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Questions and Answers-Copyright Column

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they invade everywhere. See *Brayton Purcell, LLP v. Recordon & Recordon*, 606 F.3d 1124, 2010, WL 2135302 at *4 (9th Cir. 2010).

No one ever thinks about this when they set out on their little careers as bloggers.

But there was no Website in our case, and anyhow, **Love** is a citizen of Nevada.

For the *Lanham Act* to apply in Britain, the alleged violations must have an effect on American foreign commerce. See *Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 769 F.2d 1393, 1395 (9th cir. 1985) (citing *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976), superseded by statute, 15 U.S.C. §6a). It would apply if you misused someone's mark in Britain and injured the American owner monetarily. Likewise if a deceptive product was created in Britain and shipped to the U.S. so sales of the genuine product dropped. **Love** did not perform in Britain, and his trademark right was only for

live performances. **Wilson** had not performed in the U.S.

But incredibly, **Love** claimed his ticket sales dropped after the CD came out. The Ninth Circuit called associating the issue of a CD in Britain with a drop in sales of live performances "too great of a stretch." Which makes you wonder how the district court judge held onto his temper during that admonishment.

Well as it turns out, he awarded attorney's fees to the defendants with respect to all claims finding the claims "bordered on frivolous and were not objectively reasonable" and that they "contributed to the bloat" of a "vastly overpled ... case."

Yes, the spelling "pled" is now being used, but my spellchecker marks it an error. And it's supposed to know isn't it?

The *Lanham Act* allows for attorney's fees in "exceptional cases," meaning when the case is groundless, unreasonable, vexatious, or pursued in bad faith. *Stephen W. Boney, Inc. v. Boney Servs., Inc.*, 127 F.3d 821, 827 (9th Cir. 1997). **Love** "presented not one item of evidence substantiating any U.S. effect," other than a

"misleading and deceptive declaration." Plus the phony **eBay** affidavit "unreasonably and vexatiously ... lengthened or multiplied" the work of the defendants' attorneys and the court.

In a last-ditch, whining defense, **Love** said he did it all on the advice of counsel and shouldn't be punished for it. But the court said if that were a defense, attorney's fees would never be awarded.

And he sort of has a point. Maybe they should just stick the lawyer with the total bill in form of sanctions and save Love having to sue him separately.

And you avid readers have come to the conclusion that Love squandered a lot of money when he merely needed to wait with bated breath until Wilson came to California on tour. You know he couldn't have stayed away from the scene of his youthful triumph.

And in our final pop culture footnote, "Good Vibrations" went grotesquely commercial in a Sunkist orange soda commercial in the 1970s. Just like the '60s degenerating into '70s disco and polyester while the Beatles became musak. 🌿

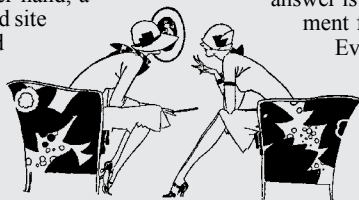
Questions & Answers — Copyright Column

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QUESTION: *A liberal arts college is being asked to put digital copies of student theses on a server. If the theses contain copyrighted images, standardized tests, etc., is permission needed? Or should access be by password only? Is there any disclaimer that the college should use if the theses are posted on the Web?*

ANSWER: Whether the theses are available on the open Web or on a password protected site makes considerable difference in this situation. In the print world, for published theses and dissertations, clearly student authors were required by the publisher to get permission to include copyrighted photographs and other materials. When the thesis or dissertation was only in the library collection, seldom did the student seek permission for incorporating copyrighted material since the thesis was not going to be published. Posting on the Web, however, is a type of publication with one difference — the college is the publisher, and a copyright holder is more likely to blame the college rather than the individual student for any infringement. Making the theses available on a password protected Website is more akin to having the printed theses available only in the library. However, students and others who have the password can access the images and can download them, so the college should make some effort to discourage downloading should be made.

While a disclaimer on the Web might make college officials feel better, it is unlikely to have any legal effect. On the other hand, a notice on a password protected site that users may not download images from the theses would be useful to alert them that downloading is not permitted and would show efforts to discourage infringement by users.



If the college decides that it does want to put theses on the Web, then student authors should be charged with responsibility for seeking permission for the use of copyrighted images.

QUESTION: *A University professor wants to use his own personal Netflix streaming account to show an entire documentary in a face to face class? Can he do this or show part of the documentary in class? The Netflix Website contains the following language:*

Unless otherwise specified, our DVD rental service and the content on the Netflix Website, including content viewed through our instant watching functionality, are for your personal and non-commercial use only and we grant you a limited license to access the Netflix Website for that purpose. You may not download (other than through page caching necessary for personal use, or as otherwise expressly permitted by these Terms of Use), modify, copy, distribute, transmit, display, perform, reproduce, duplicate, publish, license, create derivative works from, or offer for sale any information contained on, or obtained from, the Netflix Website, including but not limited to information contained within a member or members' Queue, without our express written consent.

