November 2008

Questions & Answers -- Copyright Column

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Recommended Citation

Gasaway, Laura N. (2008) "Questions & Answers -- Copyright Column," *Against the Grain*: Vol. 20: Iss. 5, Article 27.

DOI: <https://doi.org/10.7771/2380-176X.5205>

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of the grant may be effected notwithstanding any agreement to the contrary.” 17 U.S.C. § 304(c)(5).

This is the inalienable right idea.

The Second Circuit said don’t read this too broadly.

Steinbeck heirs cited *Marvel Characters, Inc. v. Simon*, 310 F.3d 280 (2d Cir. 2002) in which the author was “coerced” into recharacterizing an existing work as one “made for hire.” The after-the-fact relabeling eliminated an author’s termination right, and this was an example of the “agreement to the contrary” the *Act* proscribed.

True, but the 1994 contract terminated and superseded the 1938 one and also eliminated the termination rights under the 1938 one. See *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1046 (9th Cir. 2005)(post-1978 agreement superseding pre-1978 agreement was of “the type expressly contemplated and endorsed by Congress” because heirs could renegotiate with full knowledge of market value of the works), *cert. denied*, 548 U.S. 904 (2006).

The *Act* does not suggest the author of heirs should have more than one shot at renegotiation. Elaine used and exhausted the single opportunity. See *Milne*, 430 F.3d at 1046.

This is not too terribly hard to follow. What presents a difficulty is the Marvel case. A dispute between Simon and Marvel erupted over who created Captain America. This resulted in litigation and Simon agreeing to a settlement in which he acknowledged it as a work for hire.

No one had greater bargaining power. They were each represented by counsel. Simon could have gone to trial, but he chose to settle. There was no “coercion” in it.

I could see the result of “agreement to the contrary” if he had been clinging to a wretched job as cartoonist and agreed to give up his copyright in previously published work to keep his paycheck coming.

The case turns on equitable estoppel which is too weighty a topic for us to tackle at this point. 🐼

Something to Think About from page 66

but a way to convince people they were working for a team in the factories with a focused goal and a greater team, the USA with a far bigger picture of the world. Articles on inter-factory sports, new designs, plane part improvements, families, awards, deaths, imprisonments, testing successes and much more were the heart and soul of the papers and a

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QUESTION: *A new faculty member at a state college (A) wants to place several articles on reserve in the library for her class. She accessed these articles through full-text databases at the library of the major state university (B) where she is enrolled as a graduate student. The faculty member has asked if she can send a PDF from (B)’s databases to the library staff at (A) to be placed on e-reserve. In the alternative, may she make paper copies that could then be scanned for e-reserve as long as she signs (A)’s agreement to seek copyright permission?*

ANSWER: This database of full-text articles are licensed to (B), and the use is probably restricted to (B)’s own faculty, staff and students. Although (A)’s new faculty member is also a student at (B), and therefore has access as a student for her own research and study, duplicating the articles in any format and putting them on either print or e-reserve at (A) likely is infringement. There is some possibility that (A), as an institution in the state system, is covered under the same license agreement, but not definitely so. This is a matter of contract law rather than of copyright. Whether the faculty member makes paper copies from the database or sends a PDF file, the issue is the same. The copying to put articles on reserve in another institution likely violates the (B)’s database license agreement.

QUESTION: *How long are libraries required to keep interlibrary loan paperwork? What must be retained? Lending records, borrowing records, what the library has charged or paid?*

ANSWER: Libraries are not required to retain ILL records by law, but Congress appointed a commission (CONTU) to develop ILL guidelines. The CONTU guidelines received serious support from Congress and were published in the Conference Report that accompanied the 1976 Copy-

right Act. The guidelines require that borrowing libraries retain records of titles borrowed for three calendar years. The records need be only by titles requested within each of the three calendar years. There is no requirement to keep payment or charge records.

QUESTION: *A teacher wants to use photographs and other material in a professional presentation for which he is not being paid. Is this the same as an “educational” presentation since it is an employment enhancing activity?*

ANSWER: The Copyright Act does not automatically exempt even educational presentations. The fair use exception sometimes permits use in a nonprofit educational institution for instruction, but not always. Section 110(1) covers classroom performances and displays which is a limitation on the exclusive rights of the copyright holder. Professional presentations may or may not be fair use, but they are not the same as use in a nonprofit educational institution and do not qualify under 110(1). If the presentation is live and no copies are distributed of the images, etc., it may be fair use, but not definitely. Often speakers use images without permission for such presentations and assume that they are fair use, which they may be. If the presentation is to be placed on a Website, then the presenter should remove the copyrighted works or seek permission to use the photographs and other materials.

QUESTION: *A librarian found my “When Works Pass into the Public Domain” chart reproduced on a Website dated 1998 (www.unc.edu/~uncclng/public-d.htm) and asks the following. The chart states that works published before 1923 are now in the public domain. (1) Does it mean that now, in 2008, one can count that date as 1933? (2) If something is published before this date and then the copyright is renewed, does the renewal apply only to publications since the copyright renewal? For example, a U.S. publication dated 1906, is it public domain even if later publications have a renewed copyright notice in them?*

ANSWER: (1) No, it is still 1923 for works first published in the U.S. It will be the end of 2018 before the works from 1923 enter the public domain. (2) The 1906 work is public domain. Even if the 1906 work were renewed for copyright, it would have received only an additional 28 years, so the first term would have expired in 1934. The renewal of 28 years would have expired in 1962, so it is now in the public domain. If new editions of the original 1906 work are published, only the new material gets a new copyright date, and the term for that new material is measured from the publication date of new edition. 🐼

remembrance now of tougher times. When I read the material, I do not believe there is much difference in today’s misery, but I can also see some of the equality and diversity changes that have occurred and wonder if we need to be more proactive in saving this material. I’m dreaming and working toward an eventual grant project to preserve this material on film and digitally. Do you have some resources of your own that are so precious you would grieve at their loss? Is it worth thinking about a way to save it? I believe that gives us all something to think about! 🐼