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From A University Press -- One Size Doesn't Fit All

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- *The Directory of Venture Capital and Private Equity Firms, 2012* is in its 16th edition (softcover ISBN: 9778-1-59237-855-5; List Price: \$685, Library Price: \$450). This title is also available in **Grey House's** online database platform, <http://gold.greyhouse.com>.

Wiley-Blackwell has also been busy publishing a number of new sets:

- Those titles released in January 2012 include *The Encyclopedia of War* edited by **Gordon Martel**, providing "an overview of the most important events, people, and terms associated with warfare." (978-1-4051-9037-4, \$795 — also available via **Wiley Online**, Online ISBN: 9781444338232)
- *The Encyclopedia of Christian Civilization* edited by **George Thomas Kurian** is a four-volume set "that focuses on the history and impact of Christianity and how it has shaped societies around the world." (978-1-4051-5762-9, \$595 — Online ISBN: 9780470670606)
- *The Encyclopedia of Peace Psychology* is a three-volume set edited by **Daniel J. Christie** "that focus exclusively on psychological analyses and perspectives on peace and conflict." (978-1-4051-9644-4, \$495 — Online ISBN: 9780470672532)
- *The Wiley-Blackwell History of American Film* offers "a chronological portrait of American cinema from its origins to the present day" in a four-volume set (978-1-4051-7984-3, \$495 — Online ISBN: 9780470671153)
- Published in February 2012, *The Encyclopedia of Radicals in Chemistry, Biology and Materials* "presents methodologies and mechanisms involving free radicals of chemical and biological research, including applications in materials science and medicine" in a single volume. (978-0-470-97125-3, \$890; \$1,050.00 after April 30th)

All of the above works except the *Encyclopedia of Radicals in Chemistry, Biology and Materials* are currently available electronically via the **Wiley Online Library** at: <http://onlinelibrary.wiley.com>. Titles can be purchased via a one-time fee option — pay once for perpetual access or by annual subscription providing access to the active reference work for twelve months and includes all updates. (The *Encyclopedia of Radicals in Chemistry, Biology and Materials* will be available later this month.)



From A University Press — One Size Doesn't Fit All

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As a woman who is 6'2", I am very familiar with the reality that one size does not fit all. (A recent dip into old college photo albums confirms that in the days before online shopping made finding special sizes easier, I apparently never owned a single pair of pants that was long enough.) Though I am finally comfortable with this concept in my personal life, it took me a bit longer to understand how to apply it in my work as a scholarly publisher.

Before becoming a press director, I worked on the marketing side of publishing, and for years I operated under the erroneous belief that there was one way to sell books to academic libraries and that libraries all wanted and needed the same things. In joining the **University Press of Mississippi** in 2008, I was quickly set right on this point. **Mississippi** is a consortship press, so in the first few months on the job the editors and I traveled to our eight state campuses to meet faculty and administrators and talk about the work of the **Press**. Based on the suggestion of the state's library association director, I also made appointments to meet the library deans.

What an education in a very short period of time. After three meetings, I realized that in many ways, librarians view scholarly publishing as a mysterious process with equally mysterious business models behind it, and I saw that as a publisher (who should know better), I was unaware of a number of the significant changes taking place within academic libraries. Though my academic background is in English and I don't possess an MBA, it did seem obvious to me that this way of conducting our joint work — making decisions without the benefit of a great deal of mutual understanding of business practices and needs — could be greatly improved.

Publishers, even within the classification of academic publishers, operate in many different ways and under different publishing models. Commercial academic publishers are a class to themselves, the force behind much of journals publishing, textbooks, and new electronic content aggregations. There are Open Access publishers and academic societies who publish their own journals and other materials. And then there are the university presses. Even within this group, there is an incredible range of press size, income, and operating strategies.

University presses are most often alike in the fact that their editorial work is grounded in the peer review process, and yet what they publish — and how — can vary widely. Monographs to regional trade titles and everything in between appear on their lists, and book pricing, formats (hardcover, paperback, or simultaneous), and eBook models and pricing (when the eBooks are even available, that

is) are all over the map. The **Association of American University Presses** offers a number of excellent meetings and professional development and networking opportunities annually where best practices are discussed, but member presses formulate their own business plans according to the expectations of their own host institutions, funding formulas, available technology resources and partners, and guidance from editorial and advisory boards. What works beautifully for one press may be unrealistic or even undesirable for another.

As I learned and am still learning, the same is often true of academic libraries. Within Mississippi, the academic libraries serve campuses ranging in enrollment from just under 3,000 students to more than 20,000. Some of these campuses have distance learning programs or multiple campuses, though all of them seem to be finding that increasingly their students want to access materials online and that these students feel more comfortable texting a question to a reference librarian rather than asking in person, even when that student is sitting at a table within sight of the reference desk.

Though this will come as a surprise to none, money is often the chief differentiator between libraries, dramatically affecting the services they offer and the collections they develop. Before beginning this column, I emailed a few of my library contacts to ask how students were accessing material and how/if budgets were shifting to accommodate changes in student and faculty needs and preferences. In my own conversations and work over the past four years, I had become aware that university presses frequently formulate strategy and pricing based on the operations of **ARL** libraries. While I do not in any way mean to minimize these institutions as important customers and campus partners, it struck me that there are many, many libraries in this country that fall outside this group — far greater in number than those within the **ARL** classification — and I wondered if we as publishers were meeting their needs well.

