

Editorial

Publishing and distributing content in today's environment means working within a variety of models. An article or a series of articles published in a newsletter or website may become a mini e-book, the basis for a webinar or online course, or part of an online subscription-based database. These various models of monetizing content presume one thing—that ownership of the original content is clearly established when that original or first version of the content is written.

Owning Content is Key

In copyright, the ownership rule seems quite straightforward: Generally, an author is the first owner of copyright in her work. However, there are exceptions. In an employment situation, the employer owns the copyright in her employee's work. The law, however, treats a consultant differently than an employee. If a consultant writes an article or white paper or other document, that consultant owns the copyright in it unless there is a written agreement stating otherwise. For consultants, interns, students, and other nonemployees, you want to make sure the ownership of any content is clearly established at the start of all working relationships and for all of your projects.

Even with employees, what content is owned by the employee versus what content is owned by the employer is not always crystal clear (see below.)

Copyright Ownership Policies

Do organizations typically have copyright ownership policies in place? Although universities are careful to have written guidelines on ownership of intellectual property (IP), usually that IP concerns patents and potential patents (from inventions and other works eligible for patent protection).

Copyright ownership often lags in terms of priority and understanding and is often left out when it comes to IP ownership policies. Outside of academia, IP ownership policies are less frequent.



Should you have a copyright ownership policy? Definitely yes. All new employees should be educated about basic copyright issues, including ownership policies. For example, employees should be aware that all content created during the course of their employment and constituting part of their employment-duties is owned by you. What if the employee blogs on an unrelated issue? Such an activity would generally be outside the duties of the employee and the employee would own the copyright in the blog posts. However, what if the employee blogs or writes a book based on knowledge gained through working for you? Who owns the copyright in the blog or book? This scenario is much trickier and exemplifies the need for a copyright ownership policy. Not every situation with an employee can be spelled out in a policy.



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Lesley Ellen Harris, Editor
Copyright, Licensing & Digital Property Lawyer
editor@copyrightlaws.com

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Copyrightlaws.com
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E: editor@copyrightlaws.com

W: <http://copyrightlaws.com>

F: 202.478.0478

A good practice is to have a mechanism in place to review various projects by employees so that you can establish ownership at the beginning of that project. An important piece of this puzzle is to let employees know you own all work-related content and that they should inform you when they are working on content that is beyond the scope of employment so that you can, together and in advance of potential misunderstandings or disputes, determine copyright ownership of it.

One Article: Many Lives

You may think of an article as being just that: only one article with only one opportunity for publication and presentation to a reading-public.

And until recently, that would have been true. But, with today's explosion of social media and digital publication outlets, "an" article can and often does take on a life of its own—several lives, in fact—and can have much value within each of these lives. By securing the proper rights, original content may be published and republished, repurposed, adapted, and recycled. Without those rights, you may find a project stalled or suspended, while you are faced with a possible lawsuit to defend and mounting legal bills. Depending on the situation an after-the-license-fee¹ may be a possibility, too. Proper copyright procedures will ensure that you have maximum protection in the one constant—your content—across your various publishing and distribution models. ■

Lesley Ellen Harris
Editor

editor@copyrightlaws.com

¹ After-the-license fee refers to this situation: You realize after-the-fact that you do not have the permission that is required for your use of some content. You then approach (or are approached by) the copyright holder and pay the licensing fee.

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ORPHAN WORKS FROM THE MUSEUM PERSPECTIVE

By Rina Elster Pantalony

Museums, Copyright, and the Online Environment

As stewards of collections where individual works are copyright protected, museums negotiate and manage rights issues regularly in order to carry out their respective missions. Preserving, exhibiting, educating, and making copyright protected works available to patrons and scholars were and continue to be their primordial objectives. In addition, museums are also owners and authors of their own intellectual property. Whether authoring academic works, creating patentable systems, or managing names and marks, museums manage their own intellectual property in increasingly competitive environments.

Museums were early adopters of the internet as a means of communicating with their patrons. As early as 1995, museums experimented with the development, for purposes of academic study, of virtual libraries of images of works in their collections, and museums now are very active in the online environment. In addition to producing online exhibitions, museums participate in the development of digital repositories created for educational purposes and have branched out to embrace social media as a means of fostering discussion and interest about their collections.

