February 2017

Questions and Answers-Copyright Column

Laura N. Gassaway

University of North Carolina- Chapel Hill School of Law, laura_gasaway@unc.edu

Follow this and additional works at: <https://docs.lib.purdue.edu/atg>

Part of the [Library and Information Science Commons](#)

Recommended Citation

Gassaway, Laura N. (2017) "Questions and Answers-Copyright Column," *Against the Grain*: Vol. 29: Iss. 1, Article 26.

DOI: <https://doi.org/10.7771/2380-176X.7725>

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.

LEGAL ISSUES

Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>
Bryan M. Carson, J.D., M.I.L.S. (Western Kentucky University) <bryan.carson@wku.edu>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

Cases of Note — Invasion of Privacy, Appropriation

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

BELA GEORGE LUGOSI et al. v. UNIVERSAL PICTURES. 603 P.2d 425 (Cal. 1979)

In 1930, **Bela Lugosi** signed on with **Universal Pictures Company** to play the title role in *Dracula*.

Hope Linniger Lugosi and **Bela George Lugosi**, widow and son of the iconic vampire sued **Universal** in 1966 alleging they were appropriating property which they had inherited. **Universal** was licensing out the rights to the *Dracula* character without family consent.

And boy did they exploit it. Plastic toy pencil sharpeners, plastic model figures, T-shirts and sweat shirts, card games, soap and detergent products, picture puzzles, candy dispensers, masks, kites, belts and belt buckles, and beverage stirring rods.

They actually identified the date of the movie and actor's name. As if anyone could fail to recognize the immortal **Bela, Sr.** The trial court found it was clearly **Bela's** likeness despite **Christopher Lee**, **Lon Chaney** and **John Carradine** having also also played the role.

Lugosi never tried to exploit his image as *Dracula*. Had he done so in a business or whatever he would have impressed the business with a secondary meaning protectable under the law of unfair competition. **Johnston v. 20th Century-Fox Film Corp.** (1947) 187 P.2d 474.

That legal footnote aside, the trial court found that the interest was one of property which could pass to the heirs. They relied on a line of cases which included **Haelan Laboratories v. Topps Chewing Gum** (2d Cir. 1953) 202 F. 866 and **Cepeda v. Swift and Company** (8th Cir. 1969) 415 F.2d 1205.

The Appeal

The appellate court and later the Supreme Court of California relied on **Dean Prosser** who said it was an issue of privacy. **Prosser**, "Privacy" (196) 48 Cal.L.Rev. 383, 406.

Lugosi could have created "... a right of value" in his name or likeness. But he didn't do it.

Had he done so, it would have been protectable during his lifetime under one of the forms of invasion of privacy — Appropriation for the defendant's advantage of the plaintiff's name or likeness.

The injury is loss of potential financial gain, not mental anguish like the other invasions of privacy (intrusion into seclusion, public disclosure of private facts, false light).

Had he built a T-shirt business, sold it, and not spent the money, the money would become part of his estate.

But because the issue is one of invasion of privacy, his right is a personal one which does not extend to family members. **Prosser**, *Law of Torts* (4th ed. 1971) pp. 814-815.

The heirs of **Al Capone**, after his death, sued for an invasion of their privacy due to a movie about him. **Maritote v. Desilu Productions, Inc.** (7th Cir. 1965) 345 F.2d 418 (cert. den. 382 U.S. 883). They claimed his name, likeness and murderous personality did not fall into the public domain upon his death. The court held it was really an invasion of **Alfonse's** privacy, and he was dead. So no luck.

The widow of **Jesse James** sued a film producer for "exploitation of plaintiff's deceased husband's personality and name for commercial purpose." **James v. Screen Gems, Inc.** (1959) 344 P.2d 799. Note that the language of the allegation is the appropriation invasion of privacy which does not survive death.

For some reason, California puts the year first in the citation if that oddity is bothering anyone.

Plaintiff must prove that his privacy has been invaded.

