Cases of Note-Sundeman v. The Seajay Society, Inc., Shoptalk, Ltd. V. Concorde-New Horizons Corp.

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**Physical Ownership Can Pass Separate From Copyright**


by Bruce Strauch (the Citadel) <strauchb@citadel.edu>

The Marjorie Rawlings Reader and properly sent the manuscripts to the University of Florida Library, the royalties to the Foundation.

**Bingham** died in 1961. **Baskin** took over the full duties of literary executor but worked sloppily. Although knowing Bingham had manuscripts in her home, she never requested them. The Probate Court closed administration of the estate without commenting upon those documents.

The court didn't know they existed because Baskin never listed them as part of the estate.

Bingham's widower allowed the manuscripts to sit around his house until he moved residences and was cleaning out. Figuring they were his, he hired a dealer of rare books and manuscripts to sell them. Among them were various letters, rough drafts and Rawlings' first unpublished novel, *Blood of My Blood*, written in 1928.

**Seajay**, a non-profit dedicated to South Carolina culture — yes, we are hellaciously cultured down here — purchased *Blood of My Blood*. Dr. Anne Blythe, an officer of Seajay, made a copy of the fragile manuscript and sent it to the University of Florida Press inquiring about publishability. A second copy was sent to the Univ of Fla Library. She also presented a paper at a meeting of the Rawlings Society at the U of Fla quoting about four to six percent of the text.

Baskin claimed the manuscript and the Foundation charged Seajay with copyright violation.

Seajay argued it was a good faith purchaser from a dealer in goods of the kind in question. S.C. Code Ann. § 36-2-403(2).

This is actually kind of interesting commercial law. A thief has no title to stolen goods. So when you buy that super bargain out of the trunk of some dude's car in a park-
Questions and Answers — Copyright Column

by Laura N. Gasaway (Director of the Law Library & Professor of Law, CB # 3385, University of North Carolina, Chapel Hill, NC 27599; phone: 919-962-1049; fax: 919-962-1193) <laura_gasaway@unc.edu> http://www.unc.edu/~unelng/gasaway.htm

QUESTION: My former director wrote a “bibliographic/research guide, in “binder” form with another business reference librarian from another university. The guide is used on both campuses. The information needs to be updated for new addresses, URLs and the like. Additionally, in some places the text is a bit confusing. The librarian at the other university has given me permission to do this updating, but I have not been able to get an answer from my former director who emigrated from another country several years ago and may no longer be in this country. I have written three letters seeking permission and have had no answer. The last letter said that if I did not hear from her, I would assume the answer was yes. What are the risks if I go ahead and do the update?

ANSWER: Your question raises several issues, three of which I will discuss. The short answer is that you may go ahead whenever you and your institution are willing to assume the risk. In my estimation, however, the risk of copyright infringement problems is very slight in this situation. Although assuming the guide was produced after 1-1-78, the effective date of the Copyright Act, it was copyrighted and there is no requirement that it be registered with the U.S. Copyright Office. The important question is who owns the copyright? If the guide was produced by the director within the scope of her employment, then the university owns the copyright. As the copyright owner, the university can have the work updated, etc.

If the director was the copyright owner, she would jointly own the copyright with the librarian from the other university. If they are true joint owners, then either party may give you permission to update the work. If they are not joint owners, then there would have to be a written agreement between them specifying who owned what.

To deal with the other issue, let’s assume that the director was the sole owner of the copyright. You have written her three times to seek permission to update the work. There is no requirement that she answer you at all. Your third letter that indicated that you would proceed with the update if you did not hear from her really has no legal effect. You cannot unilaterally bind her to an agreement. On the other hand, the risk to your institution is slight. She has shown little interest in the project and the university may actually be the copyright owner.

QUESTION: My library would like to distribute the public domain chart from your Website to users on our campus. May we have your permission to do so? However, we would like to change the “published before 1923” to “published more than 75 years ago.” This will obviate the need to change the chart every year.

ANSWER: I always grant permission to use my public domain chart if you will do two things: (1) Use my name with it and (2) include the Website address so that the user would have a source for any changes.