Orphaned Works: A Special Issue for Museums

Because museums operate as stewards of collections with a mission and responsibility—on the one hand to educate and communicate with their public and, on the other hand, to care for their collections—museums hold a unique perspective on rights issues. One of the most significant legal issues facing the contemporary museum is the orphaned works issue. The issue of orphaned works, that is, works determined to likely still be in copyright where the copyright owner cannot be identified or found, is not new. Historically museums have been involved in determining provenance or attribution of works of art.

The issue has now become magnified for a number of reasons, including the following: i. the development of the internet and its global reach; ii. many twentieth-century works were created using media developed in the twentieth century and copyright laws were not originally created with these media in mind; iii. legal constructs, such as corporations and licensing arrangements, having finite shelf lives. Elaborating upon the latter, corporations that produce audiovisual works often become, over time, defunct, leaving directors dispersed and untraceable, and the term of the licensing arrangements for the underlying works in a film being for only the time necessary to distribute the film commercially. Thus, in many cases, the copyright owners of the underlying works in a film can be untraceable or not identifiable. This means that many audiovisual works sit in museum and film-archive collections and cannot be accessed—and in many circumstances not even preserved—without infringing copyright.

Thus, orphaned audiovisual works run a twofold risk of deteriorating¹ and remaining inaccessible to the public until a museum or archive is certain that the work is no longer protected by copyright. The loser in the end becomes the public. While museums and archives may be prepared to engage in a legal risk assessment in order to try to make works accessible for educational purposes, it means that the museum or archive is placed in an impossible position of having to infringe copyright in order to save a work in its collection or allow the work to be accessed, even if only for academic purposes.

Orphaned Works in the European Union

Since 2005 in North America and since 2008 in Europe, orphan works have been the subject of much debate, proposed legislation, and litigation². In response to a growing awareness of the fragility and deterioration of 20th Century audiovisual collections, the European Union ratified a Directive in May 2011 concerning the reproduction and distribution of orphaned works. Both the European Parliament and the Council adopted it on October 25, 2012³.



The new Directive on Orphan Works holds the objective of providing Europe's libraries, archives, film heritage institutions, public broadcasters, and other organizations with a public interest mission with the appropriate legal framework to provide online, cross-border access to audio visual collections, including orphan works.⁴ European Union members are now working to meet deadlines for introducing domestic legislation in keeping with the Directive. Legislation has been introduced by member states, notably in the United Kingdom and in France.⁵

Orphaned Works in the United States

Since 2005, the U.S. Copyright Office has tackled the orphaned works issue. Proposed legislation in 2006 and then again in 2008 that sought a remedies based solution died in Congress. Instead of creating an exception to copyright, the proposed legislation removed only the threat of damages for prior reproduction and distribution. The legislation in both instances was media neutral, as it applied an orphan works solution to all media and not to just audiovisual works. In both instances, it required the user of the orphaned work to first carry out a form of due diligence to try to determine and locate the copyright owner.⁶

Currently, the U.S. Copyright Office has reopened the orphaned works issue and has called for submissions as part of a broader mission to revisit issues concerning digitization; distribution of scholarly content; and section 108 exceptions for libraries, archives, and now potentially museums.⁷

Orphaned Works in Canada

Finally, Canada has long had a provision for *Unlocatable Copyright Owners* in its copyright laws. Section 77 of Canada's Copyright Act⁸ provides that where a copyright owner cannot be located, the party seeking to reproduce the work may apply to the Copyright Board of Canada for a license to reproduce or distribute the work. The Board sets the tariff and the funds are paid into the Board and held by a collective society for later distribution to the copyright owner in the event that he or she resurfaces to make a claim.

While this system is certainly more progressive than many, the provision does not address the needs of mass digitization projects because the law requires the status of a work to be determined on a case by case basis.

In addition, recent amendments to Canada's copyright laws provide a measure of comfort for noncommercial users of copyright material. Canada's new laws provide for a ceiling on statutory damages of \$5000 for noncommercial users in the event that permission was not obtained prior to use.⁹ Presumably museums would fall into this category, and while the provision does not remove the risk entirely, museums are at least able to quantify the risk prior to making orphaned works available in scholarly online repositories.

