Case Western Reserve Law Review

Volume 10 | Issue 2

1959

Renewal Rights, A Statutory Anachronism

Thomas R. Skulina

WESTERN RESERVE LAW REVIEW

Member of the National Conference of Law Reviews
Published for THE FRANKLIN THOMAS BACKUS SCHOOL OF LAW
by THE PRESS OF WESTERN RESERVE UNIVERSITY, Cleveland 6, Ohio

NOTES

Renewal Rights, A Statutory Anachronism

INTRODUCTION

The law of copyright has a direct bearing on the culture and mores of a civilization. Society has shown proportionately greater concern for the creator of a work of art as the intellectual level of the community rises.[1] Thus, it has been necessary over the years to revise the law periodically in order to satisfy the needs of the changing society. The last major change in the United States was in 1909.[2] Since there has been little revision[3] in the law, that fact alone should prompt a critical analysis of this ancient law. This article will concern itself with one problem,

1. In the preface to the first edition of SHAFTER, MUSICAL COPYRIGHT (2d ed. 1939), the author states, "Aside from its legal status, copyright has a very important social function. Its development parallels the evolution of culture, and, by tracing the growth of copyright conceptions and protections, the reader may gain an intimate knowledge . . . of how rapidly or how slowly the various nations of the earth have advanced in intellectual progress."

2. Act of March 4, 1909, 35 Stat. 1075.

3. Motion pictures were recognized in the Act of Aug. 24, 1912, 37 Stat. 488; Recording rights of poets and authors of non-dramatic literary works were protected in 66 Stat. 752 (1952), 17 U.S.C. § 1 (c) (1952).

that of renewal rights. It will trace their history, their present place in the law, the numerous legal difficulties that they involve, and will suggest a revision of our present law.

WHAT IS A RENEWAL

A renewal of a copyright, under present law, could be defined as the exercise of a privilege conferred by Congress to extend the safeguards of the original copyright to another term of an equal length of time. This resolves itself into an original term of twenty-eight years and a renewal term of twenty-eight years.[4] An important concept to master in regard to the original copyright is that:

> The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance . . . of the material object shall . . . constitute a transfer of the title to the material object. . . .[5]

The renewal is of the same nature, that is, it is a distinct property right, yet it differs in that it is an entirely new grant,[6] unencumbered by any right, interest or license attached to the original copyright.[7] One court, in emphasizing the fact that the right to renew is a grant by the Congress, has called it

> . . . a recognition extended by the law to the author of the work that has proven permanently [meritorious]. . . .[8]

Both copyrights and renewals are purely creatures of statute.[9] The United States Constitution has entrusted the regulation of copyrights to Congress, which has the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[10] Thus, the Constitution has conferred a "monopoly" on the author, similar to a patent, but has expressly stated that this should be limited.[11] Because of this limitation, once the copyright expires, there is no reversion to a theory of trademarks. Thus, for example, the title *Webster's Dictionary*

4. 61 Stat. 652 (1947), 17 U.S.C. § 24 (1952).

5. *Ibid.*

6. G. Ricordi & Co. v. Paramount Pictures, 189 F.2d 469 (2d Cir. 1951); Harris v. Coca-Cola Co., 73 F.2d 370 (5th Cir. 1934); Silverman v. Sunrise Pictures Corp., 273 Fed. 909 (2d Cir. 1921); Fitch v. Shubert, 20 F. Supp. 314 (S.D.N.Y. 1937); Southern Music Pub. Co. v. Bibo-Lang, 10 F. Supp. 975 (S.D.N.Y. 1935).

7. Fitch v. Shubert, 20 F. Supp. 314 (S.D.N.Y. 1937).

8. Harris v. Coca-Cola Co., 73 F.2d 370 (5th Cir. 1934).

9. White-Smith Music Pub. Co. v. Goff, 187 Fed. 247 (1st Cir. 1911).

10. U.S. CONST. art I, § 8, cl. 3.

11. Ogilvie v. G. & C. Merriam Co., 149 Fed. 858, 860 (D. Mass. 1907), modified in 159 Fed. 638 (1st Cir. 1908), *cert. denied*, 209 U.S. 551 (1908).

has become part of the public demesne.[12] So too, after the term of copyright had expired, the title of a novel could be used for a play.[13] In England, however, the courts abhor calling the protection of copyright a monopoly, but call it a "negative right to prevent the appropriation of the labours [*sic*] of an author by another,"[14] and expressly state that it is not analogous to a patent, thus permitting similarity if the work were reproduced independently.

