Cites & Insights

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The Front

Give Us a Dollar and We'll Give You Back Four

That's the title of my new study of public library benefits and funding, using a conservative Benefits Ratio calculated from information available in the IMLS public library database for 2009.

The 193-page 6" x 9" paperback is available from Lulu at http://lulu.com/content/12940228/ for $49.50—discounted 30% at least through the end of the 2012 ALA Annual Conference. (That discount may continue past the conference depending on continuing sales.) It's also available as a PDF version for $29.50 at http://lulu.com/content/12940367/ (that will go up to $39.50 when the 30% discount for the print version ends).

Inside This Issue

The Middle

Forecasts 7

Policy

Copyright: Fair Use, Part 1 20

I'm asking for feedback (positive or negative) and advice on doing this better. The book includes the URL for a page linking to a survey and explicitly invites email feedback with the promise that I won't respond badly to negative feedback.

I believe this book can be useful for public libraries in understanding how they compare to similar libraries on readily-measurable benefits and helping to improve budgets, but I'm not a public librarian. If people find it valuable, at least as a concept, I'll use feedback to produce a more refined version using 2010 data when that's available.

This book does not Name Names and Pick Winners: With two unavoidable exceptions, no libraries are individually identified in the

book. (The two exceptions appear in the chapter on states—one state and one statelike entity have one public library system each.)

Review Copies

I'm offering a few PDF review copies available (since the pages are 6" x 9" the PDF should work fairly well on most ereaders). Request them directly from me—waltcrawford@gmail.com. I do have notes for those requesting review copies:

- If you ask for a review copy, you're planning to write an online review of some sort (on your own blog, on some other website, to a list) and either send me a copy or a link. (I say "online" because this is a preliminary edition: It should be replaced or defunct before print reviews are likely.) At the very least, I'd ask you to complete the survey, send me direct feedback or both. A review could be as brief as "What a waste of time" or could include pages of suggestions on how to make a possibly good idea better.
- I do not care whether the review is positive, mixed or negative. I'm looking for honest feedback. I'm willing to be convinced that this just isn't a good idea. I'm absolutely certain that the preliminary version could use improvement!
- I reserve the right to stop sending out review copies at a certain point.

Basically, I'm asking that you only request a review copy if you're actually planning to review the book, noting how minimal a review can be.

Background

A series of posts on *Walt at Random* discuss the concept that resulted in this book. Excerpts from the first few pages:

> Public libraries represent excellent value propositions, either regarded as the heart of any healthy community or viewed strictly on the basis of cost and benefits. The title of this book is a conservative way of stating the benefit ratio for most American public libraries: For every dollar spent, they yield four dollars (or more) in benefits.
>
> So what?
>
> So this: Public libraries with *better* funding *continue* to show a similar ratio of benefits to cost. That's significant, especially as communities begin to recover economically and libraries seek an appropriate share of improved community revenues.
>
> The Basic Findings
>
> For 9,102 U.S. public libraries that reported at least some statistics for 2009, the median readily calculable benefits totaled 5.00 times operating

expenses—and the correlation between expenses per capita and benefits per capita was a strong 0.51.

Removing 594 special cases—most of them very small libraries or reading rooms that are almost entirely volunteer-run (with less than 10 hours per week of paid librarian time), but also 152 libraries with less than $5 operating expenses per capita and 27 libraries with more than $300 operating expenses per capita, the median benefits totaled 4.89 times operating expenses—and the correlation between expenses per capita and benefits per capita was an even stronger 0.64.

That strong correlation suggests this: By and large, providing public libraries with more funding will yield proportionally more benefits.

This is neither surprising nor wholly intuitive. More funding means longer hours, more and better programs, a more up-to-date collection and more contemporary PC support—all of which are likely to yield additional direct benefits to the community. What's not intuitive: That in general you continue to get such excellent benefits for additional funding.

The final title of this book ends in "four" rather than "five" to err on the conservative side. When rounded to the nearest whole dollar, a majority of Americans are served by libraries with at least a four to one benefit to expense ratio—and that includes more than three out of four libraries.

Background

In the fall of 2011, I studied the presence of public libraries on Facebook and Twitter as background for an ALA Editions book (*Successful Social Networking in Public Libraries*, scheduled to appear later in 2012). As research progressed, I wound up looking at (or for) the websites of every public library in 38 states (5,958 in all) and gained a new appreciation for the diversity and community connections of America's public libraries.

During that study, I became skeptical of the many stories I'd read that assume public libraries are shutting down all over America. When my attempts to get actual numbers (how many libraries had actually closed and remained closed, neither reopening, being replaced by comparable libraries or at least reopening as volunteer-run reading rooms?) were unsuccessful, I decided to answer the question for myself. With help and advice from Will Kurt and others, I concluded that only about 32 public libraries (not branches but library systems and independent libraries) have closed during the 12 years from 1998 through 2009 *and remained closed*, with nearly all of those 32 libraries serving tiny groups of people. (That study is documented in two issues of *Cites & Insights*, my free ejournal at citesandinsights.info: April 2012, citesandinsights.info/civ12i3.pdf, and May 2012, citesandinsights.info/civ12i4.pdf.)

The study of closing libraries reminded me of speeches I'd done many years ago at state library conferences, discussing the health and diversity of libraries. In preparation for some of those speeches I would download current library spreadsheets from the state library and do some analysis of

funding and circulation. I consistently found that better-funded libraries did more—and quite a bit more, sometimes showing more cost-effectiveness than less well-funded libraries. I wondered what I'd find with a slightly more sophisticated analysis of the whole nation's libraries. This book is the result.

Additional Notes

The book explores library benefits and expenditures along several different axes: population (the legal service area for each library), library budget (total operating expenditures), per capita spending, state-by-state, and benefit ratios. For each axis, nine or ten sections offer further breakdowns along a different axis, so that a library can see how it does compared to similar libraries.

As discussed later in the introduction, I'm not trying to replace the HAPLR ratings, LJ's Star ratings or studies done by state libraries and other groups (and IMLS' own reports). I'm hoping to provide another perspective that can be a useful complement—and I'm specifically trying to avoid choosing another set of Celebrity Libraries. I'm much more interested in the health and community service provided by 6,000+ libraries "in the middle" (those neither very well nor very badly funded) than I am in 10 or 100 "stars" or "best libraries."

One caution: If you really, truly hate numbers, you will find this book impenetrable. There are a *lot* of tables, designed to be brief (typically no more than eleven rows and five columns of data) and clear. I think there are 335 tables in all, as well as four graphs. (There could be hundreds or thousands of graphs, but I believe tables are far more compact and, for this data universe, more meaningful.)

I'm pretty sure at least one of the chapters is redundant or irrelevant. I'm nearly certain some data presentations (maybe most) could be improved. It may be that sharply reducing the number of tables and providing a textual précis for some tables would better serve libraries. I'm hoping—I believe—the concept is useful and the overall content is helpful. But that's not really for me to say.

The book will be available at least through July 31, 2012 and probably at least through August 31, 2012. If the consensus of those offering feedback and responding to the survey is that it's useful, then it will continue to be available until it's replaced by a more refined version based on 2010 IMLS data, probably two to four months after that data becomes available.

The Books Your Library Needs

I hope this book—at least in a later version—will be worthwhile for a few hundred public libraries and library-related agencies. A few academic

librarians interested in how low-level statistics can be used to look at public libraries may also find it worthwhile. How low-level? The fanciest statistics in the book are median figures and one particular correlation, called "correlation" in the book ("correl" in Excel) and based on Pearson's Coefficient. On the other hand, it's based on working with 14 columns of source data from each of more than 9,000 rows and preparing 18 new columns of derivative measures for each row.

I wrote two recent books that I *do* believe your library needs at least one of, both from major library publishers. The first has been around since last summer and should be even more relevant (to all academic libraries, most special libraries and some public libraries) with the successful petition at Whitehouse.gov; the second has been around since January and should be beneficial for every public library and many academic libraries.

Open Access: What You Need to Know Now

This Special Report from ALA Editions (2011, ISBN 978-0-8389-1106-8) is a fast 80 pages (8.5x11") that will get you up to speed on open access and point you to places to learn more. It's $45 from ALA Editions (cheaper for ALA members) at http://www.alastore.ala.org/detail.aspx?ID=3281 and also available as an ebook ($36) or combined print/ebook bundle ($53). ALA Editions ebooks ordered directly are actually .zip files containing ePDF, ePub, Kindle (.prc) and MobiPocket (.prc) versions.

Here's what the ALA Editions page says:

> Academic libraries routinely struggle to afford access to expensive journals, and patrons may not be able to obtain every scholarly paper they need. Is Open Access (OA) the answer? In this ALA Editions Special Report, Crawford helps readers understand what OA is (and isn't), as he concisely
>
> Analyzes the factors that have brought us to the current state of breakdown, including the skyrocketing costs of science, technology, engineering, and medicine (STEM) journals; consolidation of publishers and diminishing price competition; and shrinking library budgets
>
> Summarizes the benefits and drawbacks of different OA models, such as "Green," "Gold," Gratis," "Libre," and various hybrid forms
>
> Discusses ways to retain peer-review, and methods for managing OA in the library, including making OA scholarly publishing available to the general public
>
> Addressing the subject from the library perspective while taking a realistic view of corporate interests, Crawford presents a coherent review of what Open Access is today and what it may become.

You can also buy it as a "NOOK Book" directly from BN.com for $30.24 or a Kindle edition from Amazon for $28.44

The Librarian's Guide to Micropublishing: Helping Patrons and Communities Use Free and Low-Cost Publishing Tools to Tell Their Stories

This 184-page 6 x 9" paperback from Information Today, Inc. (2012, ISBN 978-1-57387-430-4) shows you and your patrons how to create quality print books using the tools they already own (typically), with no up-front investment: It's designed for the millions (or tens of millions) of family stories, oral histories, local histories and other worthwhile books that may only make sense for one, five, fifty or a hundred people to buy.

This book is $49.50 from ITI at infotoday.stores.yahoo.net/librarians-guide-to-micropublishing.html (with a 40% discount through July 30, 2012 if you use the code LGMP1 when you order it from that link). I'm particularly fond of the hardcover version—produced using the tools the book discusses—but you can also order any of a wide variety of ebook versions using links on that ITI page (or directly from various booksellers). For example, the Kindle version is currently $24.75 at Amazon, the Nook version is $37.80 at Barnes & Noble (bn.com), Sony wants $24.75 at the Reader Store and Kobo wants $27.89 at its bookstore. Here's what it says on the ITI page:

> In this timely book, Walt Crawford explains the how, what, and why of libraries and community micropublishing. He details the use of no-cost/low-cost publishing tools Lulu and CreateSpace and equips librarians to guide their patrons in the production of quality print books. He offers step-by-step instructions for using MS Word to design and edit manuscripts that can be printed in flexible quantities via on-demand technology.
>
> No stone goes unturned as Crawford demonstrates how, with a little attention to detail, anyone can produce books that rival the output of professional publishers. His advice is geared to making it easy for librarians to support local publishing without any additional budget, and libraries purchasing the book are granted permission to reproduce and supply key sections to their aspiring authors.

