentations by **Anne C. Barnhart-Park** of **Lafayette College** who has initiated a program of online research journals and searching exercises. **Cesar Rodriguez** of **Yale University** spoke of the inadequacies of funding for **Yale's** extensive manuscript collections and the need for personnel with the skills to reorganize them and provide better finding aids. **Walter Brem** of the **University of California, Berkeley**, discussed professionalization of Mexican history, including the roles of the research institutes which prepared scholars and researchers.

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