When I reached out a few weeks ago, one dean sent a thought-provoking response to my question about how libraries were handling the issue of resources in electronic format: "I think you'll find two primary camps trying to address this transition — the haves and the have nots." I had also asked him what he thought about the new monograph aggregations being launched this year and next, and he noted that while he thought the students and faculty on his campus would benefit from such subscriptions, he avoided "new ongoing annual expenses like the plague."

He concluded, "Perhaps you could consider the mindset of the two camps as you write articles and alternate the discussion of strategies for those with ample resources looking to aggressively build their collections/access and others who are looking to creatively economize until more stable funding materializes." His suggestion stuck with me, providing both the inspiration for this piece and a framework for future columns.

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LEGAL ISSUES



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Cases of Note — Copyright

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

Vicarious Infringement

Range Road Music, Inc. et al v. East Coast Foods, Inc., Herbert Hudson, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 668 F.3d 1148; 2012 U.S. App. LEXIS 3173.

Plaintiffs **music companies** own eight songs at issue and are members of ASCAP which collects royalties for them when the music is played. See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 4-5 (1979).

East Coast Foods owns a Southern California chain restaurant with five locales called Roscoe's House of Chicken and Waffles.

Court opinions are so totally dull. Going to the Web, one finds this is a soul food chain founded by a Harlem native, and it features — you guessed it — combos of fried chicken and waffles. It was promoted by Natalie Cole and Redd Foxx, and the Hollywood branch is a favorite for celebrity sightings. It is featured in movies Tapeheads, Jackie Brown, Rush Hour, and Swingers and on a variety of rap songs.

The Long Beach Branch has an attached bar called the "Sea Bird Jazz Lounge." When it opened in 2001, ASCAP offered **East Coast** a license to perform ASCAP music but was spurned. So the ever-vigilant ASCAP hired a private investigator to make notes. And he did, noting they played via live band and CD over the sound system eight songs associated with **John Coltrane** and jazz-fusion group **Hiroshima**, all of which **music companies** held in their copyright cache.

Music companies sued and won \$36,000 in statutory damages plus \$162,728.22 for attorney's fees and costs.

Woo. That'll teach you to screw around with ASCAP.

Vicarious Liability

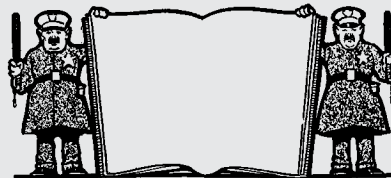
On appeal, **East Coast** said **music companies'** complaint was defective due to a lack of an allegation of vicarious liability for copyright infringement. See *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 995 (9th Cir. 2009).

They were talking about East Coast profiting by allowing the live band to infringe while performing.

A vicarious infringer "profits from direct infringement while declining to exercise a right to stop or limit it." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). But the Ninth Circuit said the complaint pretty thoroughly described what went on that night. The band played in the Sea Bird Jazz Lounge, and **East Coast** owned the lounge and made money selling booze. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

A vicarious infringer must exercise requisite control over the infringer and derive a direct financial benefit from the infringement. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 729 (9th Cir. 2007). A defendant "exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so." *Id.* at 730.

The evidence showed that **East Coast** owned and operated the Sea Bird Jazz Lounge and went out of its way to obfuscate it, which led to the hefty attorney's fee payout.



Sufficiency of Evidence

Music companies' evidence was the testimony of the investigator. **East Coast** called this error because (1) its expert testimony was a lay witness, and (2) there was no proof of "substantial similarity" between the live performance and copyrighted works.

The Ninth Circuit said identifying popular songs does not require "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702. It's the kind of reflexive thing millions of ordinary folk do on a daily basis. See Fed. R. Evid. 701. Expert testimony relies on the sort of reasoning only capable of specialists in a field. Lay testimony is what an ordinary doofus does.

They didn't really say doofus. I made that up.

A case of copyright infringement requires (1) ownership of valid copyright, and (2) copying of original elements. *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006). Of the copyright owners' six exclusive rights, one is the right of public performance. *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 n.3 (9th Cir. 1989).

Substantial similarity has nothing to do with our issues. It's a doctrine that deals with a situation where some but not all of the constituent elements of a work are used. See *Funky Films*, 462 F.3d at 1076. In our live performance, there was direct copying of the entire works with no material question of fact. The band announced they were going to perform **Coltrane** songs and proceeded to do it. None of this was contradicted by any evidence from **East Coast**. 🐼

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Both the haves and the have nots want to grow their collections with electronic scholarship and to serve their faculty and students well. According to their means, however, each library will go about this process differently. Large libraries will likely acquire monograph aggregations and find room in the budget for annual

subscription fees, while smaller libraries may look for programs offering one-time purchases that offer perpetual access.

Publishers, take note. Like these libraries, we have been (to use this dean's phrase) "creatively economizing" like mad since the 2008 crash, doing more with less. An essential part of the "doing more" should be ensuring that we offer our quality scholarly content through many avenues and in many forms and formats. One size, or one access model, does

not fit all. Publishers have the opportunity to deliver scholarship in more ways than ever before: in traditional print, in digital form, as part of an aggregation, on a short-term loan, in whole, or in part ... there are many possibilities. Those that we serve — readers and libraries — don't fit a single mold or model, and accordingly we must be flexible and savvy enough to develop and take advantage of the programs that meet the needs and budgets of both haves and have nots. 🐼