Random Ramblings — Sex, Intellectual Freedom, and Academic Libraries

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Cases of Note from page 54

Chromatic scale is a scale of twelve pitches, each a semitone above or below the adjacent one. And that's completely over my head.

In an arpeggio, you take a chord and play it one note at a time. Okay, I get that.

The error was not harmless because the Trust's expert witness testified that **Zep** had copied an original chromatic scale. He said "Taurus" had public domain elements that were modified in an original way. And this would go to extrinsic substantial similarity.

An original element of a song need not be new; just created independently in a creative way. *Swirsky*, 376 F.3d at 849.

The jury charge was dismissive of his testimony and contrary to a 9th Circuit holding.

So this got sent back for a new trial.

*Our son, who was a young teen in the glory days of **Led Zeppelin**, listened to both intros and said he couldn't hear any similarity. So trust would lose on the intrinsic test with him on the jury.*

*He also had an interesting take on laches. He reasoned that **Randy California** was alive from '71 to '97 and heard "Stairway" numerous times. How could anyone not hear it? Over. And. Over.*

He was pals with **Led Zep**, and as a musician's musician, knew how music is put together.

If he had no objection, why should his heirs be able to bring suit? 🐼

Questions & Answers from page 55

QUESTION: *A North Carolina school librarian asks about the photographs of **Queen Anne's Revenge**, the vessel of the pirate, **Blackbeard**, found shipwrecked off the coast of North Carolina and the recent litigation with the State of North Carolina for copyright infringement.*

ANSWER: In *Allen v. Cooper*, 895 F.3d 337, 4th Cir. (2018), the appeals court reversed the district court decision. Plaintiffs claimed copyright infringement for the posting of six photographs of the shipwreck on a state website violated a 2013 settlement between North Carolina on one side and the salvage company and photographer on the other. The district court held that the **Copyright Remedy Clarification Act of 1990** abrogated Eleventh Amendment immunity for states from copyright infringement suits. The Fourth Circuit disagreed and found that the settlement's language did not constitute a waiver of Eleventh Amendment immunity, nor did the aforementioned Act abrogate sovereign immunity of the state. Further, none of the exceptions to sovereign immunity applied. The case was remanded to the district court instructing it to dismiss with prejudice all claims against state officials. 🐼

Random Ramblings — Sex, Intellectual Freedom, and Academic Libraries

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Are academic libraries able to deal with overtly sexually oriented materials required by their faculty for teaching and research? I have two reasons for writing this column. First, I'm using it as a practice run for a presentation that I'll be giving at the **2018 Charleston Conference**. I'll be examining the broader question of objectionable resources in general, but sexual materials will be a key part of my presentation. Second, I was chair of the **ACRL Intellectual Freedom Committee** from 2002-2006 before it was disbanded. I often heard that intellectual freedom wasn't an issue for academic libraries, but I strongly disagree.

The proximate cause for my research was a presentation at **Wayne State University** on December 2, 2017, by **Jennifer Nash**, Associate Professor of Gender & Sexuality Studies and African American Studies at **Northwestern University**. She gave a fascinating talk on the role of African-American women in X-rated movies with a focus on the 1978 film, *Sex World*. Surprisingly, the African-American woman overcame the prejudices of the white male and seized the more powerful role in the relationship. I came away from the talk asking whether academic libraries would buy such materials for legitimate research needs. I also remember my spouse telling me about an assignment in the 1970s where she was required to visit an adult bookstore. I could see a similar assignment today to view an X-rated film.

In other words, faculty and students could have a need for such materials for legitimate teaching and research, but would the academic library buy them?

A few words are in order regarding pornography and commercially produced X-rated films. The most important fact is that pornography among consensual adults is legal. The Supreme Court has effectively decriminalized pornography. Commercial pornographers wish to avoid prosecution and want clear guidelines about what is legal or not. Child pornography is illegal because actors under eighteen cannot give legal consent. Most X-rated films show consensual acts where both men and women are eager to participate in sex and are shown having a good time. Violence does occur in about 13% of pornography according to one research study, but the violence shown is most often

consensual. Furthermore, in X-rated films, women also abuse men. Finally, the producers of X-rated films can find more than enough willing female and male actors so that issues of sex trafficking are irrelevant for mainstream productions.

The rules for following Constitutional principles including freedom of speech are different for private and public academic libraries. Private institutions have a much greater ability to control the research and teaching of their faculty. Religious institutions have broader rights to require that their faculty and students adhere to certain standards as long as doing so does not interfere with civil liberties enshrined in law, e.g., a prohibition against racial discrimination. Some federal or state programs require further restrictions if the institution

accepts tax dollars, but many offer exemptions from some rules for religious and other private institutions. One very clear exception is the ability to have single-sex colleges and universities without facing a discrimination challenge. On the other hand, a private institution that wished to support teaching topics that require the use of objectionable materials such as X-rated films may find it easier to do so than a publicly funded institution. Politicians or concerned citizens would have a much greater ability to apply pressure on the institution to avoid teaching such subjects even if doing so ran counter to the cultural diversity of the

nation and the principle that moral beliefs cannot drive policy without sufficient proof that such laws have a secular purpose. I understand that overlooking constitutional rights happens frequently and that many individuals or institutions are unwilling or unable to challenge such actions in court where they often receive an unsympathetic hearing from judges and juries. One common example is the difficulty, including threats of funding cuts, that institutions of higher education have faced in sponsoring art exhibits with erotic or blasphemous content.

