Formalities and Term

Copyright Law – Professor Grimmelmann
Class 10 – October 2, 2008

my philosophy

- Years from now, I don't expect you to remember the various distinctions
  - I expect you to remember that there are these various distinctions
  - If you take away one thing from today, let it be that for pre-1978 works, the old formalisms *matter*

formalities

the 1909 scheme

- three formalities required at publication:
  - notice (§ 10; form specified in § 19)
    - e.g. "© James Grimmelmann 2008"
  - registration (§ 11)
  - deposit (§ 13)
- 28+28 term starts running

consequences of failure to comply

- lack of proper notice destroyed copyright
  - remember *MLK*?
  - § 21 forgave a few inadvertent omissions
- lack of deposit/registration was curable

notice under the 1976 Act

- notice is optional, per BCIA (1989)
  - BCIA is *not* retroactive (see §§ 405–06)
- §§ 401–04: required form of notice
- §§ 405(b): notice defeats innocent infringer defense

registration and deposit under the 1976 Act

- § 408–10: mechanics of registering
  - § 411: required before filing suit
  - § 412: no statutory damages or attorneys' fees for infringement before registration
  - § 408(f): pre-registration system for stuff with a history of pre-infringement
- § 407: deposit (automatic w/registration)

how to screw up

- don’t register
- omit notice
- register late with an anachronistic copy
- don’t read the regulations
- don’t check the records

foreign works

- other countries have never had formalities
- pre- BCIA, some works in copyright elsewhere were public-domain here
- URIA retroactively forgave some noncompliance with formalities (§ 104A)
- the details are complicated
- and this might be unconstitutional (why?)

term

§ 302: works created after 1978

- § 302(a): life of the author + 70 years
  - on what day does it end? (§ 305)
  - what if there are two authors? (§ 302(b))
- what if you don't know whether the author is alive? or when she died? (§ 302(d)–(e))

problems

- Albert publishes *Funhouse* in 2010
  - …and dies in 2011
  - …and dies in 2080
- Albert and Betty publish *Funhouse* in 2010
  - …Albert dies in 2011; Betty in 2080
  - …neither is ever heard from again

works without authors

- anonymous, pseudymous, and for-hire works have term:
  - 95 years from publication OR
  - 120 years from creation (whichever is first)
- what if the unknown author's identity is later revealed? (read § 302(c) closely)

problems

- Albert writes *Funhouse* in 2010 as a work made for hire for MegaCorp
  - … it's published in 2010
  - … it's published in 2050
- Albert writes *Funhouse* in 2010 and publishes it under the pen name "Godot." In 2060, he reveals himself; he dies in 2070.

the 1909 Act scheme

- 28-year initial term (years 1–28)
- 28-year renewal term (years 29–56)
  - if you file a renewal certificate in year 28

The *Abend* problem

- if the author died before year 28, the renewal rights passed to the heirs
- courts allowed authors to sign away their renewal rights in advance
- these two propositions are in tension
- *Abend* says the widows & orphans win
- but what does the smart publisher do?

§ 304: works published before 1978

- The 1976 Act:
  - adds 19 years to the renewal term
  - makes renewal automatic
- Sonny Bono (1998) adds another 20 years
- bottom line: *if you make it to 1978*, you get a single 95-year term (95=28+28+19+20)

problem

- Betty publishes *Funhouse* in 1920 and doesn't renew.
  - What if she'd published in 1945? 1970?
- Betty publishes *Funhouse* in 1920 and renews
  - What if she'd published in 1945? 1970?

§ 303: unpublished pre-1978 works

- do you see the issue? how these works weren't part of the 1909 copyright scheme but are part of the 1976 copyright scheme
- use the normal post-1978 rules, *but*
  - never expires before end of 2002
  - publish by end of 2002 and get copyright through end of 2047

problems

- Karl writes *Funhouse* in 1920 and never publishes it
  - What if he publishes in 2000? In 2050?
  - How about if he publishes in 1970?

term policy

- 1798: 14+14
- 1909: 28+28
- 1976: life + 70 (or 100 for works for hire)
- 1998: add 20
- do you see a constitutional problem here?
- In *Eldred*, the Supreme Court didn't

the bottom line

- register before suing
- always check the history of a work
  - published without notice pre-BCIA?
  - properly renewed pre-1976?
- watch subject matter categories closely
- read the statute closely!

next time

transfers and termination