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LEGAL ISSUES



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Legally Speaking — Righthaven: Wrong Model

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For many years, patent “trolls” have bought up patents, then used this power to file lawsuits against “infringing” companies. Officially known as “non-practicing entities” or NPEs, trolls “derive all or most of their revenue from the enforcement of patents. Patent trolls are clearly distinguishable from major research institutions, universities, and businesses that derive their revenue, respectively, from funded research, tuition and grants, and the sale of products and services. Some of the largest of these NPEs raise large funds with which to purchase the patents they seek to enforce — without any plans to turn those patents into marketable products or services. Instead, they then use these funds to enable — through direct or veiled threats of infringement — their pursuit of royalties from successful businesses.”¹

Now a new variety of troll has arisen in the realm of copyright. The newspaper industry has fallen on hard times, so **Stephens Media LLC** has come up with a new way to make money. **Stephens Media** (the parent company of the *Las Vegas Review-Journal*) has joined with attorney **Steven Gibson** to form a joint venture named **Righthaven**.²

As **Bruce Strauch** pointed out in his excellent April column for *Against the Grain*, the business model for **Righthaven** is to sue Websites, user forums, and blogs whose users have posted copies of articles or photographs from the *Las Vegas Review-Journal*. The company searches the Internet for material from the paper. When it finds items posted, **Righthaven** purchases the rights from the *Review-Journal*, registers the copyright, and files a lawsuit. Between March 2010 and March 2011, the company filed 254 lawsuits for copyright infringement.³

Not only does **Righthaven** ask for money, in most cases it also requests that the courts transfer the domain names under the provisions of the *Digital Millennium Copyright Act*.⁴ According to one blogger, the **Righthaven** model works as follows: “Most of the lawsuits filed by **Righthaven** are based upon the display of a single *Review Journal* article on the offending Website. The lawsuits allege ‘willful’ copyright infringement... Since **Righthaven** does not send cease and desist letters before

filing suit, many of its targets have reported being taken completely by surprise. Indeed, many alleged infringers have reported that they would have voluntarily removed the newspaper articles from their Websites if they had been asked to do so.”⁵

The **Righthaven** model has resulted in many small blogs and Websites being charged large sums of money — but still less than it would cost to defend a lawsuit. 120 cases (almost half of those filed) have been settled with revenue of \$420,000. This provides an average yield of around \$3,500 per case.⁶ Recently other entities and newspapers have become involved with the **Righthaven** saga, including **WEHCO Media** and **Media News Group** (the parent company of the *Denver Post*).

The backlash against **Righthaven** has been swift and broad-based. Many attorneys and journalists have opposed this practice, including the *Las Vegas Sun* (the other major daily newspaper). The **Electronic Freedom Foundation** has condemned this model,⁷ and several anti-**Righthaven** Websites have been set up.⁸ Several recent cases have held that the postings are a matter of fair use. In April, the Internet registrar **GoDaddy** seized the **Righthaven** domain name after discovering incorrect information in their registration documents.⁹

Several judges have also found issues with the company’s aggressive enforcement techniques. One significant case was *Righthaven v. Democratic Underground* (“DU”). The DU (a major blog associated with the Democratic Party) was sued over a five-sentence extract from the paper.¹⁰ **Righthaven** alleged in its complaint that it would suffer irreparable harm because of this publication, and that:

- **Righthaven** holds the exclusive right to reproduce the Work, pursuant to 17 U.S.C. § 106(1).
- **Righthaven** holds the exclusive right to prepare derivative works based upon the Work, pursuant to 17 U.S.C. § 106(2).
- **Righthaven** holds the exclusive right to distribute copies of the Work, pursuant to 17 U.S.C. § 106(3).
- **Righthaven** holds the exclusive right to publicly display the Work, pursuant to 17 U.S.C. § 106(5).¹¹