The period of the mandatory limitation for the duration of the copyright has changed through the years in the United States, and differs among the various nations. The United States and Russia hold the dubious distinction of affording the shortest terms. At present, thirty-eight of the sixty countries which have laws governing copyright provide for a term of life and fifty years.[15]

The protection of the United States Copyright Act is limited to published works.[16] Unpublished works are protected not by statute but by common law. Since there is, of course, no common law of the United States as such, these rights vary among the states.[17]

England, before 1912, afforded no statutory right for unpublished works.[18] The published works were protected by statute and the unpublished works by the common law.[19] Because of the uniformity of the common law in England there was less compelling reason to change the law than in the United States with its different interpretations of the common law. Yet England did so, and to that extent has a more advanced copyright act than the United States. No useful purpose is served in leaving the unpublished works in a less certain status than published works. The entire area of copyright should be clearly defined.

Registration for a renewal can be made only within the twenty-eighth year of the original term.[20] If this provision is not satisfied, the

12. *Ibid.*

13. Glaser v. St. Elmo Co., 175 Fed. 276 (C.C. S.D.N.Y. 1909).

14. 8 HALSBURY'S, LAWS OF ENGLAND 424 (1954).

15. Finklestein, *The Copyright Law, a Reappraisal*, 104 U. OF PA. L. REV. 1025 (1956).

16. 61 Stat. 652 (1947), 17 U.S.C. § 2 (1952) states that the common law rights are not abrogated. The Copyright Act of Feb. 3, 1831, 4 Stat. 438, gave an author a remedy by injunction to protect unpublished works. Little v. Hall, 18 How. 165 (N.Y. 1856). See also 61 Stat. 656 (1947), 17 U.S.C. § 10 (1952) which requires publication of a work with notice. See United States v. Backer, 134 F.2d 533 (2d Cir. 1943).

17. Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

18. 8 HALSBURY'S, LAWS OF ENGLAND 384 (1954).

19. Exchange Telegraph Co. v. Gregory & Co., 1 Q.B. 147, C.A. (1896); Mansell v. Valley Printing Co., 2 Ch. 441 C.A. (1908).

20. 61 Stat. 659 (1947), 17 U.S.C. § 24 (1952).

work falls into the public demesne.[21] This rule is mandatory, and the Copyright Office has no authority to extend the renewal period or to accept a registration before the last year of the original term.[22] Thus, before this renewal year, the author has only an expectancy. Whether this expectancy can be assigned as readily as the original copyright will be discussed later. Obvious hardships can result from the rigidity of this rule. For example, where one not entitled to renew a copyright registers the renewal, and the heirs, thinking their right to the additional term is safeguarded, though confident they have a prior claim, proceed against that person, rather than register with the Copyright Office themselves, they lose everything. The renewal by the one not entitled to register for it will be declared void, and since the period closes after one year, no one can make the renewal.[23]

Where an original copyright is taken to cover "new matter"[24] of an older work, the renewal is consequently only for the new matter and not for the original work.[25] In a case involving the famous opera "Madame Butterfly" there was a copyright of a novel, a play based on the novel, and later one for an operatic version of the novel. When the copyright of the play was not renewed it became available to the public, but there remained separate interests in the novel and the opera which were prospectively renewed.[26]

Since Congress has been given exclusive domain over the copyrighting of published works, it is apparent that litigation over matters of copyright must be brought in the federal courts.[27] Under Section 28 of the Copyright Act, copyrights ". . . may be assigned, granted, or mortgaged. . . ."[28] Since the power to mortgage the property right in a copyright has been granted by federal statute, an action to foreclose on the mortgage must be brought in a federal court.[29] A covenant not to renew, however, was properly before a state court.[30] So too, a state court

21. G. Ricordi & Co. v. Paramount Pictures, 189 F.2d 469 (2d Cir. 1951).

22. 37 C.F.R. § 202.17 (1958).