ANSWER: According to this agreement, the answer is no. This is the license agreement for personal use with Netflix.

Even if the school owned a copy of the documentary, it would take permission from the copyright owner to stream the entire film to a class.

Under section 110(2) of

the *Copyright Act* [the TEACH Act] nonprofit educational institutions can stream reasonable and limited portions of films without permission, but only by following the stringent provisions of the *Act*. For example, only students enrolled in a particular course can view the transmission of the film, the school must take reasonable efforts to prevent downloading, etc.

To transmit (stream) the entire documentary, the institution must have permission and likely pay some permission fees. This applies whether it is truly for distance learning or is just a transmitted portion of a face-to-face course (which is what streaming is). If the professor wants to use the documentary from Netflix, he or she should contact Netflix and seek permission.

QUESTION: *In 1969, the student photography editor for the university newspaper took a photograph of a student sit-in that appeared in the student paper with "Photo by XXX" under the picture. The original photograph eventually was donated to the library by the publications department. It was not marked by the student with a copyright notice or any attribution. The photograph has been presumed to be university property and was reprinted in a book celebrating the institution's sesquicentennial a few years ago. Since then, the student has become a professional photographer and sought money from the school for reprinting the image which it thought it owned. In order to make the threat go away, the publicity department wants to promise the photographer that it or any similar photo will be marked on the back with the line "Copyright 1969 XXX XXXX Photography, contact 555-555-5555 (CLASS OF 1970)." Were student newspaper contents and photos owned by individual students or the college in 1969?*

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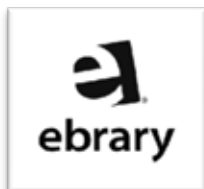
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am offering my example of ad-hoc creative solution-seeking, to illustrate the sort of idea mongering that may serve as a pathway to workable best practices: MARC-856 fields — commonly used for URLs to online content (government documents, e-journal link, etc.) — do work in both interfaces. This field might be a viable candidate for each title loaded on a device. In a brainstorming context, someone else may see pros and cons of this approach and offer different solutions for device-to-titles linking. Open-ended idea exchange and mutual encouragement for creativity will spur great library solutions. Systems-related questions may tackle future iterations of the new interface: will it allow call-number linking in the future? Is the library system vendor amenable to indexing more fields so that more possibilities open up for data linkages from device to loaded titles? Are eBook and ERM providers expanding their data linking and what will such upgrades mean for interfacing with the library system? What limitations of the library system does Cataloging encounter, and how can these pinpointed system functionalities be enhanced? Brainstorming should be strongly encouraged, as each person brings a different perspective to the table: cataloging conventions, end-user behaviors, the library system (functionalities and quirks), vendor-ILS interfaces, field mapping, and any other aspects sure to be uncovered along the way.

Skills and (re)training: It should be noted that, depending on the library, folding eBooks into the collections and shifting to data-intensive electronic resources management may entail intensive retraining of staff members who may have spent many years processing print materials.

New workflows, new brainstorming: As libraries shift from print to a diversifying mix of physical and online formats, the promises are exciting but the implications of shifting workflows may be daunting. Who will be the first handler of the eBook records? Acquisitions at the point of purchase? Cataloging? Systems in tandem with the eBook

sellers and the ILS vendor? What steps should be outsourced? What steps are better performed in-house due to customized data considerations? It may all depend on the individual purchase due to the vast range of eBook configurations. Ongoing formal and informal conversations among Acquisitions, Cataloging, Systems, and other interested parties including external constituencies will propel the library into a bright future where managing electronic resources will feel as natural as print-only once did. 🌱

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ANSWER: Under the law, the student photographer would own the copyright unless there is some agreement with the student newspaper that the newspaper itself or the university owns the copyright. If the photography editor position was a paid position (some student newspaper positions usually do have a stipend), then the photograph is a work-for-hire and the university owns the copyright. Note that some student newspapers are separate incorporated entities, and these newspapers, rather than the university, would may own the copyright.

QUESTION: *Is free clip art considered to be public domain documents? What is expected of writers when they use clip art from Microsoft programs?*

ANSWER: Free clip art is copyrighted just like everything else. "Free" just means that there is no charge for using it, not that it is free from copyright protection. Public domain means that there is no copyright at all, but this is not the case for clip art.

The question about Microsoft clip art is governed by its license agreement which anyone using the clip art should read. Companies that offer clip art under a license agreement intend that it be used within the terms of the agreement. 🌱