There's a chapter on academic libraries, since the techniques discussed could also work for libraries creating virtual university presses or, perhaps more widely, libraries creating new OA journals (since there's an easy way to create an annual print version of an OA journal, with no upfront costs, for the authors and libraries who want it—as some journals are already doing).

Cleaning Up Cites & Insights Books

Cites & Insights Books, my Lulu bookstore, now includes not only my self-published books but also my wife's genealogical and family history

books. It's getting a little crowded, especially because Lulu now splits off PDF versions as separate listings.

On July 1, 2012, or shortly thereafter, I'm going to clean up the site a bit, initially by deleting the PDF versions of *Cites & Insights* itself. Those versions were only there as a way for people to support C&I, which hasn't happened—although it's also true that the annual index now appears only within the annual volume. The print volumes will continue to be available (for a while at least). I may also delete the PDF versions of the two remaining liblog books. If you want any of these in PDF form, now's the time to act.

The Middle

Forecasts

The difference between forecasts and what I called FUTURISM in the May 2012 *Cites & Insights*? Forecasts are specific and short-term, typically for the coming year, which means they can be checked. For this roundup, I'm once again leaving out items that are primarily about ebooks—and most items I've flagged "deathwatch," which deserve their own, even snarkier, roundup.

It takes either courage or hubris to make short-term predictions or forecasts. It takes unusual honesty to go back and review your track record. It takes something else to issue the "you should…" forecasts that some of these are—that is, saying "because I do or believe x, or no longer use y, *you should all* do the same."

There's an odd split in the set of items I have at the moment: The first three are forecasts for 2010 that I missed in 2010 and 2011 roundups. The rest are more contemporary—mostly commentaries on how 2011 worked out or forecasts for 2012.

Some Belated 2010 Forecasts

One of these is from a library source. Two are not. My comments in *italics*.

Top Tech Trends—ALA Midwinter 2010

This one's by Jason Griffey, posted January 24, 2010 at *Pattern Recognition*, and it provides his trends "exactly as written before the panel started." It's a cute presentation as he claims 2010 as both "the year of" and "the death of" two specific trends.

- **The Year of the App**. "2010 is the year that Apps show up everywhere...small, specialized programs that do one thing in a standalone way are going to be everywhere: every phone, printers,

nearly every gadget is going to try and leverage an App Store of some type." *True enough.*

- **The Death of the App**. "Many of the reasons to program stand-alone Apps disappear when the HTML5 and CSS3 standards become widespread… As an increasing number of web developers become familiar with the power of HTML5, we'll see a burgeoning of amazing websites that rival the AJAX revolution of the last 2-3 years." *OK,* I *didn't buy any apps in 2011 (or in 2009 or 2010)…but somehow I have the sense that they're still around. Big time.*
- **The Year of the eReader.** "This year will see the release of no less than a dozen different eReader devices, based around the eInk screen made popular by the Amazon Kindle…" *Were there a dozen eInk devices with measurable sales? I suppose if you count all models of the Kindle, the Nook and Sony's devices separately, there might have been*.
- **The Death of the eReader.** "Early 2010 is going to be the height of the eReader, and late 2010 will see their decline, as the long-awaited Tablet computing form factor is perfected." *I'm pretty sure this is dead wrong—that devices* primarily *dedicated to ebook reading continued to grow in sales throughout 2010 and well into 2011, and probably continue to grow.*

Video Boxes, 'Notbooks' and E-Books to Dominate Gadgets in 2010
That's from *Wired*'s Gadget Lab staff, posted January 4, 2010. It begins with a slightly more hopeful beginning than January 2010 maybe deserved:

> As the economy sputters back to life, gadget makers are preparing a whole raft of hardware for you to buy in 2010.
>
> Some of it will even be worth purchasing.

Noting that January 2010 was back in the dark ages, when Apple was still rumored to be ready to release the iSlate or iGuide, these are what *Wired* thought would be the "biggest gadget trends of 2010":

- "Historians may look at 2010 as the year that gadget technology finally destroyed the cable companies. And it's the rise of internet video that is making this happy day possible." Yes, there were lots more "connected" TVs in 2010, although this passage may be a bit over the top: "We're calling it: If a TV can't access the internet directly in 2010, it might as well be sitting next to an exhibit of Neanderthals at the Natural History Museum." Add to that the Boxee Box, and *Wired* is convinced that cable was done for. "Unless you like paying exorbitant prices and enjoy terrible service and smarmy service reps, there's very little reason to keep your cable provider this year." *Except that, for most of us, the only way to get broadband fast enough to handle*

anything close to high-def quality is to pay even more *to the cable company than we would for cable itself. Guess what? Most TV in 2011 and 2012 to date—close to 98% by time, by all accounts—reaches the home through cable or satellite. This one's dead wrong.*

- The "do-everything device," as everybody dumps single-function devices like Kindles and adopts things like the PlayStation 3. Oh, and with companies moving to platform solutions so "you can go years between hardware upgrades, as opposed to every six months." *Who other than iFans upgrades their devices every six months? As for iFans…well, Apple sure has stuck with that first iPad ever since it came out in mid-2010, right? Oh, and single-function devices like ebook readers and digital cameras: Gone. Right?*
- A wider variety of low-budget computers ($300 to $500), including netbooks with bigger screens, "smartBooks" that are even smaller than netbooks, of course the *flood of Chromebooks… Maybe, maybe not. Certainly Chrome notebooks didn't exactly take off in 2010. Or 2011. Or 2012…*
- "E-book readers get competitive." And consider the ones worth mentioning: The Plastic Logic Que with its 8.5x11" screen. The eDGe $450 dual-screen device. (The section also discusses color eReaders using Mirasol technology or color eInk. Were those on the market in 2010—or 2011, for that matter?) *Yes, e-book readers got competitive. No, those weren't the players.*
- "You *will* want a 3-D TV." With Sony as a leading producer and, oh yes, the first 3D TVs that don't require glasses. In 2010. Here's the odd one: The writer in this case nailed it in the final paragraph—not that 3-D TVs haven't become widespread, but that people weren't hungering for 3D: "Still, it's an open question whether people really want to go to the expense and trouble of installing 3-D display systems in their living rooms. Given the high prices and the tradeoffs (glasses, fixed viewing distances), our bet is that any real growth in 3-D televisions is a few years away. For now, we're sticking with our 2-D televisions."
- "Pocket projectors get huge." Not just standalone "pico projectors" but projectors built into cameras and camcorders, and probably even netbooks and laptops. *Somehow this doesn't seem a major trend in 2010.*

I checked a couple of things. As far as I can tell, as many as two million households in the U.S. may have "cut the cable." Some—like my brother, and like me if I had the antenna tower for it—went back to over-the-air broadcasting. Some with sufficiently high-speed internet may be using that instead. But "destroyed the cable companies"? It is to laugh.

12 Trends to Watch in 2010

That's Tim Jones' January 13, 2010 post on *DeepLinks* summarizing Electronic Frontier Foundation's trends "we think will play a significant role in shaping online rights in 2010." It's an interesting list, and I'm just going to give the topic sentences without much commentary.

> Attacks on Cryptography: New Avenues for Intercepting Communications
>
> Books and Newspapers: .TXT is the new .MP3
>
> Global Internet Censorship: The Battle for Legitimacy
>
> Hardware Hacking: Opening Closed Platforms and Devices
>
> Location Privacy: Tracking Beacons in Your Pocket
>
> Net Neutrality: The Rubber Hits The Road
>
> Online Video: Who Controls Your TV?
>
> Congress: Postponed Bad Legislation Returns
>
> Social Networking Privacy: Something's Got To Give
>
> Three Strikes: Truth and Consequences
>
> Fair Use of Trademarks: Mockery At Risk
>
> Web Browser Privacy: It's Not Just About Cookies Anymore

The blog *does* have updates at the end of 2010—but with one post per trend, making it more cumbersome to comment on. Here's the set of results, including the post above. I've omitted some EFF material in the past because URLs weren't responding properly, but that seems to be fixed. I'd suggest going to the posts themselves. EFF is occasionally extreme for my taste but frequently serves as an effective voice; it's at least worth seeing what they had to say about these issues.

2011

With one exception, this set of items is looking backwards at predictions—and the one exception could as easily be classed as a Deathwatch item.

NVIDIA's Project Denver CPU puts the nail in Wintel's coffin

That's Jon Stokes' title for a January 2011 *ars technica* story. It's impure speculation: Stokes has taken an NVIDIA mention of a project and built from there to a fairly startling conclusion (if the title isn't misleading). The project:

> The chipmaker did unveil Project Denver, a desktop-caliber ARM processor core that's aimed squarely at servers and workstations, and will run the ARM port of Windows 8. This is NVIDIA's first attempt at a real general-purpose microprocessor design that will compete directly with Intel's desktop and server parts.

Followed by this key sentence (emphasis added):

> The company has offered nothing in the way of architectural details, saying only that the project exists and that the company has had a team of crack CPU architects working secretly on it for some time.

This is all about a CES keynote by NVIDIA's CEO—and his apparent jump from mobile devices to supercomputers to ARM to Windows 8…to Project Denver. Here's the key paragraph, making it clear that this is a premature or overstated post about *language* and, really, nothing more:

> After it sunk in that NVIDIA will produce a high-performance, desktop- and server-caliber, general-purpose microprocessor core, and that this processor core will power PCs running Windows, most of the picture had clicked into place. As of today, Wintel is officially dead as a relevant idea and a tech buzzword with anything more than historical significance. Sure, not much will change in the x86-based Windows PC market this year, but "Wintel" is really and finally dead as a term worth using and thinking with.

There follows some discussion of gaming consoles and other stuff that might make sense to some of you in the original, leading up to this (followed by a "we'll keep you posted" paragraph):

> If NVIDIA can execute in all three areas—CPU design, GPU design, and SoC system design—then it could potentially make one killer gaming and supercomputing CPU. But this is a very tall order, and a lot of things could go wrong here. Right now, the GPU execution part is the only one where confidence is warranted based on a track record. With the system integration stuff and CPU part, NVIDIA is in uncharted territory. (The Tegra SoC part of NVIDIA's record isn't as relevant as you might think, because Denver is a different kettle of fish entirely.)

Let's see if I get this straight. *If* NVIDIA can excel in several areas, *if* Windows 8 really is ported fully to ARM architecture or there's some other way NVIDIA can do this, *then* NVIDIA might have a hot item for a small piece of the PC market—"gaming and supercomputing." Some day.

Therefore, "Wintel"—not, as it turns out, the vast marketplace composed of Windows OS running on Intel CPUs (and, presumably AMD CPUs, which didn't make "Wintel" meaningless), but the *term*—is already dead. Gotcha.

No comments.

I did a little searching on *ars technica* to see how much followup there had been. A May 2011 story shows that NVIDIA's GPU shipping volumes were down 28% from a year earlier—and GPUs (graphical processing units) are what NVIDIA does. Both Intel and AMD volumes are up in the GPU market. Otherwise, I saw Project Denver mentioned several times as sort of a talisman—"when this happens, it'll be *great*."

