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Legally Speaking — The Copyright Status of Unpublished Works

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“If you steal from one author, it’s plagiarism; if you steal from many, it’s research.”

In my previous articles for Against the Grain, I have provided background information on copyright law for publishers, book distributors, and librarians. For this month’s column, however, I am expanding my focus to include authors, historians, and archivists. This column deals with the law of unpublished lectures, letters, and manuscripts. These items are the staples of historical and archival work. Publishers, archivists, and special collections librarians need to know about the rules governing unpublished works. This issue is especially important right now because the rules will change at the end of December 2002.

The 1976 Copyright Act—which is the law currently in force—provides that all of the materials covered by the statute will automatically become copyrightable upon creation, whether or not the work includes a formal notice of copyright. This rule is a change from the previous law, which required the notice of copyright to be included in the work for the material to be protected. The 1976 law applies to all types of creations, both published and unpublished. Before the passage of the 1976 Federal copyright statute, unpublished letters, manuscripts, and lecture notes fell under the purview of state common law copyright (which was discussed in my most recent column). Although letters and manuscripts that were covered by state copyright law are now included in the Federal copyright statute, state common law copyright still applies to unpublished lecture notes. And as we saw in the last column, the Federal copyright statute did not entirely preempt the common law, leaving room for common law copyright still to be applied in some circumstances.

Copyright Law and Unfixed Works

One use that is sometimes made of common law copyright is to protect items which are unfixed. The Federal copyright statute applies only to fixed works: “Original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine...” Because of the requirement for the material to be fixed, many types of work are not protected under the Federal copyright statute.

Some of these types of works include: “choreography that has never been filed or notated, an extemporaneous speech, original works of authorship communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down.” Yet these same materials would be eligible for protection if they were fixed. Therefore, if the item “otherwise constitutes a ‘work of authorship [would be copyrightable if fixed],’” these materials are subject to protection by state common law.

One type of work that is protected under the common law copyright in many states is the unpublished lecture. This issue has received more attention recently because commercial note-taking services on the Internet have become very popular among students. If the lecturer gives a lecture from a prepared text, that text is considered to be an unpublished manuscript and is protected under common law. Similarly if the speaker gives a lecture from notes, the notes are protected under the Federal copyright statute. The problem arises when a lecture is not based on notes, or when a full lecture is given but only cursory notes are used. These lectures are not “fixed in any tangible medium of expression.” Since these lectures do not meet the “fixed” test, they are not eligible for protection under the Federal copyright statute.

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Luckily for the lecturer, however, unfixed copyrights are protected by common law in most states. Prior to the 1976 Copyright Act, “Common law copyright protected “all works until they were published when publication was the event that brought them within the federal law. Today, however, works are protected from the moment of their fixation, rather than from the date of publication, so there’s very little left for common law copyright to protect. Thus, ‘unfixed’ works are one of the few remaining categories of works protected by state law. So long as the faculty member can clearly establish that she is the author, most states will fully protect her lecture, calling upon concepts similar to those found in federal law to determine whether the common law copyright has been infringed.”

Are personal letters published or unpublished?

One question of importance is whether the donation or sale of unpublished letters to libraries constitutes publication. This issue was discussed in the case of Salinger v. Random House. Salinger is the author of Catcher in the Rye. He sued Ian Hamilton, who had written an unauthorized biography entitled J. D. Salinger: A Writing Life. Hamilton used excerpts from letters written by Salinger which were available at “the libraries of Harvard, Princeton, and the University of Texas, to which they had been donated by the recipients or their representatives.”

One of Salinger’s claims was that because the letters were unpublished and were subject to state copyright law, the use of these letters fell outside of the scope of Fair Use. As I discussed in my previous column, there has been some controversy over the role of the Fair Use Doctrine in common law copyright. The conclusion, however, was that although the Fair Use doctrine is narrower in common law, Fair Use is still a valid defense. The Second Circuit Court of Appeals recognized the availability of the Fair Use doctrine in the Salinger case, but stated that the privileges were narrower because the letters were unpublished. Hamilton argued that the letters were in fact published and available for use by scholars because they had been donated to libraries.