23. Yardley v. Houghton Mifflin Co., 25 F. Supp. 361 (S.D.N.Y. 1938).

24. Adventures In Good Eating v. Best Places To Eat, 131 F.2d 809 (7th Cir. 1942).

25. G. Ricordi & Co. v. Paramount Pictures, 189 F.2d 469 (2d Cir. 1951).

26. *Ibid.*

27. Security-First National Bank of Los Angeles v. Republic Pictures Corp., 97 F. Supp. 360 (S.D. Cal. 1951).

28. 61 Stat. 652 (1947), 17 U.S.C. § 28 (1952).

29. Security-First National Bank of Los Angeles v. Republic Pictures Corp., 97 F. Supp. 360 (S.D. Cal. 1951).

30. Tobani v. Carl Fischer, 263 App. Div. 503, 33 N.Y.S.2d 294 (1942), *Aff'd.*, 289 N.Y. 727, 46 N.E.2d 347 (1942). Wife here, had made a covenant not to renew. The court held she did not have to survive to enforce the contract. There was

could construe an agreement for publication of a musical composition on a royalty basis.[31] Title to renewal rights may be established by an action for declaratory judgment in the federal courts.[32]

Though recourse to the use of renewals is not voluminous, there are many instances where the work has done better in the renewal period than in the original term. A song called the "Maine Stein Song,"[33] for example, was written around 1914. The song was sold to a publisher and promptly placed on a shelf where it remained for twenty-five years without selling a single copy. At the end of this period the song was put on the market and sold a quarter of a million copies. Another song, "Sweet Adeline," which had done poorly during the first period, did very well in the renewal term.[34] Such songs as "When Irish Eyes are Smiling,"[35] "Moonlight and Roses,"[36] and "I Wonder Who's Kissing Her Now"[37] were all involved in litigation over renewal rights. Thus, it is apparent that there is often much at stake for those claiming renewals. The determination of who can renew will be discussed later in this article, after a short review of the history of renewal rights.

LEGISLATIVE HISTORY OF THE COPYRIGHT ACTS

Since renewal rights are creatures of statute, along with the bulk of the copyright law, a review of the legislative history of the copyright acts is appropriate.

The first copyright act in an English-speaking nation was that of the famous Statute of Anne,[38] passed in England in 1709. This act provided for an original term of fourteen years and an additional term of fourteen years. The renewal term was assignable; however, the author had to sur-

---

consideration for this covenant of an expectancy and the wife's estate is entitled to the agreed price even though her death before her husband's precludes her from ever exercising the renewal.

31. April Productions v. G. Schirmer, 308 N.Y. 366, 126 N.E.2d 283 (1955). No limit was placed as to how long the royalty had to be paid. This was held to be void as against public policy and the constitutional provision limiting the period of copyright. The dissent treated the contract quite apart from the copyright and held that the copyright was only an incident to the contract, a thing done by custom and not agreement.

32. Carmichael v. Mills Music, 121 F. Supp. 43 (S.D.N.Y. 1954).

33. SHAFTER, MUSICAL COPYRIGHT (2d ed. 1939) p. 170.

34. *Id.* at 174.

35. Fred Fisher Music Co., Inc. v. M. Witmark & Sons, 318 U.S. 643 (1943).

36. Miller Music Corp. v. Charles N. Daniels, 158 F. Supp. 188 (S.D.N.Y. 1957).

37. Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 42 F. Supp. 859 (S.D.N.Y. 1942).

38. 8 ANNE c. 19 (1709).

vive to the last year of the original term.[39] This statute was accepted by the Continental Congress on May 2, 1783.[40] The various states that had not already adopted a similar statute, did so thereafter.[41] Subsequently, the regulation of copyrights was placed in the federal government and on May 31, 1790,[42] the first Copyright Act of the United States was passed. It was similar to the English act and provided for an original term of fourteen years with the right of renewal in the author that survived at the end of the first term, or by his executors, administrators or assigns. Here the statute expressly permitted renewal rights to be assigned. It also included administrators as persons who could renew. Administrators were no longer included in subsequent acts for reasons to be discussed later.

In 1831,[43] England amended her copyright statute, giving the author and his assigns a copyright for twenty-eight years, and if the author survived at the end of the first term, then he retained the copyright for the residue of his life.

The United States on February 3, 1831,[44] extended the original term to twenty-eight years but retained the length of the renewal term. It differed from the first United States Copyright Act in that it listed as persons who could renew, the author, or if he die, to his widow or children. No mention was made of *assigns, administrators* or *executors.* The last of these was to be incorporated in subsequent statutes, but the other two classes of persons were never again specified.

