

June 2017

## Questions and Answers-Copyright Column

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### Recommended Citation

Gassaway, Laura N. (2017) "Questions and Answers-Copyright Column," *Against the Grain*: Vol. 29: Iss. 3, Article 56.

DOI: <https://doi.org/10.7771/2380-176X.7795>

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# LEGAL ISSUES



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## Cases of Note — When Copyright Act Doesn't Preempt

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

**Loretta Lynn v. Sure-Fire Music Company.** United States Court of Appeals for the Sixth Circuit. 2007 U.S. App. LEXIS 14050.

*"My daddy worked all night in the Van Lear coal mines*

*"All day long in the field a hoin' corn"*

Ah yes, **Loretta Lynn**, coal miner's daughter from Butcher Hollow, Kentucky. And Daddy indeed died of black lung.

And she married at 15, launched her career in 1953 with a \$17 Harmony guitar, became a Nashville fixture with 16 number-one hits.

In 1961, **Lynn** contracted with **Sure-Fire Music Company**, giving them world-wide copyright interests in her songs in exchange for royalties. In 1966, they re-executed with one big difference. If there was a change of ownership of **Sure-Fire**, the contract "shall be null and void."

*i.e., better the bandits you know ...*

By 2003, the original **Sure-Fire** owner brothers were out and other family members in. **Lynn** filed in state court for a whole bunch of stuff.

To wit: declaratory judgment that contract void; recover master recordings; breach of contract for failing to renew copyrights and failing to collect foreign royalties and other injuries, all of which were contract or tort claims.

The state court said it had no subject matter jurisdiction as the **Copyright Act** preempted the claims. She had to go to federal court.

So **Lynn** refiled in federal court asserting the same claims.

*Of course the opinion says "Lynn." It was her lawyer. She was busy writing "Don't Come Home A'Drinkin'." And I'm sure her lawyer had a delightful time explaining what happened next because clients are always so reasonable.*

**Sure-Fire** moved to dismiss on the grounds that **Lynn** was asserting state law claims and she should be arguing copyright. And the federal district court dismissed saying Copyright did not preempt and they had no subject matter jurisdiction.

**Sure-Fire** then appealed, insisting that **Lynn's** claims lay in copyright. And we go to the Sixth Circuit which hears appeals from Kentucky, Michigan, Ohio and Tennessee. It sits in Cincinnati in solemn, black-robed majesty at the Potter Stewart U.S. Courthouse.

A federal court has jurisdiction if the complaint invokes federal law. **Caterpillar, Inc. v. Williams**, 482 U.S. 386, 392 (1987).

*Duh.*

**Lynn's** complaint had no federal law. It was all contract law. But is the complaint, as **Sure-Fire** insisted, preempted by Copyright Law?

*And what was Sure-Fire's strategy? Were they so insistent on copyright because they hadn't violated copyright?*

*As you're about to see, Lynn's lawyer did the thing right from the get-go and has gotten totally jerked around and stalled.*

Preemption can only happen if (1) the work is within the scope of the "subject matter of copyright" which the songs were; and (2) her state law rights are equivalent to any exclusive

rights within copyright per 17 U.S.C. § 106. **Wrench LLC v. Taco Bell Corp.**, 256 F.3d 446, 453 (6th Cir. 2001).

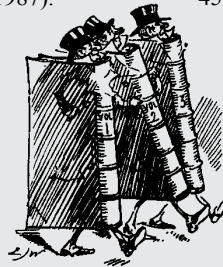
Rights protected under Copyright are to: (1) reproduce the work; (2) prepare derivative works; (3) distribute copies; (4) in the case of music, to perform it; (5) in the case of sound recordings, to perform by digital audio transmission.

**Lynn** wanted her recordings back and her foreign royalties paid over. She had to prove the formation and breach of a contract.

So the Sixth Circuit affirmed the district court's dismissal.

But back in state court, she would have to appeal their dismissal. Ye-gads.

Perhaps inspiring her to write "Full Circle." And for her attorney, "All I Want From You Is Away." 🐻



## Questions & Answers — Copyright Column

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**QUESTION:** *A university librarian asks about linking to copyrighted content and whether there is any liability when a library provides such links.*

**ANSWER:** In the United States, it is settled law that a search engine's linking to copyrighted content is not infringement. A couple of cases from the 9th Circuit U.S. Court of Appeals settled the matter. See **Kelly v. Arriba Soft Corp.**, 336 F.3d 811 (9th Cir. 2003) and **Perfect 10, Inc. v. Amazon.com, Inc.**, 508 F.3d 1146 (9th Cir. 2007). The cases held that the links actually direct searchers to the copyright holder's website where the full-size photographic image is stored. Google did not store the images. Therefore, linking is not direct infringement. The **Perfect 10** court also found that a search engine's link-

ing could be contributory infringement if the search engine's owners had knowledge that the infringing **Perfect 10** images were on its website and did nothing to take simple steps to prevent further damage to the plaintiff. The court went on to find that there was no vicarious liability because the search engine had no ability to police the infringing activities of third-party websites.

The situation is less clear in Europe, however, where some courts have held that linking is not copyright infringement, but other courts have disagreed. The distinction appears to be whether the link is to the copyright owner's own website or is to a third party's infringing website. The critical issue is whether the person providing the link knew or should have

*continued on page 45*

## Questions & Answers from page 44

known that the hyperlink posted provides access to a work that has been illegally placed on the Internet.

For libraries, as a practical matter, avoiding linking to infringing websites should be the goal. It is easy to link to official websites while eschewing those that include copyrighted motion pictures, music, photographs without permission of the copyright holder. The library is unlikely to be liable for such linking but would instead receive a cease and desist order to remove the link to infringing material.

