

Social Media Law Update

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[Blog Hyperlinks to News Stories With Copyright Protection = Copyright Infringement or Not?](#)

By [Michelle Sherman](#)

The expression "bad facts make bad law" comes to mind when reading the news reports about Righthaven LLC and the Las Vegas Review-Journal ("Las Vegas Review"). Namely, the Las Vegas Review has partnered with Righthaven to sell their copyright interest in articles *after* the articles in whole or part are attached as hyperlinks to blogs. Righthaven registers the copyrights it purportedly acquires from the Las Vegas Review and then sues the blogs without sending the standard "cease and desist" letter beforehand.

The facts are pretty egregious, and this litigation business model is being soundly criticized. Since March 2010, Righthaven has filed over one [140 actions](#). In these actions, Righthaven is overreaching and demands forfeiture of the blog site's domain - relief that is appropriate perhaps in cybersquatting cases, but not actions for alleged copyright infringement. Righthaven is becoming very rich from this business model. Most of the cases settle quickly with roughly 20% reportedly settling for several thousands of dollars.

And, Righthaven has every intention of adding more newspapers to its list of clients. Stephens Media LLC, the publisher of the Las Vegas Review, runs over 70 other newspapers in nine other states. The CEO of Righthaven is reported as saying that he has an agreement with Stephens Media to sue bloggers who hyperlink to articles in these other newspapers as well. Hundreds of lawsuits are already in the works. And, with ad revenues down, other newspapers are deciding to make money by partnering with Righthaven. WEHCO Media, Arkansas, is reported to be the second client of Righthaven.

Because of these "bad facts," originators of news media may see courts allowing hyperlinks to news articles as a fair use under Section 107 of the Copyright Act, or pursuant to an express or implied license. This outcome is not far fetched. News articles are widely distributed with the originator newspaper providing an online share feature. It is easy to imagine a situation where one person posting the article on her Facebook page that has 250 friends (the rough average number of a Facebook user) is the catalyst of the article going viral and being shared

exponentially into a far greater circulation than the blogger who used a hyperlink to the article.

In reaction to Righthaven, some people are calling for an amendment to the Copyright Act: (1) require that a "cease and desist" letter be sent with an opportunity to fix the problem before a legal action can be filed; and (2) take away the recovery of attorneys' fees in copyright infringement cases. Others are calling for a boycott of newspapers that partner with Righthaven.

Righthaven is also facing legal challenges in court. Democratic Underground is fighting back with assistance from the Electronic Frontier Foundation ("EFF").

"Democratic Underground is the largest independent discussion forum for liberals on the Internet. Thousands of people discuss and debate political issues on our site every day, particularly now during election season. Online discussion often requires quoting from news sources -- a legal fair use of the material," said Democratic Underground founder David Allen. "By targeting short excerpts of news articles with their sham copyright claims, Righthaven is chilling free and open discussion on the Internet."

EFF was apparently looking for the right set of facts to challenge Righthaven's litigation business model. Righthaven sued Democratic Underground for a five sentence excerpt of a Las Vegas Review news story that a user posted on the forum with a link back to the Las Vegas Review website.

In its answer and [counterclaim](#) filed on September 27, 2010, Democratic Underground asks the court to affirm that the excerpt of the article does not infringe copyright and is a fair use of the material. The counterclaim also asserts that Las Vegas Review has granted a "License (Express and Implied), Consent, Waiver, and Acquiescence" through the numerous ways in which the Las Vegas Review allows its articles to be shared, including a "Share & Save" feature on its website: "Share & Save allows you to bookmark news articles for future reference and share news articles with friends and web-based communities like digg and MySpace."

Democratic Underground also states in its counterclaims that the Las Vegas Review website offers and invites its users to share all of its articles through social media third parties including "Newsvine, Digg, Technorati, Reddit, StumbleUpon, Del.icio.us, Slashdot, Propeller, Mixx, Furl, Twitter, Myspace, Facebook, Google bookmark, Yahoo! bookmark, Microsoft Live favorites, Ask bookmark, and myAOL favorites."

Federal courts usually decide fair use issues by considering the four listed (but not exclusive) factors in Section 107:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for profit 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 *Democratic Underground* case will be closely followed, and is likely the precursor to more legal challenges.

In the meantime, however, blogs should be careful not to hyperlink to newspaper articles or other material that may be copyrighted, and to remove posts that include excerpts from these materials. It is not worth the risk of being sued by Righthaven or other litigation mills that may spring up until this legal issue gets some resolution from the courts. And, if a blogger is sued for copyright infringement, they should consult with knowledgeable legal counsel since there are a number of defenses worth arguing.

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