LEGAL ISSUES

Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>
Bryan M. Carson, J.D., M.I.L.S. (Western Kentucky University) <bryan.carson@wku.edu>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

Cases of Note — Copyright

Delusion Doth Not an Infringement Make

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

Chitunda Tillman, Sr. v. New Line Cinema Corporation, United States Court of Appeals for the Seventh Circuit, 2008 U.S. App. LEXIS 21522.

Screenwriter wannabe **Chitunda Tillman** was convinced that **New Line Cinema** had filched the **Denzel Washington** flick *John Q.* from his *Kharisma Heart of Gold.*

The district court compared the two and could find no similarities. And **Chitunda** brought a frivolous appeal. Because he was representing himself pro se and it didn't cost anything much.

Kharisma, copyrighted in 1998, was inspired by **Chitunda's** frustrating efforts to get medical care for his son. Now we can't have the lead be some shiftless dirt-bag who would fail to gain the sympathy of the audience. No, **Tune Love**, our lead, is an everyman millionaire, but the evil IRS freezes his assets just as he needs a quick $600-thou for heart surgery for **Kharisma**, the eponymous daughter of said **Tune**.

A thoroughly depressed **Tune** is chowing down at a mall food court when a nearby armed robbery claims his attention. As the Good Samaritan on the spot, **Tune** batters the robbers senseless but has his sandwich shot from his hands. This turns on a light bulb.

Tune determines to insure his life for $3.5 million so as to commit suicide and have his heirs finance surgery with the proceeds.

No, the plot doesn't deal with the standard suicide exclusion. It doesn't have to, you see.

Because **Tune** — gasp — drives off a cliff! Get it? That way, everyone will think it's an accident. And **Chitunda** even selected the background music — **R. Kelly's** *Trade in My Life.* And then using the device of the popular girl-in-love-with-a-ghost movies, **Tune** comes back as a wraith to see **Kharisma** happily at play, her heart ticking just fine.

*Pretty gosh darn clever, eh? But you're saying, why not a heartless insurance company villain along with the standard whipping boys of the greedy medical profession? **Kharisma** could go in for simple procedure, fall victim to malpractice and the doctors refuse to acknowledge their errors or correct them without big bucks. And ... and **Tune** could just fake his death, fully intending as a virtuous millionaire to pay the company back once the IRS gets off his case. But an insurance **Inspector Javert** pursues him relentlessly. Kind of Double Indemnity-meets-Hospital.*

Well, other than the excitement of the shot-away sandwich, the plot was pretty thin. Let's see if **New Line's** writers do any better.

Another Gripping Plot

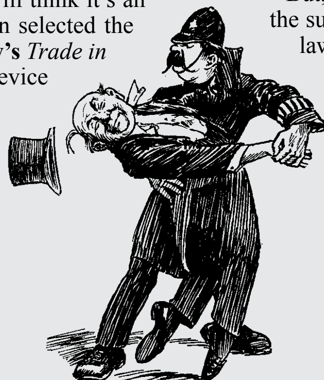
John Q. is the sob story of factory sweat John Q. **Archibald** living from paycheck to paycheck when his beloved son **Mikey** suddenly requires a heart transplant. Which gives you evil hospital and insurance company villains. Yes, his cut-rate policy did not cover transplants.

So the dauntless **John** holds the ER hostage demanding the operation.

*No, it didn't deal with the practical problem of where the heart was to come from or the tough moral choice of another needy patient being condemned to death so that **Mikey** might live.*

As you can imagine, he doesn't get far with that stunt, so the ever-resourceful **John** turns the gun on himself to selflessly provide a fresh heart for sonny.

*And he didn't shoot a sandwich out of anyone's hand, which was the only original feature of **Kharisma**.*



But, **John** does manage to botch the suicide and be hauled off by the law. The hospital, shocked at the depths of the callous behavior of their billing department, does the surgery. And the other patient in line for the heart remains unmentioned.

And in the no-dry-eye-in-the-theater finish, **John** is carted off to the hoosegow while a now healthy **Mikey** looks on.

Well, if you had been **Chitunda,** you too would have been certain that your stellar work had been ripped-off. You see, he had registered it with the **Writer's Guild**. And the dastardly *John Q.* screenwriter must have stolen it.

Chitunda said both scripts dealt with sick children, loving dads, nurses, a beeping heart monitor (yes, you read that right), prayer, weeping and — wait for it — expressions such as "Don't shoot!" and "It's a miracle."

