

# The Copyright Law's “Publish or Perish” Requirement

by *Leonard D. DuBoff*, © 2002

The Copyright Revision Act of 1976 made significant changes in copyright fundamentals. The law affected everything from the method of creating copyright and the rights covered, to the method of enforcing and protecting the copyright.

The preexisting statute, known as the 1909 Act, had strict and technical requirements for creating federal copyright protection. Under that body of law, a copyrightable work was protected by a so-called *common-law copyright* until the work was published. In fact, copyrightable works were actually protected by state laws, and those laws were not uniform. Publication was defined as an unrestricted public display, sale or the like. The statute provided that once a publication occurred, the proprietor would enjoy the protection of the federal law if the work was published with the proper copyright notice affixed to it. A publication without the proper copyright notice caused the work to become part of the public domain, though there was a limited exception for certain technical problems, such as having the notice omitted by a publisher who had contractually agreed to include the notice.

The Copyright Revision Act of 1976 liberalized the law and changed the rules for obtaining federal protection. Under the revised statute, any original work of authorship which is put in a tangible form is automatically protected by the federal law before publication. In order to retain federal protection after publication, the law required the work to be published with the proper copyright notice, though the statute contains safe harbors for works published without notice in three categories:

- (1) If notice was omitted from “a relatively small number of copies or phonorecords distributed to the public”;

- (2) If the work was registered within five years after the publication without notice and if a reasonable effort was made to add notice to all copies or phonorecords distributed in the United States after the omission was discovered; or
- (3) If the omission of notice was “in violation of an express requirement in writing” that the copies or phonorecords bear the prescribed notice.

Since March 1, 1989, no notice has been required due to legislation enacted in connection with the United States becoming a party to the Berne Convention. It is, however, advantageous to use the notice since use of the copyright notice will prevent copiers from alleging that they relied in good faith on the fact that no notice was given and were thus *innocent infringers*.

The 1976 Act essentially abolished the common-law copyright for all unpublished works created on or after January 1, 1978, the effective date of the new law, but the statute provided that copyrightable works which were unpublished on that date would remain protected until December 31, 2002, unless such works were published before that date. If the works were published by December 31, 2002, the published works would be entitled to protection until December 31, 2027, later extended by the Sonny Bono Copyright Term Extension Act to December 31, 2047.

It is, therefore, important to bear in mind the fact that as of this coming New Year’s Day, all unpublished copyrightable works which were created before January 1, 1978, will become part of the public domain unless a publication occurs before that date. Publication is defined by the current statute as a distribution of copies to the public by a sale or other transfer of ownership, or by rental, lease or lending. The Copyright Office has taken the position that the word “copies” includes the original work. In other words, individuals who have unpublished works, such as family photographs, home movies, handmade crafts, poems, essays, letters or the

like, must either publish these works by this coming New Year's Eve, or no future protection from unauthorized reproduction will be available.

Under both the old and the present copyright laws, registering a work was not prerequisite to the creation of copyright. The 1909 Act provided that the copyright proprietor should promptly register the copyright in the work once it is published with the proper notice affixed. Cases held that *promptly* meant that the registration could occur anytime within the first 28 years after publication. Indeed, many copyright proprietors did not file the original registration until the required renewal after the 27<sup>th</sup> year and before the end of the 28<sup>th</sup> year was due. The Copyright Revision Act of 1976 provided an incentive for early registration by stating that copyright owners would not be entitled to recover statutory damages or attorneys' fees unless the copyright in the work was registered before an infringement occurred. Congress provided copyright proprietors with a three-month safe harbor by stating that any work registered within three months of the first date of publication would be entitled to claim retroactive registration as of the date the work was first published.

Congress passed the Copyright Revision Act of 1976, which included, among other things, an abolition of all renewals and an extension of the period of protection. The revised copyright law makes it clear that the period of protection for works which have federal copyright protection on January 1, 1978, is 75 years and that no renewal is required. Works created on or after January 1, 1978, were entitled to federal protection

- For the life of the creator plus 50 years if the creator is a human being and the work was not a *work made for hire*; or
- If the creator is a hypothetical person, such as a corporation, or if the work is created under a pseudonym or published anonymously, then the period of protection is either 100 years from creation or 75 years from the date of first publication, whichever period expires first.

The Sonny Bono Copyright Term Extension Act extended the period of copyright protection for an additional 20 years and, as a result, reinstated federal copyright protection for many works which were thought to be in the public domain. The reason given for the Sonny Bono Extension was that the period of protection for copyright in much of the rest of the world is comparable to that granted by the extended term. As of this date, the period of protection for works created on or after January 1, 1978, is life plus 70 years for human beings and 120 years from creation or 95 years from the date of first publication, whichever period expires first, for all other creators.

Those who had copied works believing that protection had lapsed found themselves in trouble, and many complained. In fact, the extension was challenged in the *Eldred v. Reno* case, which is currently being considered by the United States Supreme Court. It is argued that the congressional act of extending copyright protection is unconstitutional since, it is claimed, it violates the First Amendment of the U.S. Constitution. The argument is that extending copyright protection impairs a potential copier's right of free speech by legally inhibiting it through the threat of an infringement suit. If the Supreme Court declares the extension unconstitutional, then the period of protection under the federal copyright law will be reduced to life plus 50 years for individuals; and 100 years from creation or 75 years from first publication, whichever period expires first, for corporations, works published under pseudonyms or anonymously.

Only time will tell which way the U.S. Supreme Court will decide. If the court declares the Sonny Bono Copyright Extension Act unconstitutional, this may raise questions about the validity of earlier extensions of the period of protection as well.

Regardless of the outcome of the *Eldred* case, educators should evaluate their portfolios and determine whether they have any unpublished work created before January 1, 1978, which they feel they would like to continue to protect. If they do, they should take steps to publish

those works in order to extend the period of protection beyond this New Year's Eve. Whether that extended period of protection will be for an additional 25 years or 45 years will depend on the U.S. Supreme Court's position on the Sonny Bono Copyright Extension Act, but in either case, an additional period of protection is available to those who are diligent.

As a practical matter, what can be done to expedite publication within the time remaining? Merely distributing a limited number of works to one's immediate family or friends is deemed to be a "limited publication" and will not suffice to continue copyright protection beyond December 31, 2002. One of the most effective and inexpensive modern means of communication is the World Wide Web. As the U.S. Supreme Court held in *New York Times Co., Inc. v. Tasini*, displaying a work in cyberspace is a publication for purposes of the copyright law. Thus, the simplest method by which unpublished works can be protected for the extended period is to have those works displayed on the Web.

For some works, such a display might not be desirable since the creator may not wish to air personal letters, pictures and the like. As an alternative, the ability to use desktop publishing as a means of preparing a work for distribution may be a more acceptable vehicle, though the work must still be distributed to the public in order to satisfy the statutory requirement for publication.

words: 1,537