BEYOND THE BOOK

ACADEMIC COPYRIGHT LAW

CATHY: – afternoon and thank you all for posting. At this time, all lines will be on the listen only mode until the question and answer session of today's conference call. This call is being recorded. If you have any objections, please disconnect at this time.

I will now turn the call over to Chris Kenneally at Copyright Clearance Center. Thank you. So you may begin.

KENNEALLY: Well, thank you, and welcome everyone. Welcome Howard Zaharoff and many people who have signed on to our program today. My name is Christopher Kenneally. I'm the director of author and creative relations here at Copyright Clearance Center, and we conduct a variety of programs under the umbrella name Beyond the Book. This is one of them. We're delighted to have everyone here with us. We're going to be talking about some of the latest developments and trends in copyright law, particularly as it applies on campus.

Before we get going with out initial part of the call, which is an interview with Howard, I'd like to mention a few things to the audience, explain about how the program will work, and how long we'll go, and promise you that we will keep to the time we said this would last. So the program should last just about an hour. We want to respect everybody's time.

We're going to have about the first half of the program devoted to chatting with Howard on a variety of topics. We'll then take your calls. There is a way to electronically, if you will, raise your hand with this conference call technology. We ask you to do that. And you can also e-mail a question to me directly. You can e-mail that to chrisk@copyright.com. I'll see your e-mail and we'll get to as many of those questions as we can.

For more background information about Beyond the Book and our various programs, do go online directly to www.beyondthebook.com. You can also check out the full program information for author relations at Copyright Clearance Center. That is online at authors.copyright.com.

Let's get started. I want to welcome to the program Howard Zaharoff. Howard is an attorney who represents writers, publishers, academics and institutions from his offices in Waltham, Massachusetts on Route 128, what we used to call our technology highway. He is a shareholder at Morse, Barnes-Brown and Pendleton, P.C., a law firm that has a large practice with some of the many startups along Route 128.

His practice focuses on information and technology businesses, intellectual property issues and licensing agreements and other commercial contracts. I should mention that this is appropriate enough for an audience of a great many academics. Howard has a Ph.D. in philosophy, as a matter of fact, as well as, of course, his law degree.

He writes frequently on legal topics and his articles have appeared in Publishers' Weekly, Folio, The Writer, Writer's Digest and The Boston Globe. He's served on the board of trustees for the Volunteer Lawyers for the Arts, and he was a director of The Writers' Room of Boston. And he's spoken to a great many groups about copyright and publishing law, including the Society of Children's Book Writers and Illustrators, the Copyright Society of the U.S., and the Greater Boston Rights and Permissions Group.

Some of you who are regular recipients of e-mails and newsletters from Copyright Clearance Center, may remember that Howard even wrote for our own magazine, Beyond the Book, last year actually, talking about protecting your ideas. And again, welcome, Howard, to the program.

ZAHAROFF: Thank you very much, Chris. It's a pleasure to be here.

KENNEALLY: Well, it's a pleasure to have you. I've enjoyed preparing this program with you, and I think the first thing I want to do is chat with you briefly about some of the basics that sort of set the table, if you will, about what's going on in copyright on campus and off.

And before we do that, though, I think the thing to say is that a lot of people are very interested in the topic of copyright these days. It's a remarkably dynamic field. Lots of assumptions and lots of rumor and concern surround it. It's remarkable for a field that is enshrined in the Constitution, just how dynamic it is, and how fast-changing it is, and we're going to talk about some of the newest developments.

But as I say, first of all, Howard, can we talk about some of the sort of basic boundaries, some of the definitions that we really ought to set out before we get going? And I suppose a place to start there is about just exactly what does it mean to copyright a piece and what is that about? Is it ownership or is it more than ownership?

ZAHAROFF: It's a good question. I actually just heard a quote this week, which I'd like to start with. It's from Mark Twain, and it's, "Only one thing is impossible for God. To find any sense in any copyright law on the planet."

KENNEALLY: Right.

ZAHAROFF: With that said, maybe it's worth just a few minutes of reminding the audience what copyrights are and what the different principles involved are just so we all have sort of a base of understanding to proceed from.

As you mentioned, copyright is federal law, comes right out of the U.S. Constitution. There's one sentence in there that gives us both the copyright laws and the patent laws.

The subject matter of copyright, what can you copyright? It applies to any original work of authorship. Basically, any mode of human creativity. Any way a person can express himself or herself in words, in images, in motions, sculpture, art, etc. Original works, the moment they are fixed in tangible form, become copyright property.

And that's actually an important principle that not everyone gets. That copyright is automatic. There is a notice procedure available. The way that – a form of notice I'm sure everyone's familiar with. That's one good measure to take when you're creating a work and you want to make sure everyone knows it's copyrighted. You should be putting a notice on it. There's also a whole registration process available through the copyright office. That's not a requirement, but it does enhance your rights.

