



# **Legal issues in corrections, retractions & expressions of concerns**

COPE North American meeting

October 2012

Mark Seeley, Elsevier



# *Agenda*

- **Setting the scene**
- **Likely areas for legal correspondence**
- **Legal cases**

# *Back from your summer program*

**& a nice letter is  
waiting for you at  
your office!**

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April 16, 2008

Received  
APR 24 2008  
Newton, MA

Mark Seeley, Vice President  
and General Counsel  
Reed Elsevier, NV  
275 Washington Street  
Newton Street, MA 02458

Re: *Mary W. Chaffee and Margaret M. McNeill v. Reed Elsevier, Marion Broome, the  
American Academy of Nursing and others.*

Dear Mr. Seeley:

Please be advised that I represent Mary W. Chaffee and Margaret M. McNeill in regard to a dispute that has arisen between my clients and one of Elsevier's publications, *Nursing Outlook* (NO). Reed Elsevier is the publisher of NO and the American Academy of Nursing is the journal's official sponsor. My clients wrote an article that appeared in *Nursing Outlook*, 2007; 55:232-241, "A model of nursing as a complex adaptive system."

## *Likely areas of legal correspondence*

- **Patent issues**
- **Defamation**
- **Allegation (or refutation of allegation)  
re publishing ethics violation**

## ***Patent issues***

- **Inventors have a short window to file**
- **Publication = public disclosure**
- **Inventor-authors are not always mindful of the legal requirements**

# *Defamation*

- **Researcher/academic reputation**
- **Publishing ethics allegation  $\neq$  reputation**
- **Objectivity & due process**
- **Truth as defense?**

## ***Allegations (or refutations)***

- **Fraud**
  - **Plagiarism**
  - **Failure to report conflicts of interest**
  - **Other misconduct**
  - **Submission process misconduct**
- 
- **SO HOW DO WE RESPOND?**

## ***Responding to allegations (or refutations)***

- **Respond to the complaint as you would to ANY OTHER FORM OF COMPLAINT**
- **Think & reach out**
- **Match the allegation to the journal policy**
  - **for example, errors vs “scienter”**
- **Consider the appropriate “venue”**
- **Fair play/ due process**



## ***Correcting the record***

- **Communication to authors' institution**
- **Publication of a notice, corrigendum or erratum**
- **Formal retraction (watermarking the article + publication of explanation)**
- **Formal removal of the article (actual deletion from the electronic record)**
- **Publication of an editorial**

## ***Actual court cases (the few)***

■ **Ho v Taflove,**  
696 F. Supp 2<sup>nd</sup> 950  
(N.D. Ill. 2010), affirmed  
7<sup>th</sup> Circ. 2011

- Developers of a math model sued for failure to acknowledge or attribute in article & symposium paper (also went to 2 journals in question & Northwestern)
- Claims trade secret misappropriation, copyright infringement, false designation of origin, etc
- But model held uncopyrightable & plaintiffs not precluded from publishing their own papers (so no damages)
- Defense wins

## ***Actual court cases (2 of 3)***

■ **Andela v U  
of Miami**, 692  
F. Supp 2<sup>nd</sup> 1356  
(S.D.Fl. 2010),  
generally affirmed  
11<sup>th</sup> Circ. 2012

- Supervisor research partner submits rejected paper to 2<sup>nd</sup> journal w/o junior partner identified
- Junior researcher sues supervisor & Univ (reverse passing off/Lanham Act)
- Trial & appellate court notes that Lanham Act (gen. for trademarks) not relevant for plagiarism (does not protect “communicative product”)
- Score 2 for the defense (also lost state court claims re employment issues)

## ***Actual court cases (3 of 3)***

■ **Romero v. Buhimschi**,  
U.S. Dist LEXIS  
73024 (E.D. Mich.  
2007),  
reconsideration  
denied 2009

- Authorship dispute with plaintiff not acknowledged (first journal said resolve first before publication)
- Lanham Act claims + negligence + false representations + contract
- Court again noted Lanham Act not for plagiarism
- On reconsideration, court says:  
“**there remain some disputes that fall outside the realm of the courts... (and) scientists (themselves) are much better positioned (to resolve such disputes)...**”

## ***Conclusions re federal court decisions?***

- The courts are not unsympathetic
- But are reluctant to intervene
- & they accept that there are other forum for these controversies

## ***Reducing legal risk***

- **Have a policy & communicate it clearly**
- **Be consistent**
- **Provide an opportunity for the alleged wrong-doer to explain-defend**

## ***Some Elsevier-specific experiences***

- ***Medical Hypotheses***
  - aims & scope somewhat philosophical
  - editor accepted “speculative” paper from notorious Aids-denialist
  - Elsevier changed editorial policy & editor, paper retracted
  - author sued (Amsterdam courts) generally on contract claim (acceptance process)

## ***Fiala/ Medical Hypotheses cont'd***

- ***January 2010 trial court decision & June 2010 appellate court decision***
  - Critical of Elsevier– noted that the Editor had accepted, broad editorial policies of the journal at that time
  - ***but*** ultimately agreed that the publisher “may enforce its own responsibility” (re problematic science)
  - ***&*** ruled that authors had other avenues for free expression



## ***2<sup>nd</sup> example: Chaos***

- Editor with long tenure with journal *Chaos, Solitons & Fractals*
- Complaints re excessive self-publication and self-citation (& broader patterns in the journal) in 2008
- Internal review & decision to restructure journal, aims & scope, & to not renew editor contract
- Reported in *Nature* article (Nov 2008 issue)
  - “*Self-publishing editor set to retire*”
  - Noted among other things dubious academic honors
- Editor sued *Nature* for defamation in the UK in 2010
- High court (UK) decision July 2012

## ***El Naschie v Nature cont'd***

- High Court decision focused on 2 key issues:
  - Truth of reporting, noting the use of phrases such as “reasonable grounds to suspect”
    - “Honest comment” principle
  - Was the comment justified?
    - Referring to Elsevier policies & COPE principles, importance of peer review was noted, requirement to minimize conflicts, objectivity of editorial review
    - PATTERN OF SELF-CITATION noted in some detail
- Court conclusion: “I consider the Article... the product of responsible journalism... It resulted in the publication of information of high order of public interest.”

# ***Conclusions? Questions?***

- Notwithstanding 2 examples, Elsevier believes in the strong relationship between publisher & editor
- Importance of engagement & commitment to scientific publishing principles
- Stick with the science!
- The courts seem to respect the scientific process, and are not over-awed by legalistic complaints...