

SUPREME COURT OF OHIO

STATE EX REL., PAUL PERREA
412 Wood Avenue
Cincinnati, Ohio 45220

Relator,

-vs-

CINCINNATI PUBLIC SCHOOLS
2651 Burnet Avenue
Cincinnati, Ohio 45219

Respondent.

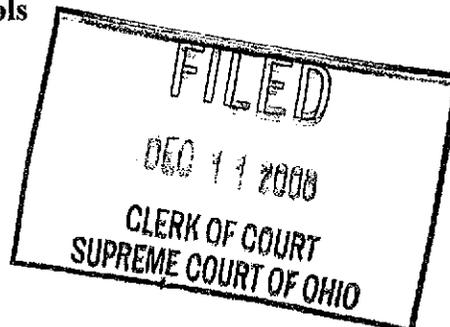
MANDAMUS PROCEEDING

CASE NO. 2008-0748

REPLY BRIEF OF RELATOR, PAUL PERREA

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III. STATEMENT OF FACTS AND PROCEEDINGS

On April 21, 2008, Relator, Paul Perrea, filed a public records mandamus complaint against Respondent, Cincinnati Public Schools (CPS). Both parties filed evidence in the case on November 4, 2008. On November 14, 2008, Perrea filed his merit brief (Perrea Merit Brief). Respondent, Cincinnati Public Schools, filed its memorandum in opposition on December 4, 2008 (Respondent Cincinnati Public Schools' Response in Opposition to Merit Brief of Relator (CPS Response Brief).

With the record now complete, here is how the case stands. Perrea is a teacher at Hughes High School. (Affidavit of Relator, Paul Perrea at ¶ 1 (Perrea Affidavit).) Perrea had concerns about the reliability and validity of the CPS Semester Exams. (Perrea Affidavit at ¶¶ 9-11, 19, 000039-40; 000042; 000047; 000052.) In his submissions, Perrea presented evidence that the exams were misleading and inaccurate. (Second Affidavit of Relator, Paul Perrea at ¶¶ 3-20 (Second Perrea Affidavit).

In response to Perrea's evidence, CPS has offered nothing to show the "validation, reliability, development and/or norms" of the Semester Exams. (Responses and Objections to Relator Paul Perrea's First Set of Interrogatories and First Request for Production of Documents of Respondent Cincinnati Public Schools (CPS Discovery Responses) at ¶ 2, MAN 00001-000010.) Moreover, in its CPS had made no attempt to counter Perrea's evidence that the tests are misleading and inaccurate. (CPS Response Brief at 19-20.) CPS brushes aside Perrea's evidence as "irrelevant." (CPS Response Brief at 20.)

This case started because of Perrea's concerns about the validity and reliability of the Semester Exams, he requested copies in a public records request. (Perrea Affidavit at ¶¶ 18-19.) More than 60 teachers signed a petition agreeing with Perrea, that CPS should provide copies of the exams. (Second Perrea Affidavit, 000095-96.) The purpose of the public records request was to "for

the evaluation of creation, administration and grading — by an independent, qualified, psychometrician — as to the fairness, accuracy, and validity of the exams.” (Second Perrea Affidavit, 000095-96.)

In the meantime, CPS has posted detailed grading guidelines for portions of the tests on its website, <http://staffnet.cps-K12.org/Staffnet/RET/scoringsemexam.html>. (Second Perrea Affidavit at ¶¶ 21, 000056-000094.) That is a non-restricted website to which the general public has full access. (Second Perrea Affidavit at ¶ 21.) Based on those guidelines, it is possible for anybody to recreate large portions of the Semester Exam questions. (Second Perrea Affidavit at ¶ 21.) Besides posting the answers to Semester Exam on its website, CPS has distributed the exams to hundreds of teachers and thousands of students. (Perrea Affidavit at ¶¶ 20 and 21.) None of the teachers or students were required to sign confidentiality agreements. (Perrea Affidavit at ¶¶ 25-26.)

As the following discussion will establish, CPS cannot meet its burden of establishing that providing copies to Perrea would violate Ohio trade secret law or by federal copyright law. The writ of mandamus should issue.

IV. ARGUMENT

Proposition of Law I: Cincinnati Public School Semester Exams are Public Records within the meaning of Ohio Rev. Code § 149.43.

A. *Ohio Public Records Act*

In Ohio, “public records, which include documents from a “public office” and a “school district,” must be made available for inspection. Ohio Rev. Code § 149.43(B)(1); Ohio Rev. Code § 149.43(A)(1). CPS is a public office and part of a school district unit. Ohio Rev. Code § 149.011(A) (office) Based on those statutory provisions, alone, Perrea has established that the

Semester Exams are public records.

Besides that, the Supreme Court has already held that similar public school standardized tests are public records subject to disclosure. *State ex rel. Rea v. Ohio Department of Education*, 81 Ohio St. 3d 527, 530, 692 N.E.2d 596, 600 (1998). The Court noted the “tremendous implications for students who take such tests.” *Id.* at 533-34, 692 N.E.2d at 602. The examinations “that evaluate students determine their capabilities should not be enshrouded in a cloak of secrecy, isolated from scrutiny.” *Id.* Because of that, the exams should be available for “oversight of the general public, concerned parents and students themselves.” *Id.* By keeping the tests secret, the schools “negated any chance that legitimate concerns could be raised through public exposure and debate.” *Id.* Because of that, the Court held that it “is paramount that such tests are subjected to the keen eye of the public.” *Id.*

Based on the holding of *Rea* and the language of the Ohio Revised Code, the Semester Exams are public documents subject to disclosure. Ohio Rev. Code § 149.43(B)(1); Ohio Rev. Code § 149.43(A)(1); Ohio Rev. Code § 149.011(A); *Rea*, 81 Ohio St. 3d at 530, 692 N.E.2d at 600.