Apparently, now I need to add a third requirement. No, you may not change the chart. The “published more than 75 years ago” was correct until October 27, 1998 when the Sonny Bono Term Extension Act was signed into law. Now, it will be 2019 before anything else goes into the public domain. So, the “published before 1923” will remain in effect for the next 20 years (until 2019) when we can then begin to say “published more than 95 years ago.”

QUESTION: Can someone re-draw a painting from the library collection and use their drawing for a brochure advertising the library’s special collections without infringing copyright? The drawing would not be an exact replica, just similar. The original painting is still under copyright.

ANSWER: A reproduction in any medium is still a reproduction. While librarians understand that a photocopy or a digital copy is a reproduction, sometimes we forget that a drawing of a painting is also a reproduction. If, when the library obtained the copyrighted painting it also obtained the copyright in the work, then no permission would be needed except from the library. However, the library would have had to receive a document specifically transferring the copyright since physical ownership of the painting does not presume ownership of the copyright. If the painting was produced before 1978 and was not protected by federal copyright, some courts held that transfer of the physical object also included transfer of the copyright.

Since the question stated that the painting was still under copyright, we should assume that it was a registered work under the 1909 Act or that it was produced after 1-1-78. Therefore, in order to use a drawing of a copyrighted painting on a brochure, unless the library owns the copyright, the library should seek permission to use the drawing of the copyrighted painting.

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nothing for almost thirty years.

HOWEVER No. 2. The Foundation claimed copyright in Blood of My Blood and copyright violation by Seajay for making two photocopies of the manuscript and allowing Blythe to quote from it in her paper.

Confused? Baskin was suing on behalf of the estate. He had no personal right to the manuscript because it had been left under the will to the Library. The estate (and of course the Library) has now lost its claim to the physical manuscript. Physical ownership of documents and copyright—the literary rights can be separately transferred. 17 U.S.C.A. § 202 (West 1996). Rawlings had apparently left all copyright

in her works to the Foundation — although the case does not say this with any clarity.

So if true, Seajay could take out Blood of My Blood and have a good read on any evening. Or maybe put it on display as Southern culture. But without copyright, it could not publish and market it.

Baskin had nothing to gain from the publication of the manuscript which is probably why he ignored it for thirty years. But once he realized he’d goofed, he had to try to recover the manuscript because the Library will be suing him for being a lossy fiduciary to the estate. They have lost the dollar value of the real manuscript as a physical object. So we’re back to the Foundation and copyright.

Fair Use Analysis: Character and Pur- pose of the Use

Blythe’s paper was a scholarly appraisal of Rawlings’ development as a writer. As such, she added something new to Rawlings’ work, created a work of a different character, was transformative. This fits it into the criticism, comment, scholarship, and literary research of fair use. Seajay had no exploitative motive in giving copies to Blythe and the Univ. of Fla Press. It was merely trying to preserve the seventy-year-old original. Seajay’s objective was to authenticate Blood of My Blood as a Rawlings work and to assess its worthiness for publication. Seajay always understood that publication could not be done without permission of the copyright holder.

The Court incredibly (!) stated Blythe might have had a potential commercial moti—continued on page 57

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"Little Shop of Horrors" — Registration Devours the Common Law


Initially, "The Little Shop of Horrors" — that tacky horror masterpiece — caught my continued on page 58
Handling Medusa — The Impact of Publisher Mergers on Journal Prices: An Update

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The Impact of Publisher Mergers on Journal Prices: An Update

by Mark J. McCabe (Assistant Professor of Economics, Georgia Institute of Technology) copyright 1999 by Mark J. McCabe

In the first of a spell-binding two part series, Medusa casts her baleful gaze on mergers, acquisitions and anti-trust law. A reputable professor of business administration informs her that, traditionally, economists have not paid a great deal of attention to the publishing industry. This may change as practitioners and scholars like Prof. Mark McCabe begin to address the peculiar characteristics of this rapidly-changing business.

Mark J. McCabe received his Ph.D. in Applied Economics from the Sloan School of Management, MIT. Before MIT he served for seven years as an economist in the Antitrust Division at the U.S. Department of Justice. At Justice his responsibilities included analysis of anti-competitive practices, mergers and federal economic regulation; he has also served as an expert witness. He has taught microeconomics and game theory at American University. Currently Prof. McCabe teaches industrial organization and advanced microeconomics at the Georgia Institute of Technology. Recently he has addressed the American Library Association, the Medical Library Association and the Association of Law Libraries. You will find a list of his other research-in-progress at his Web site, http://www.econ.gatech.edu/~mmccabe/index.html.