**QUESTION:** *A medical librarian asks about electronic book collections and what guidelines libraries should provide to students concerning printing from these books. Ritzenhouse says that it monitors to see if there is abusive copying. Are libraries liable if there is such abuse?*

**ANSWER:** Typically, libraries are required to provide the copyright warning regarding copyright infringement on (or near) all copying machines. If the printing is occurring in the library, then the warning should be posted near the printers. The wording of the warning is specified by federal regulations:

### Notice Warning Concerning Copyright Restrictions

The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

Most importantly, the license agreement that the library signed when obtaining access to the electronic book controls issues such as printing from the work, etc. So, the first step is to consult the license agreement. If the agreement is too restrictive, approach the publisher and ask to renegotiate the agreement.

**QUESTION:** *The recent changes in the Canadian copyright law have caused alarm among publishers, especially education publishers. Have the changes caused significant problems?*

**ANSWER:** It is somewhat difficult to answer this question. When Canada's *Copyright Modernization Act* was enacted in 2012, the publishing industry claimed that the legislation ignored the traditional balance of copyright interests in reflecting rights and needs of both

users and copyright owners. Publishers claim that the law tilted too far in favor of users, particularly academic users that resulted in reduced revenues for educational publishers and their authors. Prior to the revision of the Canadian law, educational institutions paid a license fee for reproducing copyrighted materials for students.

New guidelines were developed consistent with the revision to permit teachers, instructors, professors, and staff members in non-profit educational institutions to reproduce, in paper or electronic form, short excerpts from a copyright-protected work for the purposes of research, private study, criticism, review, news reporting, education, satire, and parody. A short excerpt is defined as up to 10 per cent of a copyright-protected work; one chapter from a book; a single article from a periodical; an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works; an entire newspaper article or page; an entire single poem or musical score from a copyright-protected work; an entire entry from an encyclopedia, annotated bibliography, dictionary, or similar reference work.

The changes have been very positive for educational institutions that are strapped for money. Nevertheless, publishers were concerned that some of these publishers would be forced out of business because of the changes to the law. For example, textbook publisher Emond Publishing ended its high school publishing program. The ultimate impact of these changes on publishers has not been studied and documented, however.

**QUESTION:** *An academic author asks about time limits for changing publishers when an author wants to change something in a work, produce a new edition, etc.*

**ANSWER:** Typically, this is covered in the publication agreement that the author signs when adopting a publisher. So, the first step is to consult the agreement to determine the duration of the agreement. There could also be territory restrictions in the agreement covering the publishers' rights to publish the work in certain areas of the world or in all areas.

The *Copyright Act* also provides a time period at which all rights the author granted can be reclaimed by the author. The publishing contract itself may contain a reversion provision specifying the point at which the publisher will return rights to the author. For example, many university presses revert rights when the work is no longer in print. Termination of rights is complicated to understand, but for works published after 1-1-78, the contract may be terminated 35 after publication as long as the author provides notice of termination to the publishers and records it with the U.S. Copyright Office. See *Copyright Act of 1967*, 17 U.S.C. § 203 (2010).

The *Author's Alliance* has published a book aimed at assisting authors, *Understanding Rights Reversion*, available for purchase or a free download online. It also maintains a Re-

version Portal at, <http://www.authorsalliance.org/resources/rights-reversion-portal/>. The *Creative Commons* also offers a termination tool to help authors, at <https://labs.creativecommons.org/demos/termination/>.

**QUESTION:** *A public librarian saw a recent news note that a court had found HTML to be copyrightable and asks, why the change?*

**ANSWER:** Earlier this year, a federal district court did hold that HTML could be copyrighted if it met the originality requirement. Both parties offered contextual advertising services in *Media.net Advertising FZ-LLV v. Netseer Inc.*, No. 14-3883, 2016 U.S. Dist. LEXIS 3784 (N.D. Cal. Jan. 12, 2016). Their clients put ads on their website and when visitors click on an ad, they are directed to a "search results" page. *Media.net* sued for copyright infringement alleging that *Netseer* copied its HTML that generates the search results pages which gave it an unfair competitive advantage.

The central question in the case is whether HTML is copyrightable. HTML code is a markup language that merely formats the text and files on a webpage. Most of the HTML at issue in this case appears to have been a Cascading Style Sheet (CSS) markup, the set of formatting rules for a webpage or site. The HTML on a website often includes CSS. While the content of a webpage is copyrightable, whether the HTML is likewise protectable is a hard question.

The compendium says that the content of a website is material and is copyrightable. The look and feel of a website is not protected by copyright and thus cannot be registered. The compendium considers HTML as not being copyrightable as a computer program because it is not a computer program, but merely formats content for display. Further, the Office will not register HTML code as a computer program, because HTML does not constitute source code. However, the Compendium also states that HTML may be registered as a literary work if a human being (rather than a website design program) created the code and if it contains a sufficient amount of creative expression. The claim may include the HTML code underlying an entire website or it may be limited to specific webpages. Ordinarily, CCS is not registrable, according to the Compendium.

The district court said that typically, courts defer to the Copyright Office but the Compendium is only persuasive and not entitled to complete deference. The fact that the Office had registered the work indicates implicit endorsement of the validity of the plaintiff's copyright. The court noted that the look and feel of a website is not copyrightable, but HTML that produces the look and feel is copyrightable. This is because "there are multiple ways of writing the HTML code to produce the same ultimate appearance of the webpage." Here, the court found that the HTML code evidenced minimal creativity but enough to qualify for copyright protection. The plaintiff was given leave to amend its complaint to specify what aspects of the code *Netseer* improperly used. 🐼