B. *CPS Has Not Met its Burden of Establishing That Semester Exams are Trade Secrets*

To find an exemption from the Public Records Act, CPS first argues that the Semester Exams are trade secrets. When a court undertakes a trade secret analysis, it must be mindful that the “entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute.” *State ex Rel. Besser v. Ohio State University*, 89 Ohio St. 3d 396, 400, 732 N.E.2d 373 (2000). The Supreme Court has set out six factors to analyze a trade secret claim: (1) the extent that the information is known outside the business; (2) the extent that it is known inside the business (by employees); (3) precautions taken

by the business to guard the secrecy of the information; (4) the savings and value to the business in having the information as against competitors; (5) the amount of effort or money to develop the information; (6) the amount of time and expense for others to acquire and duplicate information. *Id.* at 399-400, 732 N.E.2d at 378. Courts are instructed to “strictly construe exemptions” from the Public Records Act and “any doubts in favor of disclosure of public records.” *Id.*, 89 Ohio St. 3d at 398, 732 N.E.2d at 376-77.

1. *Outside the Business: Internet and Students*

When an entity places information on the Internet, the materials become “generally known, and lose their status as trade secrets. *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231, 1256 (N.D. Cal. 1995). In *Religious Technology*, the court reasoned that “it takes no great leap to conclude that because [millions of] people could have accessed the newsgroups postings,” *Id.* The court held that “once posted, the works lost their secrecy.” *Id.*

In this case, CPS has posted detailed grading guidelines for portions of the tests on its nonrestricted website. (Second Perrea Affidavit at ¶¶ 21, 000056-000094.) The general public has full access and anybody can recreate large portions of the Semester Exam questions. (Second Perrea Affidavit at ¶ 21.)

Besides that, CPS explains in its brief that its primary concern is keeping the Semester Exams from students. (CPS Response at 10.) Despite that concern, CPS uses the same Semester Exams over and over each year. (Hotzapple Affidavit at ¶ 7.) Each time CPS administers the exams, it discloses the contents to thousands of students and hundreds of teachers. (Perrea Affidavit ¶ 20, Exhibit A, 000001.) CPS has approximately 34,790 students, and about 2676 ninth graders. (Perrea

Affidavit ¶ 20, Exhibit A, 000001.) Based on CPS literature, it administered the Semester Exams to the ninth graders taking core courses. (Perrea Affidavit ¶ 20, Exhibit F, 000028.) Despite that, CPS did not require the students to sign a confidentiality form. *Id.* (Perrea Affidavit at ¶ 25.)

In fact, students with more experienced teachers have a built in advantage when it comes to the tests. The more experienced teachers are more familiar with the tests. (Second Perrea Affidavit at ¶ 34.) And, CPS requires the teachers to incorporate questions from the exams in their daily classroom teaching. (Second Perrea Affidavit at ¶ 33, 000097-000098.) So, the more experienced teachers — either consciously or unconsciously — are able to instruct their particular students so that they will be more successful on the Semester Exams. (Second Perrea Affidavit at ¶ 34.) The result is that students of more experienced teachers have an advantage over other students. *Id.*

CPS cites the case *Carr v. City of Akron*, 112 Ohio St. 3d 356, 859 N.E.2d 948 (2006). In *Carr*, the Court held that competitive promotional exams for positions of fire lieutenant and fire captain were trade secrets not subject to disclosure. *Id.* at 359, 859 N.E.2d at 956. CPS argues that the Supreme Court has altered the holding of *Rea* with the subsequent decision in *Carr v. Akron*. (CPS Response at 13-14.)

The facts in *Carr v. Akron* are entirely different than the facts in *Rea* and in this case. In this case and in *Rea*, the tests were for the public purpose of assessing public school students. Ohio Rev. Code § 3313.6012(A) (policy of intervention); Ohio Rev. Code § 3313.6012(A)(2) (plan for diagnostic assessment); Ohio Rev. Code § 2744.01(C)(2)(c) (public schools governmental function). In *Carr*, on the other hand, the tests were for adult employees seeking promotions in their employment. *Carr v. Akron*, 112 Ohio St. 3d at 352, 859 N.E.2d at 950.

In *Carr* the third party who designed the tests submitted an affidavit by the third party with

extensive facts showing the competitive commercial advantage. *Id.*, 112 Ohio St. 3d at 359, 859 N.E.2d at 954-56. In this case, the only person who CPS presented with an affidavit was Dr. Elizabeth Holtzapple. (CPS Evidence, Holtzapple.) She had no facts regarding competitive advantage. (Holtzapple Affidavit).

Furthermore, in *Carr*, the test-takers were required to sign a confidentiality statement. *Carr v. Akron*, 112 Ohio St. 3d at 359, 859 N.E.2d at 954-56. And, there were no facts that the city had disclosed the contents of the exam in any public manner. *Id.* In this case, by contrast, CPS posted large portions of the answers to the exams in the Internet. (Second Perrea Affidavit at ¶¶ 21, 000056-000094.) Besides that, the teachers and students were not required to sign confidentiality statements. (Perrea Affidavit at ¶ 25.)

Based on those points, this Court has not altered the holding of *Rea* in *Carr v. Akron*, 112 Ohio St. 3d at 352, 859 N.E.2d at 950. And, the holding of *Rea* applies to this case. This factor, therefore, weighs in favor of Perrea.

2. *Inside the Business: Teachers*

When information is “readily accessible to instructors,” the employer cannot show that it had “taken protective measures to guard the secrecy” of the information. *Northeast Ohio College of Massotherapy v. Burek*, 144 Ohio App. 3d 196, 208, 759 N.E.2d 869, 878 (2001).

In this case, the only thing the CPS security measures really amount to is a prohibition against students or teachers making “copies of the exams.” (Holtzapple Affidavit at ¶ 15, CPS 017.) CPS did not require the teachers to sign a confidentiality form. (Perrea Affidavit ¶ 25.) The “security measures” do not prohibit teachers from discussing the Semester Exams among themselves. (Holtzapple Affidavit at ¶ 13, ¶ 15, CPS 017.) The security measures also do not prohibit teachers

from incorporating the questions from the Semester Exams into their day-to-day teaching curriculum. (Holtzapple Affidavit at ¶ 15, CPS 017.)

