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Cases of Note: Copyright --Revisiting 1909

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LEGAL ISSUES

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Cases of Note — Copyright – Revisiting 1909

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

Twin Books Corporation v. The Walt Disney Company; Buena Vista Home Video, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 83 F.3D 1162; 1996 U.S. App. LEXIS 11462.

Bambi was not an original creation of **Walt Disney**. Rather it was a book, *Bambi, A Life in the Woods,* written by an Austrian named **Felix Salten** and published in Germany in 1923. It contained no notice to the world of his copyright. By 1926, he woke up and republished, this time with a notice of U.S. copyright. He registered in the U.S. in 1927.

In 1936, **Salten** and publisher assigned certain rights to **Sidney Franklin** who assigned it to **Walt Disney**. The animated film became a huge hit in 1942 and has been re-released seven times. And there was a huge back-end of toys and video cassettes.

Salten died in 1945. His daughter and heir, **Anna Salten Wyler**, renewed copyright in 1954. She then negotiated three contracts with **Disney** concerning her rights. When she died, her husband and children assigned all to **Twin Books**.

A dispute erupted, and everyone sued and moved for summary judgment. The district court agreed with **Disney** that *Bambi* was in the public domain.

Yes, that dreadful ***1909 Copyright Act*** was in effect. **Disney** won, but of course there was an appeal.

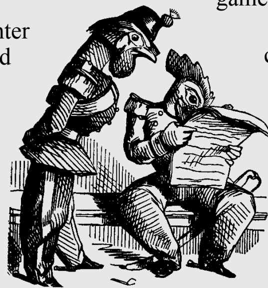
1909 Act

The ***1909 Act***, 17 U.S.C. §§ 1, *et seq.* (superseded in 1976) gave an unpublished work state common law copyright protection from time of creation to publication or registration under the federal scheme. After publication, you could acquire federal protection. Failing in this, it was thrown irrevocably into the public domain.

The ***Act*** gave the author 28 years of protection, with renewal right of another 28 years.

1923 Pub

The German publication failed to meet the ***Act's*** requirements by not giving notice that U.S. protection was sought. It did, however, prevent it from falling into the public domain in Germany. But **Disney** contends it was fair game in the U.S.



The ***1909 Act*** required a valid copyright notice. *Nimmer on Copyright § 7.02(C)(1). See, e.g.,* ***LaCienega Music Co. v. ZZ Top,*** 53 F.3d 950 (9th Cir.)(1995).

But there's still hope for the ***Salten*** *assignees.*

Nimmer tells us that a published work by a foreign author published in a foreign language in a foreign country may give us a different result in the U.S. It has never been settled by judicial determination. *Nimmer,* at § 7.12(D)(2)(a).

Early cases held it would be public domain. ***Universal Film Mfg. Co. v. Copperman,*** 212 F. 301 (S.D.N.Y.)(1914).

But in ***United Dictionary Co. v. G. & C. Merriam Co.,*** 208 U.S. 260 (1908) the Supreme Court held that Congress did not intend copyright law to have extraterritorial effect.

This was followed by ***EEOC v. Arabian Am. Oil Co.,*** 499 U.S. 244, 248 (1991) which held it's a "longstanding principle of American law" that our laws only apply within the U.S. unless Congress shows a contrary intent.

Heim v. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946) held a song published in Hungary without a U.S. notice but with a subsequent U.S. filing was okay.

Twin Books argues that since the 1909 Act had no extraterritorial effect, the 1923 German publication did not throw *Bambi* into U.S. public domain. And the Ninth Circuit found this to be right on point with *Heim.*

U.S. protection was not secured until 1926 when it was published with a U.S. copyright notice. During 1923, '24, '25, anyone could have published it in the U.S. or made a derivative movie.

Disney then argued that copyright was up and running from 1923, and the failure to renew in 1951 (within 28 years) dropped the book into U.S. public domain. But since protection didn't begin until 1926, the 1954 renewal was timely.

So **Twin Books** walks away with it.

Questions & Answers — Copyright Column

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QUESTION: Why are more books not available electronically? Are publishers concerned about copyright infringement for eBooks?

ANSWER: There are many reasons that not all books are available digitally. More and more works are digitized everyday and publishers are seeing the value of making their backlists available for print-on-demand. Many works are being published originally as eBooks, either with or without a printed version introduced simultaneously. Authors are self-publishing, and some authors are quite successful without the services that publishers have traditionally provided.

Traditional publishers (sometimes called legacy publishers) have many reasons for not offering digital works. It was only seven years ago that **Amazon** introduced the Kindle (2007), and the development of good digital reading devices was essential before eBooks could be widely distributed. Today, electronic publishing is growing by leaps and bounds while printed book publishing is on the decline. There are many reasons that some traditional publishers have been hesitant to make their

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