Of course, these are generic similarities and not protected by copyright law or there would be no more movies with heart monitors or weeping and praying. *See* ***Hertzog v. Castle Rock Entm't,*** 193 F.3d 1241, 1257-62 (11th Cir. 1999); ***Grosso v. Miramax Film Corp.,*** 383 F.3d 965, 967 (9th Cir. 2004) (holding that common setting of poker game and use of poker jargon in both works did not make the works substantially similar).

So, **Chitunda** sued on his own. Then he got a lawyer and then lost the lawyer when said lawyer looked at the discovery material provided by **New Line.**

Remember, *Kharisma* was written and registered with the **Guild** in 1998. It turns out *John Q.* was written and sold to **New Line** in 1993. They had the contract to prove it. Yes, five years before *Kharisma* existed.

Oops.

Well, that didn't satisfy **Chitunda's** litigious appetite. Clearly, the evidence had been faked.

Except, **New Line** also had industry trade publication articles discussing *John Q.* Yes, in 1993.

As we have learned, **Chitunda** appealed on his own where a soulless legal system defeated him once more. Copying of another's work may be established by direct evidence or may be inferred "where the defendant had access to the copyrighted work and the accused work is substantially similar to the copyrighted work." ***Susan Wakeen Doll Co. v. Ashton-Drake Galleries,*** 272 F.3d 441, 450 (7th Cir. 2001) (quoting ***Atari, Inc. v. N. Am Philips Consumer Elecs. Corp.,*** 672 F.2d 607, 614 (7th Cir. 1982).

As you can see, there was no substantial similarity or access to *Kharisma.*

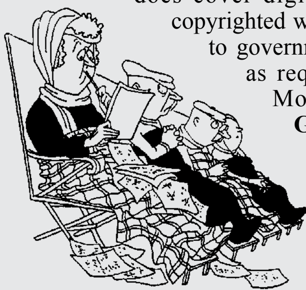
continued on page 58

Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>
www.unc.edu/~unclng/gasaway.htm

QUESTION: A corporate librarian asks about providing copies as required by U.S. Government agencies under a variety of regulations for seeking new drug approvals, various applications, etc. When a company must provide these copies, is it fair use or is it covered under the Copyright Clearance Center (CCC) license that the company has for internal company copying? Has the law changed recently?

ANSWER: There is no change in the law that permits the supply of copies to a government agency as a part of a required filing. The **Annual Copyright License** from the **CCC** does cover digital copies of copyrighted works provided to government agencies as required filings. Moreover, **Paul Goldstein**, in his multi-volume treatise on copyright, has long posited that supplying copies as required by a government agency as a part of an application process or other regulation is a fair use.



QUESTION: A new faculty member is publishing a book with a university press. She wants to include three photographs in the book, and the status of the copyright of each is unclear. (1) The first photograph was published in 1921. (2) The second photograph was taken in the 1930s, and the photographer is unknown; it was provided to the author by a family member who had a copy of the photograph. Is there a copyright owner? Does it matter that the photograph had no notice of copyright indicating when the photo was taken? (3) The third photo was from a local college yearbook and was taken in 1946; the identity of the photographer is unknown. Is the photographer the copyright holder? Or is the college the owner the photograph was published in its yearbook? Is the work in the public domain if the copyright was never registered?

ANSWER: Each of these three photographs presents different issues. (1) The photograph first published before 1923 in the United States clearly is now in the public domain. (2) For the second photograph, as with most photos, the problem is that they are unpublished works. No notice of copyright was required unless the work was published. Notice was essential on published works or the copyright holder lost rights in the work. More than likely, this photo has never been published. Unpublished works that existed as of January 1, 1978, entered the public domain at the end of 2002 or life of the photographer plus 70 years. Assume that the photo was taken in 1930. If the photographer died soon after, then it entered the public domain at the end of 2002. But, if the photographer lived until 1960, the copyright will not terminate until 2030. So, it is likely that this photograph is still under copyright, but it is unclear without knowing the name of the photographer and his or her death date. On the other hand, if the photograph is a family photo that has never been published, then the chance of anyone complaining is very slight, especially if it is a snapshot and not a studio photograph. Often it is worth taking the risk to go ahead and publish such a photograph because the likelihood of any complaint is so slight.

(3) The third photograph presents yet another issue because it was published in a college yearbook in 1946. It is not certain who owns the copyright in the photograph since it may or may not have been a work for hire. In all likelihood, the college owned the copyright in the photo because the photographer was hired by the college and the photograph was published in its yearbook. If published, not only would the work have had to contain a notice of copyright in 1946, but registration was also required. Even if both notice and registration were present, unless the copyright were renewed in 1974, it would have entered the public domain that year. If renewed, the copyright would not expire until 2041. However, renewal of a college yearbook copyright is unlikely, so the photograph is probably public domain.