In fact, the system at CPS actually encourages the CPS teaches to disseminate the contents of the Semester exams. That is because CPS teachers are required to grade certain portions of the tests. (Perrea Affidavit at ¶ 23.) Because of that, the teachers who have participated in the grading over several years, become more familiar with the contents of the Semester Exams. (Second Perrea Affidavit at ¶ 34.) Dr. Holtzapple has actually encouraged CPS teachers to conform their classroom teaching to the Semester Exams. (Second Perrea Affidavit at ¶ 33, 0000097.)

Based on these facts, the Semester Exams are readily accessible to teachers. *Burek*, 144 Ohio App. 3d at 208, 759 N.E.2d at 878. That makes this factor weighs in favor of Perrea.

3. *No Sufficient Precautions*

CPS claims that it has taken sufficient precautions to protect the secrecy of the Semester exams. CPS argues, by prohibiting teachers from keeping test booklets and keeping the test questions locked up, that they have taken sufficient secrecy precautions. (CPS Response at 10.)

In this case, teachers and students are not required to sign a confidentially agreement. (Perrea Affidavit ¶ 25.) CPS has posted large portions of the answers on the Internet. (Second Perrea Affidavit at ¶¶ 21, 000056-000094.) And CPS has a grading and teaching system that encourages teachers to disseminate the contents of the exams. (Second Perrea Affidavit at ¶ 33, 0000097.)

This factor weighs in favor of Perrea.

4. *No Savings as to Competitors/No Value to CPS*

a. *No Savings as to Competitors*

On this factor, CPS advances the conclusory argument that if the Semester Exams are

identified as public records, they may be accessed by other test developers and used for commercial gain. (CPS Response at 15.) Because CPS has the burden of demonstrating that the Semester Exams are trade secrets, it must present “sufficient evidence” to carry that burden. *Besser*, 89 Ohio St. 3d at 401, 732 N.E.2d at 378. .

In a similar case, Kenneth Besser requested that Ohio State University (OSU) produce certain documents. *Id.* at 396, 732 N.E.2d at 373. Those documents were related to OSU’s acquisition of a private Columbus hospital, Park Medical Center. *Id.* at 399, 732 N.E.2d at 377. The documents included, among other things, a February 4, 1999, memorandum and a January 28, 1999, business plan. *Id.* at 400-02, 732 N.E.2d at 378-79. OSU argued that the documents were trade secrets. *Id.* at 396, 732 N.E.2d at 373. In support of its argument, OSU submitted an affidavit by one of its executives. *Id.* at 400, 732 N.E.2d at 378. The executive claimed that the information related to the hospital purchase derived “potential economic value from not being generally known to . . . persons who can obtain economic value from its disclosure.” *Id.* at 401, 732 N.E.2d at 378-79. Besides that affidavit, however, OSU did not present any evidence that the requested materials had an “potential, independent economic value.” *Id.* at 404, 732 N.E.2d at 381.

In this case, CPS has not presented any factual basis to support its argument that other test developers would use the tests for commercial gain. (CPS Response at 15.) The only facts in this record are completely contrary to the CPS argument. Perrea has stated that his purpose for seeking the exams is “for the evaluation of creation, administration and grading — by an independent, qualified, psychometrician — as to the fairness, accuracy, and validity of the exams.” (Second Perrea Affidavit, 000095-96.) CPS has not presented any evidence that Perrea is a test developer who would use the exams for economic gain. (CPS Response at 15.) And, CPS has not presented

any evidence that the independent psychometrician is a test developer who would use the exams for economic gain. (CPS Response at 15.) Furthermore, CPS has not identified a single competing test marketer who would make a commercial gain based on the Semester Exams. (CPS Response at 15.)

The only real facts in the record are from Perrea. He has presented six and-a-half pages in his second affidavit explaining the misleading and inappropriate aspects of the tests. (Second Perrea Affidavit at ¶¶ 3-20.) He has also identified a validation process that the Ohio Revised Code and Ohio Administrative Code require for state standardized tests. (Perrea Merit Brief at 18-19, citing Ohio Rev. Code § 3301.0711(N)(2); Ohio Admin. Code § 3301-13-07(C)(1)-(10). The facts establish that CPS has no validation studies for its Semester Exams. (CPS Discovery Responses) at ¶ 2, MAN 00001-000010.) The CPS Semester Exams do not, therefore, meet that Ohio statutory and administrative minimum standards for standardized tests.

Based on the record in this case, therefore, the CPS Semester Exams do not have commercial value. No competing marketer would try to make commercial gain from the CPS Semester Exams.

b. *No Value to CPS*

This fourth factor has a second part — value to CPS. In this case, CPS submitted a volume of evidence to support its claims in this case. Because CPS has the burden of proof, it must present some facts to support the value of the Semester Exams to CPS. *Besser*, 89 Ohio St. 3d at 400, 732 N.E.2d at 378

Rather than meeting its burden with some evidence, in its entire submission of evidence, CPS does not present one single fact that shows that the Semester Exams have had a benefit for the CPS students, *i.e.*, causing improved grades, learning, or academic achievement. (Evidence Submitted by Respondent Cincinnati Public Schools (CPS Evidence).) CPS does not present one fact to

establish that the Semester Exams have been a benefit to the teachers, *i.e.*, making teaching more efficient or effective. And, CPS does not present one single fact that the Semester Exams have caused a benefit on CPS as a whole. (CPS Evidence.)

Here, again, Perrea is the party who has presented evidence on this issue. In the Second Perrea Affidavit, he points out that Semester Exams have caused confusion with the teachers and unreliable results with the students. (Second Perrea Affidavit at ¶ 33, 0000097.) Before each test, CPS asks the teachers to “predict the performance of each student on each examination.” (Perrea Affidavit ¶ 22, Exhibit F, 000031.) That means that the more experienced teachers — either consciously or unconsciously — are able to instruct their particular students so that they will be more successful on the Semester Exams. (Second Perrea Affidavit at ¶ 34.) The result is that students of more experienced teachers have an advantage over students of less experienced teachers. *Id.* Besides that, Perrea has presented numerous examples of the misleading and inappropriate aspects of the tests. (Second Perrea Affidavit at ¶¶ 3-20.)

