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Little Red Herrings--Fitbit, Libbit, Throwafit

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Little Red Herrings — Fitbit, Libbit, Throwafit

by **Mark Y. Herring** (Dean of Library Services, Dacus Library, Winthrop University) <herringm@winthrop.edu>

My wife Carol and I are notorious for never winning anything. You could place us in a room full of frequent multimillion-dollar lottery winners, and I swear all of them would lose from then on. It's contagious, really. And though we've tried on numerous occasions to improve our odds, stack the deck, all-but-cheat, the end result is the same: we simply do not win. Get every red light, pick the wrong grocery line, pick the wrong queue at the ATM. You think I'm kidding, but I'm not. Black cats run from us!

For example, every year for the past five years, the school where my wife works has a drawing for prizes. It's a way to kick off the school year in good form. Now these are not your fake-apple-for-the-teacher prizes but honest-to-goodness danegeld that anyone would want.

So, imagine my surprise and my wife's utter amazement when this year she won the first prize given away, a Fitbit. For those of you living in some subterranean ecroulement, a Fitbit is one of the newest devices that tracks your sleep, your calories, your blood sugar, your daily steps, your IQ — you name, it records it. You can track this on your laptop by syncing it with the Fitbit and you — and whoever has hacked

into your account — can see all the things you do, or don't do, right. It has these bright lights that tell you when you reached your goals: one for you-lazy-good-for-nothing-slouch to five for kiss-my-Fitbit-Tony-Horton.

Now my wife has never been — how to put this delicately — an aficionado of exercise. All of our early married life, she could eat five bowls of ice cream and still remain her petit size four. She might begin an exercise regime only to stick to it like Jell-O on the wall, which is to say, for a few days and then fall off. It was maddening, really. I would walk by the refrigerator and gain weight; consequently, I began running in my twenties and have continued into my sixties. She, on the other hand, never really gave it a thought until two children and the doleful years of living with me later began to catch up. A few years ago, she began a daily regime.

When she won the Fitbit, that sleek, hot pink wrist device, I thought she might wear it a day or two. But, much to my surprise, she really took to it and devoted herself to checking everything: her biorhythms, her sleep patterns, her daily steps, and so on. So much did this become important to her that when we went to

my older brother's fiftieth wedding anniversary recently, she astonished me.

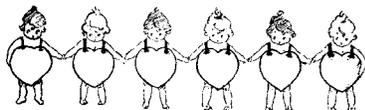
It was about 10:30 at night, and I was getting ready for bed. I had gone to brush my teeth. When I walked back into the hotel room ... she was gone. No note, no sign of her, vanished. My first thought was that after 42 years she had had enough. Surely no one could blame her. I'm nothing if not difficult but honestly in a very winsome sort of way. Frankly, I had been the picture of dutiful devotion that day so it was a bit surprising that her walkout would come *then*. About ten minutes later she walked in.

"I had three lights and so I walked around the perimeter of the hotel to get in my steps. See," she beamed. "All five."

Now I know you must be wondering where all this is going, but that's when it struck me that we need to devise something like this for libraries, something like a Libbit. Just think of it. It could measure everything from dwindling budgets, to shrinking space, to vanishing staffs, to overworked staff to, well, just about everything you can think of that's causing libraries to slowly vanish like so much frost on a warming windshield.

The lights could glow and bells go off, more like a siren, when a library closes. They could

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LEGAL ISSUES



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Cases of Note — Copyright

Don't You Dare Ignore Fair Use — The Dancing Baby Case



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STEPHANIE LENZ V. UNIVERSAL MUSIC CORP.; UNIVERSAL MUSIC PUBLISHING INC.; UNIVERSAL MUSIC PUBLISHING GROUP INC. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 2015 U.S. App. LEXIS 16308 (2015).

Stephanie Lenz uploaded onto YouTube a 29-second video of her two very young kids dancing to **Prince's** *Let's Go Crazy*. And she gave it a name. "Let's Go Crazy." Original.

She asks the 13 month-old what he thinks of the music, and he responds by bobbing while holding a push toy.

Yes, right up there with cat videos. What did we do before YouTube?

Universal was the publishing administrator in charge of guarding **Prince's** copyright. And trained lawyers sat monitoring YouTube daily.