Conclusions

Clearly there are disparities in approach. Given that digital repositories made available on the internet will cross jurisdictions and that solutions to the problems raised by orphaned works are still very much "works in progress," there are four main issues that need to be addressed as authorities grapple with this matter:

1. There is no clear definition of what constitutes an orphaned work. The European Union Directive is aimed at nonprofit public entities with audiovisual collections. By way of contrast to the EU Directive, the U.S. examined, in two past attempts, a works-neutral approach.
2. In certain jurisdictions, such as the U.S., prior proposed approaches to orphaned works required the user of the work to conduct due diligence in trying to locate or determine the copyright owner. What might constitute this due diligence is still very much a part of the debate. Should due diligence by a collecting institution be determined by legislation or by policy?
3. Within the context of collecting information about the copyright owner in conducting due diligence, who collects and sanctions the information? Should it be an authority, such as in the Canadian model, or should the system work more informally and would informality lead to more litigation?¹⁰

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COPYRIGHT IN FRANCE: THE FRENCH SYSTEM OF “DROIT D’AUTEUR” AND THE COEXISTENCE AND CROSSOVER OF MORAL AND PATRIMONIAL RIGHTS

By Jean-François Bretonnière and Thomas Defaux

The French system of *droit d’auteur* (literally translated as “the right of the author”) is generally perceived from the outside as a complex and unique set of rules, in particular in the eyes of common law jurists. The particularities of the French system are mostly due to a single factor: the French concept of moral rights.

While moral rights have now been part of most copyright legislations for some time (in the U.S. since the Visual Artists Rights Act of 1990), considerable discrepancies exist between the different systems in regard to both the scope and the legal regime of such rights.

The Origins of Moral Rights (*Droit Moral*)

French copyright law is undoubtedly the legal system which grants the strongest and the broadest protection to moral rights. This is the result of the French evolution of the system of *droit d’auteur*.

Some legal authors trace the origins of the *droit d’auteur* and moral rights back to the French Revolution which enshrined the philosophy of individualism. The introduction of moral rights is often perceived as an attempt to apply this philosophy to the creation process by securing the bond between the author and his work.

An alternative view is that moral rights emerged in France during the 19th century in the works of the jurist André Morillot (1849-1922). While French courts began acknowledging some isolated elements of moral rights in the early 19th century, Morillot sought to define the nature of the prerogatives accruing to the author by virtue of his creation by introducing a distinction between proprietary rights and extra-proprietary rights. Morillot was the first author to use the term *droit moral* which later gave birth to the English translation of *moral rights*.

However, the works of Morillot, like most of the doctrine of moral rights, were based on prior German legal theory and especially on the dualistic approach of German author Rudolf Klostermann, whereby moral rights exist alongside patrimonial rights. Nevertheless, Germany opted for the monist theory (whereby the personal and patrimonial rights are inseparable components of the same right of the author) over the dualistic theory, while the dualistic theory found strong support in France in the early 20th century.

By the end of the first half of the 20th century, the French *droit moral* became a solid set of rules emanating from the French courts.

The Extensive Scope of French Moral Rights

The final step of the French construction of the *droit moral* took place in 1957 with the insertion of the case law on moral rights into the French Copyright Law of 1957 under four main prerogatives:

- the right of attribution of a work (*droit de paternité*) is the right for an author to be identified as such;
- the right of integrity (*droit au respect de l’intégrité de l’œuvre*) is the right for the author to prevent his work from being modified or destroyed;
- the right of disclosure (*droit de divulgation*) is the right of the author to decide when and how his work will be revealed to the public; and
- the right of withdrawal (*droit de repentir*) enables the author to take back works which have previously been disclosed to the public.

These moral rights are extensive not only in their scope, but also in their legal regime. Indeed, very early on, French courts considered that moral rights should follow the same regime as personality rights and, therefore, should be inalienable and imprescriptible (French Supreme Court, 31 March 1858).



However, there is one additional feature of moral rights which creates a fundamental difference with the other legal systems. The French Intellectual Property Code not only expressly provides for the possibility to transfer moral rights on the death of the author (moral rights can be transferred only because of death), but also provides for the perpetuity of moral rights. The combination of this perpetual nature with the possibility of transferring a moral right only in case of death, offers a crucial tool to maintain control over the use of a work beyond the duration of patrimonial rights. As an example, the French courts (Paris Court of First Instance, 12 September 2001) found that the moral rights over the works of famous author Victor Hugo had been transferred to his heirs up until today even though the famous writer died in 1885.