CPS has not presented any evidence to counter these points. Because CPS has the burden of proof to show value and because it has presented no evidence, this factor also weighs in favor of Perrea.

5. *The Amount of Money to Develop the Semester Exams*

This is the only factor on which CPS presents any factual evidence to meet its burden of proof for trade secrets. CPS states that the cost to develop the Semester Exams was \$257,800. (CPS Response Brief at 6.) CPS then quickly extrapolates that figure to claim that it would cost almost twice as much each year — \$405,000 — to create new exams that it claims would be necessary if Perrea were to have copies of the exams. These figures are the centerpiece of the CPS arguments

in this case. (CPS Response at 6-7, 11, and 15.)

The way that CPS presents these figures is entirely misleading. First of all, the \$405,000 figure is based entirely on hearsay from Dr. Holtzapple's affidavit. That hearsay in her affidavit is based on an unsigned, undated, unsworn "quote" that Dr. Holtzapple says she got from West Ed. (CPS Evidence, Holtzapple Affidavit ¶¶ 9 and 21.)

The Supreme Court Practice Rules state that affidavits presented in these original actions "shall be made on personal knowledge, setting forth facts admissible in evidence." S. Ct. R. X, § 7. The Ohio Rules of Evidence state that hearsay is inadmissible. Ohio R. Evid. 802. Hearsay is an out of court statement offered for the truth of the matter asserted. Ohio R. Evid. 801(C). In Holtzapple's case she is offering West Ed's unsigned, undated, unsworn quote for the truth of the matter asserted — *i.e.*, that replacement tests would cost \$405,000 per year. (CPS Evidence, Holtzapple Affidavit ¶¶ 9 and 21.) This Court should ignore these hearsay figures. S. Ct. R. X, § 7.

Another reason the figures are misleading is because there is no evidence that CPS would have to replace the tests if this Court ordered them released to Perrea. Perrea is not a competitor. (See *supra* at 7-9.) CPS has presented no evidence that Perrea or the psychometrician would provide the tests to students. (See *supra* at 7-9.) This public records request would not, by itself, give any reason for CPS to have to replace the exams.

There is at least one more reason that the CPS figures are misleading. That is because CPS has not offered any context for the cost of the exams. CPS only argues, in conclusory fashion, that the cost of replacement would be prohibitive. (CPS Response at 15.) CPS does not provide any figures for its budget to establish the truth of its argument. In fact, the closest thing to a financial context for the exams in the record is the cost of the current CPS building project. That CPS

building plan amounts to a ten-year \$1,000,000,000 project — *i.e.*, \$100,000,000 million per year. (CPS Evidence at CPS 001.) Seen in financial context of the CPS building project — even without an overall budget — the CPS argument that the Semester Exams are prohibitive is not well taken.

6. *The Amount of Money for Competitors to Duplicate*

The final factor is the time and expense for others to acquire and duplicate the Semester Exams. *Besser* at 89 Ohio St. 3d at 399-400, 732 N.E.2d at 378. On this factor, other than the inadmissible hearsay from Dr. Holtzapple's affidavit, CPS has not offered a single fact to support this factor. Because CPS has the burden of proof on this issue, this factor weighs in favor of Perrea.

Based on all these points, therefore, CPS has not established its burden of showing the trade-secret exemption from the Public Records Act.

C. *Copyright is not a Trade Secret Exception*

CPS next argues that the Semester Exams are exempt from disclosure because they contain copyrighted material. (Perrea Affidavit at ¶ 34, Exhibit G, 000053.) The general copyright statute grants copyright protection to “original works of authorship fixed in any tangible medium of expression.” *Lexmark International, Inc v. STA Control Components, Inc.*, 387 F.3d 522, 528 (6th Cir. 2004), citing 17 U.S.C. § 102(a). To set out a claim for copyright infringement, CPS must prove that: (1) CPS has ownership of a valid copyright; and (2) Perrea would copy the constituent elements of the work that are original. *Lexmark*, 387 F.3d at 534. A person asserting a copyright, has the burden of proof on the claim. *Brown v. Latin American Music*, 498 F.3d 18, 24 (1st Cir. 2007).

As far as the first element, “originality is a constitutionally mandated prerequisite for copyright protection.” *Tiseo Architect, Inc. v. B&B Pool Service and Supply Co.*, 495 F.3d 344, 347-48 (6th Cir. 2007). Originality means that “the work was independently created by the author (as

opposed to copies from other works), and that it possesses at least some minimal degree of creativity. *Lexmark*, 387 F.3d at 534. Copyright protection does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.” *Lexmark*, 387 F.3d at 528, citing 17 U.S.C. § 102(b). That means that a work may be original, but it may not be copyrightable. *Lexmark*, 387 at 534. For example, an author may create an original idea, process, or procedure that would not be copyrightable because only the “expression” of that idea is covered by copyright. *Id.*

One way a person can assert a copyright claim is by presenting evidence in the form of a certificate of copyright. *Johnson v. Gordon*, 409 F.3d 12, 17 (1st Cir. 2005). The certificate of copyright “constitutes prima facie evidence of ownership and originality of the work.” *Id.* A certificate is issued by the Copyright Office, pursuant to 17 U.S.C. § 411(a). In the absence of a certificate, the person asserting a copyright must present “substantive support for its claim of copyright.” *Brown*, 498 F.3d at 24-25. With a copyright claim — just as with any claim — the person bearing the burden of proof may not meet its burden with “bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.” *Id.*, citations omitted. If the person asserting copyright does not present a certificate of copyright and does not present substantial evidence of originality, the copyright claim will fail. *Brown*, at 498 F.3d at 24-25.

