



1961

## Who May Secure a Copyright

John L. Plattner

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### Recommended Citation

Plattner, John L. (1961) "Who May Secure a Copyright," *North Dakota Law Review*. Vol. 37: No. 3, Article 2. Available at: <https://commons.und.edu/ndlr/vol37/iss3/2>

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## NOTES

## WHO MAY SECURE A COPYRIGHT\*

## PERSONS ENTITLED TO COPYRIGHT

Sections nine and ten of the copyright act provide, "that any person entitled thereto by this act may secure copyright for their work by publication thereof with the notice of copyright required by this act." Congress leaves it up to the author, proprietor, or assignee to secure the copyright; the word "may" implies that the provision is not compulsory but rather permissive and yet is translated into a must if the copyright is desired. Unfortunately there is no provision for examination of origin as in the case of patents, and for that reason the act provides that the protection be extended to all the copyrightable, component parts of the word copyright.

In section three, the inference is that the Act does not purport to be a part of the settled law before the present statute.<sup>1</sup>

For the purpose of continuity, this paper will be divided into several sections for simplification and easier analysis. Each class or group is subject to interpretation in applying the applicable principles of copyright law, and for a correct determination, each problem must be read in light of the Federal Copyright Act.

## GENERALLY

The Federal Copyright Act<sup>2</sup> provides that the author or proprietor of any work, made the subject of copyright, or his executor, administrators, or assignee shall be entitled to a copyright in such work. The Act further provides that no copyright shall subsist in the original text of any work which is in the public domain or any work which was published in the country or any foreign country prior to July 1, 1909, and has not been previously copyrighted in the United States Government or any reprint, in whole or in part, thereof: PROVIDED, that copyright may be secured by the post master general on behalf of the United States in the whole or any part of the publication authorized by section one of the act of January 27, 1938.<sup>3</sup> The publication or republication by the government, either separately or in a public document, or any material of which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any act

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\* Submitted in the Nathan Burkan Memorial Competition.

1. *Eggar v. Sunsales Corp.*, 263 Fed. 373 (2nd Cir. 1920).

2. 17 U.S.C. § 8.

3. 39 U.S.C. § 371.

of appropriation of such copyright material without the consent of the copyright proprietor. On these points the act is specific. It provides that the author or proprietor ". . . or his executor and administrator or assignee shall have a copyright for such work . . .,"<sup>4</sup> and an ostensible copyright by one without the statutory description is wholly void.<sup>5</sup> Thus, one who, without express or implied authority from the author, goes through the forms of copyrighting another's composition attains no copyright.<sup>6</sup> However, if a copyright is secured in the name of someone other than the composer and no one is thereby prejudiced the copyright is valid.<sup>7</sup>

Copyrights secured under the act of 1909 are computed in the case of a work published in the first instance from the date of publication, with a renewal period of the same duration. Of course, the rights under a renewal term necessarily depends on the validity of the previous copyright.<sup>8</sup> Thus only those persons on whom the statute confers the right to renewal are entitled to or can obtain it.<sup>9</sup> A corporation may be a proprietor, and through the joint action of its employees, it may become an author and thereby obtain a copyright.<sup>10</sup> The particular designations in the statute are exclusive and any person not falling within the classification of the class mentioned can not record.<sup>11</sup> (Thus while an executor is mentioned as entitled to a renewal, an administrator is not.<sup>12</sup>) If there is no executor, surviving spouse or children when the time for renewal arrives, the next of kin may renew even though the estate has been administered and the executor is discharged before the expiration of the copyright.<sup>13</sup> Also there is no vested right to renewal prior to the time when the right to it accrues under the statute.<sup>14</sup> This principle was recently upheld where the co-composer of a song, during the original copyright term, assigned his copyright renewal

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4. 39 U.S.C. § 371.

5. *Cohan v. Richmond*, 294 Fed. 430 (8th Cir. 1923); *April Production Inc. v. Schirmer*, 308 N.Y. 366, 126 N.E.2d 283 (1955).

6. *Societe Des Films Menchen v. Vitagraph Co. of America*, 251 Fed. 258 (2nd Cir. 1918).

7. *Powell v. Stransky*, 98 F.Supp. 434 (1918).

8. *See Edward Marks Music Corp. v. Continental Record Co.*, 222 F.2d 488, *cert. denied*, 350 U.S. 861 (1955). The first application for a copyright is good for 28 years with a renewal term of the same duration.

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

10. *Dan Kasoff Inc. v. Palmer Jewelry Mfg. Co.*, 171 F.Supp. 603 (1959).

11. *Fox Film Corp. v. Knowles*, 261 U.S. 326 (1923). The statute intends that an executor shall have the same right as the testator if no surviving kin can apply for the copyright.

12. *Gibran v. Nat. Comm. of Gibran*, 255 F.2d 121, *cert. denied*, 358 U.S. 828 (1959). (This, however, apparently does not apply where a will has been left but no executor has been provided for.)