Shortly thereafter, in England, vigorous debates took place between Macauly and Mr. Serjeant Talfourd.[45] The latter, in favor of greater protection to the author, in an almost maudlin oration against Macauly's position, exclaimed that to limit the author's property right for only a lifetime would:

> . . . inform the laborious student who would wear away his strength to complete some work which the world will not . . . let die, the . . . more he devotes to its perfection, the more limited . . . his interests in its fruits, [since he will not live long thereafter. At the moment of the author's death] . . . when his eccentricities . . . excite a smile or shrug no longer — when the last seal is set upon his earthly course and his works assume their

39. Carman v. Bowles, 2 Bro. c.c. 80, 29 Eng. Reprint 45 (1786); See also Rundell v. Murray, Jac-311, 37 Eng. Reprint 868 (1821).

40. JOURNALS OF CONGRESS, May 2, 1783.

41. See *Copyright Enactments of the United States, 1783-1906,* Copyright Office Bulletin No. 3.

42. 1 Stat. 124 (1790).

43. 54 GEO. III c. 156 (1814).

44. 4 Stat. 436 (1831).

45. See COPINGER & SKONE JAMES, LAW OF COPYRIGHT (1948), an excellent text on English Copyright Law.

> place among the classics . . . your law declares his works become your property . . . [and you seize] the patrimony of his children.[46]

Following these debates, in 1842,[47] the term of copyright was extended to forty-two years, or the life of the author and seven years, whichever was longer.

On March 4, 1909,[48] the United States adopted a twenty-eight year original term with a twenty-eight year renewal period. This has remained the law of the present.[49] The executor of the author's estate could renew if the widow or children died. In the absence of a wife, the next of kin can renew.

Two years later, England decided upon a copyright period of the life of the author plus fifty years.[50] If the work is published, twenty-five years after the death of the author, any publisher can obtain a license to reproduce the work.[51] This compulsory license is seldom used in England. Publishers of such inexpensive books as the "Everyman Library," "World Classics" or the "Penguin Library" series very infrequently avail themselves of this statutory license. Hence, the survivor of the author still has a valuable property right for twenty-five years. There is pressure presently to give the survivor the full fifty years.[52] This change was not incorporated in the English Copyright Act as of 1956.[53]

England affords a much longer period of inclusive enjoyment to the author and his heirs than the United States. The use of a renewal period by the United States, with its technical requirements allowing a renewal only within a one year period, is more complex than the English law and affords greater opportunity for injustice.

WHO CAN RENEW

Only those persons can renew a copyright who are given the express right by statute. Thus, all the litigation over renewals will concern itself with problems of statutory construction. Since there is no provision in the code which permits assignees to renew, the question arises whether a renewal right may be assigned. The first Copyright

---

46. *Id.* at 11.
47. 5 & 6 VICT., c. 45 (1842).
48. 35 Stat. 1075 (1909), 50 U.S.C. § 68 (1952).
49. The present copyright law is 61 Stat. 652 (1947), 17 U.S.C. §§ 1-215 (1952).
50. 1 & 2 GEO. V c. 46.
51. *Id.* §§ 4, 35 (2).
52. Copyright Committee of the Board of Trade, *Report to Parliament* p. 9 (Oct. 1952). See Finklestein, *The Copyright Law, A Reappraisal*, 104 UNIV. OF PA. L. REV. 1025 (1956).
53. 4 & 5 ELIZ. 2 c. 74 (1956).

Act[54] of 1790 had allowed assignees to renew but no subsequent act has done so.

Original copyrights can be assigned because the code expressly states that a copyright may be assigned.[55] This assignment must be in writing, and the contract assigning the copyright must be clear. Courts will not imply assignments, nor will they allow partial assignments to the various rights of the copyright holder.[56] A contract for a license is not an assignment of a copyright for there must be an express provision to accomplish an assignment.[57]

Prior to 1943, the courts would not allow an assignment of a renewal before the actual renewal year.[58] In 1943, the famous case of *Fred Fisher Music Co. v. M. Witmark & Sons*,[59] was decided. The issue in that case was whether an author can make an assignment of his renewal before the twenty-eighth year. Conflicting policies were proposed. The problem was how far must the law protect the author in his business dealings. The majority opinion of the United States Supreme Court countered arguments against assignment by pointing out that the author may be in need and may desire to make an assignment of his renewal rights. The Court asserted that he should not be prevented from doing so, and that an author has a spirit of independence which would be reviled at being treated like a ward under the paternal guidance of the law. The Court decided that the renewal rights could be assigned before the twenty-eighth year. Justices Black, Murphy and Douglas dissented and accepted for their opinion the fourteen-page opinion of the dissent in the circuit court.[60] Judge Frank, the author of this dissent, had proffered that the author was inept in business transactions, that there should be no enforcement of a renewal right before it actually accrues, and that since there are few renewals they should be treated as new rights beginning after the first term. The *Fred Fisher* decision left some questions unanswered.