There is another aspect of the first element — ownership. The person asserting the copyright claim must prove that he or she *Sybersound Records, Inc. v. UAV Corporation*, 517 F.3d 1137 (9th Cir. 2008). The owner of a copyright is the original “author of the work,” or the “person or organization that has obtained ownership of all rights under the copyright initially belonging to the author.” *Id.*, citing 37 C.F. R. § 202.3(a)(3). Based on the copyright statute, only the owner of the copyright has standing to enforce a claim. *Sybersound*, 517 F.3d at 1144. Third party strangers

cannot enforce a copyright even if an infringer is violating the statute. *Id.*

1. No Evidence, No Copyright

In this case, CPS fails on all these points. As far as the first element — ownership of copyright — CPS has not presented a certificate of copyright. (CPS Evidence.) So, it cannot create a prima facie case of copyright that way. *Johnson v. Gordon*, 409 F.3d at 17.

Besides the failure to present a certificate, CPS has not presented any evidence of originality. To assert a copyright claim, CPS cannot rest on bald assertions. *Brown*, 498 F.3d at 24-25. Bald assertions, however, are all that CPS has to offer. Dr. Holtzapple states in conclusory fashion: “The Semester Exams contain data and materials copyrighted by third parties. (Holtzapple Affidavit at ¶ 14.) With these absence of substantive facts, however, CPS has not established that the Semester Exams are works that were “independently created by the author (as opposed to copies from other works), and that it possesses at least some minimal degree of creativity. *Lexmark*, 387 F.3d at 534.

2. No Ownership, No Standing

It’s the same with the issue of ownership. CPS states — with no attribution to the record — that it has an ownership interest in the copyright to the Semester Exams. (CPS Response at 17.)

As a general matter, the Ohio Supreme Court has held that when a party does not have standing to assert a claim, the Court itself does not have jurisdiction. *City of North Canton v. City of Canton*, 114 Ohio St. 3d 253, 871 N.E.2d 586 (2007). For instance, in the *North Canton* case, the city of North Canton filed a lawsuit to challenge the constitutionality of an Ohio statute, Ohio Rev. Code § 709.02(E). *North Canton*, 114 Ohio St. 3d at 254, 871 N.E.2d at 586. When North Canton filed the lawsuit, it was asserting the rights of a third party, Metro Regional Transit Authority. *Id.*

The Supreme Court held that a “party must have standing to be entitled to have a court decide the merits of a dispute.” *Id.* at 255, 871 N.E.2d at 588. If the party does not have standing, the court does not have jurisdiction to decide the case. *Id.* In the *North Canton* case, therefore, because the city of North Canton was asserting the rights of a third party, it did not have standing to bring the lawsuit. *Id.* That meant that the Court did not have jurisdiction to decide the merits of the case. *Id.*

This general rule applies in copyright cases. In copyright cases, “standing must be supported at each stage of litigation in the same manner as any other essential element of the case.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). Under the copyright act, only the “legal or beneficial owner of an *exclusive* right under a copyright” has standing to bring a claim. *Id.*, emphasis added. A person who has a “non-exclusive” copyright interest does not have standing to assert a copyright claim. *Sybersound Record. v. UAV Corp.*, 517 F.3d 1137, 1146 (9th Cir. 2008).

In this case, the arguments by CPS establish that it does not have standing to assert a copyright claim. CPS states that “WestEd is the owner of the underlying materials and methods from which the Semester Exams were developed.” (CPS Response at 16.) CPS also states that the agreement between CPS and WestEd establishes that the “Semester Exams contained materials for which other entities hold copyrights.” (CPS Response at 16.) CPS also states that portions of the Semester Exams “were included only after permission was obtained by WestEd from the copyright holders.” (CPS Response at 16.) Based on those statements, CPS has presented no evidence that it has a copyrightable interest in the Semester Exams. (CPS Response at 17; see *supra* at 14.)

If CPS wanted to assert the copyright claims of these unnamed third parties, it may have been wise to file an interpleader action to bring in parties with the copyright claims. Ohio R. Civ. P. 22.

CPS claims that if the Court grants this public records request that it could expose CPS to allegations of breach of contract and/or copyright infringement. (CPS Response at 16.) That is exactly the purpose of Rule 22. The rules states that a defendant exposed to double or multiple liability, “may obtain such interpleader by way of cross-claim or counterclaim.” Ohio R. Civ. P. 22.

Here, just as in *North Canton*, therefore, CPS is attempting to assert the rights of third parties. *North Canton*, 114 Ohio St. 3d at 254, 871 N.E.2d at 586. Based on Ohio Supreme Court law, CPS does not have standing to assert those claims. *Id.* Similarly, based on federal copyright law, CPS does not have standing to assert the copyright claims of third parties. *Warren*, 328 F.3d at 1140; *Sybersound*, 517 F.3d at 1146. Because CPS does not have standing to assert the claims of those third parties, this Court does not have jurisdiction to decide the merits of the copyright issue. *North Canton*, 114 Ohio St. 3d at 254, 871 N.E.2d at 586; *Warren*, 328 F.3d at 1140.