The court found it odd to urge that, because an ancestor did not exploit his publicity for commercial purposes, the right to do so descends to the heirs. If so, how many generations could this descend to?

A concurring opinion notes that **Lugosi** was an actor. He memorized lines written for him and played the role. He neither wrote the novel nor the screenplay. Many others played the role. He had no more right to exclusivity in exploiting it than **George C. Scott** does to **General Patton**.

Should the descendants of **George Washington** be able to sue the Secretary of the Treasury for using his likeness on the dollar bill? And what about **Dolly Madison** cakes?

And just when you think you've learned something ...

In 1985 California passed *The Celebrities Rights Act*.

I'm surprised they didn't call it the Celebrities Bill of Rights.

Anyhoo, if your name, voice, signature, photograph, or likeness has commercial value when you croak, you can pass it to your heirs. It gets 70 years of protection. Twelve other states have done the same. 🐸

Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu> www.unc.edu/~unclng/gasaway.htm

QUESTION: *A high school librarian inquires about a campus-wide freshman reading program initiative and asks whether the school can show a motion picture as a part of this program.*

ANSWER: To show an entire motion picture to the whole school or to all of the freshmen students is a public performance, and the school would need a license for this

continued on page 57

Questions & Answers from page 56

performance. Depending on the movie, it is possible that there would be no royalty fee for the performance. Also, there are public domain motion pictures for which no permission is required. The school should contact a motion picture licensing agency to inquire about a license to perform the movie.

QUESTION: *A university librarian is puzzled about whether the U.S. Copyright Office should become an independent agency or should remain a part of the Library of Congress.*

ANSWER: Not surprisingly, most librarians would like to see the Copyright Office remain a part of the **Library of Congress**. But other members of the copyright community disagree. The first **U.S. Copyright Act** was enacted in 1790, and for many years following the enactment, copyright registrations were approved by clerks of federal district courts upon the filing of a claim by a copyright owner. The **Library of Congress** was established in 1800, but the copyright system was not moved into the Library until 1846 to relieve the burden on the court systems and to give **LC** access to the required deposits of copyrighted works for its collections. For years, a large part of the library's collection was obtained through the copyright registration system. Copyright was moved to the U.S. Patent Office from 1859-70. The **Copyright Act of 1870** reestablished the copyright registration system and deposits of two copies of published works in the **Library of Congress**. (See **Jacob Harper**, *The United States Copyright Office: Nostalgia for the Past, Obstacle for the Future*, 4, AM. UNIV. INTELL. PROP. BRIEF 30 (2013) for a history of the Copyright Office.)

In the mid-1990s there was a proposal to move the Copyright Office to the Department of Commerce which also houses the U.S. Patent and Trademark Office so that all federal intellectual property issues would be governed by one agency. There were many objections to this proposal, primarily that copyright would be completely overshadowed by patent and trademark, and that such a move would change the focus of copyright to purely an economic one.

At the request of Congress, Register **Maria Pallante** wrote a letter proposing the Copyright Office become an independent agency, and there appears to be a good deal of support for this in the greater copyright community. Library associations have opposed the move from the **Library of Congress**, and there have been many blog posts in support of the status quo. (For example, see <http://blogs.library.duke.edu/scholcomm/2016/12/14/where-should-the-copyright-office-live/>). Certainly, there are pros and cons to the proposal. Most librarians understand the benefits of remaining with the **Library of Congress**. Nevertheless, copyright industries, as well as the Register's letter, point to some of the disadvantages remaining a part of **LC**. One of the major problems has been **LC's** inability

to provide necessary information technology upgrades to support a modern copyright registration system. The Register competes with all other **LC** departments for technology upgrades despite its constitutionally mandated responsibility for copyright registration. The Office has often lacked necessary independence to act. Further, libraries and library associations often take positions on copyright matters, the very issues the Office must administer. Some argue that this creates a conflict of interest.

