

## Against the Grain

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# Notes from Mosier: Now on to Bridgeton

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## Notes from Mosier — Now on to Bridgeton

by **Steven Chase** (Regional Manager, Midwest Library Service) <chase@midwestls.com>

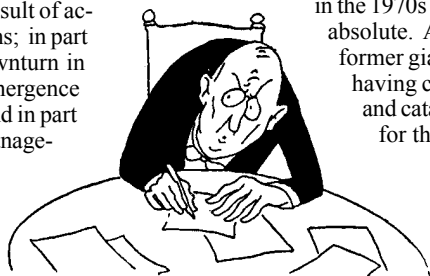
and Column Editor: **Scott Alan Smith** (Western Regional Manager, Midwest Library Service) <smith@midwestls.com>

*“When the well runs dry, they know the worth of water.” — Benjamin Franklin*

Earlier this year we at **Midwest** began a discussion regarding the nature of vendors (academic book vendors in particular), but the conversation could apply to many types of suppliers. **Steven** coined the term “authentic academic vendor” to describe **Midwest Library Service** and other companies that retain a genuine commitment to delivering consistent, excellent service. Accelerating events and market forces that are fundamentally re-shaping the vendor community sparked these musings; we thought we would share them with you.

First of all, there are far fewer vendors to ponder. In part this is the result of acquisitions and consolidations; in part it is due to the general downturn in the economy; in part the emergence of new business models; and in part the consequence of poor management and bankruptcies.

These issues are by no means unique to the library world, but one need look no further than



the acquisition of the **Richard Abel Company**, **Academic Book Center**, **Boley** (who today even remembers **Boley**?), **John Menzies Library Service**, and **Readmore**, among others — all by **Blackwell's** (long established as a book vendor and subscription agent, retailer, and publisher) for an example of the creation of a vast empire that could appear unassailable to competitors and customers alike. Indeed, in the late 1960s anyone who suggested that major academic libraries should trade with anyone other than **Abel** would have been thought naïve or ill-informed. Similarly, **Faxon's** market dominance among academic libraries in the 1970s was viewed as virtually absolute. And yet these and other former giants are no more; some having collapsed with dramatic and catastrophic consequences for their customers.

Acquisitions and mergers, closures and bankruptcies are all elements of the business cycle; they con-

tinue apace in several market sectors, leaving libraries with fewer choices.

Recessions and depressions have also taken their toll. During the dot-com era several new enterprises emerged. Some spent breathtaking and unprecedented sums on advertising and promotions, including full page color ads in mainstream media. To no avail; when the dot-com bubble burst the consequences were swift and absolute. Those who managed their companies prudently tended to survive. Those pursuing a quick return on investment or short-term gain tended to fail.

One tectonic shift in the book trade was the advent of **Amazon**. Fueled by millions of investor dollars, **Jeff Bezos** literally changed consumer behavior. In so doing he condemned whole market sectors to an untimely death — consider how many great independent bookstores, as well as some national chains, are no more. Those who assume an attitude of “survival of the fittest” take a calloused view of what great bookstores meant to their communities; we are poorer for it.

We contend that these conditions and developments are not inevitable. Well-man-

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# LEGAL ISSUES



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## Cases of Note — Copyright Preempts Invasion of Privacy

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

**DEBRALAWS V. SONYMUSIC ENTERTAINMENT, INC., dba EPIC RECORDS** UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 448 F.3d 1134; 2006 U.S. App. LEXIS 1283.

**Debra Laws**, vocalist, and **Spirit Productions (Spirit)** contracted with **Elektra/Asylum Records** to produce recordings of **Laws'** performances. **Elektra** got "sole and exclusive right to copyright such master recordings" and "exclusive worldwide in perpetuity ... to lease, license, convey or otherwise use or dispose of such master recordings." **Elektra** also got the right to use **Laws'** name, likeness and bio.

