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Questions & Answers -- Copyright Column

Laura N. Gasaway

University of North Carolina-Chapel Hill School of Law, laura_gasaway@unc.edu

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Legally Speaking Endnotes

1. **McCurdy, Daniel P.** (2008/2009, Fall/Winter). Patent trolls erode the foundation of the U.S. patent system. *Science Progress*: 78-86 at 79). <http://www.scienceprogress.org/wpcontent/uploads/2009/01/issue2/mccurdy.pdf>
2. **Righthaven Lawsuits Website.** <http://www.righthavenlawsuits.com>
3. **Righthaven Lawsuits Website.** See also, **Green, Steve.** (2011, March 18). **Righthaven** loses second fair use ruling over copyright lawsuits. *Las Vegas Sun.* <http://www.lasvegassun.com/news/2011/mar/18/righthaven-loses-second-fair-use-ruling-over-copyright>
4. 7 U.S.C. § 512(c).
5. **Fountain, Jonathan.** (2010, September 21). Las Vegas Startup Sues Websites: Copyright Trolls and the Rise of the Internet Police. **Lewis & Roca Intellectual Property Blog.** <http://www.lrlaw.com/ipblog/blog.aspx?entry=169#page=1>
6. **Righthaven Lawsuits Website.** See also, **Neuburger, Jeff.** (2011, February 24). The **Righthaven** Lawsuits: What is Fair Use of Online Publications? *Proskauer Rose LLP.* <http://new-medialaw.proskauer.com/2011/02/articles/copyright/the-righthaven-lawsuits-what-is-fair-use-of-online-publications/#page=1>
7. **Electronic Frontier Foundation.** (2010, September 28). *A Field Guide to Copyright Trolls.* <https://www.eff.org/deeplinks/2010/09/field-guide-copyright-trolls>
8. The **Righthaven** Lawsuits Website notes the following sites in its link section: **Righthaven** Victims Blog, <http://righthavenvictims.blogspot.com>, **Righthaven** Victims Twitter Feed, <http://twitter.com/rhvictims>; Stop the LVRJRighthaven Witch Hunt Facebook Page, <http://www.facebook.com/pages/stop-the-LVRJRIGHTHAVEN-witch-hunt/131089883577553>; **Righthaven** Lawsuits, <http://www.scribd.com/righthavenlawsuits>; The BottomFeeder Chronicles, <http://www.bottom-feeder.org>.
9. **Rucker, J. D.** (2011, April 24). *Serves them right: Righthaven (aka MegaCopyrightTroll) loses own domain.* <http://www.tech.com/2011/04/serves-them-right-righthaven-aka-megacopyright-troll-loses-own-domain>
10. **Electronic Freedom Foundation.** *Righthaven v. Democratic Underground.* <https://www.eff.org/cases/righthaven-v-democratic-underground>
11. **Opsahl, Kurt.** (2011, April 18th). *Why Righthaven's Copyright Assignment Is A Sham – And Why It Matters.* **Electronic Freedom Foundation.** <http://www.eff.org/deeplinks/2011/04/why-righthaven-s-copyright-assignment-sham-and-why>
12. **Righthaven v. Democratic Underground and David Allen.** No. 2:10-cv-1356-RLH-GWF (order on request to unseal and motion to strike) (D. Nev. April 14, 2011), at http://www.eff.org/files/file-node/righthaven_v_dem/2-10-cv-01356_93.pdf.
13. **Opsahl.**
14. Strategic Alliance Agreement between **Righthaven LLC and Stephens Media LLC** (January 18, 2010), at http://www.eff.org/files/file-node/righthaven_v_dem/79-1.pdf.
15. **Opsahl.**
16. Strategic Alliance Agreement.
17. **Righthaven v. Thomas DiBiase.** No. 2:10-cv-01343-RLH-PAL (order on motion to dismiss) (D. Nev. April 15, 2011), at https://eff.org/files/file-node/righthaven_v_dib/DiBiaseOrder.pdf.
18. **McSherry, Corynne.** (2011, April 18th). *More Bad News for Righthaven: Domain Name Claim Dismissed in DiBiase Case.* <https://www.eff.org/deeplinks/2011/04/more-bad-news-righthaven-domain-name-claim>
19. **Madjack Sports,** at <http://www.madjacksports.com/forum>
20. **Righthaven v. Wayne Hoehn.** No. 2:11-cv-00050 (Defendant's answer to complaint) (D. Nev., February 4, 2011), at <http://www.citimedialaw.org/sites/citimedialaw.org/files/2011-02-04-Hoehn%20s%20Answer.pdf>
21. Telephone Interview with **Wayne Hoehn,** Bowling Green, Kentucky (February 23, 2011).
22. **Righthaven v. Wayne Hoehn.** No. 2:11-cv-00050 (Defendant's motion for summary judgment) (D. Nev., February 2, 2011).
23. **Righthaven v. Wayne Hoehn.** No. 2:11-cv-00050 (Defendant's reply to Plaintiff's opposition to Defendant's motion for summary judgment) (D. Nev., March 24, 2011), at <http://www.citimedialaw.org/sites/citimedialaw.org/files/2011-03-24-Hoehn%20Reply%20to%20Righthaven%20s%20Response%20to%20Motion%20for%20Summary%20Judgment.pdf>
24. **Righthaven v. Wayne Hoehn.** No. 2:11-cv-00050 (Defendant's motion to dismiss for lack of subject matter jurisdiction) (D. Nev., April 17, 2011), at <http://www.citimedialaw.org/sites/citimedialaw.org/files/2011-04-17-Hoehn%20Motion%20to%20Dismiss.pdf>
25. **Righthaven v. Kayse Jama and Center for Intercultural Organizing.** No. 2:10-CV-1322 JCM (LRL) (order on motion for summary judgment) (D. Nev., April 22, 2011), at <http://www.scribd.com/doc/53656315/RH-v-CIO-SJ-Order>
26. CIO case at 2.
27. CIO case at 4.
28. CIO case at 4.
29. CIO case at 5.
30. **Luther R. Campbell aka luke skywalker, et al. v. Acuff-Rose Music, Inc.,** 510 U.S. 569; 114 S. Ct. 1164; 127 L. Ed. 2d 500 (1994).
31. **2 Live Crew** case at 586-587.
32. CIO case at 5.
33. CIO case at 7.
34. CIO case at 7.
35. **Tadlock, Cory.** (2008, Spring). Copyright misuses, fair use, and abuse: How sports and media companies are overreaching their copyright Protections. *John Marshall Law School Review of Intellectual Property Law*, 7, 621-646.
36. **Righthaven v. Brian D. Hill.** No. 1:11-cv-00211-JLK (order denying **Righthaven's** opposed motion for enlargement of time to file a response to defendant's motion to dismiss) (D. CO., April 7, 2011), at <http://www.scribd.com/doc/52561398>
37. **Righthaven v. Brian D. Hill.** No. 1:11-cv-00211-JLK (order striking in part **Righthaven's** notice of voluntary dismissal with prejudice) (D. CO., April 11, 2011), at <http://www.scribd.com/doc/53200329>
38. **Mirkinson, Jack.** (2011, March 17). New York Times payroll Launches. *The Huffington Post.* http://www.huffingtonpost.com/2011/03/17/new-york-times-launches-p_n_837053.html
39. **Abell, John C.** (2011, January 5). College newspaper to erect payroll: It's academic. *Wired.* <http://www.wired.com/epicenter/2011/01/college-newspaper-paywall/>
40. **Knight, Kristina** (2011, April 22). Are paywalls the answer to online publishing? *BizReport.* <http://www.bizreport.com/2011/04/are-paywalls-the-answer-to-online-publishing.html>
41. **Green, Steve.** (2011, May 4). **Righthaven** engages 'superstar' attorney in litigation campaign. *Vegas Inc.* <http://www.vegasinc.com/news/2011/may/04/righthaven-engages-superstar-attorney-litigation-c/>

Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>
www.unc.edu/~uncing/gasaway.htm

QUESTION: *How does an educational institution get permission to use film snippets on a class Blackboard site? Is there a difference if the institution wants to use the same snippets for executive education rather than in a regular university course?*

ANSWER: Assuming that the institution is a nonprofit educational institution, the good news is that using snippets of films in class management software for a class does not require permission. Under the **TEACH Act**, section 110(2) of the **Copyright Act**, transmitted performances of "reasonable and limited portions" of an audiovisual work are permit-

ted for online portion of classes. There are a number of requirements that have to be met additionally, such as making the performance available only to students enrolled in the course, having the performance available only during the class session, etc. If the instructor wanted to use more than a reasonable and limited portion of a film, however, permission would be required.

The question about executive education is less clear since "executive education" could mean a number of types of instruction. Assuming that it is for continuing education or some professional certificate, that it is offered

by a nonprofit educational institution, and students are actually enrolled in the executive education course, then the answer is the same. If, however, anyone may attend the session without enrollment, then permission to use even snippets likely would be required.

QUESTION: *A librarian is in charge of her college's archives, and the library is planning a digitization project that will include college yearbooks published between 1923 and 1977. Some of the yearbooks were published without notice of copyright. Others contain a copyright notice with an owner*

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(sometimes the editor and sometimes the business manager specified). Do these individuals listed as the owner own the copyright or does the college? There are no institutional records to clarify the ownership situation.

ANSWER: Yearbooks are treated just like any other copyrighted work. For example, assume that the 1933 yearbook contains a copyright notice. It received 28 years of protection but would have had to be renewed for copyright in 1961. If the renewal took place, then it is still protected by copyright until 2028 (95 years after 1933). If the renewal did not occur, and frankly, it is unlikely that the work was renewed for copyright, then it is now in the public domain. The only way to be sure about renewal is: (1) contact the copyright holder (the company may now be out of business though) or (2) contact the U.S. Copyright Office and pay for a search of the records. Electronic records exist only for works registered from 1978 to the present, but those can be reviewed online directly by the public at no charge. To search the pre-1978 records, the Copyright Office charges for the search, but the search should not take long to complete.