Another key feature of French moral rights is that French courts consider these rights to be part of public policy, meaning that no one, not even the author, has the power to decide on the existence and ownership of these rights. Not only is it impossible to transfer or assign moral rights under French law, it is also impossible to waive those rights, unlike under U.S. or U.K. law.

In addition, the provisions governing moral rights are considered by the French Supreme Court as being mandatory as regards international private law (28 May 1991, *John Huston*). This means that French judges are compelled to apply the provisions of the Intellectual Property Code regarding moral rights, regardless of the traditional conflict of law rules.

Among the several moral prerogatives, the *droit de divulgation* (the right of disclosure) has a peculiar status which distinguishes this right from the others. By virtue of this right, which was first recognized by the Supreme Court in the *Whistler* case (14 March 1900), authors are the sole decision makers with regard the disclosure of their work. The importance of the *droit de divulgation* is reflected in the devolution of the moral rights prerogatives. Indeed, the Supreme Court considers that the *droit de divulgation* is vested in the heirs according to specific rules of transmission, while the other moral rights prerogatives are governed by the common inheritance law (11 January 1989, *Utrillo*).

As a consequence, the *droit de divulgation*, unless specifically attributed by the author to one person, follows its own path and may end up in different hands from the other moral and patrimonial prerogatives.

The Interference between Moral and Patrimonial Rights

The dualistic approach in France remains very strong and is especially characterized in relation to damages for the infringement of authors' rights. Indeed, the infringement of any moral right prerogative allows the claimant to request damages as a result of this violation, in addition to and separately from the remedies which may be granted for the infringement of patrimonial rights.

Although the French system is based on the dualistic approach to moral rights and patrimonial rights, the exercise of the moral rights prerogatives regularly interferes with the exercise of the exclusive economic right. This interference is particularly strong as regards the exercise of the *droit de divulgation*, since this right determines the moment when patrimonial rights are created. Indeed, before disclosure, the work exists only as part of the author's personality; upon disclosure, the work becomes a patrimonial asset.

As a direct consequence, the *droit de divulgation* also interferes with the statutory exceptions to patrimonial rights. Indeed, all the statutory exceptions to the author's patrimonial rights may only apply once the work has been disclosed and not before.

Furthermore, the French Supreme Court (25 March 2010) recently reaffirmed that the author's *droit de divulgation* is not only the right to make the work available, but also to decide the means and conditions of disclosure, including the choice of the publisher and the economic conditions of publication.

Conversely, and more surprisingly, the exercise of patrimonial rights also interferes with the exercise of the moral rights prerogatives. For example, in practice, the *right of attribution* is rarely respected in the case of ghost writers. Although, in theory the author can demand at any time that his authorship be recognized under French law, for economic reasons it is rare for the author to do so.

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WHERE TO SUE IN COPYRIGHT INFRINGEMENT CASES

By Tonya Gisselberg

In the United States, does the federal district court in the copyright owner's home state have personal jurisdiction over an out-of-state infringer? The answer to this question could depend on whether the infringer willfully infringed.

What is Personal Jurisdiction?

Personal jurisdiction is the court's power over the parties in a case and is generally limited to a geographical area, such as a state. More broadly, jurisdiction is the right or authority of a court to hear and decide a case. Not every court has the right or authority to decide a particular legal dispute. For example, a small claims court does not have the authority to decide a copyright case. Only federal courts have that authority. Personal jurisdiction is therefore the right or authority of the court to make a ruling that is enforceable against a specific party. There are two kinds of personal jurisdiction: specific jurisdiction and general jurisdiction.

Specific jurisdiction is based on the relationship between the defendant's contacts with the forum state and the plaintiff's claims. The forum state is the state in which the copyright owner files the lawsuit. An example of a defendant's contacts with the forum state would be the defendant advertising its goods and services in the forum state with the specific goal of obtaining customers from that state. Contacts are anything the defendant does that has a consequence in the forum state.

General jurisdiction is based on the defendant's substantial, continuous, and systematic contacts with the forum state and under which the defendant can be considered "present" in the forum state for all purposes. Maintaining a branch office in the forum state is an example of substantial, continuous, and systematic contacts with the forum state. Specific jurisdiction is at issue when the copyright owner lives in one state, the infringer lives in another state, and the infringer's only contact with the copyright owner's home state is the copyright infringement.