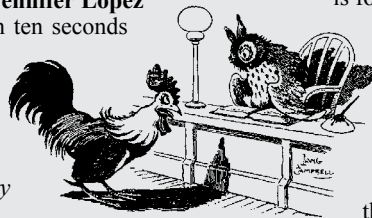
*Hmmm. I'm sure they seemed so nice when they showed her the Cities of the Plain.*

Next, **Elektra** contracted with **Sony Music Entertainment, Inc.** to grant **Sony** license to use a sample of **Laws'** recording of "Very Special" in the song "All I have." This was performed by **L.L. Cool J.** and **Jennifer Lopez**. **Laws** got no money.

*I've listened to the thing, but don't get where her bit was blended in.*

**Sony** then released a **Jennifer Lopez** CD and music video with ten seconds of the same. The song became a mega-hit with a net of forty-million bucks.

*And I presume that's after creative music industry accounting.*



**Laws** sued in California state court for the old common law invasion of privacy — appropriation of name and voice.

**Sony** removed it to the U.S. District Court, saying her claim was preempted by the **Copyright Act**. And there they won summary judgment.

### Appeal

And of course we know the U.S. Constitution gives Congress the power to promote useful Arts and blah blah. Copyright gives the holder the right to control the work and either distribute it or withhold it. Or produce derivative works, which I guess this is. Blending it in another song.

Sections 301(a) and (b) of 17 U.S.C. provides preemption. But it does not limit or eliminate state remedies outside copyright.

*You can see where this is headed. She signed away her rights. But first, we need a two-part test to determine preemption.*

*Certainly better than three-pronged.*

**Laws** asserted the common law right to privacy (appropriation of name or likeness) which is found in every state. Someone

- (1) used her identity;
- (2) made money off it or got some other advantage;
- (3) weren't given consent;
- (4) she's injured.

**Sony** said this is not ordinarily preempted, but is under the facts of the case.

### Now Two-Part Test Part A

Is the misappropriation claim within the subject matter of Copyright? Copyright protects works fixed in a tangible medium of expression. And that includes sound recordings. It's fixed when it can be communicated for more than a transitory period. You sing, sit down and shut up. That's not fixed. **Sony** had a sound recording. Once a voice is part of it, it can be communicated over and over, and falls within the subject of copyright.

Remember **Bette Midler**? Boy, that's showing your age. In **Midler v. Ford Motor Co.**, 849 F.2d 460 (9th Cir. 1988), a professional "sound alike" had imitated her voice from "Do You Want to Dance?" **Midler** didn't want to do the commercial, so an ad agency got a license from a copyright holder. A back-up singer who could imitate her voice did the song. And was told to sound like her. **Midler** was not seeking damages from the use of the song, but from the misappropriation of her voice. Her voice was not copyrightable, so this suit was outside of copyright law.

**Midler** was applied in **Waits v. Frito-Lay, Inc.**, 978 F.2d 1093 (9th Cir. 1992). **Tom Waits** sued for "infringement of voice." The question was whether **Waits'** voice was sufficiently distinctive to give him an action for appropriation.

**Laws'** voice was in a tangible medium, and **Sony** held copyright. The entirety of

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aged firms can, and do, uphold high standards of service. Privately held companies have an advantage in that they do not answer to shareholders or venture capitalists, whose demands for short-term return on investment are generally contrary to the interests of their customers. Additional benefits can be the absence of debt, and ownership of equipment and facilities.

Firms that support their employees benefit from stability. Such staff have reciprocating loyalty, and develop sophisticated skill sets, forestalling the need for constant training and re-training of new hires. Just as is true for libraries, vendors create and sustain organizational cultures. Such cultures are of as much benefit to libraries as to well-managed vendors.

We also maintain that libraries should not be inured to transparent hypocrisy.

We at **Midwest** take pride in over fifty years of steady, stable management and operations. **Midwest** is well known for meeting the needs

of students and faculty, no matter the publication date — be it in print or out of print. We are capable of providing products and services across a wide spectrum. These include EDI ordering and invoicing, copy cataloging, and shelf-ready books, customized invoicing and reporting, delivery of hard-to-locate and out-of-print titles, Web access to firm and standing order databases, as well as a wide range of collection development services. We continue to pursue informed product development and new — to **Midwest** — services.

Thus the authentic academic vendor. 