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Questions & Answers -- Copyright Column

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Questions & Answers — Copyright Column

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QUESTION: *The library in a non-profit garden and sculpture park has a children's garden. During certain exhibits the library arranges story times for children that relate to the exhibits. Story times may take place in the library or elsewhere in the gardens. The books used are either owned by the library or borrowed from nearby public libraries, and the stories are read by volunteers on the weekends of the exhibits. Sometimes, the stories are "re-told" rather than a direct reading. There is an admission fee to enter the Gardens but no fee just for the story time. Do story times create a copyright problem?*

ANSWER: Good news! Assuming that the storytellers are not paid and there is no admission charge to see or hear the performance (which is what a reading or story telling is under copyright), then the reading of that nondramatic literary work is exempted under section 110(4) as a nonprofit performance. But if performers or promoters are paid, the exemption is lost. Further, if there is an admission charge for the story time, the proceeds would have to go for charitable purposes in order to take advantage of the exemption.

QUESTION: *An institution has an online subscription to a journal but not to the print version, and there is a 12 month embargo before issues appear in the online product. For interlibrary loan purposes, does the library "own" those issues that have not yet appeared online or must it pay royalties for articles acquired via ILL from that journal during the embargo period.*

ANSWER: The CONTU Interlibrary Loan Guidelines were written in 1976, and naturally did not envision this situation. ILL assumes that the borrowing library is obtaining materials that will be lent (they are original volumes) or given to the patron if the copies are photocopies or other reproductions of the copyrighted works. The Guidelines indicate that if the library has the title on order or owns the work but it is missing from the collection, an ILL request need not be counted in the suggestion of five and would not generate the need to pay royalties. However, in this situation the library neither owns the work nor has a subscription to it; instead, the subscription is for 12 months hence and not for the current material. Therefore, the library must count ILL requests for articles in the embargoed issues within its suggestion of five and pay royalties when it exceeds the suggestion.

QUESTION: *Teachers constantly ask*

a media specialist in a middle school about reproducing workbook pages and literary texts. It is difficult to explain why this is problematic since the school is poorly funded and serves primarily students from immigrant families. To conduct the English as a Second Language courses, the teachers have relied on photocopied stories from other books as the school cannot afford to buy classroom copies of stories for this particular group of students. The school is now discouraging this type of copying using the justification that the copying of texts fails to teach the children the importance of avoiding plagiarism. Unfortunately, this logic seems to ignore the sad fact that unless the children learn to read, they will never be able to appreciate plagiarism for good or evil. Why is it wrong to assist immigrant children by copying stories to help them learn to read?

ANSWER: While the described situation seems grossly unfair, from a moral perspective, from a copyright perspective, the only possible excuse for such copying is fair use, and whether the copying is fair use is not quite so clear. The Guidelines on Multiple Copying for Classroom Use were negotiated by publishers, authors and educational associations in 1976. They were presented to Congress and published in the House Report that accompanied the 1976 Copyright Act as H.R. 94-1476. They are not the law, but have a pretty good stamp of Congress on them. Further, they have been cited with approval by several courts. The Guidelines really provide a safe harbor, so even if the copying for students exceeds the limitations contained in the Guidelines, a court might still find that the use is a fair use. One would apply the four fair use factors in order to try to determine whether the use is fair.

The Guidelines do state that no copying from workbooks, standardized tests, etc., is permitted because these works are meant to be consumed. Schools are supposed to purchase one copy for each student who is using the workbook. While this is very difficult for many school districts, consider the market for workbooks. A publisher has only one market for workbooks, and that is schools. Therefore, the effect of such copying on the market is that the copies substitute for the purchase of a workbook. This is not to say that single copies of very small portions of a workbook might not be fair use, but multiple copying of workbooks,

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Copyright — Those Very Straightforward Termination Rights

by **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

Clare Milne v. Stephen Slesinger, Inc., United States Court of Appeals for the Ninth Circuit, 2005 U.S. App. LEXIS 26853 (2005).

A.A. Milne created **Winnie-the-Pooh**, **Eeyore**, **Piglet** and the rest of the menagerie of the hundred acre wood back in the 1920s. These were copyrighted under the 1909 Copyright Act in the year 1928 and renewed under that Act in 1956.

The 1909 Act was due to complaints by **Mark Twain** et al. of authors outliving their copyright. It extended the renewal period from 14 to 28 years for a max of 56 years. This would have given the **Pooh** characters protection up to 1984 (1928 + 56 = 1984).

See, I can do math. But I'm still grateful it wasn't on the LSAT.

Charmed by the stories of **Pooh Corner**, cartoonist/entrepreneur **Stephen Slesinger** hopped a boat for England and contracted with **Milne** for exclusive merchandising rights in the U.S.

Milne died in 1956 leaving all beneficial interests in **Pooh** works to a trust benefitting his widow, and after her death to his son Christopher and his sole grandchild **Clare**.

