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Cases of Note -- Copyright -- Those Very Straightfoward Termination Rights

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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 (1984 - 1928 = 56).

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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ing CDs is not the sole interest of the authors. They also make money from radio when no one buys the music on CD. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

Statutory Damages

Statutory Damages under 17 U.S.C. § 504(c)(1) per infringed work is “a sum of not less than \$750 or more than \$30,000 as the court considers just.” But if the infringer can convince the court she was unaware of her sins, damages can be reduced to “not less than \$200.” 17 U.S.C. § 504(c)(2). **Gonzales** asked for the \$200 amount.

But that takes us to § 402(d) which says: “If a notice of copyright ... appears on the

published phonorecord ... to which a defendant ... had access, then no weight shall be given to such a defendant’s interposition of a defense based on innocent infringement ...”

Gonzales downloaded data without copyright notices, but she had access to CDs bearing the notice. She may not slip the noose because prior infringers in the chain failed to put copyright notices on the works.

But what about the right to a jury trial?

BMG cleverly asked only for \$750, eliminating any question of fact for a jury. See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). *Feltner* holds that a suit for statutory damages is one at law permitting the defendant to demand a jury trial. But by going with the bottom “not less than” amount, **BMG** eliminated a jury’s role and allowed for summary judgement.

Gonzales focused on: “The right to a jury

trial includes the right to have a jury determine the amount of statutory damages.” *Id.* at 353. She seemed to feel a jury of her file-pilfering peers should be able to nullify the statute and send the author home empty-handed.

Defendants in copyright cases do not have some absolute right to ask jurors to “return verdicts in the teeth of the law.”

Okay, I’m sorry. Are you satisfied now?

Gonzales said she had “learned her lesson” and dropped her broadband access to the internet. She didn’t need the injunction.

Her laying off pirating for a while does not make the issue moot. The injunction is appropriate to make sure she doesn’t jump back into the free-booting once things die down. See *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). 🐱

Adventures in Librarianship — Self Improvement

by **Ned Kraft** (Ralph J. Bunche Library, U.S. Department of State) <kraftno@state.gov>

“Good evening, class. Welcome to ‘Self Improvement for Librarians.’ I’m your instructor, **Mary Marshall**. Our first lesson is probably our most exciting, and I suspect it’s the reason most of you signed up for the class. Who hasn’t fanaticized about being able to impress our bosses, our colleagues, and our friends by using insightful quotes from **Melvil Dewey**? Certainly we can do no better than to cite a man so prescient as to accurately predict that the turn of the last century would be known to historians as the ‘Library Age.’”

“I’ve distributed several essays by **Mr. Dewey** and I’d like to start by going around the room and asking each of you to say how you might use a quote in a social or business situation. Please make sure your nametags are visible. **Miss Sartre**?”

“Yes, I think I know exactly what you mean. For instance, if I was a hostess at a small party and I forgot to get any food or drinks, I could tell people as they walked in the door ‘If any such omission occurs, it is unintentional.’”

“Well, that’s perhaps not quite the best use of a Dewey phrase. **Mr.... Ranjaksiminee**, can you think of something?”

“Well, ah. Okay, if... if you were maybe talking to your boss about a raise or something

you might say “We live now not in the age of the reservoir but in the age of the fountain.”

“Alright. And by that you would mean...”

“Well, like, maybe, give me more money.”

“Okay. Okay. That might work, but let’s try someone else. **Miss Billingsworthy**?”

“Sure! Let’s say I’m with my boyfriend and we are once again for the zillionth time *discussing* our so-called engagement while sitting in his car outside my apartment building. I might turn to him with a real ‘don’t-mess-with-me’ look and say, ‘The solution of our difficulties lies in recognition by the State that public libraries are not only good things, but that they are an absolutely necessary part of our educational system.’ See what I mean? I am the public library and *he* is the State. It’s metaphorical!”

“You’re right about that, **Miss Billingsworthy**. That would be metaphorical. Moving on... **Mr. Franklin**, care to contribute?”

“Me?”

“Yes, **Mr. Franklin**. Don’t be shy.”

“Alright, well, if I... let’s say that maybe I didn’t pick up her dry cleaning on the way home from work and my mother... let’s say my

mother was angry about that and wouldn’t stop talking about it and maybe I could say to her ‘Let us dwell on what has been well done, not on what has been omitted,’ or, or something like that.”

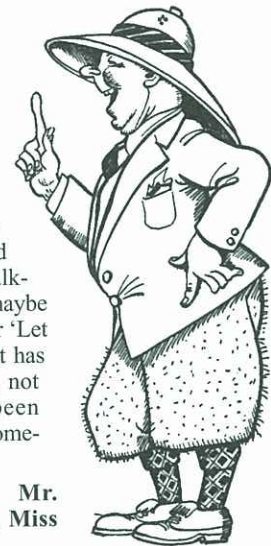
“Excellent, **Mr. Franklin**! Yes, **Miss Sartre**?”

“I think I get it now. If I was at a party and I met an astrological scientist or something and I wanted to make a good impression, I might say ‘Space is the only requisite and if the shelf room is exhausted, the floor space is equally good, except for the inconvenience of stooping.’”

“Well, that’s not quite...”

“Or if I met someone who talked a different language, I could say ‘Translations are classed with their originals.’”

“Class, why don’t we take a short break and gather our thoughts.” 🐱



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formation on books, conferences, and journals. www.cognizantcommunications.com/filecabinet

Also received another gem in the mail, this time a small booklet called **On Literary Biography: Twenty-one Statements** (DLB, 2005), published by **Bruccoli Clark Layman**. A charming little compilation. My favorite so far is: “Literary biography requires no justifi-

cation. It stems from basic interests and basic needs. Literature is about people, and it appeals to readers who wish to know about people, their values, their motivations, their backgrounds and their interactions ...” **Richard Layman** (p.11)

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