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## Cases Of Note -- You Can't Own History

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# LEGAL ISSUES



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## Cases of Note — You Can't Own History

### Copyright – Facts v. Expression

by **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

*Annie Laura Thompson v. Looney's Tavern Productions et al.*, United States Court of Appeals for the Sixth Circuit, 2006 U.S. App. LEXIS 27551 (2006).

The Alabama vote for secession in 1860 was quite close with the slaveholders of the southern part voting “yea” and the small farmers of the north “nay.” The farmers saw it as “a rich man’s war and a poor man’s fight.” **Chris Sheets** was the Winston County delegate to the secession convention.

In Winston County, **Bill Looney** called a “Neutrality Convention” at his tavern and proposed seceding from Alabama and forming the Free State of Winston. When this failed, he gathered Union sympathizers and donned the blue uniform. He led guerrilla raids and became a person of near legend both during and after the war when many old grudges were settled.

**Wesley Thompson** wrote three novels on this era entitled *Tories of the Hills*, *Free State of Winston*, and *So Turns the Tide*.

*This case is particularly maddening because it does not summarize the facts and I can't find the District Court opinion through LEXIS. So I'm having to piece together what caused the litigation, partially through guesswork.*

It seems that **Wesley Thompson** must have died and left copyright ownership to his two sisters (daughters?) **Annie Laura Thompson** and somebody **Yarbrough**. A play titled “Incident at Looney’s Tavern” was licensed by **Yarbrough** to use portions of *Tories of the Hills*.

A joint owner of a copyright may grant licenses without the consent of the other joint owners. 1 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT, 6-30, § 6.10 (2002). So **Thompson** was bound by that.

Then **Lanny McAlister** wrote a screenplay on this history called “Freedom Run.”

**Annie Laura** sued a whole bunch of folks including **McAlister**. She had lawyers at one point, but they evidently had a falling out. After she lost on summary judgment, she appealed *pro se*.

*Which lawyers and judges just loathe. And you can see why. Summary judgment had worked so well against her that she brought her own motion on the appeal. Which of course*

*was disallowed because she hadn't moved in district court. But on to the law.*

#### Fact v. Expression

To prove copyright violation, you must establish ownership of copyright and copying of original elements. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991).

“No one may claim originality as to facts. Facts may be discovered, but they are not created by an act of authorship. One who discovers an otherwise unknown fact may well have performed a socially useful function, but the discovery as such does not render him an ‘author’ in either the constitutional or statutory sense.” 1 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT, 2-172.16, §2.11[A] (2002).

*Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5<sup>th</sup> Cir. July 1981) held no protection for industrious collection. *Craft v. Kobler*, 667 F. Supp. 120, 123 (S.D.N.Y. 1987) held ditto “[n]ot withstanding that enormous effort and great expense may have been required to discover factual information . . .”

*Which was also the holding in Feist which overturned Jeweler's Circular in which a man made a list of businesses and addresses in a town and begat the “sweat of the brow” theory of copyright.*

History has never been subject to copyright. The cause of knowledge mandates it be the common property of all. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2<sup>nd</sup> Cir. 1980).

*Despite this over-wrought statement, it's easier to see history as fact which is not protected by copyright while the historian's expression is. Which led to the brou-ha-ha of eminent historians caught “plagiarizing” other works.*

*My take on the scandals was the historians had writing factories where sweated grad students toiled for meager pay and got sloppy with their ghost writing.*

#### Substantial Similarity

Without evidence of direct copying, you must find substantial similarity i.e. more than

a de minimis fragment. See 2 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT, 8-24 §8.01[G] (2002).

Writing about the same moment in history will require some measure of similarity. *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598, 604 (7<sup>th</sup> Cir. 1957). And ‘stock’ or standard literary devices – scènes à faire – are not protected by copyright. *Hoehling*, 618 F.2d at 979. These are “sequences of events which necessarily follow from a common theme” or “incidents, characters, or settings that are indispensable or standard in the treatment of a given topic.” *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1248 (11<sup>th</sup> Cir. 1999).

**Annie Laura** argued that both play and novel contrasted the Montgomery mansions with the hardscrabble life in the North Alabama hills. This is classic scène à faire. How else could you illustrate the difference between Winston County

folks and the slaveholders of the southern part of the state?

A lone sentence in “Freedom Run” bore some similarity to *Tories of the Hills*. One inconsequential passage does not make substantial similarity. See *Toulmin v. Rike-Kumler Co.*, 137 U.S.P.Q. 533 (S.D. Ohio 1962).

*Just how de minimis can you get?*

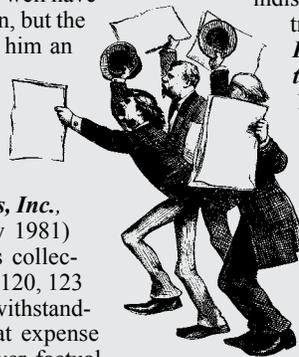
#### And There's More

**Annie Laura** listed similarities between the novel and the screenplay: (1) events take place in the same locales; (2) same settings; (3) same relevant factors; (4) same plot; (5) same theme; (6) same characterization; (7) same places; (8) same mood; (9) same pace.

*Well, you can see that's going to fall flat.*

The locations are historical places in Winston County. The events were historic events that went in chronological order. These are not protected. The killing of various people, the burning of the county jail, Union encampments and the home guard are all history and they flow naturally in the telling of the story.

