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## Cases of Note-Philip Fisher v. Charles Schultz, et. al. and Worldwide Church of God v. Philadelphia Church of God, Inc.

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# LEGAL ISSUES



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## Cases of Note —

### Philip Fisher v. Charles Schultz and Worldwide Church of God v. Philadelphia Church of God, Inc.

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

#### Copyright - Abstraction-Filtration Test

**"Call up the barristers, Watson, the game's afoot!"**

*Philip Condon Fisher v. United Feature Syndicate, Scripps Company; Charles Schultz; CBS; News America Publishing; Kellogg Company; General Electric; Capital Cities/ABC, Inc.; CNN etc. & etc. including a whole passel of other folks to add up to 41 defendants including incredibly Tyson Chicken.*

US Court of Appeals (10th Cir.) 2000 U.S. App. LEXIS 1749 (Feb. 7, 2000).

**Philip Fisher** owns a comic strip character named "Chipper" — a "chicken" (meaning yellow streak down his back) dog detective. Apparently (I've never seen the strip) Chipper dresses in Sherlock Holmes attire with deerstalker cap, Inverness cape and horn shaped pipe.

*Inverness cape (Webster): overcoat with a long, removable, sleeveless cape.*

*The "chicken" part is important as you will find when you breathlessly read all the way to the final paragraph.*

**Charles Schultz** and a raft of producer and advertising folks (hence all the defendants) put together "It's A Mystery Charlie Brown" with Snoopy decked out à la Holmes.

The case was dismissed under Fed.R.Civ.P.12(b)(6) motion to dismiss for failure to state a claim for which relief may be granted. The Tenth Circuit affirmed.

#### Copyright

You can directly prove copying, I guess, with a video of Schultz tracing over Chipper as he composes Peanuts.

Or, you can indirectly prove copying by showing Shultz had access to Chipper and there is a substantial similarity between Chipper and Snoopy qua Holmes.

The "abstraction-filtration-comparison" test is used to determine substantial similarity. *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1284-85 (10th Cir. 1996). You separate ideas from expression (abstraction); filter out the ideas (filtration); compare what remains to the work that was supposed to have been copied (comparison).

*Got that?*

Copyright protects only the expression of an idea and not the idea itself. *Autoskill Inc. v. National Educ. Support Sys., Inc.*, 994 F.2d 1476, 1491 (10th Cir. 1993). So we take out the ideas and compare the residue to Snoopy minus its ideas.

*Now it's clear. Right?*

And we apply the "reasonable person" standard. Would a reasonable you or me type goof conclude that there was some serious copying of expression going on?

#### Okay, Now Let's Compare

Fisher said both Snoopy and Chipper were both cowardly detectives which makes for substantial similarity.

Snoopy appeared in 1950, Chipper not until 1974. During the 24 pre-Chipper years, Snoopy appeared in multiple guises, one of

which, in 1962, was Holmes. Chipper is a "humanized" dog, while Snoopy is always a dog. Snoopy doesn't talk aloud, and he's Charlie Brown's pet.

Fisher said Snoopy appearing "cowardly" in "It's A Mystery" was a departure from the normal heroic Snoopy and thus evidence of copying. The Court found instead, that Snoopy in whatever role he plays has "bravado" but is neither particularly heroic nor cowardly.

*Yes, I looked up "bravado." Webster says it means "pretended courage or defiant confidence where there is really little or none."*



#### Scènes à faire

Copyright is there to protect the original. 17 U.S.C. §102(a). Original means created independently and having that *Feistian* minimal degree of creativity. The Irish cop, the absent-minded professor, and the hooker with the heart of gold are stock characters and not protected. *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9F.3d 823,838 (10th Cir. 1993).

#### Fisher v. Tyson Foods

*You're thinking, what? Another Clinton scandal?*

*Wrong.*

Tyson has the phrase "Chick 'N Chippers" on a food product. Fisher said this infringes "Chicken Chipper," his chicken dog detective.

*And what about chicken dogs themselves, those ersatz hot dogs found in all stores?*

At any rate, this intriguing claim got bounced because he failed to allege Tyson had access to his comic strip, which seems like a neglige error in the pleadings, but he never corrected it. Fisher brought this action pro se and predictably got ensnared in the marvelous complexities of judicial procedure.

#### Copyright - Suppression of Facts or Right to Shut Up?

*Worldwide Church of God v. Philadelphia Church of God, Inc.*, US Court of Appeals (9th Cir.), 2000 U.S. App. LEXIS 23390 (Sept. 18, 2000).

Herbert Armstrong founded the **Worldwide Church of God** (Worldwide) in 1934 and ran it until his death at age 92 in 1985. He wrote 3,000 articles for the church magazine, *The Plain Truth*, and a 380-page book, *Mystery of the Ages* (Mystery). All were copyrighted by **Worldwide**, a non-profit religious organization.

After Armstrong's death, the church backed away from the doctrine espoused in the book *Mystery* based on changed attitudes about divorce, remarriage, divine healing and relationship of the races. **Worldwide** stopped distributing the book, but never attempted to destroy copies held by libraries or those in the hands of private individuals.

*Well, duh.*

The change in doctrinal views provoked a schism with a resulting splinter church, **The Philadelphia Church of God**, (Philly) run

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by “defrocked” WCG ministers.

