

Against the Grain

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Cases of Note-Copyright-Contrib Infringement - Safe Harbor

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LEGAL ISSUES



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Cases of Note — Copyright

Contrib Infringement - Safe Harbor

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HARLAN ELLISON V. STEPHEN ROBERTSON AND AMERICA ONLINE INC. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 357 F.3d 1072; 2004 U.S. App. LEXIS 2074.

Harlan Ellison (b. 1934) has published over 1,700 short stories, novellas, screenplays, comic book scripts, teleplays, and essays. He's won **Hugos**, **Nebulas** and **Edgars**. Famous novels include *Web of the City*, *Spider Kiss*, *The Starlost*, *A Boy and His Dog*. Whew.

He was expelled from **Ohio State** for belting a professor who belittled his writing skills. And he proceeded to send said prof a copy of each and every story he published.

He refuses to use a computer and types on a manual typewriter. He voiced himself on the *Scooby-Doo! Mystery Incorporated*. The episode "The Shrieking Madness" was **H.P. Lovecraft** inspired. And he was in a scene with Milhouse on *The Simpsons*.

Yes, what a character. He has some famous quotes.

"The two most abundant things in the universe are hydrogen and stupidity."

"People who can't get laid watch star trek and eat twinkies."

"Love ain't nothing but sex misspelled."

"You are not entitled to your opinion. You are entitled to your informed opinion. No one is entitled to be ignorant."

In 1962 he began churning out screenplays for *The Oscar*, *The Loretta Young Show*, *The Flying Nun*, *Burke's Law*, *Route 66*, *The Outer Limits*, *Star Trek*, *The Man from U.N.C.L.E.*, *Cimarron Strip*, *The Alfred Hitchcock Hour*.

Widely known to be argumentative, he assaulted an author at the **Nebula Awards** banquet, sent 213 bricks to a publisher postage due, and a dead gopher to another by slow mail. And he's sued various people.

Which leads us to our case. And another known quote on copyright thieves: *"If you put your hand in my pocket, you'll drag back six inches of bloody stump."*

Anderson and AOL

Around April of 2000, **Stephen Robertson** posted four **Ellison** (copyrighted) short stories on the USENET, a peer-to-peer file sharing network. The particular USENET newsgroup — *alt.binaries.e-book* — was primarily a vehicle for exchanging unauthorized digital copies of works by famous authors.

AOL subscribers are given access to USENET, so **Ellison** emailed AOL, warning of the infringement in compliance with notification procedures of the **Digital Millennium Copyright Act (DMCA)**. He got no reply. AOL claims to have not received it.

Which it hadn't. But there's a reason for it as you'll see below.

Ellison sued **Anderson**, and included AOL for vicarious and contributory copyright infringement. Upon receipt of service of suit, AOL blocked users' access to *alt.binaries.e-book*.

At the trial court level, AOL got summary judgment on direct and vicarious copyright infringement, but was told contributory infringement was a triable fact. BUT, the safe harbor limitation of liability under the **DMCA** blows that claim away.

The Appeal

You are contributorily violating copyright if you induce, cause or materially contribute to infringement. **A&M Records v. Napster, Inc.**, 239 F.3d 1004, 1013 (9th Cir. 2001) (*Napster II*)

You are vicariously liable for infringement if you enjoy a direct financial benefit from another's infringement and have "the right and ability to supervise" the activity. *Napster II*, 239 F.3d at 1022.

But ... Safe Harbors?

Congress wrote Title II of the **DMCA**, **Online Copyright Infringement Liability Limitation Act (OCILLA)** 17 U.S.C. § 512 (2003) to get cooperation between copyright owners and Internet service providers.

To give greater certainty of legal exposure to service providers, it created a series of "safe harbors" for ordinary activities.

Contrib Infringement

For **Ellison** to win, he must show AOL knew infringement was taking place and contributed to it.

Knowledge

Incredibly, AOL had changed its contact email address but waited some months to register the change with the U.S. Copyright Office and failed to configure the old address to forward new messages. Which was why they didn't get **Ellison's** notice.

Further, AOL had received a phone call from a subscriber telling them of infringing activity on the *alt.binaries.e-book* group.

They don't address whether a lone phone call to a behemoth corporation should trigger knowledge. But that's why it's a jury question.

Material Contribution

AOL provided a service that automatically distributed all USENET postings, infringing and noninfringing when it knew of the infringing stuff. This can be a material contribution, making for a triable issue. **Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.**, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

Vicarious Infringement

Ellison must show AOL received a direct financial benefit from the infringement and had the right to supervise the activity.

AOL's future revenue depends upon a growing userbase. While the infringing group might be a small portion of AOL's vast revenue, it can still be liable without regard to size. Indeed, almost any unit of their services might seem relatively small next to the whole.

But was the infringing activity a draw for subscribers? **Ellison** could not show AOL attracted customers by ripping off his stories nor could it show it lost them when the infringement was lost.

Good grief. What exhaustive discovery would have to be undertaken to prove this?

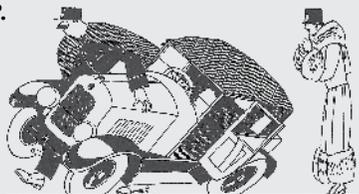
But the vicarious claim flopped.

Leaving contrib still alive but for ...