But basically, notice and registration are there to improve your position. But the moment you fix your original work in tangible form, you word process and save a document, you handwrite a poem you've been thinking about, you record some new tune that you've been composing on audio tape. That act of fixing the work in tangible form gives you a copyright in that work.

KENNEALLY: So even taking a photograph, for example?

ZAHAROFF: Even a photograph. Again, if the subject is in the real world, you can't exclusively appropriate the subject, but your particular pose and lighting and manner of presentation, that's what the courts have recognized as originality in photos. So any original expression, once you fix it in a physical form, it's automatically subject to copyright protection.

KENNEALLY: Can I just mention, Howard, so the audience does know, and there is occasionally some confusion, and we'll direct people to where they need to go for more information about this.

Copyright Clearance Center is copyright.com. We are not involved with registering copyright at all. We're involved with providing a marketplace, if you will, for people like academic authors to have their work reused in various ways with content consumers, as I call them, whether that's on campus or off. Copyright.gov, copyright.G-O-V, is where the Copyright Office has it's online site, and that's where you can get all the various forms to register copyright.

And you're point about kind of protecting your position there is that if you do register a work, then that provides for some very specific legal standing, correct? And that allows for something called statutory damages.

ZAHAROFF: That's correct. There are actually a number of benefits that flow from registration. In fact, most people, except for, say, major book publishers and some newspapers and magazines, most people don't actually bother to register their copyrights until they need to. If you do have something you've created of value and you want to enhance your protection, registration is a very quick, easy, and inexpensive way of doing it.

As Chris mentioned, you've got at copyright.gov all the forms that you need are there. And the copyright office has wonderful information. Circulars and notices and things, all very well organized. Actually, I was looking at it today. There's a 10-page booklet on copyrights related to academia and a lot of legislative history in there. So people are really interested in the topic. The copyright.gov site is an excellent place to begin.

KENNEALLY: And probably the most reliable. The sad fact of the matter about the Web, when we go to the Web for information, is that you really don't know sometimes whether to trust or not what people are saying about any particular subject, whether it's copyright or the World Series. But certainly, copyright.gov would be about as authoritative a source as you could find. Of course, we like to think that Copyright Clearance Center is also really informative, but for really the very first place to go, would do want to suggest strongly you go to copyright.gov. How is copyright handled and what are the various permutations of copyright on campus, Howard, that we should be aware of?

ZAHAROFF: Well actually, maybe I could just finish one or two other quick points.

KENNEALLY: Well, I'm sorry, sure.

ZAHAROFF: They do actually constitute a good background to the question you're asking. Number one, what do you have when you have a copyright? As I said, you fix your work in tangible form, and it's copyrighted, but what do you have then? The answer is it's easiest and best, I think, to think of copyright as kind of a bundle of rights. The five primary rights people are aware of are reproduction, like copying, adaptation, preparing derivative works, public performance, public display and distribution of copies of the work to the public.

And it's really that bundle of rights that constitute the copyright. There are some limitations on copyright, and if people are interested, I'm happy to talk about them. They include fair use, they include *sens a faire*, and they include some very specific permissions that are given to educators and non-profit institutions under special provisions of the Copyright Act.

Key issue, that sort of last basic principle, concerns ownership of copyright, and this will kind of lead into some answers to your questions, Chris. The question is, well, who owns the copyright in a work?

And the answer is basically that it's the author or artist, the original creator, owns the copyright and whatever he or she creates, subject to two basic exceptions. One is when there is some written instrument that specifically assigns or transfers the rights to a third party or identifies the work as a work-made-for-hire and meets some other criteria. So one the hand, you have to have a writing. If it's not a writing, the only time that someone other than the author owns the copyright is when it is a work-made-for-hire that is something created by an employee within the scope of his or her employment.

So either there's a written transfer or instrument that assigns the copyrights to a party, or it's a work created by an employee within the scope of his or her employment. Other than that, it's the actual author or creator that will definitely own the copyright.

And so, to go back to your question, what are some of the issues that come up on academia. One of them that's been a little bit back in the news lately, in large part because of some recent court actions in Kansas, concerns the question of who owns the copyrights in works created on campus by faculty?

KENNEALLY: Can you tell us about the Kansas case just briefly?

ZAHAROFF: Yeah, I mean, briefly, and again, pretty much all I know about it is what I read the facts described in the case and in a couple of newspaper accounts, it sounds like the Kansas City board of regents got maybe a little bit greedy and basically attempted to establish a policy that would have assigned to it all rights and all intellectual property created by employees, including faculty of the Kansas State system. I think the University of Pittsburgh – Pittsburgh State University was the main university involved.