*No, it has nothing to do with W.C. Field's favorite town and the home of the Philly cheese steak. Remember, Philadelphia means “brotherly love.”*

The **Philly** folks see the *Mystery* book as divinely inspired and essential for a true understanding of the *Bible*. They were determined to keep on using it, and began copying it verbatim except for leaving off “Worldwide” on the copyright page.

Worldwide sued.

### So Who Owns It?

**Armstrong** left his entire estate to Worldwide, and copyright may pass under a will. 17 U.S.C. §201.

**Philly** said Armstrong granted a nonexclusive implied license for *Mystery* to be used by all those who valued its message. Thus **Worldwide** took under the estate, subject to that prior license for all to use the book.

An implied license may be implied orally or by conduct. *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990). But Philly's only evidence was that Armstrong wanted the widest audience possible for the book, not that he granted them a license or intended anyone other than Worldwide to have the right to reprint the book in its entirety.

### How About Fair Use?

The District Court found that Philly's use for non-profit religious and education purposes—including the copying of a complete religious text—was a fair one.

The Appeals Court found to the contrary that Congress had allowed only a narrow religious privilege, that being “performance of a ... literary or musical work ... or display of a work, in the course of services at a place of worship or other religious assembly.” 17 U.S.C. §110(3). And Philly was outside this. *see F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 1982 U.S. App. LEXIS 20700 (7th Cir.) (“F.E.L. can prevent churches from copying or publishing its copyrighted works, even if the churches only intend to use the copies or publications at not-for-profit religious services ... Neither the religious element nor the non-profit element of a performance will protect illegal copying or publishing.”)

### So How About Free Speech?

*I've never understood why lawyers like to pitch this in. The First Amendment addresses government suppression of speech. So I guess the idea is copyright law is government enacted and works as a suppression if Philly can't copy the book.*

*The Court did have some interesting public policy pronouncements to make though.*

The public's interest in the free flow of information is protected by there being no copyright protection for facts. It would serve no purpose to allow piracy of a work simply because it was of public importance. *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985).

*And here's a curious thought in our loud-mouth global media age.*

“Moreover, freedom of thought and expression ‘includes both the right to speak freely and the right to refrain from speaking at all.’” *Id.* 471 U.S. at 559 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

Remember, **Worldwide** wants *Mystery* out of circulation. **Philly** thinks people need to read the book, and no one is printing it.

The Copyright Act seeks to encourage the dissemination of creative works. A balance is sought between author and public's rights. The author can exploit the work during the term of copyright, but the term is limited so the public will ultimately freely get its hands on the work.

“But nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright.” *Stewart v. Abend*, 495 U.S. 207, 228-229 (1990).

## Dissent


The dissent took up this right to not speak issue. It argued that the whole fair use doctrine turns on the potential commercial impact of a copied product on the original. In this case, however, Worldwide has not reprinted *Mystery* since 1988 and shows no evidence of intending to reprint it.

**Worldwide** considers the book “racist” while **Philly** feels it is divinely inspired. It's hard to impossible to abstract-filter fact from expression in a religious work.

But the end result is **Philly** is inhibited from “access to ideas without any countervailing benefit.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 450-451 (1984).

*Remember Sony was about home video-copying of t.v. shows and viewing them at a different time. Assuming there was something important on t.v. (!), the public was benefited by time-shifting to be able to watch the shows and not having them obliterated.*

The right to refrain from speaking does not “suggest that this right not to speak would sanction an abuse of the copyright owner's monopoly as an instrument to suppress facts.” *Harper & Row*, 471 U.S. at 559

*Hmmm. Kind of a thought-provoker.* 

## Legally Speaking — Publishing The Law: The Origins Of Legal Publishing

by **Bryan M. Carson, J.D., M.I.L.S.** (Coordinator of Reference and Instructional Services, Western Kentucky University Libraries / Warren County Law Library, 1 Big Red Way, Bowling Green, Kentucky 42101; Ph: 270-745-5007; Fax: 270-745-2275) <bryan.carson@wku.edu>

In today's world, we don't even think twice about being able to find the law. Law is all around us, published by governments, publishing companies, Bar Associations, and even libraries. The Internet and legal databases have greatly expanded our ability to find the law. In some ways, it seems as if we are drowning in laws. However, think about what the alternative is like. If we couldn't easily find the law, it would be much easier for dictatorships to be established. Instead, every citizen in our nation has access in some fashion to the published law, either through a library or on the Web. As a result, people can easily find out what the law is.

A much-quoted (and often mis-quoted) line from Shakespeare's play *Henry VI* explains it all. In order to establish a dictatorship, a character named Dick says, “The first thing we do, let's kill all the lawyers.”<sup>1</sup> A few

lines later, a character named Cade asks of a clerk, “Dost thou use to write thy name? Or hast thou a mark to thyself, like a honest plain-dealing man. . . .”<sup>2</sup>

The moral of Shakespeare's play is that lawyers, literacy, and knowledge of the law are the basic components of our freedom. Take a moment to imagine what life would be like if we didn't have laws that were available to the public, and libraries to house these laws. Without publishers and libraries, our society would be totally different.

The history of legal publishing covers a lot of ground, so I will discuss the topic in two columns. Before looking at modern law, I will discuss law in the ancient world. In the next issue, I will discuss how modern law and legal publishing have been influenced by these ancient principles.

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