However, this case didn’t turn out so well for **Righthaven**. During the discovery phase, the DU requested that **Stephens Media** produce their agreement with the *Review Journal*. After examining this document, DU’s lawyers sought to unseal the agreement and release its contents to the public. The **Electronic Freedom Foundation** supported this request, which **Righthaven** and **Stephens Media** opposed. However, **Judge Rodger Hunt** (D. Nev) agreed that the document should be unsealed and made public, stating: “consider[ing] the multitude of cases filed by **Righthaven**, on the claimed basis that **Righthaven** owns the copyrights to certain **Stephens Media** copy, it appears to the Court that there is certainly an interest and even a right in all the other defendants sued by Plaintiff to have access to this material.”¹²

It turns out that the copyright “assignment” is being made solely for the purposes of the litigation, which DU and **Righthaven** argue makes it invalid and “a sham.”¹³ The agreement reads in part as follows:

Stephens Media shall retain (and is hereby granted by **Righthaven**) an exclusive license to Exploit the **Stephens Media** Assigned Copyrights for any lawful purpose whatsoever and **Righthaven** shall have no right or license to Exploit or participate in the receipt of royalties from the Exploitation of the **Stephens Media** Assigned Copyrights other than the right to proceeds in association with a Recovery... **Stephens Media** shall have the right at any time to terminate, in good faith, any Copyright Assignment (the ‘Assignment Termination’) and enjoy a right to complete reversion to the ownership of any copyright that is the subject of a Copyright Assignment...¹⁴

This agreement makes **Stephens Media** the real party in interest, even though **Stephens** has not been filing the lawsuits. The **Electronic Freedom Foundation** maintains that assignment purely for the purpose of litigation is invalid.¹⁵ The **Stephens Media** agreement is troublesome for another reason. It does not assign all *Review-Journal* articles. It assigns

continued on page 57

only those articles that **Stephens Media** finds to have been used. The pertinent language reads as follows:

Stephens Media shall assign (at the times stated) to **Righthaven**, pursuant to the procedures set forth in Section 7: (a) any copyrights owned by **Stephens Media** that **Stephens Media** desires to be the subject of Searching (the “Searching Decision”), with each such respective assignment to occur within a reasonable time after **Stephens Media** makes each respective Searching Decision, (b) any copyrights owned by **Stephens Media** that **Stephens Media** considers (the “Material Risk Conclusion”) a material risk of infringement (with each such respective assignment to occur within thirty (30) days after **Stephens Media** makes each respective Material Risk Conclusion, and (c) within thirty (30) days of having respective Infringement Notice, each and every Infringed Copyright that exist during the Term (the “Assigned Infringed Copyright(s)”).¹⁶

In a separate case, **Judge Hunt** also dismissed a **Righthaven** domain name seizure against **Thomas DiBiase**, noting that “Congress has never expressly granted plaintiffs in copyright infringement cases the right to seize control over the defendant’s Website domain.”¹⁷ As the **Electronic Freedom Foundation** noted:

[T]he threat is utterly improper. The country’s most popular online destinations, like the *New York Times*, **Amazon** and **Yahoo!**, have faced copyright infringement allegations based on their ordinary operations. But no one would imagine that a plaintiff alleging copyright infringement against those companies would be entitled to domain-name transfer as a copyright remedy if infringement was established. Consider the **Drudge Report**, one of many sites that **Righthaven** sued. Its domain name is estimated to be worth well into the millions of dollars. Transfer would confer a lottery-sized jackpot on the plaintiff and cause catastrophic harm to the defendant — a result that **Congress** did not and could not have intended when it crafted the copyright damages scheme. Moreover, seizing an entire Website based on a tiny portion of content, even if that content were infringing, necessarily violates the First Amendment.¹⁸

A recent case demonstrates **Righthaven’s** model and the procedure of these lawsuits. **Wayne Hoehn**, an insurance agent in Bowling Green, Kentucky, posted an article the *Review-Journal* to the Website **Madjack Sports**.¹⁹ The article dealt with unions and sports, and the posting included discussion and commentary on the article. In fact, **Hoehn’s** answer to the complaint stated that: “**Hoehn’s** use of the

work in a discussion forum was for educational purposes, namely to stimulate commentary and criticism, and had no actual or potential effect on the work’s potential market.... The copyrighted work was an informational piece intended to stimulate discussion, and **Hoehn’s** use of it furthered this goal.”²⁰