Copyright infringement is a tort, i.e. an injury to another's person, property, or reputation, so copyright infringement affects the copyright owner where he resides. A long-arm statute gives a state court jurisdiction over an out-of-state defendant. When there is no applicable federal long-arm statute, federal courts apply the forum state's long-arm statute. Courts apply the long-arm statute of the forum state in copyright infringement cases, since the Copyright Act does not address when a particular defendant can be sued in a particular state.

Washington State's Long-Arm Statute

Washington State's long-arm statute has been interpreted to extend jurisdiction to the limit of federal due process. The Due Process Clause of the Fourteenth Amendment to the United States Constitution sets the limit that no one shall be "deprived of life, liberty or property without due process of law." In applying Washington State's long-arm statute, the court does not need to separately analyze Washington State law, but only needs to determine whether exercising jurisdiction conforms to the federal constitutional requirements of the Fourteenth Amendment's Due Process Clause.

The Ninth Circuit Court of Appeals uses a three-part test to determine whether a defendant has sufficient minimum contacts with the forum state to be subject to specific personal jurisdiction in that state. The three-part test has subparts, which can make the discussion seem confusing.

The three-part test for minimum contacts comprises the following:

- (1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;



(2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

(3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

Personal Jurisdiction in Willful Copyright Infringement Cases

The Ninth Circuit applied the above three-part test to a case in which the only contact with the forum state was alleged willful copyright infringement. In *Washington Shoe Company v. A-Z Sporting Goods Inc.*, the copyright owner, Washington Shoe, discovered that a business with a single retail store in Alma, Arkansas, A to Z Sporting Goods (A-Z), was selling infringing copies of Washington Shoe's copyright-protected rain boot designs. A-Z did not sell products over the internet. The attorney for Washington Shoe sent A-Z two cease and desist letters. After receiving the second letter, A-Z moved the boots out of its store but sold its remaining supply of the boots to a thrift store.

The first part of the three-part test for minimum contacts was the only relevant part: The plaintiff must demonstrate that the defendant "either purposefully availed itself of the privilege of conducting activities in the forum, or purposefully directed its activities at the forum." The purposeful availment analysis is generally used in contracts cases, while the purposeful direction analysis is used in tort cases. The Ninth Circuit applied the purposeful direction analysis, as copyright infringement is a tort.

The purposeful direction analysis has three parts, requiring that the defendant

- (1) committed an intentional act;
- (2) expressly aimed at the forum state; and
- (3) caused harm that the defendant knows is likely to be suffered in the forum state.

Thus, courts may exercise personal jurisdiction over a defendant who engages in an intentional act that causes harm in the forum state, even if that act takes place outside of the forum state.

The Ninth Circuit ruled that A-Z committed an intentional act when it allegedly willfully infringed Washington Shoe's copyright. The phrase *intentional act* has a specialized meaning under this test. It means that the actor intended to perform the physical act. Intentional act does not include the actual or intended results of the act. In shooting a gun at a target, pulling the trigger is the act, not hitting the target with the bullet. The Ninth Circuit determined that A-Z's intentional acts were its purchasing the allegedly infringing boots from China and selling them to a thrift store. The Ninth Circuit did not indicate which of the exclusive copyrights A-Z violated by purchasing the allegedly infringing boots.

The Ninth Circuit ruled that A-Z's conduct was expressly aimed at Washington State. Proving willful copyright infringement requires showing either that the defendant was actually aware of the infringing activity or that the defendant's actions were the result of reckless disregard for, or willful blindness to, the copyright holder's rights. Evidence that the alleged infringer has been notified of the infringement is probably the most persuasive evidence of willfulness. The harm caused by copyright infringement must at least be felt where the copyright owner is located, so the impact of a willful infringement must also be directed there.

The Ninth Circuit ruled that A-Z's sale of the boots, after having received two cease and desist letters from Washington Shoe's attorney informing A-Z that the boots were knock-offs and infringed Washington Shoe's copyrights, was an intentional act expressly aimed at Washington Shoe's copyright and at the State of Washington.

"Something more" than an act in another state creating foreseeable effects in the forum state is necessary for specific personal jurisdiction.



The Ninth Circuit ruled that A-Z's alleged willful infringement, A-Z's knowledge of the existence of the copyright, and A-Z's knowledge of the state in which the copyright holder is located, provided the "something more" necessary for the express aiming requirement.