So is "Wintel" dead as a term? "A Google search yields X results" is, I know, an utterly useless comment, so noting that such a search limited to the past month yielded about 40,100 results and to the past week

about 13,000 doesn't say the term isn't dead. After all, given TV and popular literature, the dead and undead can be exceedingly active.

Effects on the Windows marketplace in 2011? Not only "not much" but, as far as I can tell, nothing at all.

The top 5 ed tech developments of 2011 that weren't

This one's fairly narrow—"ed tech"—but it's also interesting as it's a writer explicitly saying "this didn't work out the way I thought it would." Here's the summary that appears *above* the December 20, 2011 *ZDNet Education* story by Christopher Dawson:

> If you had asked me in 2010, these technologies would have been a much bigger deal than they were.

[Emphasis in the original.] Before discussing the misfires, Dawson offers an enthusiastic summary of what *did* happen in 2011 for tech in general:

> Android exploded, tablets finally took off in a big way (although the iPad still reigns supreme both for consumers and in ed tech), HTML5 gained some real traction, "social" in all its forms went completely mainstream, Google Apps gained even more legitimacy (along with plenty of other cloud technologies), and the Mac vs. Windows debate was replaced by real market differentiation

Without attempting to critique that paragraph, let's go on to the five that didn't, offering Dawson's headings in bold and my brief notes in regular text:

- **Android**: Specifically, the promise of "ultra-cheap tablets for everyone." Among other things, there's this: "And those ultra-cheap Android tablets? It turns out that they stink."
- **Electronic textbooks**: More specifically, *interactive* textbooks running on those cheap Android tablets. Oh, and *cheap* interactive textbooks (since, presumably, it doesn't cost a small fortune to make a textbook *meaningfully* interactive?).
- **PCoIP**: Basically, "complete PCs" living on blade servers with students using thin clients. "While there have been successful deployments, they have generally been isolated case studies and not the real time-, energy-, maintenance-, and/or money-saving ventures they should and could have been."
- **BYOD**: "Bring your own device"—the idea that schools should achieve "1:1 computing" by telling students to bring their own notebooks or equivalent. Dawson's commentary here makes me wonder about his definition of "very workable." He admits that parents may not *have* the funds to buy their kids notebooks and that robust backends with no security issues may not be free, but that leads to saying it's "a very workable idea that just hasn't worked yet."

- **Tech-centric pedagogy**: Not just using technology to enhance learning, but making technology the *center* of teaching. Why is this inherently a good idea? You got me.

Dawson is (wait for it) a consultant on "educational technology and web-based systems" who's also the marketing VB for a "virtual classroom and learning network SaaS provider." This is another one with, apparently, no comments at all. What I miss: Any sense that some of Dawson's "it didn't happen" might be worth reconsidering, not just being disappointed about.

Tech's biggest misfires of 2011

This one, on the other hand, isn't an admission of bad forecasts (and maybe doesn't belong here at all). It's a celebration/snarkfest of "delays, false starts, security breeches [sic] and straight up technological turf outs" written by Bryan Heater and posted at *engadget* on December 29, 2011. (Assuming that Heater isn't talking about bulletproof pants, I'm siccing rather than simply correcting to "breaches" because, dammit, *engadget* claims to be a professional operation, not just some semiliterate blogger.)

The list? The failed AT&T/T-Mobile merger; the widespread use of Carrier IQ "diagnostic" software on mobile devices; Cisco's shutting down Flip; the continued (at that point) absence of the longest-running vaporware, *Duke Nukem Forever;* Fusion Garage and its new, ahem, wonder tablets, the Grid10 and Grid4, which were apparently as successful as the JooJoo (remember the JooJoo? No?); the HTC Thunderball because of lousy battery life; the nonexistent iPhone 5; Jawbone's Up wristband; the Kobo Vox ereader; the Kno dual-screen tablet; Netflix Qwikster; Nintendo's 3DS Circle Pad Pro; the Notion Ink Adam, yet another tablet disappointment; PlayStation Network's problems; Research in Motion in general; and HP's webOS.

It's quite a list and you may find the one-paragraph write-ups (with links) interesting—and this time, there *are* comments. 923 of them before they were closed (apparently after very little time, since in early May 2012 the newest comment is labeled "4 months ago," presumably within a week or two of the story's posting). I did not attempt to read all of them. The first is hard to argue with: "The iPhone 5 was more the fault of publications like Engadget, rather than Apple themselves." A long discussion follows…I gave up after 100 additional comments before reaching the end of it.

Thursday Threads: Looking Backwards and Looking Forwards

This December 29, 2011 item by Peter Murray, the *Disruptive Library Technology Jester*, bridges the end of this section and the start of the next section. It's all links, to be sure, and looking backwards, I'm just going to

note one of them, Jenn Webb's "Five things we learned about publishing in 2011," posted December 28, 2011 at *O'Reilly Radar*. The five?

- **Amazon is, indeed, a disruptive publishing competitor**: Amazon seems to want it all—not just sales but the whole shebang. Examples include the expanding toolkit for self-publishing through Amazon, but also AmazonEncore (called Amazon's "flagship imprint"; AmazonCrossing (translations of foreign-language books); Seth Godin's Domino Project; and Montlake Romance, an Amazon romance imprint. Then there's the Kindle Owner's Lending Library and more emphasis on Kindle Singles.
- **Publishers aren't necessary to publishing**: More authors have figured that out—but, in fact, for many authors that's not entirely true (I, for one, benefit enormously from the editing, packaging and publicity capabilities of good publishers). She says self-publishing is "becoming more mainstream"; I wonder how broadly that's true, but it's a point. (Worth noting: CreateSpace, one of the two significant no-fee publish-on-demand operations, is an Amazon division.)
- **Readers sure do like ebooks**: And I certainly like the lead for this discussion, even if it's sicworthy: "There good news is that people are still reading…"
- **HTML5 is an important publishing technology**: It's supported in EPUB3 and sort-of in Kindle Format 8.
- **DRM is full of unintended consequences**: You think? Maybe here it's worth quoting the final sentence, after Webb notes that DRM doesn't stop piracy and isn't really well supported by statistics: "But it *does* give publishers one thing: a longer length of rope with which to hang themselves."

I frequently feel discussions of publishers should be prefaced with "the Big 6 publishers" but maybe this group goes a little beyond that.

Peter Murray lists the five and says we can add a sixth: "The relationship between libraries and publishers is no longer a passive one." It's still *mostly* passive, but that may be changing.

2012

Now we're firmly in the realm of forecasts—and we'll start by picking up Murray's two lists of 2012 forecasts. one from *Fast Company*, one from the UK's National Endowment for Science Technology and the Arts.

10 Bold Tech Predictions For 2012

That's "expert blogger" David Lavenda, posting on December 12, 2011 at *Fast Company*'s "Expert Blog." These are explicitly flagged as *business* developments. His boldface predictions; my comments:

- **Social business will take off in 2012, but companies will struggle to adopt**. You'll have to read this one yourself; it strikes me as bafflegab.
- **A significant failure in a popular cloud service will set the cloud movement back**. If A then probably B, as it may cause sensible businesses to look closely at the "huge cost savings" Lavenda assures us even small businesses get by losing local control over their computing and data resources.
- **Mobile IT will grow slowly in the enterprise**. Very much business-centric, mostly saying businesses really aren't going to equip *all* their employees with smartphones and tablets in any great hurry. And why should they? This one doesn't strike me as bold *at all*; it strikes me as realistic.
- **Organizations will increase IT infrastructure investments**. Note my observation on the previous "bold prediction," but double it.
- **An iPad tablet alternative will emerge out of the fragmented Android market**. I wouldn't call this bold: more like "nearly inevitable."
- **Android vs. iOS 2012**: "Apple will have to become more flexible in its software distribution model for enterprise software or it will risk making the same Macintosh vs. PC mistake of the 1990s. It is not reasonable for organizations to grant Apple control of application distribution to their internal workforce." Hard to argue with that—but it's not a prediction, since Lavenda isn't saying Apple *will* increase flexibility.
- **eBooks will dominate**. In my opinion, that requires an unusual definition of "dominate," but I could be wrong. eBooks having more than 50% of total book sales for 2012? If that's what he's saying, that *is* a bold (and, I think, improbable) prediction.
- **Information overload will get much worse**. While the discussion is interesting, I don't buy it. He's mixing hyperconnectivity with filtering failure. They're two different things.
- **Consolidation in the social business/enterprise collaboration market**. Another purely business discussion.
- **A significant new player will emerge in the social networking space**. "Facebook will remain the dominant player for the foreseeable future, but an attractive alternative will emerge in 2012." Writing in December 2011, that's not only not bold, it's simply recognizing reality. The name of that player ends in a plus sign, by the way.

I think I'm with Peter here: He's less sure that ebooks will "dominate," "but they will certainly become more prevalent." Otherwise, I'm starting

to feel like making my own Bold Predictions (after looking at the third, fourth, fifth and tenth ones above), such as:

- Pigs will continue to fly only as cargo within airplanes.
- Threats of public library closures will greatly outnumber actual library closures, but the threats will get much more press than the less negative outcomes.
- Tens of thousands of infographics will appear that use lots of space to say very little, and that frequently in a misleading manner. (Infographics are to statistical clarity as PowerPoint and Prezi are to oratory.)

12 predictions for 2012

This one—a set of 12 discussions from a central page—is tough because it's from the UK and situations may be different there. Still, it's worth a few notes. These are stated as "predictions for the year ahead spanning the tech, retail and entertainment industries as well as business and the public sector." I'm not giving all of them, just a few that seem noteworthy beyond the UK.

- **Innovation for frugality.** Because it's likely that a number of nations will either have little to no economic growth or actually suffer contraction in 2012, there should be both more innovations that allow people to do things cheaper—and more "frugal innovation" coming out of places with small budgets. (I wonder about the assertion that "extravagance is inevitable" in well-funded operations like CERN: Is that universally true?)
- **Raspberry Pi and the rise of the cheap computer.** The claim here is that we all (or at least many of us, specifically kids) will start programming again—like back in the days of cheapo TV-based computers running BASIC. The discussion gets away from the Raspberry Pi itself and makes a broader claim: "the rise of the cheap, programmable computer is my prediction for 2012." I'd be astonished if this proves to be true in any broad sense.
- **Massively connected.** The Internet of Things finally takes off. The writer here thinks everything's in place for this to "get everywhere in 2012." I'm not holding my breath.
- **Your mobile wallet.** A "this time for sure!" prediction—and, indeed, that's the content: "We've been promised a wallet in our phones for years, but 2012 will be the year that it breaks through." The writer enthuses over the fact that every transaction done using a Near Field Communication chip in a phone "becomes an opportunity to exchange data and trigger an application." Which means it becomes *yet another way that your current location and information about you*

become part of a datanet. Clearly this is entirely desirable to the writer; maybe not so much for some of the rest of us.

That's four out of 12. A few of the others are very much UK-centric, and there are some I just don't feel the need to comment on.