Since **Wayne Hoehn** and I both live in Bowling Green, I naturally had to interview him about the case. I spoke with **Mr. Hoehn** on February 23, 2011. He gave me the factual background of the case, noting that he did give credit to the paper and the author of the article. Again, **Mr. Hoehn** reiterated that the purpose of the posting was political commentary and discussion, a purpose that is supported by the fair use principles (and, I would argue, the First Amendment).

Mr. Hoehn noted that “It’s really odd in these days when they have share buttons and email.... It’s equivalent to having a recipe and sending it to your mother.” After all, the *Review-Journal’s* interface actually encourages people to share its articles.

Righthaven did not send a “cease or desist” request to either **Mr. Hoehn** or the Website owner. Instead, they immediately filed a case in the **U.S. District Court** for the District of Nevada. Their attorneys then “offered” to settle the case. According to **Mr. Hoehn**, he could have settled for around \$2,500 to \$3,000. However, he decided to fight the case “as a matter of principle.” **Mr. Hoehn** stated that: “It’ll cost me more in the short term, but it will save some money in the long run for going through this stuff in the future.”²¹ He contacted the **Electronic Freedom Foundation**, which put him in touch with anti-**Righthaven** attorney **Marc J. Randazza**.

On February 2, 2011, **Mr. Hoehn’s** attorneys filed a motion for summary judgment on the grounds that the use was transformative and protected under the fair use doctrine.²² After **Righthaven** opposed this motion,²³ **Mr. Hoehn** filed another brief, relying heavily on the decision of **Judge James Mahan** in *Righthaven v. Center for Intercultural Organizing* (hereinafter “CIO case”), which is discussed extensively below. Finally, based on the results of the Democratic Underground case, **Mr. Hoehn’s** attorneys filed a motion to dismiss for lack of subject matter jurisdiction.²⁴

In the CIO case, **Judge James Mahan** granted summary judgment in favor of the defendant on fair use grounds.²⁵ This case arose after the CIO posted an article in its entirety on their Website. “The disputed article discusses whether police in the Las Vegas area were targeting minorities. Defendants, an Oregon nonprofit organization dedicated to helping immigrants become aware of immigration-related issues in the United States, posted the article in its entirety on their Website, purportedly to educate the public about the issues contained therein.”²⁶

The CIO claimed that the fair use provisions of 17 U.S. Code § 107 allowed this article to be posted. Many people think of fair use as an exception to copyright law, but in reality it is an affirmative defense. In other words, the defendant tells the court that “I did violate the owner’s exclusive rights, but I was entitled to do so.” Thus in the CIO case, it made sense for the defendants to claim fair use. The language of § 107 reads as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- 1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2) The nature of the copyrighted work;
- 3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4) The effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The four factors listed above are the basis of the fair use doctrine. When analyzing the use of a work, it is important to always look at all four of these factors. The “purpose and character of the use” involves asking whether the use is for the purpose of making money. The “nature of the copyrighted work” deals with the material itself. The use is more likely to be fair if the work is non-fiction or factual. It

is less likely that the use of a fictional, literary, or creative work will be fair, although even then comment, criticism, teaching, and scholarship may provide a reason to use portions of a copyrighted work.

“The amount and substantiality of the portion used” does not lay out a specific amount. The amount must be “reasonable” (whatever that means!). There are many myths about this provision. For example, some people claim that there is a specific page limit. Others believe that using a single chapter of a book is always fair use. These myths are *not* true. The amount that is “reasonable” is the amount that is necessary to use for the particular cir-

continued on page 58



circumstances — and nothing more. This clause is the subject of many questions, especially in a university setting. When asked about this by faculty, I always advise people to use as little of the copyrighted work as possible, and only what is truly needed. (Of course, this is true from a pedagogy and instructional design standpoint as well, something I am also not loath to point out.)