---

54. 1 Stat. 124 (1790).

55. 61 Stat. 652 (1947), 17 U.S.C. § 28 (1952).

56. Hirshon v. United Artists Corp., 243 F.2d 640, 645 (D.C. Cir. 1957); quoting Finklestein, *The Copyright Law, A Reappraisal*, 104 U. PA. L. REV. 1025, 1060 (1956).

57. Mills Music v. Cromwell Music, 126 F. Supp. 54 (S.D.N.Y. 1954).

58. Silverman v. Sunrise Pictures Corp., 273 Fed. 909 (2d Cir. 1921); White-Smith Music Publishing Co. v. Goff, 180 Fed. 256 (D.R.I. 1910); West Publishing Co. v. Edward Thompson Co., 169 Fed. 833 (E.D.N.Y. 1909); 28 Ops. Att'y. Gen. 162 (1910). An earlier Supreme Court case allowed such an assignment but it based its decision on the 1790 Act. Paige v. Banks, 80 U.S. (13 Wall) 608 (1872).

59. 318 U.S. 643 (1943). See also Selwyn & Co. v. Veiller, 43 F. Supp. 491 (S.D.N.Y. 1942).

60. M. Witmark & Sons v. Fred Fisher Music Co., 125 F.2d 949 (2d Cir. 1942).

As in the case of assignments of copyrights, assignments of renewals have to be in writing and are strictly construed against the assignee. An assignment of the original copyright in general terms will not assign the renewal right.[61] A transfer of "all right, title and interests" might be broad enough to divest a grantor of the contract of his renewal rights, but the court will look to the intention of the parties. Since the right of renewal is a separate right from the original copyright, the circumstances justifying the right of renewal must be stronger than those transferring the original copyright.[62] Yet actual words of an assignment are not necessary, and "Bill of Sale" could be a sufficient expression of an intent to assign the renewal expectancy.[63]

If there is a prior assignee, he must record the assignment or lose against a subsequent assignee, who is a bona fide purchaser for value and who records.[64] In considering the surrounding circumstances, the court will consider the adequacy of the consideration for the assignment.[65] Where one is an employee for hire, which means that he is no longer the author for copyright purposes, he cannot make an assignment of the renewal for he has no rights in the work of art. The rights belong to the proprietor. Hence, an assignment from the employee, even though recorded earlier than the statutory author, the employer, will not prevail, and is void notwithstanding that it was so recorded.[66]

One problem left unsettled by the *Fred Fisher* case occurs where an author assigns his renewal right before the last year of the first term, and then dies before the twenty-eighth year. This question was involved in *Miller Music Corp v. Charles N. Daniels.*[67] In this case, two music publishers brought an action for copyright infringement against each other. One had received an assignment from a co-author who predeceased the twenty-eight year, the other was an assignee of the author's executor. The assignee of the executor prevailed, since the code is silent as to assignments of renewal rights in the future, but expressly gives the executor the right to renew if the author, and wife or children are dead. The author not only cannot deprive his relatives by a prior assignment but where he is not survived by a widow or child, he cannot make an assignment which will prevail against his own selected executor. It is

61. Edward B. Marks Music Corp. v. Borst Music Publishing Co., 110 F. Supp. 913 (D.N.J. 1953).

62. Rossiter v. Vogel, 134 F.2d 908 (2d Cir. 1943).

63. *Ibid.*

64. 61 Stat. 652 (1947), 17 U.S.C. § 30 (1952).

65. Rossiter v. Vogel, 134 F.2d 908 (2d Cir. 1943).

66. Von Tilzer v. Jerry Vogel Music Co., 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd.* 158 F.2d 516 (3d Cir. 1946).

