Against the Grain

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Cases of Note -- Copyright: Chain of Title -- Talkartoon Betty

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LEGAL ISSUES

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Cases of Note — Copyright

Chain of Title — Talkartoon Betty

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Fleischer Studios, Inc. v. A.V.E.L.A. et al., UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 2011 U.S. App. LEXIS 3487 (2011).

Max Fleischer created **Betty Boop** in 1930 for a series of cartoon films, and when it became big, licensed it for use in toys, dolls, and other merchandise. **Betty** "combined in appearance the childish with the sophisticated — a large round baby face with big eyes and a nose like a button, framed in a somewhat careful coiffure, with a very small body …" ***Fleischer Studios v. Ralph A. Freundlich, Inc.,*** 5 F. Supp. 808, 809 (S.D.N.Y. 1934).

Ah yes. The perfect baby-voiced cigarette girl/ torch singer/ chorine. And the first sex symbol of cartoons with high heels, garter belt and cleavage. As the Depression bit in, she was a beguiling reminder of the vanished carefree Jazz Age. And she was modeled on the silent movie star ***Clara Bow****, the famous silent film "It-girl."*

Singer ***Helen Kane****, the original "Boop-Oop-A-Doop" girl who looked much like* ***Clara Bow*** *and much like* ***Betty****, sued in 1932. The court ruled the "baby" technique of singing did not originate with her.*

In 1934, the National Legion of Decency imposed the Production Code on Hollywood restricting sexual innuendoes. This dealt a severe blow to ***Betty*** *and forced the newly tame* ***Betty*** *to seek juvenile audiences, which led to a decline in popularity.*

But as an icon of her time, ***Betty*** *came back for a cameo in the 1988 "Who Framed Roger Rabbit."*

Another interesting note, ***Fleischer's*** *biggest success was* ***Popeye****. He did well in life.*

Around 1940, **Fleischer** sold his rights to her cartoons and character. In the 1970s, **Fleischer's** family under the name Original **Fleischer** tried to buy back the rights. Convinced that they are the exclusive owner, they have licensed it for toys, dolls, and other stuff such as the ceramic **Betty Boop** doll found with meth packages inside in the search warrant case ***United States v. Lakoskey,*** 462 F.3d 965, 971 (8th Cir. 2006).

A.V.E.L.A. and other defendants also license **Betty** bringing on this lawsuit.

Fleischer asserted exclusive copyright through the following purported chain of title: Original **Fleischer** to **Paramount Pictures** (1941); **Paramount** to **UM&M TV Corp.** (1955); **UM&M** to **National Telefilm Associates** (later **Republic Pictures**) (1986); **Republic** to **Fleischer** (1997).

A.V.E.L.A. got a dismissal on the basis of no admissible evidence to establish the links in the chain after **Fleischer** to **Paramount**.

On Appeal

As the copied works were created before 1978, the ***Copyright Act of 1909*** applies.

The burden is on **Fleischer** to show ownership via the chain of title. ***Litchfield v. Spielberg,*** 736 F.2d 1352, 1355 (9th Cir. 1984).

No dispute that **Paramount** got rights from **Fleischer** to both **Betty Boop** character and the cartoons. But in the **Paramount** to **UM&M** deal, **Paramount** carved out the **Betty Boop** character and retained it.

Subsequent conduct on the part of **Paramount** can be used to discern contractual intent. *See* ***Wolkowitz v. FDIC*** *(In re Imperial Credit Industries, Inc.),* 527 F.3d 959, 966 (9th Cir. 2008). But this works in **A.V.E.L.A.'s** favor. **Paramount** sold its **Betty Boop** character copyright to **Harvey Films**.

Presumably to make new movies. Although there's no evidence they ever did.

Nonetheless, the contractual language retaining the character was clear and unambiguous.

As you can see, there's nothing much to this case. Just a nice opportunity to contemplate cartoons in days of yore.

Next is what is developing as a really big deal.

Copyright — Fair Use on the Web – Publisher Apocalypse Meets Blogger Armageddon

Righthaven LLC v. Realty One Group, Inc. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, 2010 U.S. Dist. LEXIS 111576 (2010).

Righthaven has the blogosphere in an uproar with its copyright-litigation-for-profit business model. **Righthaven** trolls the Web and files copyright infringement lawsuits principally for the *Las Vegas Review Journal* and the *Denver Post,* but seems to be picking up new clients. Rather than serving as an attorney for those papers, it buys copyright from them and files suit on its own behalf. Which is to say it produces nothing creative it is trying to protect.

Righthaven does not attempt to mitigate damages via a cease and desist letter. Rather it demands the flabbergasting $150,000 statutory damages plus forfeiture of the Website domain name to get a blogger's attention and then settles for what the poor shlub can afford. This has nonetheless proved quite lucrative if one can believe the information on the Website **Welcome to Righthaven Lawsuits**. And their targets are truly random bloggers scattered throughout the U.S. One is a woman who blogs about her cat.

Nelson is a Nevada realtor with an Internet blog with info about buying homes in Nevada. **Nelson** used eight lines of a thirty-line *Las Vegas Review Journal* news story with both factual info about a federal housing program and reporter's commentary on the effect on the housing market. When **Righthaven** sued, **Nelson** fought back and raised a Fair Use defense, and the district court held in his favor.

"[T]he fair use of a copyrighted work, … for purposes such as criticism, comment [or] news reporting … not an infringement of copyright." 17 U.S.C. § 107.

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A. Purpose and Character of the Use

Nelson's blog is both educational and commercial, but the underlying motive is to generate business for himself as a realtor. Which would weigh against fair use.