The final factor in a fair use analysis is “The effect of the use upon the potential market....” This factor asked whether the use would replace or affect sales. Again, using examples I deal with every day, faculty members often want to know whether they can reproduce and distribute a chapter from a textbook in their classes. When an instructor assigns a textbook, the publisher gets paid for the sale. But if the teacher copies a chapter, the publisher doesn’t get paid. Thus, it is *never* fair use to copy and distribute a chapter from a current textbook instead of having students buy the book.

In its analysis of the CIO case, **Judge Mahan** found that the purpose of the use was transformative. “Although the former owner, the *LVRJ*, used the article for news-reporting, the court focuses on the current copyright owner’s use, which, at this juncture, has been shown to be nothing more than litigation-driven. Accordingly, CIO’s use of the article to educate the public is transformative and does not constitute a substitution of the plaintiff’s use.”²⁷ The court also found that the use was non-commercial, stating: CIO is a non-profit corporation with an educational mission; indeed the plaintiff has characterized the defendant as such on the face of the complaint.... [D]efendants did not sell, license, or publish the work commercially... and no reasonable jury could conclude that the defendants used the disputed article for a commercial purpose.”²⁸

The nature of the work is an important part of the fair use analysis. News is not subject to copyright. Facts and ideas are specifically excluded by 17 U.S. Code § 102, which lays out the subject matter of copyright. Because news consists of facts, the news itself cannot be copyrighted. However, the author’s expression of this news can itself be copyrighted. This is the basis for the *Review-Journal’s* copyright rights.

Nonetheless, courts have traditionally found less protection for factual and news items than for fictional or creative works. In the CIO case, the court noted: “a reasonable trier of fact could only reach one conclusion as to the nature of the disputed article — it is an informational work, which readily lends itself to a productive use by others and, thus, deserves less protection than a creative work of entertainment.”²⁹

The CIO used the entire article, which normally cuts against fair use in the “amount

used” test. However, courts have ruled that the amount used can be sufficient to evoke the purpose. For example, the *2 Live Crew* case — *Campbell v. Acuff-Rose Music, Inc.*³⁰ — famously involved parody that involved using the original work in its entirety. **Luther Campbell** (a.k.a. Luke Skywalker), the leader of the hip-hop group *2 Live Crew*, wrote a parody using **Roy Orbison’s** song “Pretty Woman.”

In *2 Live Crew*, the **Supreme Court** found that the use was protected under fair use and the First Amendment, stating that: “we recognize that the extent of permissible copying varies with the purpose and character of the use.... Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable....”³¹

In the CIO case, **Judge Mahan** ruled that the defendant’s use of the entire article was reasonable, stating:

[T]he amount used was reasonable in light of the purpose of the use, which was to educate the public about immigration issues. Because of the factual nature of the work, and to give the full flavor of the information, the defendants used the entire article rather than trying to distill it. The court finds that it would have been impracticable for defendants to cut out portions or edit the article down.³²

The final factor in a fair use analysis is the effect on the potential market. Here, the judge put an end to **Righthaven’s** claims rather quickly. The order noted: “First, the plaintiff has failed to allege that a ‘market’ exists for its copyright at all, and the court declines to simply presume the existence of a market.... Second, because **Righthaven** cannot claim the *LVRJ’s* market as its own and is not operating as a traditional newspaper, **Righthaven** has failed to show that there has been any harm to the value of the copyright” [citations omitted].³³

Thus, factors one, two, and four were in favor of fair use. Even with factor three **Judge Mahan** ruled that it was reasonable for CIO to use the whole work, and the court granted summary judgment to CIO on the merits of the case. The court ruled:

[T]he defendant’s use of the copyrighted article in this case constitutes fair use as a matter of law. The article has been removed from its original context; it is no longer owned by a newspaper; and it has been assigned to a company that uses the copyright exclusively to file infringement lawsuits. Plaintiff’s litigation strategy has a chilling effect on potential fair uses of **Righthaven**-owned articles, diminishes public access to the facts contained therein, and does nothing to advance the *Copyright Act’s* purpose of promoting artistic creation.³⁴