13. *Silverman v. Sunrise Pictures Corp.*, 290 Fed. 804, *cert. denied*, 262 U.S. 758 (1924).

14. See note 13 *supra*.

rights to the plaintiff and before the expiration of the original copyright, the co-composer died leaving no widow or child and his will contained no specific bequest concerning renewal copyright. The renewal rights accrued to the executor and not to the plaintiff.<sup>15</sup> Hence an author dying before the time in which the right of renewal accrues cannot bequeath this right by will.<sup>16</sup> This right of the survivor, upon applying for the renewal, should be checked carefully with the copyright statute before an application is made, as the statute is mandatory rather than directory and is strictly construed.

#### STATE

As the Federal Copyright Act does not provide expressly for the copyrighting by the government the question is still subject to some doubt. There is at least one decision of a state court holding that the state may lawfully take unto itself the copyright of the reports of cases determined by its own judiciary.<sup>17</sup> This question of whether a state could take out a copyright and enjoy the benefits thereof was brought before the United States Supreme Court in *Banks v. Manchester*,<sup>18</sup> but unfortunately the court found it unnecessary to decide this issue and the case was disposed of on other grounds. It is probable that the highest court would hold that a state could not be considered a citizen of the United States or a resident therein within the terms of the copyright statute, which seems to leave little room for interpreting the word citizen.

#### ASSIGNMENT

The copyright act expressly confers upon the author, proprietor or assigns of any subject matter, the right to obtain the copyright.<sup>19</sup> Any intellectual product may be assigned by the author, inventor, or designer before the statutory copyright is obtained, in which case, the copyright, pursuant to the expressed terms of the statute may be taken out by the assignee.<sup>20</sup> Also no one is entitled to obtain a copyright unless he is the author, or is an assignee of the author.<sup>21</sup> What the author may do himself, he may assign to another, including the right to secure a copyright. The assignee then becomes a proprietor, as this term is equivalent to assign in the same clause

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15. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960).

16. *Silverman v. Sunrise Pictures Corp.*, 290 Fed. 804, *cert. denied*, 262 U.S. 758 (1924).

17. *Goulds v. Banks*, 53 Conn. 415, 2 Atl. 886 (1880).

18. 128 U.S. 244 (1910).

19. 17 U.S.C.A. § 8.

20. *National Comics Pub. v. Fawcett Publications*, 19 F.2d 594 (2nd Cir. 1951).

21. *April Production Inc. v. Schirmer, Inc.*, 308 N.Y. 366, 126 N.E.2d 283 (1955).

and implies that the right was originally derived from the author.<sup>22</sup> But where the assignee is not a proprietor, but merely a licensee, the latter may not take out a valid copyright.<sup>23</sup> This right to obtain may be transferred by parol.<sup>24</sup> It may also be inferred that an author who places a book in the hands of a publisher intends to authorize the publisher to obtain a copyright. The inference, then, is to convey the author's right of copyright; however, it may be rebutted where it appears that the author subsequently took out a copyright in his own name.<sup>25</sup> Thus an author may assign the writer's privilege of taking a copyright independently and make a transfer of the copyrightable thing itself, where the work is sold to one person and the copyright to another or is reserved unto himself.<sup>26</sup> The ultimate question, where there is no express contract, is whether the right to obtain the copyright upon work produced is at the request of another, in which case, the latter is the proper party to secure a copyright. An express agreement, on the part of the author, that the employer shall have a copyright of the work produced entitles the employer to the copyright. The fact that one is employed to execute literary work does not vest the power in the employer to copyright the finished product.<sup>27</sup> Of course, the intention of the parties, as to which of them shall have the right to copyright, is decisive.<sup>28</sup> Nor does the mere fact of employment make the employer the absolute owner of his employee's productions. If there is nothing within the terms and conditions under the attending circumstance implying that the copyright shall belong to the employer, it may be secured by the author.<sup>29</sup>

#### LETTERS, PHOTOGRAPHS AND ARCHITECTURAL PLANS

Generally it may be said that the writer of a letter has a distinct property right within the letter superior even to that of the person to whom the letter is sent,<sup>30</sup> and after the writer's death his representatives are the persons entitled to copyright it. However, the recipient of a letter may publish it against the will of the letter

22. *Harms v. Stern*, 229 Fed. 42 (2nd Cir. 1915). The legal title to a copyright vests in the person in whose name it is taken out and may be held in trust for the true owner.

23. *Morse v. Fields*, 127 F. Supp. 63 (1954).

24. *Callaghan v. Myers*, 128 U.S. 617 (1865).

25. *Miffen v. R. H. White Co.*, 190 U.S. 260 (1900).

26. *Bong v. Campbell Art Co.*, 214 U.S. 236 (1909).