A-Z caused harm that it knew would likely be suffered in Washington State. Consequently, A-Z could reasonably anticipate being called into court in the State of Washington.

Personal Jurisdiction in Nonwillful Copyright Infringement Cases

When there is no willful copyright infringement, the court still undertakes the same analysis outlined above, i.e., applying the three-part minimum contacts analysis. However, in these cases where there is no willful copyright infringement, the express aiming analysis can lead to a different result. Larry G. Johnson is an attorney in Washington State and the sole copyright owner of *The Deposition Guide, A Practical Handbook for Witnesses*. Catharine M. Venzon is an attorney in New York State. Venzon's law firm posted scanned pages from Johnson's book on its website. Johnson sued Venzon and her law firm for copyright infringement in federal court in Washington State. Venzon brought a motion to dismiss for lack of personal jurisdiction. The district court granted the motion, determining that Venzon's conduct was not expressly aimed at Washington State.

The district court found that Venzon's acts in posting parts of Johnson's book on her website and the acts of her law firm were intentional. The district court also found that Venzon knew that Johnson was a resident of Washington State while she was engaged in the allegedly infringing activities. Although some Ninth Circuit cases supported Johnson's argument that "the express aiming requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state," the district court determined that "something more" than just knowledge that the copyright owner resides in the forum state is necessary. A defendant's internet advertising, by itself, is not sufficient to establish jurisdiction over the advertiser in the copyright owner's home state.

The district court ruled that the "something more" in this case required the plaintiff to show that the defendant targeted the plaintiff by using defendant's website to infringe plaintiff's copyright with the intention of competing with the plaintiff in the plaintiff's forum state. Johnson was unable to show that Venzon infringed his copyright with the intention of attracting clients beyond New York State. The district court found that Venzon's website was aimed locally, even though it was accessible nationally.

Johnson alleged willful infringement in his complaint, but the district court did not discuss willful infringement in issuing its order dismissing Johnson's complaint.

Personal Jurisdiction over Foreign Defendants

MacDermid, Inc. v. Deiter is a trade secrets case, but it illustrates the point that purposeful availment, the contract case equivalent to express aiming, can be found when the defendant knows where the plaintiff's servers are located and uses those servers to obtain the plaintiff's intellectual property.

Plaintiff MacDermid is a chemical company with its principal place of business in Waterbury, Connecticut, and a subsidiary in Toronto, Ontario, Canada. Defendant Jackie Deiter was a former employee of the subsidiary and lived near Toronto. MacDermid alleged that prior to her termination, Deiter forwarded confidential and proprietary MacDermid files from her corporate email account to her personal email account, thereby misappropriating MacDermid's trade secrets and obtaining unauthorized access to and misusing MacDermid's computer system. Deiter obtained and emailed the files by remotely accessing MacDermid's Waterbury, Connecticut, servers from her home near Toronto.

The Second Circuit ruled that Deiter purposefully availed herself of the privilege of conducting activities within the state of Connecticut. Deiter knew that MacDermid's email system and the storage of its trade secrets and confidential and proprietary information were centralized in Waterbury, Connecticut, and used the Connecticut servers to retrieve and email confidential files.



Deiter also directed her allegedly tortious conduct towards MacDermid, a Connecticut corporation. The Second Circuit ruled that not only did Deiter have sufficient minimum contacts but that exercising personal jurisdiction was also reasonable under the Due Process Clause.

Website owners whose servers are located in the same state as their principal place of business may want to consider putting notices on their websites stating their servers' locations. Depending upon the forum state's long-arm statute, a website owner may be able to use that notice to establish jurisdiction over a nonresident defendant where the website owner's principal place of business is located. ■

Tonya J. Gisselberg (LL.M., J.D., B.A.)
Gisselberg Law Firm, Inc.
Redmond, WA USA

tonya@gisselberglawfirm.com
www.gisselberglawfirm.com/

Cases

MacDermid, Inc. v. Deiter, No. 11-5388-cv, Second Circuit Court of Appeals.

Washington Shoe Company v. A-Z Sporting Goods Inc., Nos. 11-35166 and 11-35206, Ninth Circuit Court of Appeals.

Johnson v. Venzon, No. C12-895RSL, Western District of Washington, Seattle.