B. Nature of the Work

Nelson only lifted factual content from the article which supports fair use. *See e.g.,* ***Los Angeles news Service v. CBS Broadcasting, Inc.,*** 305 F.3d 924 (9th Cir. 2002) (re-publication of a video depicting a news report was a fair use because it was informational rather than creative).

C. Amount of Copyrighted Work Used

Eight out of thirty sentences, weighing in for fair use. *See e.g.,* ***CBS Broadcasting, Inc.,*** 305 F.3d at 941 (copying only as much as necessary to provide relevant factual information weighs in favor of fair use).

D. Effect on Potential Market for Copyrighted Work

Little or no effect on the market. Reader would still go to the *Review Journal* for the other twenty-two sentences plus the author's riveting commentary. Does not dilute the market for the article.

This holding was by **Larry Hicks**, U.S. District Judge. Since then, a **Judge James Mahan**, also of Nevada, has ruled in favor of fair use in ***Righthaven v. Center for Intercultural Organizing,*** but as this goes to press, the opinion is unpublished. But incredibly in this case, the entire article was lifted. **Judge Mahan** also feels **Righthaven** is diminishing the value of the copyright by using it purely for a lawsuit and that copyright under those circumstances is entitled to less protection.

Mind you, I don't have any trouble seeing the other side on that one. The newspapers are merely outsourcing their litigation. But the defense attorney in one of the cases says **Righthaven** is on the edge of champerty and barratry, the old common law prohibitions against buying a piece of a lawsuit.

And, as both **Righthaven** losses are in Nevada, the appeal goes to those la-la land folks on the Ninth Circuit in San Francisco. While they are infamous for creating off-the-wall new law and being reversed by the **U.S. Supreme Court**, in the area of copyright, they know their stuff. And this is just the kind of brave new world cosmological thinking they delight in.

Some commentators are predicting the opening of the floodgates for soft infringement on the Web. But whatever happens, this will have a big impact.

Questions & Answers — Copyright Column

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QUESTION: An academic author wants to use a digital image of a painting owned by a museum. The painting appears to be in the public domain since the painter died in the 16th century. Is the author required to get permission from the museum to use the image on the dust jacket for the book?

ANSWER: For many years, museums claimed copyright in the photographs of public domain works of art since photographs may be protected by copyright. After ***Bridgeman Art Library v. Corel Corp.***, 36 F. Supp. 2d 191 (S.D.N.Y. 1999), this matter was clarified. The court held that although some photographs are copyrightable, exact photographic reproductions of public domain works of art lack originality and therefore do not quality for copyright. Attribution is a benefit to readers to identify the painting, the artist, and specify where the original is housed; this also acknowledges the museum as the owner of the painting.

QUESTION: An academic librarian has read about the judge's rejection of the Google Books Settlement 2.0 proposal. What will happen next? Are library users disadvantaged by this decision?

ANSWER: In March 2011, **Judge Denny Chin** for the federal district court, Southern District of New York, rejected what many termed an overreaching settlement proposed by a number of publishers and **Google** that would have granted **Google** unprecedented ability to reproduce copyrighted works, index them, and license their use as well as to manage orphan works. *See http://thepublicindex.org/docs/amended_settlement/opinion.pdf* for the full text of the judge's order. Doubtless, scholars would have benefited from the availability of this huge corpus of scanned books, but some copyright owners have pointed out that people would benefit from bank robberies if the proceeds were distributed to those in need. In other words, both represent a taking of property without compensation, and the argument is that it is justified because of the public good. Most librarians have mixed feelings about the proposed settlement, recognizing the tremendous benefit the **Google Books** project would offer to libraries and to scholars. On the other hand, giving a monopoly to **Google** for making, storing, and providing access to the digital copies of these works is problematic.

What will happen now is not clear. **Judge Chin** highlighted problems in the proposed agreement ranging from the attempt basically to rewrite U.S. copyright law, to the settlement's opt-out system rather than opt-in for copyright holders, to the monopoly it would create for **Google**, to the private management of orphan works. There are several potential next steps, some of which could occur simultaneously. First, the parties could appeal the judge's ruling. Or, the parties could go back to the drawing board for a third time to redraft a settlement agreement. The litigation challenging **Google's** scanning of materials could go forward should settlement prove impossible. Another potential outcome is that other entities such as the **Internet Archive**, the proposed **Digital Public Library**, another nonprofit entity, or a coalition of these organizations create digital libraries of millions of books with similarly excellent search capability, but they do so with permission of the copyright holder. The settlement rejection could spur Congressional action, especially for orphan works legislation but also for public funding of a national digital books project. It is too soon to know with certainty what will happen next, however, but these are a few of the possibilities.

QUESTION: A public library has created a digital archive of local photographs that were donated to the library over the years and has posted them on the Web. The librarian has been contacted by a member of the community asking for a photograph to be removed from the online display because he is the photographer and owns the copyright. What should the library do?

ANSWER: A purely legalistic answer would focus solely on whether the individual actually owns the copyright, the date of the photo, whether it had been published, registered for copyright, etc. The library certainly could take such a stand, research the copyright issue and work with the city or county attorney for a legal solution to the problem. But there are other serious concerns in addition to copyright ownership. For example, how important is that particular photograph to the overall collection? Is it worth causing hard feelings with a member of the community? Is it possible to work with the individual to ensure that he receives credit as the photographer but get him to grant permission for the photograph to remain online? The library also may want to make sure that its website asks for copyright holders to come forward so that they may be credited; and the Website should contain a statement that the library will remove any copyrighted photograph from the

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