With their legal skills and ear for music, they dismissed one line/half a line of a song or ones in raucous bars with music in the background. Their guidelines did not include any consideration of fair use.

As **Lenz** asked her toddler his opinion of the music, they determined the **Prince** composition "was very much the focus of the video." And jumping all over this, they sent a take-down

notice to YouTube. This included a "good faith belief" statement as per 17 U.S.C. § 512(3)(A) (v) which notes a good faith belief that the use is not authorized by copyright owner, agent or law.

YouTube yanked the video and notified **Lenz**. Uh-oh.

Our furious mother seems to have read up on the law and fired off a counter-notification to **Universal** under § 512(g)(2)(B). **Universal** riposted that she had neglected to swear she wasn't perjuring herself as per § 512(g)(3)(C).

Is that a pretty good guide to managing the legal end of your YouTube cat videos?

Well, by gosh, **Lenz** corrected her counter-notice, and YouTube caved and restored it. But not content with her victory, **Lenz** sued in 2007 with some procedural floundering around until, in 2008, she went forward with only one claim for misrepresentation under § 512(f).

And then we got a partial motion for summary judgment, an interlocutory appeal and blah blah, and we're before the 9th Circuit.

The Appeal

Yes, it's the "evidence viewed in a light most favorable to the non-moving party presents issues of material fact." **Warren v. City of Carlsbad**, 58 F.3d 439, 441 (9th Cir. 1995).

Libbits could become the latest craze. Everyone would want one and would check to see how many glowing lights showed goals being reached. Granted, it might take a few years for even one library to have all five lights shining at once. But think of how it might work: people would not go to bed before checking on their favorite library and would not go to sleep until they had helped that library reach its goals. They would climb out of bed and write another check before firing off another email to some legislator.

OK, OK. I get it. It's a pipedream that even **Apple** wouldn't fall for. So what do we do in the meantime?

We fall back on that timeworn but as yet unsuccessful other fit, the throwafit. We throwafit and continue making our case, as often as we can, as much as we can, and with as much devotion as we always have. 🍄

In 1998, the DMCA added some stuff among which is Title II — Online Copyright Infringement Liability Limitation Act — 17 U.S.C. § 512.

Under 512(c), service providers like YouTube and Google may escape copyright infringement liability if they "expeditiously" remove stuff upon receiving notice of infringement. And there are elements as stated above. And the service provider has to tell the user.

The restoration by counter-notification is automatic and must be done within ten days. And then the copyright owner and cat video producer slug it out with YouTube stepping back out of the way.

And there's punishment for abusing the DMCA.

Must Consider Fair Use

And now we get to the big point. 17 U.S.C. § 107 "empowers" and "formally approves" fair use. "[A]nyone who ... makes a fair use of the work is not an infringer of the copyright with respect to such use." **Sony Corp. of Am. v. Universal City Studios, Inc.**, 464 U.S. 417, 433 (1984).

Fair use is not merely an affirmative defense, but a right granted by the **Copyright Act of 1976**. **Bateman v. Mnemonics, Inc.**, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

So. Did **Universal** misrepresent its good faith belief that the dancing baby was not subject to fair use? A copyright holder is not liable for a simple blunder. There must be "a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner." **Rossi v. Motion Picture Ass'n of Am. Inc.**, 391 F.3d 1000, 1004-05 (9th Cir. 2004).

Universal is only liable if it knowingly misrepresented its good faith belief in violation. But it must consider fair use!! Which they didn't do.

Although the consideration doesn't have to be "searching or intensive." That monitoring attorney can make a pretty snap decision while wading through the "crush of voluminous" mess on the Web. Computer algorithms will do. Human review is not required.

And what does our outraged mother win? Well, she gets to go to a jury to seek nominal damages a mere eight years after she began. 🍄

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flash when another budget is cut, or when some administrator says, "But it's all on the Internet," or when some legislator claims that higher education gets way too much money. Wait. Scratch that last one. If we alarm on that one none of us will get any sleep. Better to have it glow gold when a legislator says something intelligent about libraries.

We could even place giant-sized Libbits in town squares in case everyone thought they were too square and wouldn't wear them. These life-sized Libbits would gong mercilessly when books were removed to make way for computers, or when deans or directors were reminded that they didn't generate enough revenue or were simply financial black holes.