Professor McCabe's recent work caught Medusa's eye when he introduced it in "The Impact of Publisher Mergers on Journal Prices: A Preliminary Report," ARL, the Newsletter of the Association of Research Libraries, October, 1998. Below he reports his latest findings. — LD

Near the end of 1997, Reed-Elsevier and Wolters-Kluwer proposed a merger of their operations that upset more than a few librarians. Elsevier's publishing "empire" was about to grow even larger. The fear of runaway academic journal prices was palatable in places where the mere mention of the company's name causes people to grab for their wallets.

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attention on this one. As I began to read it, the lack of minimal business sense on the part of some of the players dumbfounded me. Is this why Hollywood always seems to lose money?

In 1959, Charles Byron Griffith wrote the screenplay for "The Little Shop of Horrors" which was made into a movie in 1960. I only mention Griffith for horror movie buffs. He doesn't play a role in this otherwise.

The screenplay was not registered for copyright, however, until 1982. And the movie was not registered until 1985. A musical stage play based on the movie was authorized in 1981.

There are a slew of parties involved along with Griffith — music book and lyric writers and movie companies that bought out each other. Boiling it down, Shoptalk ended up with the musical; Concorde with the movie. Shoptalk paid Concorde royalties for being allowed to do the musical. Under the terms of a 1983 agreement, Concorde was to renew the movie copyright before expiration.

Incredibly, Concorde did not renew the movie copyright which expired in 1988, and the movie flopped over into the public domain. Shoptalk stopped making royalty payments to Concorde.

Shopitalk (the musical owner) took the position that they were relieved of continuing to pay royalties because Concorde had neglected to renew the copyright and that was a material breach of their agreement. Concorde owned nothing, so Shopitalk owed them nothing for doing a derivative work.

Concorde argued the agreement was not conditional on renewal of copyright. Rather, Shopitalk had promised to pay royalties for "the right to prepare ... and publicly perform ... a musical play based upon and derived from the screenplay and the original motion picture." Concorde further claimed they still possessed a copyright in the underlying screenplay even without a copyright in the motion picture.

So your real question of interest here is whether a copyright in the screenplay exists independent of the movie.

The 1909 Copyright Act — repealed in 1976 — governs works published before 1978. Under the 1909 Act, published works were protected by federal law, unpublished ones by state common law. Publication occurred when the copyright owner consented to "tangible copies" being "made available to the general public." Bartok v. Boosey & Hawkes, Inc., 523 F.2d 941, 945 (2d Cir. 1975) (quoting L. Nimmer, The Law of Copyright § 94 at 944.05 (1974)). Authors had a 28-year term of protection from first publication which was renewable for another 28 years. 17 U.S.C. § 24.

Before publication, the author was protected by common law. Sanga Music, Inc. v. EMI Blackwood Music, Inc., 55 F.3d 756, 758 (2d Cir. 1995). This allowed author control of first publication. Once published — or once the work was registered for copyright — common law protection ended. See, e.g., Caliga v. Inter Ocean Newspapers, 213 F.2d 188, 30 S.Ct. 38 (1909); Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 347, 28 S.Ct. 722 (1908).

Remember, "Little Shop of Horrors" screenplay was made into a movie in 1960 — long before any registration was done.

Eight of first publication included not just choice of publisher, but also choice of format and medium. First, however, means first. One time. There is no first publication right in every medium. See, e.g., Baitjac Productions, Inc. v. Goodtimes Video Corp., 160 F.3d 1223, 1235 (9th Cir. 1998).

When an author consents to a work being incorporated in a derivative work — screenplay — movie — the derivative work is a first publication to the extent it discloses the underlying work. See, e.g., Roy Export Company v. Establissement de Valdez, Liechtenstein v. Columbia Broadcasting System, Inc., 672 F.2d 1095, 1102 (2d Cir.), cert. denied, 459 U.S. 826 (1982).

"The Little Shop of Horrors" movie was first published in 1960. It was a first publication of whatever portion of the screenplay was in it — presumably the entirety. Concorde effectively had no common law copyright in the screenplay separate from the movie and was not entitled to royalties.

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