Anticipating 2012

A library-specific list from *Gavia Libraria* (the library loon), posted December 21, 2011. The mysterious loon admits that she's been unable to predict things "that in hindsight were obviously coming" but wants to do some predictions anyway. She groups things into four categories—and I like what I read well enough to mostly just quote her (noting that the blog has a CC BY license, all the more amusing because the only attribution you can give is to Gavia Libraria, the library loon). I'm leaving out areas that seem (to me) outside C&I's scope; you really should read the whole post. Where I have comments, they're in [brackets].

Likely flashpoints

A really big Big Deal will finally explode noisily. Small Big Deals are already crumbling, but they just aren't enough to create an academe-wide furor. Twenty-eleven did produce three big-enough near-misses, however: Access Copyright in Canada, RLUK taking on Elsevier and Wiley, then backing down, and poor desperate Purdue's last-minute one-year deal with Elsevier…. [Seems likely. Will 2012 be the year?]

Maria Pallante will do something exceedingly stupid and horrible. The signals sent by the US's new Register of Copyrights are terrifying, especially for academic libraries. You thought SOPA was bad? Pallante could be worse, because one can't filibuster the woman to stop her. Likely initiatives include bad orphan-works policy, an entirely unhelpful "section 108 revision," and an Access-Copyright–like compulsory licensing scheme. {I wish I could disagree here, but so far Pallante seems to be another copyright maximalist.]

Grinding slow, but exceeding fine

PLoS will continue its growth. If there's a smarter group of people in this business than PLoS, the Loon doesn't know who it might be.

Anger at toll-access publishers will continue to gain faculty mindshare. This has been painfully slow in coming, but 2011 saw quite a few more outright philippics, and quite a bit less FUD and apologias from toll-access publishers, than heretofore. It's not yet time to translate that into major gains for open access… but it's a necessary start nonetheless. [I think the Loon's right on all counts—both the overall trend and that 2012 may be too early for major gains in OA. A Whitehouse.gov petition is great, but may not be a major gain as such.]

Hathi Trust will survive and prosper. The Authors Guild's lawsuits grow increasingly shrill and desperate. They won't win anything by them. And while the orphan-works snafu was indeed embarrassing, it's hardly fatal.

Perhapses

One PLoS One imitator announced in 2011 will fold in 2012. The Loon's nonexistent money is on SAGE Open, but it could be any of them. Predictably, the toll-access-publisher lobby will trumpet this as a major open-access failure, ignoring both the success of PLoS One and the well-above-zero churn rate of toll-access journals. N.b.: 2012 could well be too early, but the Loon would be rather shocked (not necessarily in a bad way, of course) if this didn't happen by 2015.

The silent war between MLSes and underemployed postdocs for library staff positions will come to a head. The Loon thinks MLSes will ultimately hold their ground, Jeff Trzeciak or no Jeff Trzeciak; this sort of battle has happened before. How ugly the war gets depends in part on how quickly Trzeciak's institution hands him his head, which would scare other library administrators away from library-labor casualization via postdocs. (No matter when it happens, the Loon's firm opinion is that it didn't happen nearly soon enough.) [Meanwhile, JT has moved on…and I'm staying right away from this fight.]

Anything could happen, and probably will

SOPA and its ilk. The Loon prays that the Internet discovers its lobbying spine. It'll need it. [Given that SOPA's morphed into CSIPA, I share the Loon's prayer.]

The eventual lawsuit-driven shape of Google Books. The Loon wouldn't touch this with her tiniest, most expendable pinfeather. [Ditto—although I'm ready to predict that whatever emerges will have almost nothing to do with the original grandiose "oh, you don't really need library stacks anymore" perversion of what Google was actually saying.]

Privacy in social media and on mobile devices. Worse and worse… we can certainly expect more scandals and more blunders; what the Loon wouldn't even try to predict is the reaction thereto, from legislators or the social-media-using public at large. [Nor will I.]

A fine and interesting set of predictions, including the ones I chose to omit. Yes, I know I'm a disagreeable old cuss, but I don't disagree with *everybody*.

Ditch these 10 devices in 2012

While I picked this up from the *Chicago Tribune*, it's actually written by Deborah Netburn of the *Los Angeles Times* and it's the kind of thing that drives me right up the wall—a story that *begins* by essentially saying that this "create more garbage!" list only makes sense if you want everything to be multifunction. To wit, the introduction:

> When researching this list of obsolete technology, we discovered that most of the devices we've deemed no longer necessary are actually very useful items that served us better than the smartphone functions that have come to replace them. They helped us navigate strange cities (GPS for the car),

> easily take video of our children (Flip cam), and transport large files between our home and office computers (flash drive).
>
> So why have they become obsolete? Because they did one thing and one thing only, and a person can carry only so many devices in their coat pockets or purses, no matter how small. And so we suggest that in the coming year you bid a fond farewell to these 10 items, on the off chance that you haven't trashed them already.

Maybe I should stop right there, scream and turn the page. Pushing people to keep replacing perfectly good technology with *newer better hotter* and labeling items that might be last year's version as "obsolete" inclines me to say that, while I don't believe print newspapers are obsolete, some forms of newspaper "journalism" damn well should be.

So what's the actual list?

- Flip cams—she's talking about the whole cheap, small camcorder category, not just Cisco's odd decision. Why "obsolete?" Because some smartphones take video.
- Portable DVD players. Since, y'know, *everybody* that would use these inexpensive little devices must be carrying a notebook or "one of the increasingly ubiquitous tablets."
- Flash drives. *Really*? Yep. "Thanks to the rise of cloud computing and the ease of sending giant files, the 2-inch flash drive has come to seem almost clunky." So you should *throw all your flash drives in the garbage*, on the "off chance that you haven't trashed them already."
- GPS devices for your car. You see, "we've always got our iPhone on, and it's always charged"—and since "we" clearly means *everybody*, then all other GPS devices are obsolete.
- Small digital cameras. Again, *we all have smartphones*, so anything short of a professional-grade digital camera is worthless trash.
- Fax machines. Well, OK, maybe this one. (Or maybe not: I've had to activate the fax portion of my multifunction printer at least once this year, for good reasons.)
- Netbooks. We all have tablets now, so there's no room for netbooks.
- CD players. Because they take up more space than MP3 files and "don't have the cachet of vinyl." Dead, dead, dead.
- Voice recorders. Now, if she'd said "virtually all modern MP3 players are also voice recorders" I might be more sympathetic, but nope: The ubiquitous smartphone that everybody already owns makes *everything else* obsolete.
- PDAs. OK, I'll give her two out of ten. And go scream again.

This is the kind of writing that gives journalism and consumerism bad names. You photographers out there: How many of you feel that your

smartphone is a full, complete, adequate replacement for your best non-professional-grade digital camera? I'm guessing it's not everybody.

The last two—or the last two dozen?

The last two items I've tagged for this discussion are Richard Watson's December 31, 2011 "New Trends for 2012 (a compilation)" at *What's Next: Top Trends* and John Lang's December 27, 2011 "Experts Predictions for 2012 in Technology, Business, and Economics" at *The Proverbial Lone Wolf Librarian's Weblog*.

Except that neither of these is a standalone set of predictions. The first offers ten lists from ten different sources, with links, plus an additional link to "26 words for 2012"; the second is a set of 14 links to articles offering predictions. After looking through more than half of the lists and links, I find that I have forecast fatigue. If you have more endurance than I do, you can click on either of the links above and go to town. This roundup, however, is done.

Policy

Copyright: Fair Use, Part 1

Fair use is law. It is not an admission of copyright infringement with a defense. It is not just a doctrine. It is part of U.S. copyright law—specifically, section 107 of the law:

> Notwithstanding the provisions of sections 17 U.S.C. § 106 and 17 U.S.C. § 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.

Why do I say this? Because Big Media tends to put scare quotes around "fair use," sometimes to deny that it exists, and because it's been claimed so often that it's only a defense—that claiming fair use is admitting

copyright infringement. It's not. If the first paragraph of section 107 is too long, here's an excerpt (emphasis added):

> The fair use of a copyrighted work…is not an infringement of copyright.

The problem that arises is threefold:

- As you can see, the definition of fair use is vague—it's a set of factors, not a clear rule.
- There's been a generally successful ongoing push to minimize the use of fair use, and specifically to demand that authors and creators obtain permission for every use of copyrighted material, even if such use seems likely to fall into fair use.
- Even more so than for other aspects of copyright law, fair use is diminished by bullying and intimidation—the threat of lawsuits and actual lawsuits that heavily favor corporate interests over individual interests, including those of writers and other creators.

This two-part piece is in four or five sections dealing with various events and thoughts on fair use over the past couple of years. I'd originally hoped to do the whole thing in a single essay, but that once again seems too large for an issue with more than one essay. Therefore, the third, fourth and possibly fifth sections will appear later—probably in the next issue. The first portion of this roundup is, I believe, unmistakable good news. The others are all more complicated. I should note that I am not a lawyer and I am not offering legal advice.

Righthaven

Here's how Wikipedia puts it in an *excruciatingly* value-neutral piece:

> Righthaven LLC is a copyright holding company founded in early 2010, which enters agreements from its partner newspapers after finding that their content has been copied to online sites without permission, in order to engage in litigation against the site owners for copyright infringement. The lawsuits have been heavily criticized by commentators, who describe the activity as copyright trolling and the company as a "lawsuit factory".

I'm not sure the verb in that first sentence has the right tense. At this point, "was" appears more appropriate, especially since the company's assets are subject to seizure and the domain (righthaven.com) has already been sold at auction. But that's getting ahead of the story.

Righthaven set up a deal with the publisher of the Las Vegas *Review-Journal* to sue people—bloggers and others—for reproducing newspaper articles on their sites without permission. In the first year, it filed 255 suits—typically demanding $75,000 and the "infringer"'s domain name and settling for a few thousand dollars. (Does this "sue for the moon and settle for a few thousand bucks" model sound at all familiar?) Here's the awful part, again from Wikipedia: "As of December 2010 approximately 70 cases had settled."

Later, Righthaven set up similar agreements with an Arkansas outfit and Media News Group. It also started suing over graphics and photographs and adding other newspapers. After all, what a deal! The company bullies bloggers and others and the newspaper gets half of the action.

Pretty sweet. Identify "infringers." Send 'em nasty letters and file suits. Collect Big Bucks. Profit! Until…people started fighting back, with help from the Electronic Frontier Foundation and others. That started before the first material collected for this roundup, so we're entering the story partway in.

Righthaven Says It Will Stop Suing Over News Excerpts

That's the title on David Kravets' November 18, 2010 story on *Wired.com*'s "Threat Level." Seems Righthaven had even been suing for relatively brief excerpts—for example, eight sentences out of a 30-sentence story about the real estate market. Realty One Group (or, rather, realtor Michael Nelson on his blog) quoted the material. Righthaven sued. Instead of coughing up $3,000, Realty One filed a motion to dismiss claiming fair use. The quick discussion by the court found that three of four factors favored fair use and granted summary judgment for the defendant (which only happens when the facts *can't* support a finding in favor of the plaintiff):

> After reviewing Nelson's use of the copyrighted material, the court finds that Nelson's use falls within the Fair Use doctrine. Accordingly, Nelson did not infringe Righthaven's copyright as a matter of law and the court shall grant Nelson's motion.