67. 158 F. Supp. 188 (S.D.N.Y. 1957).

somewhat anomalous and the court pointed out the need for statutes to settle this difficulty. Again it is found that our code has not kept up with the times.

England, of course, avoids these problems since there is no renewal term. The original term may be assigned according to statute,[68] but once the author dies the copyright, published or unpublished, vests in the personal representatives as part of the estate.[69] In England the author is precluded from assigning the reversionary interests. Exceptions are made, however, in the case of encyclopedias, dictionaries, year books, newspapers, etc.[70]

England zealously protects the author's estate, but also gives the author a lifetime in which he may reap the fruits of his assignment. The fact that royalties will be paid to his heirs should not affect the publishers who are still making a profit on the work. Undoubtedly the United States needs a statute covering this problem. Where there is a wife or child, perhaps the estate should be given the fruits of his labors, but certainly where he leaves no one but an executor and some distant relatives, he should not be precluded from assigning his renewal.

The rationale for the executor's exercising the renewal is that he stands in the place of the author.[71] The Supreme Court upheld the code provision which gave the executor the right to renew; no new estate was created because the executor could renew the copyright only when the author could.[72] The executor, of course, cannot make a claim for renewal if the widow is alive and could make the claim herself.[73] The order for exercising the claim is maintained notwithstanding the fact that a brother applies earlier than a widow,[74] or a next of kin applies earlier than an executor.[75]

Another problem in construction came before the Supreme Court[76] over the word "or" in the provision that permits the widow or children of an author to renew a copyright. The Copyright Act in 1831 provided for renewal by the widow *and* the child. The 1870 Act, and the ones thereafter changed the "and" to *"or."* The Court had to consider whether it would adopt the intention of the earlier statute. When Congress had

68. 4 & 5 ELIZ. 2, c. (1956).

69. 8 HALSBURY'S LAWS OF ENGLAND 417 (3d Ed. 1954).

70. *Id.*, at 418.

71. White-Smith Publishing Co. v. Goff, 187 Fed. 247 (1st Cir. 1911).

72. Fox Film Corp. v. Knowles, 261 U.S. 326 (1923).

73. *Ibid.*

74. Edward B. Marks Music Corp. v. Borst Music Publishing Co., 110 F. Supp. 913 (D.N.J. 1953).

75. Yardley v. Houghton Mifflin Co., 25 F. Supp. 361 (S.D.N.Y. 1938).

76. De Slyia v. Ballentine, 351 U.S. 570 (1956).

changed the word there was no notice of dissatisfaction. The Copyright Office had been allowing children to apply for renewals along with the widow or widower. The term "or" was not considered by them as one of survivorship.[77] The Court held that they would embody the policy of the earlier statute and the widow *and* child take as tenants in common. Again a problem is left unsettled. Do the children take as a class or do they take as individuals? If an author were survived by a wife and five children, would the wife take a one-sixth share or would she get one-half and the children one-tenth each? This question has not been settled by the courts to date.

In the same case that decided that the construction of the word "or" would mean "and," there was also the problem whether an illegitimate child would take along with the widow. Since the Supreme Court considers the body of state law for problems involving adoption laws, the Court decided to do so in this case to arrive at the meaning of the word "children." Under California law, an illegitimate child could be an heir, so the Court in this instance permitted the illegitimate child to share with the widow. Justices Douglas and Black concurred, however, they asserted that rather than using a state interpretation of the meaning of "children," which could lead to variable interpretations, there should be a federal, universal interpretation. Rather than leaving this matter to the courts, the term should be defined by the code. This is another problem that could be settled by proper statutory drafting.

Since the code mentioned only executors, the administrator is excluded.[78] This is quite reasonable since, as has already been indicated, the executor takes *eo nomine* for the author, while the administrator does not enjoy that same position.