In December, the House Judiciary Committee introduced a policy proposal covering a number of copyright issues and Copyright Office matters. The recommendation is for an independent Copyright Office. It also includes a technology modernization plan for the Office, increasing the autonomy of the Office from **LC**, additional control over its own budget and technology and various other reforms. Public comment on the proposal closes January 31, 2017.

QUESTION: *A photographer asks what has happened in the case against Getty Images filed by photographer Carol Highsmith.*

ANSWER: What began as a very explosive \$1 billion case has pretty much fizzled. **Carol Highsmith** made thousands of her images available to the public through donation to the **Library of Congress**. **Highsmith** learned that **Getty** had more than 18,000 of her images on its website and was selling her photographs and charging people for the use of those images when she received a letter from **Getty** demanding that she pay \$120 for using her own images on her website. She charged that **Getty** was holding itself out as the copyright owner of the photographs and falsely applied watermarks to her images. She sued for copyright misuse and for false removal of copyright information. Further, she said that she never relinquished ownership in the copyrights when she transferred the images to **LC**.

Getty countered that **Highsmith** placed her works into the public domain and therefore had no rights to assert. She replied that she merely intended to create a Creative Commons type of license with access through the **Library of Congress**. **Getty** said that it made a mistake in requesting payment from **Highsmith** which it rectified upon notification. In October 2016, the federal district court agreed with **Getty**, and dismissed her federal copyright claims accepting **Getty's** arguments that public domain

works are regularly commercialized. The two sides settled the remaining minor state law claims under New York law, but the terms of the settlement were not divulged.

QUESTION: *An author asks about the benefits of electronic copyright registration as opposed to paper registration.*

ANSWER: The Copyright Office actually encourages electronic registrations by providing certain benefits over traditional paper registrations. To register a copyright, the owner must send the Office three things: (1) a completed application; (2) the filing fee; and (3) a copy or copies of the best edition of the work (copyright deposit).

The benefits of electronic filing include: (1) a lower filing fee; (2) the ability to pay the fee via a credit card; (3) faster processing time; (4) the ability to track the status of the application online; (5) the ability to upload certain categories of deposits directly; and (6) fewer opportunities to make errors on the application. One wonders when the Copyright Office will no longer accept paper applications.

QUESTION: *A faculty member wants his students to read three chapters from a book and wants to post these chapters individually on Blackboard at different times during the semester. Each chapter would remain on the website only two weeks. Is copyright permission required for this?*

ANSWER: It is likely that no permission is needed for such use. One would consider issues such as the length of the book. In other words, under fair use, one of the considerations is quantity and quality of the portion reproduced. If the book has 30 chapters, then three chapters represent only 10% of the work, a small part of the work. If the book has only five chapters, then three of those chapters represent a large portion and students should be required to purchase the book or the school should pay royalties for reproducing the chapters. Certainly, the school can obtain a license for posting the chapters on Blackboard.

QUESTION: *An elementary school teacher asks if she has permission to use a document or a part of a document for classroom use, must she indicate that she has received permission.*

ANSWER: It is not required that copies reproduced by permission contain a statement that it is reproduced with permission. However, it is a good idea to do so. It points out to everyone that the reproduction is with permission and models this behavior to students. 🐼

Rumors from page 50

ingest diverse library data at higher speed and greater volume. The new service will enable a shift in the way that libraries manage their print and digital collections and in the ways that people access those resources. <https://www.jisc.ac.uk/> and <https://www.oclc.org/>

Tim Whisenant has just been appointed regional vice president for the Western U.S.

at **WT Cox Information Services**. He brings 27 years of expertise to the library community and he began his career as a reference and instruction librarian. **Whisenant** will manage the Western U.S. territory in all library markets including academic, public, and special libraries with a concentration on account management, integrated solutions, and customer service. **WT Cox Information Services** is located at 201 Village Road, Shallotte, NC.

<http://www.wtcox.com>

continued on page 65