The court’s opinion in the Salinger case states: “The author of letters is entitled to a copyright in the letters, as with any other work of literary authorship.” The opinion also says “that the recipient . . . [of the letter] is entitled to deposit it with a library.” The person who gives the letters may also specify the conditions under which the materials may be accessed and used. The basic rule is: “The owner of the literary rights, including the right to complain of infringing copying, while the recipient of the letter retains ownership of the tangible physical property of the letter itself.” The court decided that “Salinger’s letters are unpublished, and they have not lost that attribute by their placement in libraries where access has been explicitly made subject to observance of at least the protections of copyright law.”

Because the court found that the letters were not published, Salinger still owned the copyright. The court also ruled that Fair Use was subject to greater restrictions under state common law copyright than under the Federal copyright statute, and found in favor of Salinger because the excerpts Hamilton used were larger than the amount allowed by common law Fair Use principles.

One important case in which the conclusion differs from the Salinger case is Wright v. Warner Books. Richard Wright was the author of Native Son and Black Boy. Wright’s widow sued Warner Brothers over the creation of a biography by Margaret Walker entitled Richard Wright: Daemonic Genius. The case involved several letters that Wright had written which Wright’s widow claimed were unpublished and therefore subject to common law copyright. One of the plaintiff’s claims was that the Fair Use doctrine was more restrictive for unpublished materials which are subject to common law copyright than for published materials protected by the Federal copyright statute. Thus, something that might be Fair Use under the Federal copyright statute would not be allowed under common law copyright. Wright’s widow claimed that Walker’s book had used more material than was allowable under state common law copyright.

The judge did not rule on the issue of how much use constitutes Fair Use. Instead, the judge ruled that a large part of the materials had been published, and were therefore subject to the Fair Use doctrine under the Federal copyright statute. According to the opinion, “[The] plaintiff ignored certain salient facts, chief among them this: a considerable amount of what she claims has never been published has, in fact, been published.” The judge decided this point based upon the sale—for a considerable sum—of Wright’s letters to the Beinecke Library at Yale University. The judge continued: “The sales contract specifically states that Yale purchased the right to ‘use the Wright Archive,’ and the University agreed to restrict access to only one manuscript not at issue here. It seems reasonable to conclude that for the purchase price, and pursuant to the sales contract, the University became free to share Wright’s work with interested scholars.”

The judge went on to analyze Walker’s book according to the Fair Use doctrine under the Federal copyright statute. According to the opinion:

The works’ [sic] status as published or unpublished is just one — albeit a critical — aspect for the court to consider. Additional circumstances present: here suggest that Walker’s use of the works in question is fair. First, she has paraphrased, rather than directly quoted, Wright’s work. And second, the paraphrasing by and large involves straightforward factual reportage. While Salinger, too, concerned paraphrasing but nonetheless concluded with a finding of infringement, there the Second Circuit confronted attempts not merely to paraphrase factual data but also — and significantly — to adopt creative expression that was distinctly personal.”

(Citations omitted)

The Wright decision is a contrast to the decision in the Salinger case. In Salinger, donating the letters to a university library did not constitute publication. In the Wright case, however, the letters were sold to the library for a fee. The court in the Wright case felt this distinguishing fact made all the difference. Since Salinger was alive, there were privacy concerns in the Salinger case that did not exist in the Wright case because Richard Wright was dead. However, the main reason the outcomes were different in the two cases had to do with the different rules which apply to published manuscripts and unpublished manuscripts.

Unpublished Manuscripts

The 1976 Copyright Act took effect in 1978. One of the important parts of the law was that it made unpublished manuscripts subject to the Federal statute. It is important to remember that the rules were different for unpublished manuscripts created before 1978. Early law granted ‘commonlaw’ copyright for works that remained unpublished. A manuscript left in the desk drawer had common law privileges, and the statutory privileges began only upon publication and registration. Basically, manuscripts received protection under the common law, while the federal copyright statute protected published materials. The general rule was that the common law copyright protection ended upon publication, once the item was published, it was covered by the Federal copyright.

The biggest difference between copyrights that are recognized under the Federal copyright statute and those that are covered by state common law is the duration of the copyright. Common law copyright does not expire; it lasts forever. “As long as the manuscript, letter, or other work remained unpublished, the common law rights never expired. The author may be dead for centuries, but the copyright lived on.”

