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# Cases of Note: Sometimes It's Not a Federal Action

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# LEGAL ISSUES



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## Cases of Note — Sometimes it's Not a Federal Action

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**BORDEN V. KATZMAN**, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, 881 F.2d 1035; 1989 U.S. App. LEXIS 12914.

**Dr. Arthur Borden** is an emeritus professor of English at **New College of the University of South Florida**. **Anita Katzman** wrote and published a novel entitled *My Name is Mary*. The book grew out of a 1974 trip to Tahiti where **Katzman** learned of a 19th-century Tahitian Queen, **Pomare IV**.

*My Name is Mary is selling used for \$0.01 on Amazon, and it really has nothing to do with the case. I guess it just establishes she's not a fantasist. She got published before self-publishing appeared on the scene.*

Upon her return, she set to work writing *A Reason to Tarry*. Doing research, she discovered a book written during the time of **Pomare's** rule — **A. J. Moerenhout**, *Voyages aux Iles au Grand Ocean*.

**Borden** and **Katzman** were acquaintances at **New College**. **Katzman** doesn't speak French, and **Borden** offered to translate the book in exchange for \$500 contributed to the **New College** music festival. **Borden** did several other translations as well and assisted in organizing research materials for *A Reason to Tarry*. He was paid for this.

But he hadn't started on *Voyages* yet. **Katzman** had looked at it in the **Library of Congress** and gone back to Tahiti where she searched for a copy of the out-of-print book. And she found it, and **Borden** did the translation.

*Katzman certainly has an enviable lifestyle. Book browsing in Tahiti. But now things get nasty.*

**Borden** — he's an aged prof after all — applied to the Copyright Office to register his translation. And he got a contract with University Press to publish it.

*University Press of Florida serves all the state system. Borden was in the OSS in WWII and was Humanities Division Dean at New College. And old professors always have to get one last pub.*

Upon discovering this, **Katzman** threatened the Press with litigation, claiming a breach of fiduciary duty. She feels it would pre-empt the sales of her book on **Pomare IV**. And Press began dragging its feet on publishing.

*It doesn't say why she didn't claim it a work-for-hire.*

**Borden** filed suit in 1985, asking for a declaratory judgment that she was "without right to threaten suit," alleging copyright infringement or theft of copyright. **Katzman** said this was not a copyright issue, but a fiduciary one. And she counter-claimed, asking he be permanently enjoined from publishing his translation.

The district court held for **Borden**, saying publication rights are the exclusive domain of the **Copyright Act of 1976**. And, as it was a copyright suit, gave **Borden** attorneys' fees and costs — \$21,757.90.

*Boy that must have stung. But they didn't round off that 90¢.*

### And Now We're on Appeal.

The late **Judge Friendly** of the 2d Cir. once remarked a layman might be surprised to learn that an action in which the copyright owner is prevented by a threat of litigation from exercising his rights of ownership is not an action arising under the copyright laws. **T.B. Harms Company v. Eliscu**, 339 F.2d 823, 824 (2d Cir. 1964), cert. denied, 381 (U.S. 915 (1965)).

**Borden** brought suit under the **Declaratory Judgment Act**, but that doesn't confer federal jurisdiction unless there is diversity of states or

a federal question. **Skelly Oil Co. v. Phillips Co.**, 339 U.S. 667 (1950). They both live in Florida, so diversity is out. **Borden** says it falls under the **Copyright Act** because **Katzman** is denying him a right to publish, which is a right of a copyright owner. And that puts them in federal court.

**Katzman** conceded that **Borden** held copyright in the translation. And she has no desire to publish the translation. She's just threatening him if he does.

Federal jurisdiction only applies if she violates his rights by selling or vending the translation.

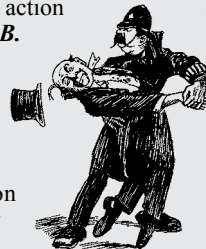
### State Matters.

**Katzman** says she introduced him to the **Moerenhout** book and obtained the copy in Tahiti. **Borden** knew all about *A Reason to Tarry* and that the material in *Voyages* was vital to it. She said this created an implied agreement of confidentiality which he has breached.

Whether they entered a fiduciary relationship is a matter for state courts.

So they reversed and remanded to the district court to vacate the judgment and make **Borden** give **Katzman** her money back.

*I can't find A Reason to Tarry on the Web. Perhaps you'll have more luck. Or perhaps it didn't make the cut "in today's tough fiction market."*



## Questions & Answers — Copyright Column

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**QUESTION:** *The Copyright Compliance officer on a campus is working with the Provost, and they are looking for ways to raise awareness of copyright compliance issues. One idea is to use a copyright quiz for faculty. Is there an authoritative online copyright quiz that the campus could adopt?*

**ANSWER:** By doing a computer search, I located several quizzes posted by educational institutions. How authoritative these may be is unknown. Colleges that have quizzes posted online include **California State University Sacramento** (<http://www.csus.edu/indiv/p/>)

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