3. *Fair Use*

a. *No Copyright, Fair Use is Moot*

Next CPS argues that Perrea is not entitled to copies under the fair-use doctrine of copyright. According to the fair-use portion of the copyright statute, there are circumstances in which one may copy an original work of authorship without violating the copyright statute. 17 U.S.C. § 107. Those circumstances that amount to fair use depend on the “purpose” of the person who copies a work. *Id.* If copies are “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,” the copies are “not an infringement of copyright.” *Id.*

When a party does not have a legally cognizable copyrightable interest, however, the fair use issue is moot. *Gladwell Governmental Services, Inc. v. County of Marin*, 2005 U.S. Dist. Lexis

42276, No. C-04-3332 SBA at *8 (N.D. Cal. Oct. 17, 2005) (copy attached). That means, if a party with no copyrightable interest asks a court to decide a fair use issue, that party is asking the court to “issue an advisory opinion on a hypothetical set of facts.” *Id.* Courts do not have jurisdiction to “adjudicate a hypothetical ‘fair use’ defense to a moot claim.” *Id.*

In this case, because CPS has not established a copyrightable interest in the Semester Exams, the fair-use issue is moot. *Id.*

b. Fair Use Ohio Supreme Court

Even if CPS had established a copyright claim — which it has not — fair use would not limit Perrea’s access to the Semester Exams. First of all, the Court has already decided this fair use issue. In *Rea* it held that “[e]xceptions to public records requests do not include the copyright defense where public records fall under the ‘fair use’ exception.” *Rea*, 81 Ohio St. 3d at 532, 692 N.E.2d at 601-02. If the relator had “no intention of copying these materials for commercial resale purposes,” the public record request would not violate the copyright statute. In this case, Perrea informed CPS that he “did not intend to use the copies for any commercial purpose.” (Perrea Affidavit ¶ 35, Exhibit G, 000054.) He further assured CPS that he would “only use the copies for criticism, research, comments, and/or education.” *Id.*

Based on these facts, therefore, the purported copyright exception by CPS does not apply to Perrea’s public records request.

c. Fair Use Factors

i. Purpose: Non-Profit Educational

The first factor that the statute identifies for the fair use exception to copyright is “the purpose and character of the use, including whether such use is of a commercial nature or is for

nonprofit educational purposes.” 17 U.S.C. § 107(1). In Perrea’s case, he has specifically informed CPS that his purpose for getting copies of the test is to have an “independent, qualified psychometrician” examine them for “fairness, accuracy, and validity.” (Perrea Affidavit at ¶ 19, 000040; Perrea Second Affidavit at ¶ 32, 000095.) More than 60 of Perrea’s colleagues share his purpose for obtaining copies. (Perrea Second Affidavit at ¶ 32, 000095.)

Based on these facts, Perrea’s purpose fits into the first fair-use factor. 17 U.S.C. § 107(1).

ii. Nature of Copyrighted Work

Considering the nature of the Semester Exams, the Supreme Court has already noted the “tremendous implications” of public school assessment tests. *Rea*, 81 Ohio St. 3d at 533-34, 692 N.E.2d at 602. The examinations should not be secret, they should be open for public exposure and debate. *Id.*

Despite the holding of *Rea*, CPS cites a multi-state bar examination case in which a federal district court found that the exams were copyrighted. *National Conference of Bar Examiners v. Multistate Legal Studies*, 458 F. Supp. 2d 252 (E.D. Penn. 2006). In that case the National Conference of Bar Examiners developed multi-state bar examination (MBE) testing materials for 50 jurisdictions to evaluate applicants seeking bar admission. *Id.* at 253.

At the same time, a company, Multistate Legal Services, developed MBE test-preparation services to applicants who were getting ready for the bar exam. *Id.* The company offered a variety of programs for applicants to address substantive law on the MBE and to develop test-taking strategies. *Id.* at 254 Multistate Legal Services arranged for applicants to take the MBE exam, then had the applicants provide the questions to Multistate. *Id.* at 255-56. Based on the copied questions, Multistate Legal Services then made millions of dollars using the MBE questions for its test-

preparation programs. *Id.* at 261. The court found that Multistate Legal Services violated copyright by making copies of the MBE exams. *Id.* at 259.

The Semester Exams in this case are different in nature from the MBE exams in *NCBE v. Multistate*. In this case, the Semester Exams are mandatorily administered to public school students for the public purpose of assessing their performance. Ohio Rev. Code § 3313.6012(A); Ohio Rev. Code § 3313.6012(A)(2); Ohio Rev. Code § 2744.01(C)(2)(c) (see *supra* at 5.)

Besides that there is a strong Ohio public policy in favor of scrutiny and criticism for public school tests. Ohio Rev. Code § 3301.079(D)(1) (diagnostic tests are public records); *Rea*, 81 Ohio St. 3d at 533-34, 692 N.E.2d at 602 (achievement tests are public records).

The MBE exams, by contrast, are not mandatory; they are for applicants seeking a license to practice law. *NCBE v. Multistate*, 458 F. Supp. at 253. And, the MBEs are not given to public school students. *Id.* Furthermore, the MBE exams had commercial value — Multistate made millions selling its copies questions from the exams. *Id.* at 261. In this case, CPS has not presented any facts that would establish that there is any commercial value to the Semester Exams. (See *supra* at 7-9.)

This factor, therefore, weighs in favor of fair use for Perrea.

c. *The Amount and Substantiality*

The third fair-use factor is the “amount and substantiality of the portion used in relation to the copyrighted work as a whole. 17 U.S.C. § 107(3). In this case, Perrea has requested only the “Semester Exams administered in January 2007 to 9th graders.” (Perrera Affidavit at ¶ 19.) He did not request the answers to those exams. His purpose was to have the exams evaluated by an independent psychometrician as to their fairness, accuracy, and validity. (Perrea Affidavit at ¶ 19,

000040.)

Here, because Perrea only asked for the Semester Exams, and not the answers to those exams, the amount and substantiality of the exams also would weigh in his favor.

d. *Effect on the Market*

The final fair-use factor is the “effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). In this case, there are no facts to indicate that Perrea’s proposed use would have an effect on the market. CPS has not presented any evidence that Perrea, a psychometrician, or any test developer who would use the exams for economic gain. (CPS Response at 15.)

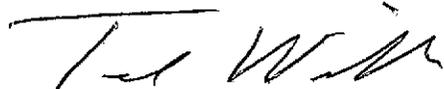
This factor, therefore, weighs in favor of finding fair use.

Based on all these points, CPS has not established that copyright is an exception to the Ohio Public Records Act.

V. CONCLUSION

For all these reasons, Relator, Paul Perrea, respectfully requests that this Court issue an Order in Mandamus requiring Respondent, Cincinnati Public Schools, to produce the records he has requested in this case.