Prior to the 1976 Copyright Act, the only protection that unpublished materials received was that of state common law copyright. Under the new law, all unpublished materials are subject to the Federal statute. In order to ensure an orderly transition to the new rules, all works which were subject to common law copyright will remain protected until December 31, 2002, since “Congress
was of the view that such a peremptory divestiture of copyright... might [violate] constitutional requirements of due process." As attorney Robert Clarida points out, after December 31, 2002, "Untold billions of works now subject to copyright protection will go into the public domain simultaneously. Thus Congress ensured that every letter Jack Kerouac ever wrote to his mother, every notebook sketch by Matisse, every Mozart counterpart exercise, would eventually, someday, lose its copyright protection."31

Beginning on January 1, 2003, unpublished manuscripts will no longer be protected by copyright. Those unpublished manuscripts will become part of the public domain 70 years after the death of their author.39 Therefore, unpublished manuscripts from writers who died before 1932 will be in the public domain.39 The only way to avert the impending release of protection is to publish the items before the end of 2002.40 According to the Federal copyright statute, "if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047."41 The Federal copyright statute designated the date of December 31, 2047 as the expiration date for copyright because that will be 70 years after the statute took effect in 1978.

**What constitutes publication?**

In order to obtain the additional protection until the end of 2047, the copyright owner must publish the manuscript. What can an owner do to "publish" his or her manuscript? According to Section 101 of the copyright statute, "Publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication."42 There are several methods that can be used to publish a manuscript. Robert Clarida suggests three ways to obtain publication. These three ways involve using the World Wide Web, depositing works in a library, or distributing copies freely to the public.43

One way to obtain quick publication is by creating a Website on the World Wide Web.44 "Although the posting of material on a Website does not technically result in the distribution of tangible copies, the Copyright Office has taken the position that works made generally accessible through the World Wide Web may be considered published."45 This statement is based on Copyright Office Circular 66, which says: "For works transmitted online, the copyrightable authorship may consist of text, artwork, music, audiovisual material (including any sounds), sound recordings, etc." The idea that Websites are "published" makes sense, since they are available to the public just as much as printed books are.

A second method for publishing works is making copies available for "unrestricted access." In a public library,46 This method is based on the Wright case,47 as well as on Copyright Office Compendium II.48 If the works have been sold to the library by the copyright owner and are available to the public with no restrictions, then according to the Wright case the items have been published.49

Nimmer on Copyright also provides some support for this position by discussing situations where copies of the work (such as architectural plans) are placed in public files where the public has the authority to make unlimited copies of the work.50 The case which Nimmer cited is Certified Engineering, Inc. v. First Fidelity Bank, N.A., 849 F. Supp. 318 (D.N.J. 1994). This was about "deposits of engineering plans for a real estate subdivision. Although prior cases had held no general publication to have occurred [sic] from deposit of architectural plans for approval of constructing a single building, the court distinguished those cases from the circumstances... of securing approval for an entire subdivision, which purportedly made the plans available to the public for general copying."51

The third method of publication involves making copies freely available to the public without restriction. The Copyright Office
Compendium II notes that making an unrestricted gift of copies, giving them away on the street, or leaving them in a public place to be picked up are all sufficient to effect publication. "As with any form of publication, the key element is that the works be available to the general public, without restriction as to who may have access or what use may be made of the published material." Publishing an item by making copies available to the public has many similarities with publication by library deposit. In both situations, the materials must be made available to the public without restrictions, and must be available to copy without restrictions. However, it is important to avoid the problems involved with limited publication, since a limited publication does not fall within the statutory definition of "publication." According to Nimmer, "A limited publication has been held to be a publication 'which communicates the contents of a manuscript to a definitely selected group and for a limited purpose, without the right of diffusion, reproduction, distribution, or sale.'" The most important distinction between publishing by deposit or distribution and creating a limited publication is the ability to make reproductions.