There has been some litigation over the meaning of the provision in the code allowing for renewal by a proprietor

> of any posthumous work or . . . any periodical, cyclopedic, or other composite work . . . upon which the copyright was originally secured by the proprietor . . . or . . . [which was] copyrighted by a corporate body [not just an assignee] . . . or by an employer . . . for hire. . . .[79]

The term "posthumous works" has been defined as those works, "on which the original copyright has been taken out by someone to whom the literary property passed before publication."[80]

The term "composite work" relates to a work upon which ". . . a number of authors have contributed distinguishable parts, which they

77. 37 C.F.R. § 201.24(a) (1938).
78. Danks v. Gordon, 272 Fed. 821 (2d Cir. 1921).
79. 61 Stat. 652 (1947), 17 U.S.C. § 24 (1952).
80. Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697, 699 (2d Cir. 1941).

have not however separately registered."[81] The problem occurs in deciding whether a work is a *composite* work, that is, of the nature of a periodical, or whether it is a *joint* work. If it is the latter, a copyright taken by one of the authors will protect the others. The elements of a joint work are satisfied if the authors who produce the work, produce it with the intent to create a single work, thereby merging their separate interests in the work.[82]

The most common example of a joint work is a musical work where two or more artists combine, one providing the words, the other the music, and perhaps another the arrangement.[83] As long as there is a *common end* sought by these artists, the work is a joint work. Physical propinquity of the authors is not the essential factor in deciding this. Where one thinks of the work as a unit, there are good grounds for not calling the work composite.[84] The author of a joint work who obtained the renewal may sue for its infringement without joining the other author, though that author retains an equitable interest in the renewed copyright.[85] The author who copyrights the composition in his own name ". . . becomes a constructive trustee for the other co-author. Copyright protects both the words and the music."[86] And so ". . . the renewal copyright enures to the benefit of . . . [the] co-author or of those entitled to a renewal under the . . . Act, if that co-author be dead."[87]

Another reason for determining whether a work is composite is that in a composite work the proprietor may renew the copyright notwithstanding the fact that there were a number of authors; whereas if the work is not composite and not joint, there can be no renewal by one author of another's work. Hence, a widow could not get a renewal for illustrations added fifteen years later to a work of her deceased husband.[88]

---

81. *Ibid.*

82. Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944).

83. Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946), *cert. denied,* 331 U.S. 820 (1947).

84. Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 42 F. Supp. 859 (S.D.N.Y. 1942).

85. Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266 (2d Cir. 1944).

86. Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 42 F. Supp. 859, 864 (S.D.N.Y. 1942).

87. *Id.* at 865.

88. Harris v. Coca-Cola Co., 73 F.2d 370 (5th Cir. 1934), *cert. denied* 294 U.S. 709 (1935). The rights between co-authors are not clearly defined. The problem of whether there can be an accounting between them has not been settled clearly.

The courts must also decide whether, under a given set of facts, the author is, in fact, an employee for hire. If he is, he is no longer entitled to renew. The courts will look at such factors as a continuing relationship, salary, the type of work done, etc.[89] The proprietor, if the work is for hire, can obtain the renewal, since there is no longer any reason to protect the author who no longer has any interest in the work.[90]

CONCLUSION

Congress was stirred into action after an address by Theodore Roosevelt, when the president in a message to Congress stated that, "Our copyright laws urgently need revision . . . [and that] a complete revision of them is essential."[91]

In this present era with a somewhat greater emphasis toward the fostering of scientific rather than literary pursuits, there is even greater reason to protect the author, who is independent enough to take the great financial risk to become a worthwhile artist. Giving a greater term of years of exclusive rights in instances where the work does not have a great success will not be a detriment to the public since the work will not be of much benefit to anyone. If the work is so good that it survives for many years, the author should be able to reap the fruit of his genius, for a reasonable number of years, and this protection should extend to his heirs as well. The law pertaining to renewal rights, if the United States does not accept instead, a life grant and a term of years, must be amended so that the numerous problems left unsettled may be expressly clarified.

The law of copyright is a creature of statute. Hence, the statutes should encompass and define the entire areas as far as possible.

THOMAS R. SKULINA

One court has held that co-owners of a copyright are tenants in common but there is no accounting unless a co-owner is to reap a personal benefit. See Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 73 F. Supp. 165 (S.D.N.Y. 1947). See also Shapiro, Bernstein & Co. v. Jerry Vogel Music Co. 221 F.2d 569 (2d Cir. 1955), *rehearing denied* 223 F.2d 252 (1955). See also Maurel v. Smith, 271 Fed. 211 (2d Cir. 1921); *Accounting Between Co-Owners of a Copyright,* 48 COL. L. REV. 421 (1948).

89. Tobani v. Carl Fischer, 98 F.2d 57 (2d Cir. 1938).

90. Shapiro, Bernstein & Co. v. Bryan, 27 F. Supp. 11 (S.D.N.Y. 1939).

91. 40 CONG. REC. 102 (1905).