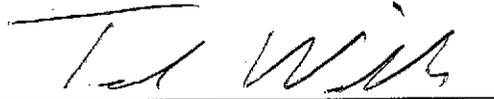
Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above document was served by regular United States Mail on Mark Stepaniak, Taft Stettinius & Hollister, 425 Walnut Street, Suite 1800, Cincinnati, Ohio 45202-3957, this 11th day of December, 2008.



Ted L. Wills (0059473)

VI. APPENDIX

Gladwell Governmental Services, Inc. v. County of Marin, 2005 U.S. Dist. Lexis 42276, No. C-04-3332 SBA at *8 (N.D. Cal. Oct. 17, 2005)

GLADWELL GOVERNMENTAL SERVICES, INC., a California corporation, Plaintiff, vs. COUNTY OF MARIN, a legal subdivision of the State of California; COUNTY OF TUOLUMNE, a legal subdivision of the State of California, and DOES 1 through 50 inclusive, Defendants.

Case No.: C-04-3332 SBA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2005 U.S. Dist. LEXIS 42276

October 15, 2005, Decided

October 17, 2005, Filed

SUBSEQUENT HISTORY: Remanded by *Gladwell Gov't Servs. v. County of Marin*, 2008 U.S. App. LEXIS 2291 (9th Cir. Cal., Jan. 28, 2008)

CORE TERMS: counterclaim, moot, retention, declaratory judgments, legal interest, hypothetical, advisory opinion, fair use, actual controversy, legally cognizable, copyrightable, infringement, judicial efficiency, declaratory relief, affirmative defense, copyright-protected, ownership, mooted, ownership interest

COUNSEL: [*1] For Gladwell Governmental Services, Inc., a California corporation, Plaintiff: Kevin D. Hughes, Tisdale & Nicholson, LLP, Los Angeles, CA.

For County of Marin, a legal subdivision of the State of California, County of Tuolumne, a legal subdivision of the State of California, Defendant: Geoffrey A. Goodman, Cary M. Adams, Murphy Austin Adams Schoenfeld LLP, Sacramento, CA.

For Diane Gladwell, Gladwell Governmental Services, Inc., a California corporation, Counter-defendant: Kevin D. Hughes, Tisdale & Nicholson, LLP, Los Angeles, CA.

For County of Marin, a legal subdivision of the State of California, County of Tuolumne, a legal subdivision of the State of California, Counter-claimant: Defendant: Geoffrey A. Goodman, Murphy Austin Adams Schoenfeld LLP, Sacramento, CA.

JUDGES: Sandra B. Amstrong, United States District Court Judge.

OPINION BY: Sandra B. Amstrong

OPINION

ORDER DENYING COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DISMISSING COUNTERCLAIMS

AND RELATED COUNTERCLAIM

On October 18, 2005, Counterclaimants' Motion for Partial Summary Judgment came on regularly for hearing before the Honorable Sandra Brown Armstrong. After consideration of the parties' written submissions, [*2] as well as the argument of counsel at hearing,

IS HEREBY ORDERED THAT COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BE DENIED AND THE COUNTERCLAIMS BE DISMISSED.

I. BACKGROUND

On March 7, 2005, the Court granted the Defendants' Motion to Dismiss Plaintiff's Complaint. In so doing, the Court ruled that the Marin County ("Marin") records retention schedules were a "work made for hire", owned by Marin. (Order, p. 8) The Court ruled that Plaintiff Gladwell Governmental Services, Inc. ("Gladwell") had no ownership interest in the Marin schedules, and therefore, no ownership interest in any copyright therein. (Order, pp. 7-8)

The County of Marin and the County of Tuolumne (collectively, the "Counties") now seek declaratory judgments with respect to ownership of the Marin schedules and the scope of copyright protection the schedules merit -- these are issues in which (as per the Court's prior ruling) Gladwell has no legal interest. Because there is no "present live controversy" between the parties as to either of the Counties' three counterclaims, the Court must dismiss them as moot.

II. THERE IS NO "PRESENT LIVE CONTROVERSY" AS TO ANY OF THE THREE ISSUES [*3] RAISED IN THE COUNTIES' MOTION AND SO THE COURT MUST DISMISS THEM AS MOOT

The exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy. *Preiser v. Newkirk*, 422 U.S. 395, 402, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975). More particularly, a federal court has no authority to issue a declaratory judgment apart from that authority granted it by the Declaratory Judgment Act, which requires by its terms that an "actual controversy" exist between the parties before the court. 28 U.S.C. § 2201; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S. Ct. 461, 81 L. Ed. 617 (1937). "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna*, *supra*, at 240-241. The rule in federal cases is that an actual controversy must exist at all stages of review and not merely at the time the complaint is filed. *Preiser*, *supra*, at 402.

The "actual controversy" must be one which presently exists and not simply one which may occur. *Farrum v. International Ass'n of Machinists*, 161 F.Supp. 391 (S.D.N.Y. 1958); *Garcia v. Brownell*, 236 F.2d 356[*4] (9th Cir. (Cal.) 1956). Whenever an action loses its character as a "present live controversy" during the course of litigation, federal courts are required to dismiss the action as moot. *Allard v. DeLorean*, 884 F.2d 464, 466 (9th Cir. 1989). An action ceases to be a "present live controversy" and becomes moot once either party is shown to lack a "legally cognizable interest in the outcome" of the adversary proceeding. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979); *DiGiorgio v. Lee*, 134 F.3d 971, 974 (9th Cir. (Cal.) 1998). See also *Lusardi v. Xerox*, 975 F.2d 964 (3rd Cir. 1992) (No agreement between the parties to allow the federal court to hear the case will rescue a mooted claim.)