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## Questions & Answers from page 51

the copy made under the Section 108(c) requirements.

**QUESTION:** *Teachers in an elementary school want to scan photographs and illustrations from books that the library owns in order to create PowerPoint slides. The slides are then used by the individual teacher in a lesson typically dealing with the story in the book. Is this permissible? Is there a limit on the number of slides that may be scanned? Is there a limit on the number of years that a teacher may use the slides without permissions?*

**ANSWER:** Most likely, it is a fair use for an individual teacher to use such PowerPoint slides in teaching. Under section 110(1) teachers in a nonprofit educational institution are permitted to display works to their students in the course of teaching. Scanning the illustrations for a presentation to the students, I believe is fair use if only a few of the images from a book are scanned and the purpose is for teaching. The slides should not be posted on the Web or otherwise distributed. There is no restriction on how many semesters these slides may be used by the teacher.

**QUESTION:** *If a university is drafting a copyright policy is it better to create it as a part of the patent policy or a separate policy?*

**ANSWER:** Although copyrights and patents are both types of intellectual property, they are very different from each other. The statutes are separate (Title 17 U.S. Code for Copyright and Title 35 for Patents), qualifications for protection, the duration of protection, and remedies are different for each. In academia, every faculty member is affected by copyright: all faculty use copyrighted works for teaching, and in institutions that expect research and scholarship, faculty produce scholarly works. By contrast, only a few faculty members are likely to produce patentable works; and typically those faculty members are in science, medicine, engineering and computer science.

Universities are much more interested in patents than they are in copyrighted works since patent royalties produce considerable income for the institution. Usually, there is royalty sharing arrangement between the university and the faculty inventor. On the other hand, most institutions permit faculty members to own the copyright in their copyrighted works.

The concern for including both copyright and patent in one policy is that copyright is likely to take a backseat to patent, and the default position could become university ownership for copyrights as it is for patents. Because of the money at stake with a patent, universities will consider them more important despite the fact that many fewer faculty members produce patentable inventions as opposed to copyrighted works. 🐾

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“Cherry Kaiser” in “Freedom Run” and “Cherry Parker” in *Tories* have only a first name in common. Ditto “John Walker” and “Bill Walker.”

The expression and pacing of the screenplay was quite different from the novel. Everyone agreed the novel had many characters and moved very rapidly while the screenplay focused on one or two and moved quite slow.

*Which sounds like it's unsaleable.*

The only identifiable common theme of the two was a southern belle in love with Union sympathizer.

*Woo! Is that generic or what?* 🐾

## Biz of Acq — Acquisitions in a Career College Library

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**Column Editor's Note:** *The author discusses the role of the acquisitions librarian in the career college, with a focus on one specific institution. — AF*

Career colleges, also called for-profit or proprietary colleges, are one of the fastest growing areas in education today. They range from schools that specialize in one subject and have one location, to schools that have many different locations and offer courses and degrees from diplomas to PhDs. Larger schools may have campuses located in several states, some are growing internationally, and some schools exist totally online. The **Minnesota School of Business/Globe University (MSB/GU)**, a privately owned career college in Minnesota, stayed relatively small for its first 100+ years and by 2002 had only four campuses, all located in the Twin Cities. Since 2002 MSB/GU has built four additional campuses, added an online MBA program, and continues to expand and grow with arrangements and partnerships in other states. This is due, in part, to a growing segment of the population that is looking for an alternative to the traditional college or university, and to the fact that most career college students qualify for federally funded financial aid.

Circumstances are unique in a career college library, and very different from the traditional academic library. Most career college libraries start out small, and their librarians learn to make do with limited resources, funds and people. Career college librarians often are solo librarians with many responsibilities, including acquisitions. Because MSB/GU was relatively small prior to 2002, each of the four college campuses had its own library and campus librarian. There was no need for a titled Acquisitions Librarian because there was no budget for collection development and no books were being purchased in large quantities. Each campus librarian submitted his or her own requests for materials. There were no acquisitions policies or procedures, and every campus librarian basically did his own thing. Because there was no catalog, no one knew who was ordering what.

Because of changing standards with the **Accrediting Council for Independent Colleges and Schools (ACICS)**, the main accrediting agency for career colleges, the MSB/GU libraries, like many other career college libraries, began to weed out textbooks and donations and started to buy new books. The school was expanding and adding new campuses, each with its own library, and there was a need to develop an acquisitions position. At MSB/GU, the title and role of Acquisitions Librarian were created in 2002. The new title was given to a librarian who was already a campus librarian, which meant that she continued to run her own library, supervise her staff and do bibliographic instruction, while adding duties related to acquisitions and collection development.

Career colleges are businesses and are looking to make a profit, so they expand when a new market in the population is found, or with increased demand for a particular field or subject. They may close or cancel programs and schools just as suddenly, when the market or need is no longer there. Career college libraries often have few established policies and are slow to create them, as with MSB/GU. If a librarian creates a policy, it may not be approved by the owners of the school or retained from one quarter to the next. The first Acquisitions Librarian at MSB/GU was free to create procedures and define responsibilities of the position, which included ordering books and other materials via stores, vendors and publishers, organizing collection development librarians to turn in materials on time, and sending check requests to the corporate headquarters. From the beginning, she had to use what was available to do the job, as there were no new funds, no additional salary and no library resources added to help with the new role. Through trial and error and the extensive use of Excel spreadsheets, she custom-made order forms for tracking orders, approvals,

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