Whoops. So Righthaven said it would only file lawsuits when at least 75% of an article was quoted. Specifically, it said that in a case where it was suing a political group for quoting four paragraphs of a 34-paragraph story—and then moved to dismiss that suit without granting legal costs to the political group (and EFF).

Nevada court hits copyright troll with Fair Use surprise

I'm pleased to say that Matthew Lasar used Fair Use *without* scare quotes in this November 2011 story at *ars technica*. This time, the suit was over an *entire* article—and the judge wanted Righthaven to show cause why the suit shouldn't be dismissed on the basis of fair use. Traditionally, unfortunately, it's been up to the person or group *using* fair use to defend that use—but the tide was starting to turn.

The defendant was the Center for Intercultural Organizing in Portland, Oregon, an advocacy group for immigrants and refugees. CIO's blog had (apparently) republished in full a news report on misdemeanor violations leading to deportation. Righthaven not only sued for statutory damages, it wanted *loads* of stuff about CIO including its financials and

"All evidence and documentation relating to the names and addresses (whether electronic mail addresses or otherwise) of any person with whom the Defendants have communicated regarding the Defendants' use of the Work"—that is, presumably, everybody who'd read the blog. Oh, and it wanted CIO's domain.

CIO filed a motion to dismiss because Righthaven didn't hold copyright until after the item was posted (Righthaven claimed to transfer copyrights from the papers), and thus lacked standing to sue. Lasar writes:'

> What's interesting about the Nevada court's latest action is that Judge Mahan is leapfrogging over the Center's standing and jurisdiction arguments and turning the matter into a Fair Use issue.

In other words: Maybe it doesn't matter who holds copyright; maybe it's fair use in any case.

Fair Use For the Win in Righthaven Case

That's how it turned out, as explained in this March21, 2011 post at EFF's *DeepLinks Blog* by Kurt Opsahl. (EFF also properly uses fair use without quote marks.)

> Last Friday, a judge in the Nevada federal district court patiently explained why fair use disposes of Righthaven's copyright claim arising from the republication of an entire news article by a nonprofit organization. The hearing was in one of the now-250 Righthaven copyright cases. A written order, which will help set a persuasive precedent for other copyright troll cases, will be issued later.

I like Opsahl's comment on these suits in general and Righthaven's strategy:

> Righthaven seeks the maximum damages under the Copyright Act as well as control over the domain name, but is willing to settle for four-figure sums that seem calculated to be less than the cost of defense. Meanwhile, the actual articles that Righthaven sues over remain available for no charge on the newspaper website. [Emphasis added.]

The judge went through the four factors, but also noted that Righthaven's only use of the material was for lawsuits—and that the lawsuits were having a chilling effect on fair use.

> Since Righthaven's use of the work "does nothing to advance the Copyright Act's purpose, which is to encourage and protect creativity," Judge Mahan was inclined to find CIO's non-commercial use to be fair even though it used the entirety of the article.

Strong stuff—I mean, after all, doesn't every Proper American® know that the purpose of copyright is to enrich copyright holders?

The good side of a bad lawsuit

Kevin Smith (you're going to see his name a *lot* in this roundup) commented on the case in this March 31, 2011 post at *Scholarly Communications @ Duke*—one of the most consistently thoughtful and interesting blogs about copyright and publication issues in academic, out of Duke University Libraries. He found the case interesting, but with a caveat:

> For those of us who believe that education and technological innovation require more space in the fair use analysis than courts usually recognize, there was an interesting decision recently that might be heartening if it were not so heavily dependent on the fact that the plaintiff in the case was so unsympathetic.

I choose to be heartened anyway, but Smith's point is a good one. Righthaven was indeed a "really obnoxious plaintiff." Smith focuses on two aspects of the finding:

- Determining that the CIO blog didn't serve the same market as the newspaper, which broadens the fourth factor analysis.
- Focusing on the fact that it was Righthaven as "the rights holder" (I'm adding the scare quotes; you'll see why a little later) rather than the newspaper:

> The other unusual bit of reasoning in this case makes the "disliked plaintiff" effect quite clear. The judge talked a good deal about how the rights holder (Righthaven)was using the copyright, which is not usually part of the fair use analysis. Usually, the use inquiry focuses on how the defendant is using the work, but here the judge looked at how Righthaven was exploiting the copyright solely as a means for bringing lawsuits. Righthaven does not produce creative work nor support those who do; it simply sues, or threatens to sue, other entities. This use "exclusively for lawsuits" was a mark in favor of fair use, the judge seems to be saying, because finding otherwise would have a chilling effect on other fair uses. This is an extraordinary bit of reasoning—linked to, but conceptually separate from, a concern for a chilling effect on free speech—that represents a substantial departure from the usually fair use analysis.

Smith isn't disagreeing with the decision; he's noting unusual aspects of it. He's also noting that the four factors aren't exclusive (go back and read the wording carefully: "the factors to be considered shall include"). "Judges are free to consider other things, including the good faith of both plaintiffs and defendants."

More Bad News for Righthaven: Domain Name Claim Dismissed in DiBiase Case

That's Corynne McSherry writing on April 18, 2011 at EFF's *DeepLinks Blog*, and it may be the less significant of two Righthaven-related EFF

posts that day. But it was another strike against Righthaven—dismissing its absurd claim that it should be granted a defendant's domain name(s) as a remedy for copyright infringement.

> While this latter ruling was overshadowed by the unsealing of the Strategic Alliance Agreement, it represents a crucial precedent for other Righthaven victims. Righthaven always requests this relief in its complaints, and then uses the demand as leverage in settlement negotiations. As Righthaven CEO Steve Gibson said last year, the company sees the domain name threat as "something available to deter infringements." Websites that have built up strong name recognition are highly reluctant to put that domain at risk.

But it's an improper threat.

> 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.

Incidentally, the link in the first quoted paragraph is to a Las Vegas newspaper—the *Sun*, that is, not the *Review-Journal*. It's quite a story. We'll get back to the domain bit shortly, but first…

Why Righthaven's Copyright Assignment Is A Sham – And Why It Matters

Kurt Opsahl, also April 18, 2011 on the EFF *DeepLinks Blog*, with a revelation that could mean the advances in fair use were incidental benefits. At the request of EFF and Fenwick & West, the district court unsealed the Strategic Alliance Agreement between Righthaven and Stephens Media (publisher of the *Review-Journals*). (The court's language makes it increasingly clear that it was getting, shall we say, mildly annoyed with Righthaven: "Righthaven and Stephens Media have attempted to create a cottage industry of filing copyright claims, making large claims for damages and then settling claims for pennies on the dollar, with defendants who do not want to incur the costs of defending the lawsuits.")

That agreement is essential to the lawsuits, since only a copyright holder can sue for infringement. And the copyright holder needs to claim

ongoing harm in order to have much chance of success. But here's section 7.2 of the agreement:

> 7.2 Despite any such Copyright Assignment, 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.

Additionally, section 8 provided for termination of the "assignment" at any time. As Opsahl puts it:

> In short, the "assignment" is a sham, Righthaven's claim has been baseless from the outset. Stephens Media, which has struggled to hold the litigation at arms length, is the true and exclusive owner of the copyright and the only entity with standing to bring a copyright claim.

There's more to the post—for example, Stephens Media making assertions that are, according to its own documents, less than truthful. I won't go through the rest, although it's interesting.

Righthaven Defies Court, Ignores Domain Name Ruling

Things start getting a little bizarre right about here, as detailed in this April 22, 2011 item by Kurt Opsahl at *DeepLinks Blog*. Even though the Chief Judge (of a Nevada federal court) had already dismissed Righthaven's claim that seizing an infringer's domain was appropriate relief, the firm filed a *new* infringement case…and asked for not only the domain name but a whole bunch more:

> Order the surrender to Righthaven of all hardware, software, electronic media and domains, including the Domain used to store, disseminate and display the unauthorized versions of any and all copyrighted works as provided for under 17 U.S.C. § 505(b) and/or as authorized by Federal Rule of Civil Procedure 64.

According to Opsahl,

> Not only has the domain name claim been specifically and completely rejected by that very court, but Righthaven's new citations do nothing to help its claim. As an initial matter, Section 505 does not have a subsection (b), and concerns attorneys' fees, not the surrender of domains and hardware. While Righthaven probably meant to cite to some other section and was simply sloppy in the drafting, no section of the Copyright Act will help them. Indeed, Righthaven has already "concede[d] that such relief is not authorized under the Copyright Act."

Rule 64 doesn't help either—partly because the court's already rejected the argument, partly because it has to do with state law, not federal law. Note that the new suit also continues the assertion that Righthaven holds

exclusive rights to the articles involved—an assertion already undermined by the opening of the Strategic Alliance Agreement.

Righthaven v. CIO: It's Hard Out Here for a Troll

If you want to read just one EFF post regarding fair use and Righthaven, this might be the one to read—by Kurt Opsahl, posted April 26, 2011 on *DeepLinks Blog*. It follows the district court's finding that Center for Intercultural Organizing (CIO)'s posting of a copyrighted news article was a non-infringing fair use. "The well-reasoned opinion sets a powerful precedent for fair use and against copyright trolling."

> While considering the purpose and character of CIO's use, the court compared the use made by CIO with the use made by Righthaven. The court wrote: "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." This led to the court to conclude that the purpose and character of the work was "transformative," meaning it was used for a new purpose and therefore weighed towards fair use.
>
> Likewise, when analyzing the "market harm" factor, the Court noted that Righthaven "failed to allege that a 'market' exists for its copyright at all." Indeed, recently unsealed evidence shows that Righthaven is unable to make that allegation, as it is contractually prohibited from licensing the works in question. The court also noted that "Righthaven cannot claim the LVRJ's market as its own and is not operating as a traditional newspaper." The court cited to eBay v. MercExchange, a landmark Supreme Court from 2006, which refused to presume harm to the markets of patent trolls (entities that buy up patents solely for purposes of litigation). Taken together, this meant that the "market harm" factor favors fair use where Righthaven is concerned.
>
> Finally, the court's overall balancing clearly disfavored copyright trolling. The Court noted that Righthaven'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."
>
> The decision confirms that a non-publishing entity that uses copyrighted works for litigation is in a materially worse position than the original publisher in a fair use analysis. While Stephens Media would likely have lost anyway, the business model promoted by Righthaven ensured that at least two of the four factors and the balancing favored fair use.

As the post also notes, other problems with Righthaven seemed likely to overshadow fair use concerns, but this decision stands as a valuable focus on fair use: Even if Righthaven had standing (which it may not have), there was no infringement.

Class-action lawsuit targets Righthaven's "extortion litigation"
This piece, posted by Nate Anderson in May 2011 at *ars technica*, notes the start of another front in Righthaven's battles. BuzzFeed, accused of violating Denver *Post* copyright in a photograph of a Denver airport TSA security patdown (Righthaven had already filed another *50* Colorado lawsuits after the Denver *Post* signed up), launched a class action counterclaim. Key points in the counterclaim:

- Abuse of process—suing first rather than attempting to negotiate licenses or filing takedown letters.
- Trying to seize domain names.
- Lack of standing: Righthaven doesn't control the copyright.

