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Questions & Answers -- Copyright Column

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Cases of Note from page 54

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in favor of fair use in *Righthaven v. Center for Intercultural Organizing*, but as this goes to press, the opinion is unpublished.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 copy-

right 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 qualify 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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posted digital archive should the owner object to its inclusion.

QUESTION: *Why do so many journal publishers include in their license agreements restriction on divulging the terms of the license including price of the subscription?*

ANSWER: Nondisclosure clauses in licensing agreements are fairly standard legal practice for all types of licenses. For library subscriptions, the matter has been in the press recently and a number of large academic libraries are refusing to sign such agreements as they come up for renewal. **Cornell University** is one such institution, and a document detailing the reasons for its stance is found at: <http://www.library.cornell.edu/aboutus/nondisclosure>. Many suspect that the reason that publishers require nondisclosure clauses in their licenses is because they make various price deals with different libraries. In addition to price, there could be other terms that differ for different size institutions, geographical locations, subject emphasis, etc. The problem, of course, is if there is a nondisclosure clause, one simply cannot know whether there are differences from institution to institution or consortium to consortium. Further, libraries want to be treated fairly in comparison to other libraries. Thus, the increasing refusal to sign license renewals that have nondisclosure clauses.

QUESTION: *If the librarian knows that a patron intends to infringe copyright for material checked out to the person, is the library responsible? What should the librarian do?*

ANSWER: If the patron asks whether certain behavior would be infringing, the librarian can supply materials to answer the question but should refrain from practicing law without a license. Naturally, the library also should refrain from making infringing copies for users. However, the library is not responsible for the patron's behavior if the library has posted the required warning where copy requests are received and on the order form for such copies as required under section 108(d) of the *Copyright Act* and the library has posted notices of copyright on reproduction equipment required by section 108(f)(1). 🐾

Rumors
from page 44

and **Tintin** in the land of the Amish. Are you ready for the upcoming **Spielberg** movie about **Tintin**? Did you know that the creator was from Belgium?

The he's-allover-the-place **Rick Anderson** gives us a glimpse inside the ALCTS Collection Development Forum at ALA Midwinter. (this issue, p.40) And **Bob Nardini** mentions the same Forum in his column, this issue, p.76.

Bob also sends the following news about new staff at **Ingram**. **Marc Roberson** joins **Ingram Content Group** as Director of Sales, Public Li-

against the grain
people profile

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BORN AND LIVED: Cincinnati and Dayton, Ohio areas, Austin, Texas for a short stint.

PROFESSIONAL CAREER AND ACTIVITIES: Reference and instruction librarian and a writer, editor, and blogger for reference and eBook topics.

FAMILY: Nice nuclear family with an Alaskan Malamute named Moon.

IN MY SPARE TIME: I travel as often as possible, preferably with family and friends and enjoy life to the fullest.

FAVORITE BOOKS: Love the legal thrillers and mysteries, but have no time to read them.

PET PEEVES: Bad service and the statement "we've always done it that way."

PHILOSOPHIES: Everything happens for a reason, the more you give, the more you get, and work hard, play harder.

MOST MEMORABLE CAREER ACHIEVEMENT: Receiving a trademark on *No Shelf Required*. The idea for a blog to discuss electronic reference and eBooks was suggested to me by a reference publisher in 2008. I took the idea and ran with it, developing the content and brand over time. For me, *No Shelf Required* is the perfect intersection of my experience as a librarian and my education in communication and marketing.

MY PUBLICATIONS: *No Shelf Required: E-Books in Libraries*, ALA Editions, 2011. *E-Reference Context and Discoverability in Libraries: Issues and Concepts*, IGI Publishing, forthcoming. *No Shelf Required II: The Use and Management of E-Books*, ALA Editions, forthcoming.

GOAL I HOPE TO ACHIEVE FIVE YEARS FROM NOW: Professionally – create the ultimate research environment for library users, whether a digital tool, collection of services, or a combination of the two. Personally – Visit the three continents still on my bucket list with my family and friends.

HOW/WHERE DO I SEE THE INDUSTRY IN FIVE YEARS: I hope to see authors, artists, publishers, and libraries much more in-tune about licenses, DRM, and business models. Ideally, we will be settling into good practices based on collaborative efforts amongst our groups, all to provide the best access and service to end-users.

HISTORY AND BRIEF DESCRIPTION OF YOUR LIBRARY: Named after the world-famous **Wright** brothers, **Wright State University** in Dayton, Ohio, continues their spirit of innovation. The university serves nearly 18,000 students, offering more than 100 undergraduate and 50 Ph.D., graduate, and professional degrees. 🐾



braries. **Marc** comes to **Ingram** from the library systems market where he spent the last ten years in sales management. **Marc** can be reached at **Ingram** at <marc.roberon@ingramcontent.com> **Janet Walsh**, is **Coutts** new Area Manager for the Southeast U.S. **Janet** comes to **Coutts** from **American Baptist College** where she was the library director. Prior to working at **American Baptist**, she was the Assistant Director of Library Services at **Fisk University**. **Janet** also has a wealth of sales and training experience gained from working for the library system vendors **DRA** and **SIRSI**. **Lisa McDonald** is an MLIS degreed librarian with a strong background in sales and account management. **Lisa** worked for ten years at **OCLC** where she held a variety of positions including Contract Cataloging Consultant, Project

Manager and Metadata Specialist. **Lisa** will be responsible for the U.S. Central territory. Welcome, everyone!

Seems like this month has been a month of **traveling to meetings**. Now I sort of know what it's like to be a sales rep. Not really, but I can pretend. Anyway, attended **ACRL** in Philadelphia at the end of March. It too was great! I approached **ACRL** with fear and trepidation figuring that all my friends would have retired and I wouldn't know anyone. Wrong! Guess who was the first person I saw when I walked in the exhibits? **Carl Teresa**, General Manager of **Wolper Subscription Services**! **Carl** looks as great as he used to when he was at **Ballen Booksellers** (**Carl** and **Ballen** used to handle the

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