Other resources

Tort definition: <http://dictionary.reference.com/browse/tort>

Looking for copyright training?
Explore the variety of online and in-person options on copyright and licensing training at:
www.copyrightlaws.com

News Brief RESELLING FOREIGN BOOKS OKAY

U.S. Supreme Court upholds reselling of foreign books in *Kirtsaeng v. John Wiley & Sons*. Decision seen as victory for librarians and those who share and resell copyright-protected works – see www.supremecourt.gov/opinions/12pdf/11-697_d1o2.pdf.

News Brief TWITTER PHOTOS REQUIRE PERMISSION

A U.S. District Court has ruled that news organizations cannot publish photographs found on Twitter without obtaining copyright permission. The case is *Agence France Presse v. Morel*.

News Brief SCRAPING IS NOT FAIR USE

U.S. District Court (SDNY) ruled in *AP v Meltwater* that scraping news articles from the web and providing excerpts (article headline, hyperlink to source article and up to 300 characters from the opening text of the article) to paying subscribers is a copyright infringement and not fair use.

News Brief CANADIAN FAIR DEALING ACTION

The Canadian reprography collective Access Copyright has initiated legal action against Toronto-based York University alleging York's fair dealing guidelines authorize and encourage copying that is not supported by the law.

Visit copyrightlaws.com

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4. Finally, how should the system treat remedies in the event that an owner resurfaces after her work has been reproduced and classified as an orphaned work. Should her damages be limited or should, instead, her right of action or right to a claim be extinguished? ■

Rina Elster Pantalony
 Faculty, Coordinator Intellectual Property Projects
 Moving Image and Archive Preservation Program,
 Department of Cinema Studies
 New York University, New York USA

Rina.pantalony@nyu.edu

¹ In certain jurisdictions, it is debatable whether a preservation exception would apply to audiovisual works. In the U.S., in part because of the orphaned works issue, the Copyright Office is actively engaged in studying section 108. See www.copyright.gov/docs/section108/.

² Litigation on the issue of the digitization of out-of-print books as infringing copyright ensued in the U.S. in *The Author's Guild, Inc. v. Google Inc.* and then subsequently in *The Authors Guild, Inc. v. HathiTrust*, both of which require treatment outside the scope of this article.

³ Directive 2012/28/EU.

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>.

⁵ <http://kluwercopyrightblog.com/tag/orphan-works/> In addition, France has introduced a law so that out-of-print books may be digitized. The law has been somewhat controversial and has generated considerable commentary.

⁶ www.copyright.gov/orphan/.

⁷ *Supra*.

⁸ www.cb-cda.gc.ca/unlocatable-introuvables/brochure2e.html.

⁹ www.copyrightlaws.com/canadian/copyright-modernization-act-new-canadian-copyright-laws/.

¹⁰ <http://ssrn.com/abstract=2208163>.so that out-of-print books may be digitized. The law has been somewhat controversial and has generated considerable commentary.

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The French Supreme Court recently decided to depart from this dualistic theory in order to favor a more pragmatic, business-friendly approach with regard to collective works.

The historical concept of *droit d'auteur* dictates that the author of a work can only be a natural person since the work is seen as the expression of his personality (which explains why France does not recognize works made for hire). The only situation where the author's rights may be vested to the employer ab initio is the case where the employer is considered as the promoter of a *collective work* which has been created by several people under its direction and supervision.

Traditionally, this doctrine of collective works was understood only as an exception to the individualistic concept of French copyright and was therefore limited to patrimonial rights (i.e., in another illustration of the dualistic approach, the moral rights over his own contribution remained vested in each contributor). The Supreme Court (22 March 2012) recently departed from this approach by deciding that both moral and patrimonial rights were vested in the promoter of a collective work, thereby coming closer in the case of a collective work to the monist approach according to which both prerogatives are inseparable.

Conclusion

Although the French copyright system is based on a dualistic approach that separates moral and patrimonial prerogatives, the crossovers between moral rights and economic rights seem to be unavoidable and necessary to maintain a balance and to limit the differences with the other legal systems.

The main challenge for the future is how the increasing intervention of the institutions and courts of the European Union on copyright issues will address the issue of moral rights and the specificities of the various systems. ■

Jean-François Bretonnière and Thomas Defaux
 Baker & McKenzie SCP
 Paris, France

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