My answer to whether the academic library should buy materials such as X-rated videos for valid teaching and research is quite simple. The mission of the academic library is to support the teaching and research needs of faculty, students, and staff. The

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mission is not to judge whether these teaching and research needs are valid. Others in the college or university have this responsibility. The department chair, dean, provost, university president, or governing board have the responsibility to make such determinations that will then affect what the library needs to purchase to provide support. Even here, the principle of academic freedom should protect, at least in principle, that ability of faculty members in a public institution to select their research topics and to at least propose teaching their specializations. In the example that led to this column, **Northwestern University** hired **Dr. Nash**, gave her tenure, and promoted her to Associate Professor. I do not know if she has asked the library to provide materials for her research, but I consider her claims to library support to be as valid as any other faculty member in a similar position.

I accept that academic libraries can't buy everything that their faculty want and that purchasing X-rated materials might pose some special problems for libraries. To begin, academic libraries can ethically refuse to honor faculty requests for materials for personal use. This is the function of the public library. I don't expect my university library to support my personal reading and viewing habits though it often does with materials bought for literature and film studies research and teaching. Cost is the second major reason for not purchasing a faculty request. Most libraries have some sort of limit on the individual and cumulative amount of money they are willing to spend on a faculty member's research. X-rated films may fit into this category if they are no longer easily available and must be purchased through secondary markets. A third reason that could be especially valid is format. Perhaps the film is only available on VHS, a format that the academic library no longer supports. This reason was used by many libraries as a way to avoid purchasing *Sex* by **Madonna** since it was spiral bound, a format that many public libraries don't collect. I, like many others, considered this to be a dishonest but plausible excuse for not purchasing a controversial item on the

New York Times bestseller list. If the faculty member can deal with the obsolete format with personal equipment, this undercuts the library's reason for not purchasing the item. Finally, I have heard librarians argue that libraries are not obligated to buy materials that will be used by only one person because the purpose of the library is to support multiple uses. To this, I say "bunk." One use is more than a substantial percentage of librarian/vendor selected materials will ever receive.

A more valid concern is that erotic materials including X-rated videos have a greater risk of being stolen. One additional reason for users to steal such items is the perceived possibility of embarrassment during the normal check-out process — the worry that the stuffy librarian will say: "Why would a nice person like you want to read (view) such horrible and immoral materials?" (I actually had this happen to me as a high school student in the early 1960s when I asked for a racy novel from the locked case in my public library). Theft may also occur during processing including the removal of such items by those who find them morally objectionable. With such issues, I would consider it reasonable to find ways to protect these materials such as putting them behind the desk or housing them in special collections.

I'll concede that this column may be more an intellectual debate than a practical matter. Any faculty member or student who needs an X-rated film can most likely find a copy through a Google video search or on a major pornography platform such as Pornhub. With the vast number of videos available and the limited number of porn descriptors, the main requirement might be advanced searching skills to zero in on the wanted item. (I needed about ten minutes to find the key film *Sex World*, that **Dr. Nash** discussed in her talk). Many free tools also exist to download these videos. Doing so is, of course, a copyright violation; but the copyright owners of X-rated videos pay much less attention to protecting their rights and issuing take down notices. Finally, the quality might not be as good as a DVD version but would most likely be satisfactory for content analysis.

To summarize the main points of this column, I've created the following case study to test how readers respond. The situation is

reasonable and close enough to the facts to be possible. The professor who wants the library to make available a copy of the film, *Sex World*, is a tenured Associate Professor in gender studies with an excellent scholarly record that can be verified with a quick search in **Google Scholar**. Her department and college support her research. She teaches a course where this film about a black porn star is part of the syllabus and required viewing for her students. She has also given the same lecture on campus that she gave at **Wayne State University** and thus created possible demand for this film. She is even willing to donate the film to the library so that it will cost the library nothing. The format is DVD, which the library collects. Perhaps she is enough of a radical that she is doing so in part to test the library's commitment to intellectual freedom. She also believes that the film is an important part of the cultural record with valuable insights on the role of race and gender in the United States and provides evidence of attitudes towards sex in the late 1970s. What would you decide? Would the size and private/public status of the college or university make a difference?

To conclude, this column and my upcoming presentation at the **Charleston Conference** are part of my current research agenda that seeks to show that honoring a commitment to intellectual freedom is not as easy as most librarians think it is. (The current controversy about having an open meeting room policy is an example of librarian pushback against First Amendment legal requirements and the Library Bill of Rights). Supporting banned books is important but is only the beginning of a commitment to intellectual freedom. A book or film can't be banned if the public, school, or academic library doesn't purchase it. For most, if not all libraries, some users of all ages have valid information needs on controversial topics such as sex education, non-mainstream religions/atheism, radical political movements, witchcraft, psychological disorders, and even career guidance for sex workers. I also have plans to write an article about what a "balanced collection" really means. While I doubt that I'll change library selection decisions, I can at least broaden the discussion. 🌱

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humanities (SSH) monographs that preceded OA books. A willingness to experiment has become established in OA book culture. New trials in search of a viable future business model continue to be launched. Cooperative ventures include **Knowledge Unlatched** and **MUSE Open**. **Bookboon.com** uses advertising, but this only works for widely viewed topics such as textbooks or health titles directed at patients. **punctum books** calls for donations or subscriptions to gain

early access. While journal publishers like **MDPI** and **Frontiers** depend on support for the original journal article, **Australian National University Press** relies on print sales. But, like journal APCs, most still rely on book or chapter charges. The business models are very diverse, particularly considering the relatively small number of titles involved. **Open Access Book Publishing 2018-2022** provides detailed market information for this segment of scholarly book publishing. It analyses trends impacting the industry and forecasts market growth to 2022. The report includes a review of more than 20 notable OA publishers and programs, including **InTechOpen**,

Bookboon.com, **Frontiers Media**, **SciELO**, **De Gruyter**, **Brill**, **Knowledge Unlatched** and **Springer Nature**.

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