

# TEXAS LAWYER

## COPYING OFF THE WEB IN THE UNIVERSITY CONTEXT

by TIM HEADLEY

**S**uppose you serve on one of the many advisory boards of an institution of higher education. The purpose of your advisory board is to help raise funds for scholarships and to attract famous professors to your university by offering them “chairs,” thus supplementing their income from the university. You have agreed to serve on the committee in charge of the annual fund-raising gala, and you are at the first meeting of that committee.

The newly selected committee chairwoman says she has some new, exciting ideas to make it a memorable event. There will be the usual silent and live auctions. There even will be one famous professor sitting at each table. Moreover, this year she suggests that there be huge screens displaying scenes and images designed to evoke fond memo-

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ries of college life, along with tasteful pleas for the audience to participate generously in the auctions, so that college students can continue to enjoy that special time of life.

She then asks for suggestions of what to put on the screens. One board member suggests photographs of some of the well-known, favorite places for students to gather. Others suggest pictures of the reflection pool, the fountain and the tower, perhaps taken at sunset.

Then someone suggests that mere images don't evoke as much emotion as movies do. The committee doesn't have the money to commission the making of a movie or even the taking of photographs. “No problem.” says another. “There are plenty of talented students here who can get all kinds of photographs, and even movies, for free off the Internet. All we need to do is compile a list of the kinds of images and movie clips we want, and give it to student volunteers to get those images and movie clips for us off the 'Net. What famous

movies shall we use?”

The committee eventually agrees on a list of images and movie clips and the chairwoman submits the list to some student volunteers.

Will your university be liable for copyright infringement? Will you be liable? The university can be liable for the copying and the subsequent display of the copyrighted materials. First, let's tackle liability for the copying. Generally speaking, the law of agency applies. An entity will be liable for the copyright infringements of its agents. Should these advisory board members be considered agents of the university? If so, did they “contribute” to the infringement? Assuming they did not contribute to the infringement, or assuming they were not agents of the university, is there still liability for the online copying by the students?

As part of the Digital Millennium Copyright Act, Internet service providers, including universities, are exempt from liability for money damages under certain conditions. If the student volunteers use their own computers, and the university is merely an Internet service provider, and the student volunteers do not store the images on the university's network, then 17 U.S.C. §512(a), entitled “Transitory Digital Network Communications,” applies.

Under 17 U.S.C. §512(j) (1) (B), the university will not be liable for monetary relief, but will be liable for injunctive relief, requiring the university to terminate the access of the student volunteers and/or to take “reasonable steps” to block access to certain offshore Web sites.

Question: Could one successfully argue that the advisory board spoke for the university if it “directed” students to copy materials off the Internet? Under 17 U.S.C. §512(a) (1), the “service provider” (in this case the university) will be liable for monetary relief (up to \$150,000 for each copyrighted work) if it directed the copying of the material off the Internet.

If the student volunteers use the university's computers, and perhaps store some of the images on those computers or on the university's network, then 17 U.S.C. §512(c), entitled “Information Residing on Systems or Networks at Director of Users,” applies. To escape liability, subsection 1(B) of that section requires that the university “does not receive a financial benefit directly attributable to the infringing activity.” Thus, in this case, the university most likely would be liable.

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## Contributory Infringer

What if one of the board members suggested that perhaps one of the university's graduate students could do the downloading as part of some ongoing research project that one of the professors already may have required of graduate students? One limitation on the liability of universities and colleges for online copying is addressed in 17 U.S.C. §512(e). This section excludes liability for infringing activities by a faculty member or a graduate student, when such employee is performing a teaching or research function, as long as: 1. the infringing activity does not involve the provision of online access to required or recommended instructional materials; 2. the college had not been notified more than twice in the past three-year period about an infringement by that same person; and 3. the college informs all users about compliance with the copyright laws.

Obviously, this provision requires that the university maintain a database devoted to keeping track of copyright infringement notifications. These notifications go out daily to universities from such whose business it is to find infringers. Additionally, the university must designate on its Web site, and to the U.S. Copyright Office, the name, address, phone number and e-mail address of an agent to receive the notifications.

What about liability for the display of the copyrighted materials at the fund-raiser? In response to an argument that there is no express language in the Copyright Act that would impose vicarious liability for the infringing acts of others, in 1984 in *Sony Corp. v. Universal City Studios Inc.*, the U.S. Supreme Court said: "The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another."

In *Sony*, the Supreme Court further described a contributory infringer as one who "was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner."

In our scenario above, most likely the board members who participated in directing the copyright infringement would be personally liable and be found to be agents of the university, thus also making the university liable. 

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