> In the end, the suit claims that all of Righthaven's conduct was "motivated solely to intimidate Defendants and extract settlement money," and it noted that vigorous attempts to defend Righthaven cases often lead to voluntary dismissals from the company. "Righthaven voluntarily dismisses the copyright litigations it has initiated if it foresees that it will need to engage in substantive litigation with the alleged infringer," says the counterclaim.

Apparently the Colorado judge overseeing those cases isn't much fonder of Righthaven than the Nevada judge is, based on this text from a court order:

> Neither *The Denver Post* nor Righthaven attempted to mitigate any damages by simply sending a cease and desist letter, nor any other request to discontinue the alleged infringement, prior to initiating this action. Instead, Righthaven has brought this lawsuit (and apparently 251 others) against alleged infringers, further exacerbating the Court's overloaded docket. Righthaven's motivation for avoiding the simple act of requesting that Mr. Hill cease and desist is simple, it is using these lawsuits as a source of revenue. Such abuse of legal process should be rejected.

Apparently, Righthaven at this point was claiming *it* was suffering from a lack of due process—as it was fighting to avoid paying defendants' attorney's fees. And, as Anderson notes, Righthaven was getting money: "one has only to look down the Righthaven case list in Colorado to see just how many suits have already settled."

Criminal Justice Blog Moves to Dismiss Sham Copyright Troll Lawsuit
This is a press release issued May 5, 2011 by EFF—relating to another Righthaven case involving Thomas DiBiase, the case that uncovered the questionable nature of Righthaven's standing to sue. It's worth noting as a landmark—the point at which fair use probably ceased to be the primary reason for dismissing Righthaven suits. The key quotation:

> "Copyright law demands that only the owner of exclusive rights under the Copyright Act can enforce copyrights--someone with some skin in the game," said EFF Senior Staff Attorney Kurt Opsahl. "But the Strategic

> Alliance Agreement between Righthaven and the Review-Journal shows that the newspaper kept all the rights to exploit its article. Righthaven's role is only to pursue heavy-handed lawsuits while trying to extract settlements for less than the cost of defense."

Old law and modern lawsuits

Kevin Smith weighed in again on May 12, 2011 at *Scholarly Communications @ Duke* with a truly interesting discussion of champerty (as defined by Bing, "an illegal agreement between a litigant and somebody who aids or finances litigation in return for a share of the proceeds following a successful outcome").

> The basic problem that rules against champerty address is the buying and selling of legal claims. At its most egregious, champerty involves someone making a frivolous claim, usually in tort, and selling that claim to a legal speculator. In this way the claimant gets a swift and certain profit, while the speculator steps in to gamble on a bigger return as a result of the lawsuit.
>
> Over time the rules against champerty have evolved and often become subsumed into other kinds of regulation. The rules that limit lawyers' contingency fees are one example of the evolution of champerty prohibitions. The underlying ethical concern, which is that courts will be clogged with poorly-justified lawsuits simply to serve external and purely financial interests, spans a wide range of legal fields and activities.

EFF used the term in its motion to dismiss one of Righthaven's suits. And that's where this post's connection to Righthaven ends—because Smith is more interested in the Georgia State University lawsuit (see later in this article), "which is being partially funded by the Copyright Clearance Center."

> I want to be clear that this arrangement, where the Copyright Clearance Center bears some of the costs of prosecuting the litigation, is not precisely the kind of thing champerty rules were intended to prevent. In the GSU case, the rights holders are themselves the plaintiffs, and, since no damages are being sought, there can be no suggestion that CCC has purchased a stake in any recovery.
>
> Nevertheless, and in spite of its own protestations, the CCC does have a financial stake in the outcome of the suit, which goes to trial in a few days. A ruling that narrows fair use even further than the interpretation of it that GSU and many other universities are already using would drive many more transactions to the CCC and greatly increase their revenue. Essentially, CCC is financing an aggressive marketing strategy by paying 50% of the litigation costs in this case. They did not buy a stake, but they certainly have a stake.

It's not champerty—but it raises similar ethical concerns.

> Suppose, for example, that one of the reasons that this case has not settled is that the plaintiffs are not subject to the normal financial concerns that accompany litigation. With an interested and supportive "angel" absorbing half the costs, it may be a smart gamble for plaintiffs to move forward even with a weak case rather than negotiate and settle on a reasonable "clarification" of fair use.

GSU is another and much more difficult discussion. Back to Righthaven…

Righthaven Loss: Judge Rules Reposting Entire Article Is Fair Use

That's David Kravets, writing on June 20, 2011 at *Wired.com*'s "Threat Level." This case involves a 19-paragraph editorial from the *Review-Journal*, posted by a *user* of a website "to prompt discussion about the financial affairs of the nation's cities." The judge noted that there was no evidence to back Righthaven's claim that the post would reduce readership of the editorial on the newspaper's site (an interesting claim to begin with, since the newspaper wasn't bringing the suit), that the editorial was not primarily creative work and that the posting was for purposes of discussion.

But the judge didn't need to decide fair use: He *also* found that RIghthaven lacked standing to sue. The defendant planned to seek legal fees. The piece notes that some bloggers who had settled with Righthaven were considering legal action against the firm.

One unfortunate aspect of this particular article: Kravets calls fair use "an infringement defense." It's not. If a use is fair use, it is *not infringement*.

Newspaper chain fights for copyright troll's survival

Kravets again, this time in a May 2011 item at *ars technica*. The gist: Stephens Media asserted that it had revised the agreement with Righthaven so that Righthaven *would* have standing. Not that this would help with any suits already filed, to be sure: You can't gain standing to sue after you've already sued.

But did anything really change?

> Yet under the latest plan, Stephens Media still does not give up its copyright — meaning it wants to reap the benefits of risk-free payouts while continuing to retain ownership of the works in question.
>
> Under the latest terms, which a different Nevada federal judge last week ruled did not give Righthaven standing, Stephens Media assigns its copyrights to Righthaven, but with a number of caveats. Under the deal, Righthaven is required to give Stephens Media 30 days' notice if it plans to capitalize on those works for any other purpose than bringing an infringement action. And Stephens Media reserves the right to re-acquire for $10 any copyright it had ceded to Righthaven.

> In effect, the arrangement prevents "Righthaven from ever exploiting or reproducing the work," US District Judge Philip Pro of Nevada ruled in dismissing a Righthaven case last week.

Copyright troll Righthaven now starts paying those it sued

And things kept getting worse for Righthaven. This one's by Nate Anderson, published in July 2011 at *ars technica*. The heart of it:

> Yesterday, a federal judge in Nevada ordered Righthaven to pay $3,815 in legal fees after botching one of its cases. Righthaven had sued one Michael Leon back in September 2010, but it didn't even serve the right paperwork in the case. When multiple defendants started responding to the court, the judge notes that she "became suspicious that there may have been a problem" and set a hearing to talk about it.

And this ("Randazza" is a legal group that's been handling a number of Righthaven cases):

> The problems here were of a technical/procedural nature, but far worse could be coming in the more substantial cases. Randazza's group also won a "fair use" finding last month in another Righthaven case, and they are now asking for $34,000. Given the standing issues that have plagued Righthaven—judges have found that the company didn't even have the copyrights needed to bring many of these suits—much more pain could be ahead. Given that the average Righthaven settlement was apparently a few thousand dollars, it wouldn't take many $30,000+ awards to wipe out the cash the company has earned in the last few years.

Righthaven learning it can't change the facts after it sues

Another Nate Anderson *ars technica* item from July 2011, this one harking back to the Kravets piece but a little more bizarre in its telling.

> Like a leech—or perhaps a tick—the copyright lawyers at Righthaven latch on tight and don't let go, even as their cases have begun to crumble around them. Instead, they're doubling down on their lawsuit strategy against individual bloggers who repost an article or two.

The story? In June 2010, Righthaven sued Dean Mostofi for reproducing an article about foreclosures. The day before this article, the judge tossed the case because Righthaven lacked standing to sue. Ah, but Righthaven claimed that the 2011 change in its agreement with Stephens Media *gave* it standing. To which the judge responded…well, not so much. He offered an example of what could and couldn't change after filing a suit:

> As an example, a party who misstates his domicile may amend to correctly state it. This is an amendment of the allegation. However, that party is not permitted to subsequently move in order to change his domicile and amend accordingly. This would be an amendment of the jurisdictional facts, which is not allowed. Here, Plaintiff and [Review-Journal owner]

> Stephens Media attempt to impermissibly amend the facts to manufacture standing.

So what did Righthaven do?

> Hours after the case was dismissed, Righthaven filed a brand new lawsuit against him over the same charge, on the grounds that this time, the amended operating agreement with Stephens Media is in force and gives Righthaven standing.

Righthaven, still angering judges, finally pays cash for its mistakes

Yet another July 2011 *ars technica* story by Nate Anderson—this time with a touch of the orphan defense (a person who's killed his parents excuses the killings because, judge, *he's an orphan now*). Righthaven did send a check for $3,815 to a lawyer—although it managed to use an obsolete address rather than the address of the law firm that appears on its pleadings. But that's the icing. This is another story worth reading directly; it's funny, if also a little sad.

> Righthaven has been hit with both fee awards and sanctions in various cases, and it has resorted to such desperate stratagems to avoid payment that the Nevada federal judge overseeing many of its cases is fed up.
>
> Back on July 14, Judge Roger Hunt ruled that "there is a significant amount of evidence that Righthaven made intentional misrepresentations to the Court… This conduct demonstrated Righthaven's bad faith, wasted judicial resources, and needlessly increased the costs of litigation." He hit Righthaven with a $5,000 penalty.

Righthaven asked for and received an extension for the payment—but then wanted another one.

> The reason? It had spent so much time investigating ways to get out of the fine, and expended so much effort on dealing with other cases, that it simply couldn't comply in time. ("Counsel's investigation has been extremely time consuming and has also been impacted by numerous pending responses dates in a significant number of Righthaven and non-Righthaven matters.") Also, no one would give Righthaven a bond for the $5,000, and the firm didn't want to simply cough up the cash.

The judge was, by this time, pretty much fed up:

> After reexamining the issues and counsel's stated difficulties, the Court concludes that it was overly generous in granting the extension because counsel's situation is largely—if not entirely—of his and Righthaven's own making. Righthaven and its counsel should concentrate their efforts on material issues and court orders, not wishful research.
>
> Further, if counsel does not have time to do all that he needs to in Righthaven's dozens of cases, the Court kindly suggests that he or Righthaven obtain additional help, not complain to the Court about time constraints. Righthaven also informed the Court in its motion that it plans

to request a stay of the monetary sanction. The Court already granted an extension, which it will not change, and suggests Righthaven not waste its time on a motion requesting any further relief from the sanction.

