Against the Grain

Volume 24 | Issue 2 Article 27

April 2012

Cases of Note -- Copyright

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LEGAL ISSUES

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Cases of Note — Copyright

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Vicarious Infringement

Range Road Music, Inc. et al v. East Coast Foods, Inc., Herbert Hudson, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 668 F.3d 1148; 2012 U.S. App. LEXIS 3173.

Plaintiffs **music companies** own eight songs at issue and are members of ASCAP which collects royalties for them when the music is played. See ***Broad. Music, Inc. v. Columbia Broad. Sys., Inc.***, 441 U.S. 1, 4-5 (1979).

East Coast Foods owns a Southern California chain restaurant with five locales called Roscoe's House of Chicken and Waffles.

Court opinions are so totally dull. Going to the Web, one finds this is a soul food chain founded by a Harlem native, and it features — you guessed it — combos of fried chicken and waffles. It was promoted by ***Natalie Cole*** *and* ***Redd Foxx****, and the Hollywood branch is a favorite for celebrity sightings. It is featured in movies* ***Tapeheads****,* ***Jackie Brown****,* ***Rush Hour****, and* ***Swingers*** *and on a variety of rap songs.*

The Long Beach Branch has an attached bar called the "Sea Bird Jazz Lounge." When it opened in 2001, ASCAP offered **East Coast** a license to perform ASCAP music but was spurned. So the ever-vigilant ASCAP hired a private investigator to make notes. And he did, noting they played via live band and CD over the sound system eight songs associated with **John Coltrane** and jazz-fusion group **Hiroshima**, all of which **music companies** held in their copyright cache.

Music companies sued and won $36,000 in statutory damages plus $162,728.22 for attorney's fees and costs.

Woo. That'll teach you to screw around with ASCAP.

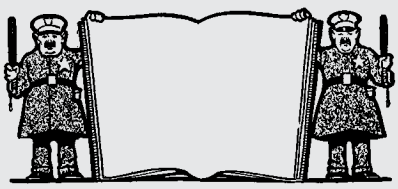
Vicarious Liability

On appeal, **East Coast** said **music companies'** complaint was defective due to a lack of an allegation of vicarious liability for copyright infringement. See ***Dream Games of Ariz., Inc. v. PC Onsite***, 561 F.3d 983, 995 (9th Cir. 2009).

They were talking about ***East Coast*** *profiting by allowing the live band to infringe while performing.*

A vicarious infringer "profits from direct infringement while declining to exercise a right to stop or limit it." ***Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.***, 545 U.S. 913, 930 (2005). But the Ninth Circuit said the complaint pretty thoroughly described what went on that night. The band played in the Sea Bird Jazz Lounge, and **East Coast** owned the lounge and made money selling booze. See ***Ashcroft v. Iqbal***, 556 U.S. 662 (2009).

A vicarious infringer must exercise requisite control over the infringer and derive a direct financial benefit from the infringement. ***Perfect 10, Inc. v. Amazon.com, Inc.***, 487 F.3d 701, 729 (9th Cir. 2007). A defendant "exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so." *Id.* at 730.



The evidence showed that **East Coast** owned and operated the Sea Bird Jazz Lounge and went out of its way to obfuscate it, which led to the hefty attorney's fee payout.

Sufficiency of Evidence

Music companies' evidence was the testimony of the investigator. **East Coast** called this error because (1) its expert testimony was a lay witness, and (2) there was no proof of "substantial similarity" between the live performance and copyrighted works.

The Ninth Circuit said identifying popular songs does not require "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702. It's the kind of reflexive thing millions of ordinary folk do on a daily basis. See Fed. R. Evid. 701. Expert testimony relies on the sort of reasoning only capable of specialists in a field. Lay testimony is what an ordinary doofus does.

They didn't really say doofus. I made that up.

A case of copyright infringement requires (1) ownership of valid copyright, and (2) copying of original elements. ***Funky Films, Inc. v. Time Warner Entm't Co.***, 462 F.3d 1072, 1076 (9th Cir. 2006). Of the copyright owners' six exclusive rights, one is the right of public performance. ***S.O.S., Inc. v. Payday, Inc.***, 886 F.2d 1081, 1085 n.3 (9th Cir. 1989).

Substantial similarity has nothing to do with our issues. It's a doctrine that deals with a situation where some but not all of the constituent elements of a work are used. See ***Funky Films***, 462 F.3d at 1076. In our live performance, there was direct copying of the entire works with no material question of fact. The band announced they were going to perform **Coltrane** songs and proceeded to do it. None of this was contradicted by any evidence from **East Coast**.

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Both the haves and the have nots want to grow their collections with electronic scholarship and to serve their faculty and students well. According to their means, however, each library will go about this process differently. Large libraries will likely acquire monograph aggregations and find room in the budget for annual subscription fees, while smaller libraries may look for programs offering one-time purchases that offer perpetual access.

Publishers, take note. Like these libraries, we have been (to use this dean's phrase) "creatively economizing" like mad since the 2008 crash, doing more with less. An essential part of the "doing more" should be ensuring that we offer our quality scholarly content through many avenues and in many forms and formats. One size, or one access model, does not fit all. Publishers have the opportunity to deliver scholarship in more ways than ever before: in traditional print, in digital form, as part of an aggregation, on a short-term loan, in whole, or in part ... there are many possibilities. Those that we serve — readers and libraries — don't fit a single mold or model, and accordingly we must be flexible and savvy enough to develop and take advantage of the programs that meet the needs and budgets of both haves and have nots.