QUESTION: A U.S. academic institution sponsors a study abroad program taught by its faculty and staff. The students are U.S. students who are studying abroad, and some courses are offered online from the home institution. Students access databases from the home institution. Does operating in a foreign country make any difference? What if there are a few foreign nationals enrolled in the U.S. study abroad program?

ANSWER: The good news is that U.S. law applies to students enrolled in the U.S. institution's study abroad program. Typically, students who access licensed databases from the U.S. institution are covered under the license agreement for that college or university. This is

continued on page 59

Cases of Note
from page 57

And if you're still unconvinced and long for another cite on this profound point of law, *see* ***Armour v. Knowles,*** 512 F.3d 147, 153-54 (5th Cir. 2007) (holding that district court properly granted summary judgment for defendants where copyright holder admitted writing song after defendants wrote allegedly similar song).

And if that wasn't silly enough for you, let's go to the next frivolous appeal.

Copyright — I Know You've Got My Money. Give It To Me.

Michael Joe Chapman v. Airleaf Publishing and Book Selling and Brian Jones, United States Court of Appeals for the Seventh Circuit, 292 Fed. Appx. 500; 2008 U.S. App. LEXIS 18551.

Michael Chapman authored a 47-page book, "History of the World and Good or Evil Since the Garden of Edon" [sic] and had it published by a vanity press **Airleaf Publishing and Book Selling** which was a division of an undetermined LLC. **Airleaf** is defunct after numerous accusations of taking money from aspiring authors and failing to print, distribute or remit royalties.

Chapman had gotten $9 in royalties and was convinced a class book such as his had surely earned him much, much more. And yes, finding no lawyers interested in his lucrative case, **Chapman** represented himself in both the suit and the appeal.

Chapman said his book was listed for sale on 20 Websites including the noted **Barnes & Noble** where its sales rank is 728,827. Ergo, tens of thousands of copies must have been sold. And **Airleaf** had violated copyright law by not paying him the lavish sums owed.

Airleaf — which briefly had an attorney before he withdrew due to not being paid — answered that only two copies had been sold. And **Barnes & Noble** only order after they have made a sale.

The district court astutely noted that this was a breach of contract action and belonged in state court rather than federal. *See* ***Saturday Evening Post Co. v. Rumbleseat Press, Inc.***, 816 F.2d 1191, 1194-95 (7th Cir. 1987). But if you're doing your own lawyering, why not appeal? The Seventh Circuit affirmed.

Questions & Answers
from page 58

true whether the students are U.S. nationals or not. In future license negotiations, it would be a good idea to clarify that study abroad students enrolled in the U.S. institution's foreign study program are included in the license.

QUESTION: At a public school, the concern is about making the multiple copying of school music performances. These include students singing music selections, graduation ceremonies and orchestra performances. The teachers want copies of the Christmas Music program for each student to keep. Is this permissible? What section of the TEACH Act governs this?

ANSWER: It is not the ***TEACH Act***, but section 110(4) of the ***Copyright Act*** that permits the performance itself (so long as there is no admission charge and no payment of fees or performers, promoters, etc.). The *Guidelines on the Educational Use of Music* governs copying the music performance. These were negotiated guidelines that were published in the *House Report* that accompanied the ***Copyright Act*** of 1976. The *Guidelines* are found on many Websites such as: *http://www.unc.edu/~unclng/music-guidelines.htm*. The *Guidelines* state at A.4. "A single copy of a student's performance may be made for evaluation and rehearsal purposes. This copy may be retained by the educational institution or the individual teacher." Thus, the *Guidelines* do not permit multiple copying of the performance or copies provided to students.

QUESTION: An academic librarian is trying to find an equivalent English phrase for a commonly used expression on Russian dissertations and also on some older publications, mostly serials, that were published in amateurish fashion (reproduced from typescript, somewhat like samizdat except by Russian émigrés in Paris and other countries). Literally it is something like "published with the rights of a manuscript" and sometimes appears as just "with the rights of a manuscript" and is a sort of copyright statement. Is there some similar phrase used at any time in English along the lines of: "publication retains rights of a manuscript" "published with all of the rights attendant to a manuscript" "holds the rights of a manuscript" "by all rights a manuscript?"

ANSWER: Probably the closest in the United States is "All rights reserved" along with the copyright notice. It was required under the **Universal Copyright Convention** (not really so universal since it was primarily western hemisphere). However, now the **UDC** is pretty much subsumed by the **Berne Convention** which the United States finally joined in 1989. "All rights reserved" is no longer needed. There is nothing specific about manuscript publishing rights in this country because of the right of first publication which automatically belongs to the author. Thus, no specific language is needed on manuscripts.