The recent rulings against **Righthaven** appear to be part of an accelerating trend. Courts are increasingly finding that copyright and trademark owners have misused take-down notices in order to seek unsubstantiated monetary claims. This has been especially prominent with media and sports companies, as pointed out by a recent article in the *John Marshall Law School Review of Intellectual Property Law*.³⁵

Righthaven’s misguided attempt to monetize news via copyright enforcement is now clearly under attack. **Judge John Kane**, who is hearing the **Righthaven** cases in Colorado, wrote in *Righthaven v. Brian D. Hill* that the **Righthaven** business model “relies in large part upon reaching settlement agreements with a minimal investment of time and effort.... The purpose of the courts is to provide a forum for the orderly, just, and timely resolution of controversies and disputes. Plaintiff’s wishes to the contrary, the courts are not merely tools for encouraging and exacting settlements from defendants cowed by the potential costs of litigation and liability.”³⁶ When **Righthaven** sought to voluntarily dismiss this case, **Judge Kane** ruled that the dismissal would be *with prejudice*.³⁷

The **Righthaven** model is based on fear and intimidation. Yet this is clearly the wrong model for the beleaguered newspaper industry. Instead, many newspapers are now erecting pay walls, forcing would-be readers to subscribe online just as they did in print. The *New York Times* will now allow readers to access up to 20 articles per month before being asked to pay. A subscription service is available for readers who intend to read lots of articles.³⁸ The *Daily O’Collegian* at **Oklahoma State University** has erected a pay wall for readers who are not affiliated with the institution.³⁹ While these attempts to lure the genie back into the bottle may yet turn out to be futile, at least newspapers are experimenting with new business models in an attempt to save their core business — without resorting to copyright claims.⁴⁰

So many cases have ruled against their claims that **Stephens Media** has now been forced to hire an expensive litigator. However, this expense will eat up much of the quick profits that **Righthaven** has made. Along with the ensuing judicial backlash, **Righthaven’s** model is turning out to be problematic. According to **Eric Goldman**, director of the High Tech Law Institute at **Santa Clara University School of Law**, **Righthaven’s** business model is the wrong way:

Their model assumes lots of quick settlements, and their profit/loss projections may not have anticipated just how many — and how hard — defendants would fight back in court. I wouldn’t be a bit surprised if **Ms. Cendali’s** fees in this case end up being many multiples of the maximum damages that **Righthaven** could possibly hope to get from **Pahrump Life**. That’s hardly a path to riches for **Righthaven**.⁴¹

endnotes on page 59

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Questions & Answers — Copyright Column

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QUESTION: *How does an educational institution get permission to use film snippets on a class Blackboard site? Is there a difference if the institution wants to use the same snippets for executive education rather than in a regular university course?*

ANSWER: Assuming that the institution is a nonprofit educational institution, the good news is that using snippets of films in class management software for a class does not require permission. Under the **TEACH Act**, section 110(2) of the **Copyright Act**, transmitted performances of "reasonable and limited portions" of an audiovisual work are permit-

ted for online portion of classes. There are a number of requirements that have to be met additionally, such as making the performance available only to students enrolled in the course, having the performance available only during the class session, etc. If the instructor wanted to use more than a reasonable and limited portion of a film, however, permission would be required.

The question about executive education is less clear since "executive education" could mean a number of types of instruction. Assuming that it is for continuing education or some professional certificate, that it is offered

by a nonprofit educational institution, and students are actually enrolled in the executive education course, then the answer is the same. If, however, anyone may attend the session without enrollment, then permission to use even snippets likely would be required.

QUESTION: *A librarian is in charge of her college's archives, and the library is planning a digitization project that will include college yearbooks published between 1923 and 1977. Some of the yearbooks were published without notice of copyright. Others contain a copyright notice with an owner*

continued on page 60