OCILLA'S Safe Harbors

To be secure in a safe harbor, a service provider must have a termination of services

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Questions & Answers — Copyright Column

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QUESTION: *A middle school teacher asks whether it makes a difference if she prints copies of an article for each student in her class or simply provides a link to an online version of the article for her students.*

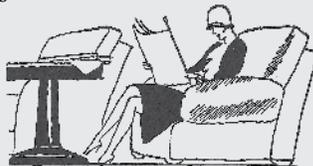
ANSWER: While printing copies of the articles for students is likely a fair use, there is a difference in printing versus providing a link for students to access the article. Printing concerns the reproduction and distribution rights of the copyright owner, and fair use is an exception to that right. Providing a link implicates no right of the owner.

There are practical reasons for choosing one over the other. Printing copies of the articles for students makes sense when each student needs a copy in front of them for a specific classroom activity. Not all students may have access to computers or the internet. Further, the online link may not allow printing but merely reading on screen. On the other hand, relying on a link helps train students to use the Internet and is most useful when students can read from the screen or print at the student's choice.

QUESTION: *A college art librarian asks about virtual reality art creations and whether they qualify for copyright protection.*

ANSWER: To date, virtual reality (VR) has been primarily used in video games but there is much promise that VR will soon change how we search the internet and use social media. Although still in its infancy, VR allows artists to use color and light and incorporate it with motion so that three-dimensional works seem to float in the air. Not only does VR permit the artist to create new and different types of works, but it also allows viewers to interact with the works in ways not previously possible.

Section 102(a) of the *Copyright Act* defines the types of works that are eligible for copyright protection. While VR works



are not mentioned in the statute, the section's wording indicates that new types of works can be protected under these eight broad categories, and this has occurred. For example, in the early 1980s, courts held that video games (not mentioned in section 102(a)) were copyrightable as audiovisual works even though the sounds and images varied based on manipulation by the players of the games. Therefore, there is unlikely any difficulty with claiming copyright protection for these works. As with other types of works, these works must be registered for copyright in order for to sue infringers. Some speculate that enforcement of copyrights in VR works may be more difficult, however.

Of more concern are VR created solely through artificial intelligence without human intervention. In the United States, only human authors qualify as authors for copyright purposes so works created by machines or animals are not eligible for copyright protection.

QUESTION: *A college librarian asks whether schools are permitted to hire commercial copy shops to produce materials for the classroom that were obtained under a Creative Commons license.*

ANSWER: This issue was recently addressed by the Second Circuit U.S. Court of Appeals in *Great Minds v. FedEx Office & Print Services*, 886 F.3d 91 (2d Cir. 2018). *Great Minds* is a non-profit organization that designs educational materials that it sells in book form and releases them to the public without charge but subject to a **Creative Commons** license. The license allows "any member of the public to download, reproduce, and distribute the materials subject to the terms of the license." It offers a

"worldwide, royalty-free, non-sublicensable, non-exclusive, irrevocable license to ... reproduce and share the materials, in whole or in part, for noncommercial

purposes only." **FedEx** is a commercial enterprise and **FedEx** concedes that its copying services are commercial in nature, and that its reproduction would be impermissible under the license if **FedEx** were acting as a direct licensee.

The court found that **Great Minds'** license did not explicitly address whether licensees may engage third parties to assist them in exercising their own noncommercial use rights under the license. Due to the absence of any clear license language to the contrary, licensees may use third-party agents such as commercial reproduction services in furtherance of their own permitted noncommercial uses. In this case, because **FedEx** acted as the mere agent of licensee school districts when it reproduced **Great Minds'** materials, and because there was no dispute that, the school districts themselves sought to use **Great Minds'** materials for other than permissible purposes, **FedEx's** activities did not breach the license or violate **Great Minds'** copyright.

QUESTION: *An archivist asks about archival works that enter the public domain and what are the circumstances under which a user must seek permission from the archives to use the work.*

ANSWER: The question does not specify permission for what. There are two possibilities here: copyright permission and access permission. No permission is required to use copyrighted works by reproducing sections or even the entire work. However, the archives control access to the work. It owns the artifact and may control who, if anyone, has access to that work. Usually, access is controlled to protect the work from damage. Fortunately for users, most archives want to make works available to the public and that is why they are digitizing their collections, which both protects the artifact and provides access to the content.

QUESTION: *A publisher asks whether handwriting can be copyrighted.*

ANSWER: The short answer is no although the underlying literary work certainly may be copyrighted. It would have to be a font based on the handwriting of someone even to consider the issue. One can imagine that the handwriting would also need to be that of a famous person to attract sufficient attention to raise the issue of copyrightability.

Although in common speech, "typeface" and "font" often are used interchangeably, they are not the same. A font is actually a file or program (when used digitally) that informs one's printer or display how a letter or character should be shown. A "typeface" is a set of letters, numbers and other symbols that are consistently used to compose text or other combination of characters. In a typeface,

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policy for repeat offenders, implement it, and inform its users.

The 9th Circuit found AOL did not have an effective policy in place at the time due to the email SNAFU that had new emails falling into a vacuum. Or at least evidence from which a reasonable juror could conclude no effective policy.

And So ...

We go back to the trial court level for a jury

to consider the issues of contributory infringement and safe harbor protection.

In the course of plowing through this, you might have wondered just what the damages might be for the pirating of four stories. And was the battle worth it?

*If we can believe **Variety** Feb. 5, 2002, **Ellison's** lawyer didn't take the case on contingency. At that point, **Ellison** had shelled out \$250,000 in legal bills.*

*But from **Techdirt** June 10, 2004 we learn that "after years of fighting, it looks like **AOL** just got fed up and has paid him off in a settlement to go away."* 🐼