Against the Grain

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Cases of Note-Copyright

Bruce Strauch
The Citadel, strauchb@citadel.edu

Legally Speaking
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ment of a reasonable risk management (loss control) program involving implementation of security procedures and fire prevention and suppression methodologies. This article has attempted to summarize key issues to consider in the purchase of insurance, as well as basic aspects of implementing an effective loss control system.

Endnotes

1. **Capron Hannay Levine** is a senior underwriter at **Chartis Private Client Group** in New York City. Previously she was with **AXA Art Insurance Corp.** and **Chubb Insurance**. A 2004 graduate of **Mount Holyoke College** in History of Art, she is experienced in underwriting private and institutional art collections. She can be contacted at <Capron.Levine@chartisinsurance.com>. The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of **Chartis**.

2. **Sarah Duxbury**, "Insurance Costs Slam Museums," San Francisco Business Times, January 14, 2007, available at *http://www.bizjournals.com/sanfrancisco/stories/2007/01/15/story1.html?page=all.*

3. Donors generally prefer to donate money for acquisitions or expansion projects rather than for operating costs such as insurance.

4. See ***Bill West v. Huntington T. Block Insurance***, No. 91 Civ. 6733, 1994 U.S. Dist. LEXIS 8022 (S.D.N.Y. 1994) (dispute over amount of coverage under policy after private art collection stolen).

5. e.g., ***In re Messervey Trust***, 2001 Tex. App. LEXIS 430 (4th Dist. 2001) (insurer denied claim for stolen art collection because insured attempted to recover for more items than he actually owned).

6. **Robert K. Wittman**, *Priceless: How I Went Undercover to Rescue the World's Stolen Treasures* (Random House/Crown: 2010) at page 94.

7. Generally speaking, only gas-based or water-based automatic fire suppression systems are suitable for protecting cultural properties. Note that gas systems are only suitable for protecting the contents of a tightly-sealed room that can contain the gas once it is discharged. Up until ten years ago "Halon" was the only gas available that was "safe" for use around people and collections. Halon was found to cause serious damage to the environment, however, so further production has been banned worldwide. Several replacement gases have been developed and are available (FM 200, Inergen, FE 13, etc.). In the event that a water-based system is used, there are three types of automatic sprinkler systems: Wet-pipe systems, Pre-action systems, and Dry-pipe systems. Each has a control valve where the system can be turned off and a water flow alarm that activates once water is moving through the pipes. Note that, for highly-valued and fragile books and manuscripts, use of a water-based system presents separate concerns and risks.

Cases of Note — Copyright

Column Editor: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

Roger Miller Music, Inc.; Mary A. Miller v. Sony/ATV Publishing, LLC, UNITED STATES COURT O F APPEALS FOR THE SIXTH CIRCUIT, 2012 U.S. App. LEXIS 3472 (6th Cir.).

I always have to go to the map and remind myself where the Sixth Circuit lies. In roughly a stack from north to south: Michigan, Ohio, Kentucky, Tennessee. Duh. Tennessee. Nashville. ***Roger Miller****.*

Roger Miller you of course know for "King of the Road," and cornball country songs like "Do-Whacka-Do," "England Swings," "Chug-a-Lug," "You Can't Roller Skate in a Buffalo Herd," et al.

On his Website you can buy t-shirts that say "I'm gonna keep drinking until I look like the picture on my driver's license," and "I've got all the money I need as long as I don't have to eat or buy anything."

Roger — I feel like I can first-name him — assigned copyright and renewal in the 1960s to **Tree Publishing Co.** (later swallowed by **Sony**). In the swap, he got royalties. The songs copyrighted in 1964 came up for renewal in 1993.

Getting ready for this event, **Sony** registered renewal in April, 1992. **Roger** died in Oct. 1992, willing everything to his wife **Mary Miller.** The timeline is important. He died before the renewal of the 1964 songs.

Things rocked along for twelve years with **Sony** exploiting the songs and **Mary** getting royalties. Then she decided she wanted more. In 2004, **Mary** sued **Sony** for damages and a declaration that she owned the renewal to songs from 1958 to 1964.

I don't know why she and her lawyer thought she could get the earliest ones.

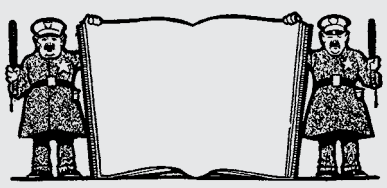
The district court held that **Sony** owned the renewals to the 1958 to '63 songs and had an implied, non-exclusive license to 1964 songs due to **Mary** taking money for twelve years without objection.

If you're confused at this point, remember that the 1976 revision of copyright became law in 1978. That gave us the life of the author plus 70 years rule. This case deals with songs written in the 1960s which is original term plus renewal term.

Sony Wins on Appeal

Had **Miller** been alive on Jan. 1, 1993, the assignment would have been effective. It would have been ineffective if he had died before 1992. But **Miller** was still living in 1992 when **Sony** applied to register the renewal. **Sony** argued he only had to be alive at the time they applied for it to be effective.

Hmmm? Does that make sense? Let's plough on.



Pre-1978 copyrighted works have an original term of 28 years with a renewal term of 67 years. 17 U.S.C. §§ 304(a)(1)(A), (a)(2)(B). Renewal can be registered at any point of the final year of the original term or at any time within the renewal term. But if you do nothing and don't register, it renews automatically at the start of the renewal term. *Id.* § 304(a)(3)(B).

This last bit is the result of the ***Copyright Renewal Act of 1992***. Prior to that, failure to register resulted in the work entering the public domain. Which was not good.

If you don't apply for renewal, it doesn't go to the public, BUT — and this is a big but — it vests in a hierarchy of people under paragraph (1)(C):

1. author
2. widow, widower, children
3. executor if no widow, widower, children alive
4. next of kin if no will.

Why is this?

The ***Act*** made the original and renewal copyrights distinct legal interests. This was to aid the desperate artist bargaining feebly with heavyweight publishers. If he became successful, he could bargain from strength on the renewal. ***Stewart v. Abend,*** 495 U.S. 207, 218-19 (1990). Likewise the family if he was successful but dead. *Id.* at 218.

But of course those burly book/music publishers know this and while the author is weak will muscle him into assigning the renewal rights. ***Miller Music Corp. v. Charles N. Daniels, Inc.,*** 362 U.S. 373, 375 (1960). As with **Sony.**

But — and this is another big BUT — he only has a contingency interest in the renewal until the date arrives. *Id.* at 375-78. If he croaks before the magic date, the interest flips to the statutory successors without regard to the author having assigned the renewal. *Id.* at 375.

An assignee stands in the shoes of the assignor and has no more rights than the assignor possessed. ***Moutsopoulos v. Am. Mut. Ins. Co.,*** 607 F.2d 1185, 1189 (7th Cir. 1979). Renewal is contingent in the author because if he dies before renewal time, ownership flips to the (1)(C) people. So it's also contingent in **Sony.**

But what about the Application for Renewal Business?

The author is the first of the (1)(C) hierarchy. **Sony** applied for renewal the same as **Miller** might have. And as he was still alive, the right of the renewal would vest in him at renewal date and was by contract assigned to **Sony**. The class closed with the renewal application, shutting out all the other relatives. And **Sony** takes it all.

Life lessons: If you want to be really nice to your heirs and maximize their haul, get famous and then drop dead before the renewal application.