27. *Miffen v. R. H. White Co.*, 190 U.S. 260 (1900).

28. *Tobani v. Carl Fischer*, 98 F.2d 82 (6th Cir. 1928). This evidence may be gathered from the terms of the employment contract.

29. *Anderson v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928).

30. *Henish v. Meier*, 166 Ore. 482, 113 P.2d 438 (1941).

writer if it is necessary to protect a threatened invasion of his rights.<sup>31</sup>

On the other hand where a photographer is engaged in the usual course of business to take pictures for consideration, the hirer is the owner of the negatives and photograph. From this it follows that he is entitled to copyright as distinguished from the photographer.<sup>32</sup> However, where there is no consideration given and it is at the photographer's expense, he becomes the owner of the negative and photograph and is entitled to the copyright.<sup>33</sup>

Architectural plans, drawings, and specifications are considered the architect's and until publication he has exclusive right of use for copyrighting purposes in his work product.<sup>34</sup>

#### JOINT AUTHORS

Where two or more people act as joint authors of a preconceived production a copyright may be secured in both their names<sup>35</sup> and each has his undivided interest in the document. As in joint tenancy, a copyright may also be secured by tenants in common.<sup>36</sup>

#### CITIZENSHIP AND RESIDENCY AFFECTING THE RIGHT TO COPYRIGHT

17 U.S.C. § 8 provides that the copyright secured under the act shall extend to the intellectual work of an author or proprietor, not domiciled within the United States, who is a citizen or subject of a foreign state or nation only when the foreign state or nation of which such author or proprietor is a citizen or subject grants similar rights to citizens of the United States, and that the existence of the reciprocal document shall be determined by the President of the United States, by proclamations made from time to time, etc., is substantially the same as in the preceding statute.

Section eight (nine) of the act goes on to provide that the copyright secured by this act is extended to the work of the author or proprietor who is not a citizen or subject of a foreign state or nation only when he is either (a) domiciled in the United States at the time of first publication of his work, or (b) is a citizen or subject of what is commonly called a "proclaimed country."<sup>37</sup>

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31. *Folsom v. Marsh*, Fed. Cases No. 4,901 (1841). ". . . No person has any right to publish them without his consent, unless such publication be required to establish a personal right or claim, or to vindicate character."

32. *Avedon v. Exstein*, 141 F.Supp. 278 (1956).

33. *Lumiere v. Robertson Cole Distributing Corp.*, 280 Fed. 550, *cert. denied*, 259 U.S. 583 (1922).

34. *Larkin v. Penn. R.R.*, 125 Misc. 238, 210 N.Y. Supp. 374 (1925).

35. *Shapiro, Bernstein Co. v. Jerry Vogel Music Co.*, 161 F.2d 406 (2nd Cir. 1955).

36. *Edward B. Marks Music Corp. v. Wonnell*, 61 F.Supp. 722 (D. 1945).

37. For countries which the United States has established copyright relations with see 17 U.S.C.A. § 9 (pocket part).

The domicile may be acquired by (a) residence or (b) intention to remain, which may be inferred in various circumstances as payment of taxes, establishment of a home or intention to become a citizen.<sup>38</sup>

It is to be noted that the status of the author is the determining factor rather than that of the proprietor. Hence if the author is not entitled to copyright, the proprietor can acquire no greater right than the author himself possessed even though the proprietor may be a citizen of this country.<sup>39</sup>

It should be noted, that the proclamations of the President regarding the existence of these reciprocal conditions does not create the right of non-resident alien authors to benefit under the copyright laws. It only extends the conditions under which these privileges may be exercised.<sup>40</sup> Today, by proclamations, treaties and conventions the United States has established copyright relations with most countries.

Each country should be carefully checked to fully appreciate the extent the area in which these proclamations, treaties and conventions apply. No two countries are identical, each compact contains numerous qualifications which alter the particular act.

JOHN L. PLATTNER

## JURISDICTIONAL CONFLICTS OF COMITY IN FEDERAL AND STATE COURTS

The problem to be considered is that of jurisdictional conflict between federal and state courts which could arise in the following manner: The defendant commits an act or acts that are in violation of both federal and state laws. The federal government gains physical custody of the defendant and he is tried, convicted and placed on probation. The question then arises; can the state prosecute the defendant for violation of state laws? Do both courts or only one court have jurisdiction? When does the first court's jurisdiction cease? These and related questions will be discussed in the following article.

### HISTORY

The authorities seem to be in conflict in the case of either the state or federal court first acquiring jurisdiction over the defendant and to whether they must grant the other right to prosecute. The

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38. *Ricordi v. Columbia Graphophone Co.*, 258 Fed. 72 (D. 1919).

39. *Bong v. Campbell Art Co.*, 214 U.S. 236 (1919).

40. *Chappel v. Fields*, 210 Fed. 864 (2d Cir. 1914).