The yearbooks published without a copyright notice are in the public domain because they were published without notice. Even for the yearbooks that contain a notice, it is actually unlikely that they were renewed for copyright — only about 80-85% of works were ever renewed for copyright and those tended to be works that were still being marketed at that time. Typically, the market for yearbooks is only the year of publication.

The notices of copyright indicate that the editor or business manager own the copyright. If the college was the owner, usually its name would appear as the copyright owner. Without records, it is difficult to determine any ownership beyond that found in the notice. My best guess is that the college did not own the copyright. Today, institutions are much more

likely to negotiate for copyright ownership than during those years.

Because of all of this, the library may well decide to go forward and digitize the yearbooks and simply assume the risk that no copyright owner will come forward and complain. It might be useful to determine what strategy will be employed should an owner ever come forward.

QUESTION: A medium-sized public library wants to record the story time for children and then replay them on the local community access channel. Will the library need to get permission for each book? Are there problems with filming the children who are listening to the story time reading?

ANSWER: If a librarian was simply reading a book aloud to children present in the public library, there would be no problem because of section 110(4) of the Copyright Act which exempts certain public performances such as reading the book aloud under certain conditions which story times typically meet. The problem raised by this question is the recording of the reading and then replaying it over the air. There is no exception in the copyright law either for the recording or for replaying on television, even on community access channels.

On the other hand, would the copyright owner object? It is hard to predict. The safest course would be to seek permission from the publisher and to ask to record the reading and play the video over the community access channel. In fact, the library could ask the publisher for permission for several titles at once and see what the response might be.

Concerning the filming of children participating in story time, there are serious legal issues. It will require parental permission, etc. As important as those issues are, they have nothing to do with copyright. The public library should consult with the city or county attorney about this issue and what releases may be required to permit the filming.

QUESTION: When someone produces a

genealogical transcription, is that transcription copyrightable?

ANSWER: A genealogical transcription may be defined as a readable version of a document in which the original handwriting is difficult to read. Any copyright would exist in the original document and would belong, at least initially, to the original author.

In all likelihood, the work was not published but remained in manuscript format or was a handwritten document. So, the work was protected by common law copyright if it was created before 1-1-78. This meant that the work was ineligible for federal copyright protection because it was not published, but it also meant that it never entered the public domain. When the Copyright Act of 1976 was enacted, Congress set a date at which unpublished works would enter the public domain. For such works that existed on 1-1-78 but which remained unpublished through the end of 2002, they entered the public domain at the very end of 2002 or life of the author plus 70 years, whichever was greater. If the works were published between 1978 and the end of 2002, it does not enter the public domain until the end of 2047 or life of the author plus 70 years, whichever is greater.

Even though the transcription is a very useful thing, it does not create a new copyright in the work. On the other hand, a compilation of transcriptions, as long as the compilation is not a total universe of documents (such as all of the letters of a particular writer), the compilation might be copyrightable as a compilation. The compilation itself has to be original, and that means that there is sufficient creativity in the combination of the selection of items to include, in the indexing, the organization, or in value adding to the material.

Oddly, if the work is in the public domain and someone translates it into a foreign language, the translation may be copyrightable as a derivative work since translations have been held to meet the originality standard.

Cases of Note — Copyright v. Implied Contract

Column Editor: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

Larry Montz; Daena Smoller v. Pilgrim Films & TV; NBC Universal et al., UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 2011 U.S. App. LEXIS 9099.

This scintillating column has frequently covered the litigation travails of poor shlubs who shop their screenplay idea to a movie company and then see it appear under someone else's name. Unable to claim copyright to an idea, their lawsuit ends up with zilch. So why didn't they follow the script of this case?

As far back as 1956, the California Supreme Court recognized an implied contractual right when a writer submitted his work to a producer. **Desny v. Wilder**, 46 Cal. 2d 715,

299 P.2d 257 (Cal. 1956). And this “Desny claim” has been around for fifty years. See **Gunther-Wahl Productions, Inc. v. Mattel, Inc.**, 104 Cal. App. 4th 27 (2002).

But is it preempted by federal copyright law? Not according to **Grosso v. Miramax Film Corp.**, 383 F.3d 965 (9th Cir. 2004), cert. denied 546 U.S. 824 (2005). The expectation of payment for the use of an idea adds a new element that takes it out of the realm purely protected by copyright. “Contract law, whether through express or implied-in-fact contracts, is the most significant remaining state-law protection for literary or artistic ideas.” **Benay v. Warner Bros. Entm’t, Inc.**, 607 F.3d 620, 629 (9th Cir. 2010).

Let’s Learn About Larry

Our plaintiff **Larry Montz** is a parapsychologist and naturally had a super-duper idea for a TV series to feed America’s prodigious appetite for the weird and unexplained. A crack team of paranormal sleuths would roam the world with cool gear like magnetometers and infrared cameras investigating paranormal happenings. Ghosts. Poltergeists. Magnetic ley lines. Doubtless some sexy babes mixed in. Hoo-ha! Reality TV at its finest and just the stuff that makes America the world’s leading cultural imperialist.

Daena Smoller, publicist and producer, made the pitch to NBC, the **Sci-Fi Channel**

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