The Counties seek declaratory judgments with respect to ownership of Marin's schedules and the scope of copyright protection the schedules merit. As a result of the Court's March 7, 2005 ruling, Gladwell has no legally cognizable interest in the outcome of these counterclaims. Furthermore, the declaratory relief sought is as to the validity of defenses to an action that has been dismissed. The fact that, theoretically speaking, [*5] Gladwell may in the future obtain a reversal of the dismissal on appeal simply does not create a "present live controversy". *Calderon v. Ashmus*, 523 U.S. 740, 746-747, 118 S. Ct. 1694, 140 L. Ed. 2d 970 (1998) (there is no "case or controversy" where an action seeks declaratory relief as to the validity of defenses that the defendant may or may not

advance in future litigation that may or may not take place). For each of these reasons, the counterclaims are moot and must be dismissed.

A. The First Counterclaim Is Moot Because The Court Has Already Ruled that Marin Owns The Retention Schedules

The Counties' first counterclaim seeks a declaratory judgment that under the contract between Marin County and Diane Gladwell, Marin County is the sole owner of the records retention schedules. The Counties concede that the ruling sought is precisely the ruling received on March 7, 2005. Thus, it is a settled question, and not a live issue between the parties.

B. The Fourth Counterclaim Is Moot Because Gladwell Has No Legal Interest In Whether Marin's Retention Schedules Are Copyrightable

The Counties' fourth counterclaim seeks a declaratory judgment that the records retention schedules at[*6] issue are not copyrightable. This issue was briefed last winter, but the Court expressly declined to resolve it because the question of whether the retention schedules were copyrightable was mooted by the Court's threshold ruling that Gladwell had no legal interest in any such copyright. (Order, at fn. 5) This remains true today. Gladwell has no legal interest in the Marin schedules, or any copyright that might protect them, and therefore, no legal stake in the outcome of this counterclaim. *Ashcroft v. Mattis*, 431 U.S. 171, 173, 97 S. Ct. 1739, 52 L. Ed. 2d 219 (1977) ("Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement; were the rule otherwise, few cases could ever become moot.").

In *Ashcroft*, *supra*, after the defendant successfully defended a claim by virtue of a particular affirmative defense, plaintiff sought a declaratory judgment as to whether defendant would have been liable were it not for the affirmative defense. There was no live controversy on the point and so the court refused to issue what would effectively be an advisory opinion. The Counties are attempting the same tactic here: The matter has been resolved, but they want [*7]the Court to issue advisory opinions as to defenses that were not adjudicated. The Court has no jurisdiction to do so.

Indeed, to the extent Gladwell has any stake in whether the Marin schedule is copyright-protected, it is not adverse to the Counties' but rather is in agreement. Gladwell is in the business of creating records retention schedules for California governmental entities. It would be hard-pressed to stay in business if Marin County obtained a monopoly on the unique selection, coordination and arrangement of

data that Gladwell has developed in 10 years of serving California local governments. Thus, a ruling that Marin owned a copyright in the retention schedules would be potentially devastating to Gladwell's business. The fact that the interests of the Counties and Gladwell with respect to resolution of these issues is aligned fortifies the conclusion that no justiciable controversy is present. *A.G. Edwards & Sons, Inc. v. Public Bldg. Com'n of St. Clair County, Illinois*, 921 F.2d 118 (7th Cir. 1990)(If parties seek the "same result" on a claim, then no "case or controversy exists between adverse parties over this issue.").

C. The Fifth Counterclaim [*8] is Not Only Moot, It Asks The Court to Issue An Advisory Opinion On A Hypothetical Set Of Facts

The Counties' fifth counterclaim seeks a declaratory judgment that the County of Tuolumne's use of the Marin County records retention schedules was a "fair use". For all of the foregoing reasons, Gladwell has no legally cognizable interest in the outcome and so this is not a "present live controversy". Furthermore, the Counties ask the Court to issue an advisory opinion on a hypothetical set of facts, which it cannot do.

The "fair use" doctrine is a defense to a claim for copyright infringement. The Court has dismissed Gladwell's complaint and ruled that Marin owned the retention schedules at issue. As a result, and since Marin consented to Tuolumne's use of the Marin schedules in the first place, there is (1) no unauthorized use at issue; (2) no live claim of infringement; (3) no occasion for Tuolumne to raise the " fair use " defense; and (4) no cause to adjudicate a hypothetical " fair use " defense to a moot claim.

The Counties are effectively asking the Court to resolve a multi-layered hypothetical: (a) What if Gladwell did own "some portion" of the records retention schedules and[*9] (b) what if the schedules were copyright -protected and (c) what if Marin shared them with Tuolumne without Gladwell's authorization and (d) what if Gladwell had a live infringement claim? This Court simply has no jurisdiction to provide an advisory opinion on a

hypothetical set of facts. *Ashcroft v. Mattis*, 431 U.S. 171, 172, 97 S. Ct. 1739, 52 L. Ed. 2d 219.

D. Adjudicating Moot Claims and Hypothetical Questions Does Not Serve "Judicial Efficiency"

In the Conclusion section of their brief, the Counties make an appeal to the "interests of judicial efficiency". The interests of judicial efficiency are not served by the adjudication of moot claims, or the issuance of advance rulings on collateral defenses to a litigation that may never be litigated.

III. CONCLUSION

For the above reasons, the Court denies Counterclaimants' Motion for Partial Summary Judgment and dismisses the Counterclaims, as follows:

On Counterclaimants' First Counterclaim: The Court finds that the declaratory judgment sought is precisely the ruling received in the Court's March 7, 2005 Order. Thus, it is a settled question, and not a live issue between the parties. It is DISMISSED.

On Counterclaimants' Fourth Counterclaim:[*10] The Court finds that the counterclaim is moot because Counterdefendants have no legal interest in the Marin schedules, or any copyright that might protect them, and therefore, no legal stake in the outcome of this counterclaim. It is DISMISSED.

On Counterclaimants' Fifth Counterclaim: The Court finds that the counterclaim is moot because Counterdefendants have no legal interest in the Marin schedules, or any copyright that might protect them, and therefore, no legal stake in the outcome of this counterclaim. In addition, the Counterclaim seeks an advisory opinion based on a hypothetical set of facts. It is DISMISSED.

Date: October 15, 2005

United States District Court Judge