Here, in a separate case, comes the orphan defense:

> In a separate case, Righthaven v. Hoehn, defense lawyers are demanding $34,000 after the case was tossed due to the issue with Righthaven's lack of copyright ownership. (To rub salt in the wound, the judge went on to rule anyway that the "infringement" at issue was actually a fair use.) To avoid paying the opposing lawyers, Righthaven recently argued that fees could not be awarded; since Righthaven had no standing the sue, the court had no jurisdiction in the case, and therefore could not assign legal fees.
>
> The defense attorney handling the case, J. Malcolm DeVoy, was incredulous.
>
> "Righthaven deserves some credit for taking this position, as it requires an amazing amount of chutzpah," he wrote. "Righthaven seeks a ruling holding that, as long as a plaintiff's case is completely frivolous, then the court is deprived of the right to make the frivolously sued defendant whole, whereas a partially frivolous case might give rise to fee liability. Righthaven's view, aside from being bizarre, does not even comport with the law surrounding prudential standing."

That one, as it happens, didn't take long to come to fruition. Yet another Nate Anderson *ars technica* story, this time appearing in August 2011:

Righthaven rocked, owes $34,000 after "fair use" loss

This piece covers the decision in the Hoehn case. Anderson begins with this wonderfully terse summation: "The wheels appear to be coming off the Righthaven trainwreck-in-progress." After repeating some of the information above (including DeVoy's quote), we get the outcome:

> The judge agreed. In a terse order today, he decided that Hoehn had won the case (as the "prevailing party") and "the attorney's fees and costs sought on his behalf are reasonable." Righthaven has until September 14 to cut a check for $34,045.50.

"It was a dumb idea": newspaper chain fires copyright troll Righthaven

That's David Kravets in a September 2011 story at *ars technica*—and he's quoting the *new* CEO of MediaNews Group (publisher of the *Denver Post*, the *San Jose Mercury-News* and several dozen other papers). The new CEO announced the termination of the Righthaven deal at the end of September—and said he'd never liked the idea.

> Paton said if he was MediaNews' chief a year ago, he likely never would have signed on with Righthaven, which hoped to fix the print media's financial ills by suing bloggers and website owners for reposting snippets or entire

> copyrighted articles. Terms of the Righthaven-MediaNews deal grant each side a 50 percent stake in settlements and verdicts.

Naturally, the publisher couldn't actually shut down the three dozen outstanding suits over *Denver Post* items—because, ahem, Righthaven "controls" the items and thus the suits. (The story includes a link to the agreement. According to the story, the agreement *only* gives Righthaven permission to sue—not any other rights to the content.)

US Marshals turned loose to collect $63,720.80 from Righthaven

Nate Anderson again, this time in a November 2011 *ars technica* story—and, again, the first sentence may say it all (but I'll quote the entire paragraph):

> Looks like it's time to turn out the lights on Righthaven. The US Marshal for the District of Nevada has just been authorized by a federal court to use "reasonable force" to seize $63,720.80 in cash and/or assets from the Las Vegas copyright troll after Righthaven failed to pay a court judgment from August 15.

Still fighting over the Hoehn fees award, Righthaven was claiming that being forced to pay the fees could put it out of business or into bankruptcy, thus preventing it from winning the case on appeal. It didn't get the appeals filed on time. The appeals court refused to delay the deadline—and when the money didn't arrive, the lawyers on Hoehn's side asked for a Writ of Execution, this time for roughly twice as much money given additional costs and fees.

Skipping over a few weeks (and some other stories) we get…

Copyright troll Righthaven's domain name now up for auction

Once again *ars technica*, this time a December 2011 story by Jacqui Chang. (You might find one of the linked stories worth reading; it offers a concise summary of Righthaven's history and its attorney's continued belief that he was doing something worthwhile and legal.)

Here's the first of three paragraphs, and maybe it's all you need to know:

> Righthaven's domain name went up for auction on Monday in order to satisfy court judgments against the copyright trolling firm. The auction for righthaven.com is taking place at Snapnames and will remain open through 3:15pm EST on January 6, 2012. As of publication time, the auction has six bidders and the current bid is $1,250.

As noted in stories elsewhere, the domain finally sold for $3,300, to Stefan Thalberg of Zug, Switzeerland. The Righthaven man & wife legal team is facing an investigation by the Nevada State Bar.

The new righthaven.com includes the HavenBlog with this definition of "right-havened":

> past participle, past tense of right·haven (verb)

1. trans. To turn the tables on.
2. To inflict total karmic defeat upon, especially by means of an opponent's purported strengths.
3. To reclaim a maligning term and adopt it as a banner.
4. @righthavened; see: Twitter

The new outfit offers "spineful hosting." You can read more yourself.

Court Declares Newspaper Excerpt on Online Forum is a Non-Infringing Fair Use

One final note, as the various Righthaven cases unwind, this time by Kurt Opsahl, posted March 10, 2012 at EFF's *DeepLinks Blog*.

> Late Friday, the federal district court in Nevada issued a declaratory judgment that makes is harder for copyright holders to file lawsuits over excerpts of material and burden online forums and their users with nuisance lawsuits.
>
> The judgment—part of the nuisance lawsuit avalanche started by copyright troll Righthaven–found that Democratic Underground did not infringe the copyright in a Las Vegas Review-Journal newspaper article when a user of the online political forum posted a five-sentence excerpt, with a link back to the newspaper's website.

The key here: an online forum isn't liable for users' posts *even if* it wasn't protected by the DMCA "safe harbor" clause. Excerpting portions of an interesting article and linking to that article is fair use. (Opsahl phrases it correctly: "a fair use, not an infringement of copyright.")

That's probably not all there is to the Righthaven story, but it's enough for now. What does it all boil down to? A lawyer (or group of lawyers) sold a newspaper publisher on the idea that it could get back some of the money it's losing by getting a few thousand bucks each from a few *million* "infringers." Hey, if only a million lawsuits were settled for $3,000 each, the publisher would get $1.5 billion—as would, to be sure, Righthaven. If you ignore issues such as whether Righthaven actually had standing to sue and whether these repostings of material *freely available on the newspaper's website* constituted infringement or were fair use, it might sound like a pretty sweet scheme. The publisher risked $500,000. It was probably not the best choice. In the process, fair use got some positive attention.

Georgia State

We turn now to something entirely different, not in a good way: A copyright infringement lawsuit by three publishers (Cambridge University Press, Oxford University Press and Sage) against Georgia State University. The story's not over and I'm not attempting to provide a full discussion, but here are a few interesting documents along the way. The suit has to do with course readings distributed electronically through e-

reserves and course management systems. The two university presses and one commercial press that brought the suit don't seek damages; they seek injunctive and declaratory relief. GSU claims that the distribution is fair use based on its purposes (teaching, scholarship, research or non-profit educational uses). The suit was filed in April 2008 and amended in December 2008.

Going forward with Georgia State lawsuit

This October 1, 2010 piece by Kevin Smith at *Scholarly Communications @ Duke* is the earliest I tagged, although far from the earliest on the suit. This post cites and discusses a decision by judge Orinda Evans (Federal District Court in Atlanta) on cross motions for summary judgment. Smith didn't think either side would win a summary judgment—and while he was right, "I have to admit to being surprised at how favorable the ruling issued yesterday is to Georgia State; even though the Judge clearly expects to go to trial, there is a lot in her ruling to give hope and comfort to the academic community."

> For those who are keeping score, the Judge has granted the defense motion for summary judgment on two of the three claims—direct and vicarious infringement—and denied it in regard to the third claim, which is contributory infringement. The plaintiff's motion for summary judgment has been denied in its entirety. The net result is that the case will go forward on the single issue of contributory infringement.

There's a *lot* more here, and since I'm really only looking at the GSU case as it involves fair use, I'm skipping most of it: Go read Smith's article. (He's a good writer—much better than I am—so that's not an onerous suggestion. Also, he knows what he's talking about. And there is a "JD" after his name.) The most relevant portion for fair use: the judge's finding that the 2009 GSU copyright policy "on its face does not demonstrate an intent by defendants to encourage copyright infringement; in fact, it appears to be a positive step to stop copyright infringement." That policy includes a set of checkpoints to be used in determining whether something is fair use—and it "looks quite a bit like those used on many other campuses." In the absence of a settlement, Smith says, "this order increases my confidence that the focus will be on a realistic and pragmatic evaluation of activities that, in my opinion, ought to be considered fair use."

Who infringed at Georgia State?

Peter Hirtle asks that question in this October 4, 2010 post at *LibraryLaw Blog*. He notes the court's ruling and Smith's "excellent analysis" (briefly discussed above).

> The bottom line is that the court did not find Georgia State guilty of direct and vicarious copyright infringement, as the plaintiffs requested. The only

issue that will go forward is whether Georgia State contributed to the copyright infringement of others through its implementation of its 2009 policy.

Hirtle is most interested in the "unanswered question of who actually infringed"—since you can't have indirect infringement without direct infringement.

> The publishers seem to suggest that it was the "librarians and professors" who scanned, copied, displayed, and distributed the Plaintiffs' copyrighted works "on a widespread and continuing basis." Under the publishers' theory, they could have sued the faculty members who made or requested the copies (and who also write the books they publish) for direct copyright infringement.
>
> In reality, the most that professors and librarians do is make one copy available on a server. Any distribution of these works is initiated by the students. The court seemed to recognize this in a footnote when it observes that the plaintiff's theory of liability would actually have the students who downloaded material be the potential direct infringers. The case may hinge, therefore, on whether students, and not faculty and librarians, are potential direct infringers. The question would then be whether a student making a single copy of a brief work for educational purposes is a fair use. If it is, then there is no direct infringement and there can therefore be no indirect contributory infringement.

It's worth pointing out that the GSU situation and the Righthaven debacle have only one thing in common: Fair use comes into play. Otherwise, the major GSU issue that remains is (as far as I can tell) the one posed in that second paragraph above: "whether a student making a single copy of a brief work for educational purposes is a fair use." Hirtle also points to another Smith discussion, this time on *ARL Policy Notes*. Also worth reading, given its clear note as to why the suit is against GSU administrators rather than GSU itself (the university is part of the state and immune) and its clear discussion of three types of infringement liability (direct, vicarious and contributory).

The GSU E-Reserves Case: Good News?

Barbara Fister's October 10, 2010 "Library Babel Fish" column at *Inside Higher Ed* discusses the GSU case—and, as with Smith and Hirtle, Fister is always worth reading. She also reads the October ruling by the judge as good news "for now." Her summary of what GSU is being sued over and why it matters to other institutions is crisp and concise:

> This is an important case, because what Georgia State does is not unlike what most academic institutions are doing: making selected readings available to students either through library e-reserves systems, through course management systems, or both. Publishers feel somebody should pay if so many students have access to this literature. Librarians feel they are

> applying the four factor test carefully and paying permissions only when the factors do not support fair use—because we can't afford to pay over and over again just in case. Faculty want to expose their students to texts that are important to their courses but which are not included in textbooks, and asking students to pay for the privilege, article by article, would make that difficult if not impossible.

Fister notes the "worst-case scenario":

> A ruling that found our systems for making readings available were themselves contributory to copyright violation and therefore illegal or so inherently risky that we'd have to buy our way out of the problem, abandoning fair use as a part of everyday scholarly life. Any ruling that suggested the use of these systems was largely illegal would tamp down any impulse to say "here's a really interesting article on the topic we're discussing" or "you really should become familiar with this classic essay, even though it's not reprinted in your textbook." The cost to the student (or to the institution) combined with the hassle of purchasing permission would toss most of those texts off the reading list.