Yes, Chris was the Christopher Robin of the stories and he was viciously bullied through his British boarding school years as a result.

Slesinger created **Stephen Slesinger, Inc.** (SSI), conveyed his interests to that corpora-

tion which in turn granted all rights to **Walt Disney Productions** in 1961. Remember, SSI is merchandising of **Pooh** dolls etc. The widow and the **Pooh Property Trust** separately granted **Disney** movie rights.

In 1971, the widow died, and her interest went to the **Pooh Property Trust** which then held **Milne's** copyright interest in **Pooh** and royalties from the **Milne-Disney** agreement.

Along comes 1976 and a new Copyright Act. The fixed-term plus a renewal term was eliminated. Now there was a single term of author's life plus 50 years. 17 U.S.C. § 302(a). But what about the prior works under the 1909 Act?

Despite that 1976 date, works published or registered before **January 1, 1978** got a maximum of 75 years from date of publication or 100 years from date of creation, whichever was less. 17 U.S.C. § 303.

And, to allow author or heirs to cash in on the change, the Act allowed them to terminate a grant of rights made prior to Jan. 1, 1978. 17 U.S.C. § 304(c). Faced with that horror, **Disney** proposed a renegotiation, and the Trust emerged with a much better deal, to wit: a net gain of hundreds of millions with **Clare** getting the lion's share.

This was hammered out in 1983 which is key to the case.

Then **Clinton** and the Congress signed off on the Copyright Term Extension Act of 1998 (CTEA).

This was allegedly done to satisfy the dying wishes of Sonny Bono and to harmonize with the European Union. Although there are those who believe it to be grotesque pandering to Disney lobbying.

Copyright was now life of the author plus 70 years and all previously granted copyrights were extended to a max of 95 years.

CTEA re-recognized the right of termination provided for under the 1976 Act.

With the passage of CTEA, **Clare** set out to terminate SSI's interest and shove the whole thing over to **Disney**. **Clare** and the ever-helpful **Disney** went to court seeking a declaration that her termination was valid. But the district court ruled to the contrary.

Understand that **Clare** got the benefits of CTEA's copyright extension to 95 years. She was trying to use the re-stated right of termination to cut out SSI and get a still-better deal with **Disney** for that share.

CTEA and Right of Termination

Well, what does CTEA say on the subject?

"... where the author or owner of the termination right has not previously exercised such termination right, the ... grant of a transfer ... of the renewal copyright ... executed before January 1, 1978 ... is subject to termination ..." 17 U.S.C. § 304(d).

Yes, it says transfers executed before January 1, 1978. And **Clare** terminated the 1930 grant in 1983. No pre-1978 grant was in existence when **Clare** went to court.

The rationale of termination was to aid authors who had little bargaining power at the time of the first contract. When the fabulous work reaped big bucks in the marketplace, the author or his heirs could renegotiate the deal. And this was precisely what was done by the **Pooh Trust** in 1983.

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even for immigrant children, likely is not, in this instance. Perhaps the school can obtain permission from the copyright holders to permit the copying.

QUESTION: Have the courts defined "distance education?" Does the Copyright Act or any related case law indicate that course management programs are considered to be a part of the classroom?

ANSWER: To my knowledge there have been no cases dealing with distance education and copyright. The statute does not define distance education but section 110(2) uses an expansive description to include courses and sessions offered at a distance by an accredited nonprofit educational institution or government agency as well as online instruction and online portions of traditional face-to-face courses. So, course management programs are not part of the face-to-face classroom covered under section 110(1) but instead are online portions of a face-to-face course, and thus are covered under section 110(2).

Copyright — Ka-Zaa Pirates and When "Learning your Lesson" is Not Enough

BMG Music, et al., v. Cecilia Gonzales, United States Court of Appeals for the Seventh Circuit, 2005 U.S. App. LEXIS 26903 (2005).

Primary infringer **Gonzales** claimed her use of **KaZaa** file-sharing network was fair use. She claimed to be sampling the 1,370 songs she down-loaded onto her computer and kept there until she was caught. She also claimed to already own or later purchase many of the songs in that big bunch. But at least 30 she admits to never owning.

The district court slapped her with \$22,500 in damages and an injunction against future downloading. The Seventh Circuit gave a hearty affirmation.

The court held this is not time-shifting à la Betamax with a single use just at a different time — but a direct substitute for a song not pur-

chased in the store. See William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 117-22 (2003).

Gonzales focused on the fourth element of fair use, the impact on the market for the songs. She says her try-before-you-buy behavior is great advertising for the product and enhances its market value. The case law holds to the contrary with empirical support showing a 30% drop in music sales as file sharing became widespread. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014-19 (9th Cir. 2001). See also *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y.2000) (holding that downloads are not fair use even if the downloader already owns one purchased copy).

All 1,370 downloads are violations. Sell-

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