**BREAKING NEWS: Copyright and the First Amendment**

In my last column, I discussed the First Amendment in terms of the Fair Use doctrine. On Tuesday, February 19, 2002, the U.S. Supreme Court agreed to hear Eldred v. Ashcroft, a case challenging the Sonny Bono Copyright Term Extension Act. This act, passed by Congress in 1998, added an additional twenty years onto the term of copyright for everything covered by the Federal copyright statute. The Eldred case revolves around the issue of whether the Federal copyright statute is so restrictive that it violates Freedom of Speech under the First Amendment, particularly because of the long period of time during which materials are subject to copyright. In the coming months, I will be following this important case, which involves a balance between copyright law and the First Amendment.

**Conclusion**

The laws of copyright are currently in a state of flux. The common law copyright of unpublished manuscripts will expire on December 31, 2002. In order to obtain additional protection, manuscripts must be published before the end of 2002. Publishers, librarians, authors, historians, and archivists all need to know about the changes that are occurring at the end of 2002. The challenge to the Bono Act, which will be heard by the U.S. Supreme Court, involves a balance between copyright law and the First Amendment. In order to stay on top of the law, publishers, librarians, book distributors, authors, historians, and archivists all need to know about the changes that are taking place.

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**Cases of Note — Trade Dress - Abercrombie Takes a Dressing Down or Eroticism Rules the Case**

by Bruce Strauch (The Citadel) <strauchk@earthlink.net>


And where better to learn about "trade dress" than at Abercrombie's where the models are frequently undressed and where that will be seen as very important if you can actually get to the bottom of this.

Abercrombie targets the college age market with its casual clothing. Once an esteemed sporting goods/department store founded in 1892, it was struggling with New York rents until it was bought by The Limited, Inc. in 1988. Then it made a remarkable turn-around expanding to 157 retail stores and a mail-order catalogue all protected under registered trademarks.

And it was a venerable old New York landmark. Multiple floors, each with a distinct theme. I once stood on the luggage floor and watched in awe as a plutocrat Sugar Daddy bought some bedazzler a matching set of zebra skin suitcases at $10,000 each. And that was in 1972 when I was paid $8,000 a year.

Abercrombie says its "trade dress" has "unique and inherently distinctive features" such as design logos, primary color combinations, use of natural cotton and wool, and a cool lifestyle image promoted in its catalogue.

Yes indeed. And what a lifestyle it is. Nude touch football is a game I've never been asked to play. All the Sexual Revolution got me was married.

American Eagle Outfitters has a similar line of clothes sold in 300 stores with a history dating from 1977.

Looks like AE is really pressing them. Plus my college freshman daughter says A&F is "so yesterday" which sounds like the trump of doom coming from a major league consumer like she.

A&F sued for violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (common law of trade dress protection. A&F claims its catalogue was copied by AE in its Fall 1997 Quarterly. Same styles, layout, lifestyle editorial content. And AE had a marketing memo instructing its execs to check out A&F stores and see what was happening. AE did not contest the claim of copying the trade dress. It admitted it for the sake of a motion for summary judgment which it won. And this is an appeal to the 6th Circuit by A&F. Where AE won once again.

To win a case of trade dress violation, you must show 1) trade dress is distinctive and shows the source of the goods; 2) dress is primarily nonfunctional; 3) competition goods are confusingly similar. See Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 210 (2000).

**So What's This Dress Business?**

Trade dress is "the image and overall appearance of a product," identifying style created by packaging or whatever that makes it distinguishable from other products. Ferrari S.P.A. Esercizio Fabbriche Automobili E Corse v. Roberts, 944 F.2d 1235, 1238-39 (quoting Allied Mktg. Group, Inc. v. CDL Mktg., Inc., 878 F.2d 806, 812 (5th Cir. 1989)). It involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 764 n.1 (1992) (quoting John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 980 (11th Cir. 1983) (citing Original Appalachian Artworks, Inc. v. Toy, Ltd., Inc., 658 F.2d 821, 831 (11th Cir. 1981)).

Ye-gads, what an exhausting citation. You'd think the Supreme Court could make up its own definition.

McCarthy on Trademarks § 8.4 says trade dress has an expansive meaning that includes book covers, magazine cover designs, the "G" shape of a Gucci watch, a fish-shaped cracker, the Marlboro Man and ... wait for it ... the look of a mail-order catalogue!

Trademarks "include any word, name, symbol, or device or any combination thereof." 15 U.S.C. § 1127. In effect, any—continued on page 60