Fister says these systems don't harm authors. They threaten "a revenue stream that doesn't actually exist: payment for readings that didn't used to be assigned" because students wouldn't be willing to pay for expensive course packs. She also does something interesting and a little wicked: Looking at the mission statements of the three publishers, two of them university presses. Oxford: "furthers the University's objective of excellence in research, scholarship, and education." Cambridge: "to further the University's objective of advancing knowledge, education, learning, and research." SAGE "believes passionately that engaged scholarship lies at the heart of any healthy society and that education is intrinsically valuable."

> It's hard to see how suing universities whose faculty members want to share knowledge with their students is advancing knowledge, or to believe that the imposition of more cost on students or on the libraries that try to support their learning will make society any healthier. We clearly need a new way of funding publication costs if these publishers have a genuine interest in furthering knowledge and education.

Good stuff.

The other shoe drops

Back to Kevin Smith at *Scholarly Communications @ Duke*, this time on December 12, 2010, discussing *another* lawsuit—against UCLA (the university itself) for copyright infringement because it streams digitized video through its course management system. This time the plaintiff wants damages.

The link between the two is clear: In both cases, the university uses course management systems to provide certain materials in the belief that

doing so represents fair use (including special academic exceptions to copyright). And, as Smith says, it's another part of "the assault on academic fair use." Otherwise, the suits are quite different, in ways that make the second suit surprising.

Much of Smith's discussion concerns the oddities of the suit and you really should read the original if you care about this sort of thing. Briefly, it's odd that the suit comes from an association rather than the named distributor (generally, since an association holds no copyrights, it can't sue); it's odd that it names UCLA itself as defendant and claims damages, since UCLA is an arm of the State of California and presumably entitled to sovereign immunity; it's odd or at least interesting that the suit goes to lengths to try to preclude a fair use defense—including the issue of whether the purchaser of a DVD has agreed to licensing restrictions that exclude fair use.

I don't have much to say here except: Go read the piece.

A nightmare scenario for higher education

Back to the GSU case, which was headed for trial in May 2011. Kevin Smith wrote this May 13, 2011 piece at *Scholarly Communications @ Duke* after perusing various pre-trial motions. He was particularly struck by the proposed injunction desired by the plaintiffs, It's quite a document, asking for some modest remedies:

> Subject only to the provisions of Paragraph III hereof, GSU shall be and is permanently enjoined and restrained from creating, reproducing, transmitting, selling, or in any manner distributing, or assisting, participating in, soliciting, encouraging, or facilitating the creation, reproduction, download, display, sale, or distribution in any manner of, copies, whether in hard copy format, digital or electronic computer files, or any other format, of any and all Works without permission.

Paragraph III doesn't help all that much. (There's also a requirement that GSU make most or all of its computer systems available to the plaintiffs to monitor compliance, a requirement that would probably violate a number of state privacy laws.) Smith's take (excerpted, but you should read it in full):

> I have always known that there was a lot at stake for higher education in this case, but the injunction the publishers want would be a nightmare scenario beyond even my most pessimistic imaginings.
>
> First, if this injunction were adopted as proposed, it would enjoin everyone at Georgia State, including students, who would seem to largely lose their fair use rights by virtue of enrolling at GSU…It would make GSU responsible for every conceivable act of copying that took place on their campus. In short, administrators at Georgia State would have to look over the shoulders of each faculty member whenever they uploaded course material to an LMS or any other web page. Arguably, they would have to

> monitor student copying at copiers provided in their libraries, since GSU would be enjoined from "encouraging or facilitating" any copying, beyond a limit of about 4 pages, that was done without permission…
>
> I can only imagine the angry reaction of faculty members if this requirement were actually imposed on our campuses; they might finally rebel against the exploitation they suffer from these "academic" publishers. In any case the order quite literally asks the impossible and was apparently written by people with no functional knowledge of how higher education actually works. The administrative costs alone would be staggering, not to mention the permission fees.

Smith believes the real purpose is to drive more money to the Copyright Clearance Center (apparently funding 50% of the suit) in the form of permissions. "The way the injunction would accomplish this would be by entirely eliminating fair use for Georgia State."

Guess what's considered acceptable as a "limited" excerpt? 10% or 1,000 words of a prose work—*whichever is less*. "Many schools that adopt 10% as a fair use standard will be shocked to find that, under this definition, that is often still too much to be acceptable, since the 1000 word limit will usually take over." (1,000 words make up less than a page and a half of *Cites & Insights*.) There's also a rule about cumulative effect—the *total number* of excerpts across the entire GSU campus. Oh, and no more than 10% of the total *reading* for a class could be such brief excerpts:

> The point of this rule is nakedly obvious. If a campus had the temerity to decide that it was going to follow the rules strictly (since the flexibility which is the point of fair use would be gone) and make sure that all of its class readings fell within the guidelines, they still would be unable to avoid paying permission fees. Ninety percent of each class's reading would be required, under this absurd order, to be provided through purchased works or copies for which permission fees were paid, *no matter how short the excerpts were*.

Smith doesn't believe it would be possible to comply with the order, calls it "a nightmare, a true dystopia," and hopes the judge is sensible enough not to grant it. I'm astonished at the sheer overreach of the proposal from two university presses and an academic publishers—as though they're literally at war with universities.

This piece drew a lot of comments, some of them surprising. (The sheer number of comments may have to do with /. picking up the story.)

The Georgia State filing—A declaration of war on the faculty?

Paul Courant weighed in on this proposed order in a June 9, 2011 post at *Au Courant*. He begins by noting distinctions between adversaries and enemies. It's a good discussion: We all deal with adversaries, and sometimes they're our friends—but differ from us on one issue or

another. "But in a case currently before a federal court in Atlanta, Cambridge University Press et al v. Patton et al, three academic publishers, with the support of other publishers' organizations, notably the Copyright Clearance Center, have taken a position that crosses the boundary from adversary to enemy."

Citing Smith's take on the proposed order, Courant adds:

> [W]hile it's not an uncommon strategy to ask for far more than you expect to receive in a negotiation, which this proposed injunction surely is, your "highball" offer is certainly something that you wouldn't mind having. What the plaintiffs are saying is that they are quite willing impose enormous costs on academic performance and academic freedom in exchange for higher profits. This is not the request of a friendly adversary; this is the attack of an enemy.

Courant's an author and a faculty member, and says he does not know that he could comply with the proposed restrictions: "they are too onerous and much too expensive."

> Call me gullible, but even now I am not fully persuaded that academic publishers are the enemies of faculty and the university. However, I do think that something has gone horribly wrong when entities that were created to serve scholarship employ legal procedures that would hamstring scholars and students who engage in customary and effective behaviors in their teaching and learning. I hope that Judge Evans will recognize that the publishers' proposal is a plain violation of copyright and would be destructive of vital public purposes. And I hope that cooler heads will prevail among the plaintiffs as well. If not, we will have to find other means to a better future than the one which the publishers propose. Whether that future can include publishers who would behave inimically to the purposes of higher education is less certain.

He also links to the proposed faculty certification form that would have to be filled out for each piece of material to be used in electronic course reserves, and it's quite a little form. By the way, *one graph or chart* from a book or periodical issue (or a drawing or cartoon or picture) is enough to require the form and to put cumulative use restrictions into play.

Dispatches from the Future

This one you really *need* to read in the original, posted on June 13, 2011 by Barbara Fister in her "Library Babel Fish" column at *Inside Higher Ed*—a summary can't do it justice. She's imagining a future in which the GSU suit has been settled on the plaintiff's proposed terms (and, of course, adopted elsewhere—through threat of lawsuit if necessary). Where Smith refers to a nightmare scenario, Fister spells out that nightmare in real life.

One excerpt from a wonderful piece:

> A special issue of your society's journal published this week is devoted to the concept that you're covering this afternoon. What a goldmine! One of the articles has a chart that will really get the idea across, and another one has a table full of results that would be perfect for a discussion. You make a couple of screen shots and start to insert them in your slidedeck before remembering that you're only allowed to use one illustration from any journal issue without first getting permission. You send quick e-mails to the authors, who you know from conferences. Both reply almost instantly. They're thrilled that you want to use their research in your teaching. Unfortunately, they don't own the copyright. You'll have to go through the publisher. That's okay, you know the publisher; it's your society after all. But since the organization outsourced their publishing operations, the copyright belongs to a for-profit corporation based in Europe. You search for their permissions policy online, but run out of time. Would have been sweet . . .

As far as I can tell from looking at the source documents, Fister is not exaggerating. Not at all.

Licenses, prices, fair use and GSU

Kevin Smith again, writing *after* the actual trial. This post appeared at *Scholarly Communications @ Duke* on August 3, 2011. He links to post-trial briefs from both sides (requested by the judge) and some unrelated publications.

> Reading the plaintiffs' brief, I was struck forcefully by the realization that they are asking the Judge to eliminate fair use virtually entirely for academia and instead substitute a compulsory license. This is especially clear when you see in their proposed injunction a requirement that permission be obtained for 90% of the readings in any course, regardless of whether or not some or all of that 90% could be considered fair use (under the extremely restrictive definition provided in the proposal). This is essentially asking the court to force a license even where the law—under anyone's interpretation—does not require it.

The defendants argue fair use. Smith finds the argument compelling, noting two points in particular:

> First, the defendants address the frequent claim made by publishers that the Supreme Court, in Campbell v. Acuff Rose Music, has limited fair use to situations that are transformative and that copies for educational purposes are not transformative. The defendants proposed Conclusions of Law point out that Campbell itself expressly renounced this claim in two ways. First, it explicitly noted that "transformative use is not absolutely necessary for a finding of fair use." Then, in a footnote (number 11), the Campbell Court stated that "The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for

> classroom distribution." You seldom get such devastating language to direct against one of your opponent's central contentions.
>
> The second really important aspect of the defendants' proposed Conclusions of Law is this simple (if grammatically awkward) statement, which ought to be repeated like a mantra whenever fair use is discussed, because it is so obviously right: "The fair use defense would mean nothing if it addressed only those uses that plaintiffs have not developed a mechanism by which to charge for such portions of the work."

It's hard not to like that last quoted sentence, awkward or not. Or, as the first comment says, "Amen!"

And that's it for this discussion. It's also the end of Part 1 of this two-part roundup. More later…

A Funny Thing Happened On the Way to This Issue

When I wrote this section in mid-May, a penultimate paragraph said the judge hadn't issued a ruling; these things take time. The judge *did* issue a ruling. On May 11, 2012. Judge Evens found copyright infringement in five of the 99 cases, fair use (or some other justification) in 94 cases. But she *did* find infringement in five cases—in a thoughtful 350-page decision. A lot has appeared since then and will continue to appear as the publishers propose an injunction, GSU and others respond and the judge determines how to go forward.

I have 20 items tagged with "gsu" in my diigo library tagged gsu—it's not exhaustive by any means, but it's a start. This case *will* expand the understanding of fair use and undermine some of the more nonsensically restrictive guidelines for its use within academia. Beyond that, I haven't a clue.

Masthead

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Comments should be sent to waltcrawford@gmail.com.

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