And so the board of regents took the position originally that they would own everything. And then they backed off a little bit and were willing to acknowledge certain rights in faculty.

But meanwhile, they wanted to do in unilaterally without having to negotiate. So it was really a kind of a collective bargaining case. But the underlying question did concern who owns copyrights and faculty works. And whether it is inevitably going to the employer under copyright law, which required the court to address, at least a little bit, the question of whether there's a teacher exception. And I don't know how many of our listeners are familiar with it, but this is kind of the hot question that comes up from time to time in that it's – is there, under the Copyright

Act, some general exception from the normal rules of ownership that I mentioned before?

And the reason people talk about the teacher exception is that, at least in the earlier Copyright Act – we're now under an act that's been in effect for about 30 years. Before 1978, the Copyright Act at the time was the 1909 act. In a number of cases under that act, the courts had said quite clearly that there was a teacher exception, i.e. Despite the normal rule that an employee owns works created by its employees, the institutional context, in academia, we will recognize and exception to that rule and note that sort of traditional works, course materials, academic writings, artistic or creative works, that are made by faculty members, that those will be the intellectual property, at least in the copyright sense, copyright property, of the faculty.

KENNEALLY: And that was the situation that prevailed under the Copyright Act of 1909.

ZAHAROFF: Correct.

KENNEALLY: So that, as you said to me yesterday, if Saul Bellow is writing Humbolt's Gifts at his office at Boston University, that's still his book.

ZAHAROFF: Right. I actually think he was at the University of Chicago, but yes.

KENNEALLY: Oh, OK. Well, he's – right. OK.

ZAHAROFF: Whatever university's he at, that would then be recognized as his. And, yeah, the question that has arisen from time to time since the new act went into effect in 1978 is, is there still a teachers' exception? And the answer is, it really isn't clear. It's probably the wrong question. The question is really would the courts recognize a teacher exception as a general proposition when they are confronted with it?

Unfortunately, if you do read the strict wording of the Copyright Act, it makes it a little hard to assume that there is a such a teacher exception. Now there is answer to that that some commentators give, and it's that the teacher exception was so well engrained by the time the Congress was considering a new copyright act, that no one even thought it was necessary to consider the issue, so obviously it remains.

That's a little bit of a surprising answer given how much effort when into crafting the new act and the fact that there a lot of negotiations among university groups, academic publishers, etc. over fair use, for example.

Kind of remarkable that the whole question of a teacher exception would have escaped people's notice in the enactment if the intent was to actually be sure that it survived.

Nevertheless, a number of courts have addressed the issue and have suggested that there really are some good reasons for there being a teachers' exception. I think the two that are normally given are academic institutions do not have the wherewithal to – or interest in supervising the work that's done by their faculty or any interest or ability to help them publish it.

I think a real contrast would be if I'm an employee of the newspaper. The newspaper assigns me topics. The newspaper supervises me. Monitors my progress. Edits my work. And as soon as it's done, they publish it. So there, it's obviously critical that the newspaper be the owner of the copyrights in its employees' work.

Academia is the opposite extreme. Universities don't generally assign the topics to their faculty. They don't help their faculty get it published either. And so it really does make sense from a policy perspective in a lot of cases for faculty to continue to own their copyrights, even under the new law.

KENNEALLY: Well, what happened in Kansas, Howard?

ZAHAROFF: Well, again, the court looked at the question of whether intellectual property was inevitably – if it was basically a black letter and inviolate rule mandated by federal law that in all circumstances, intellectual property, created by faculty as employees, would be owned by the institution. And if that were the case, then in fact, it would not – it probably was not something that the regents had to negotiate with the faculty. And the court looked at it and said that's clearly not true from a couple of perspectives.

One is, copyright is only one form of intellectual property. Other forms, such as patents, have somewhat different rules, and so you couldn't have a blanket rule that covered all intellectual property anyway.

More importantly, I think from the perspective of today's conversation, is that it looked at the question of is there or could there be a teachers' exception. And actually, reading the statute – and I may sound maybe a little too black and white before – though I do think if you read it literally, the current Copyright Act ownership rules, the work-for-hire definition, it does look hard to say that there's a teacher exception in there.

But in fact, when you focus hard on the question of what is within the scope of employment, it is clear that under standard legal notions of what defines the scope of employment that a lot of things the faculty members do, often including a lot of the traditional works they create on their own initiative, in particular, really aren't within the scope of their employment, as the law has traditionally understood it. And therefore, for a lot of these works, they really aren't necessarily works for hire that are owned by the institution.

That said, the court points out quite quickly – I think quite correctly – that if you had to rely on that, it wouldn't simply be a case-by-case determination, it would virtually be test-by-test determination to figure out where in this or that particular situation, what the faculty member was creating was or was not a work for hire.

You know, I do think, though, we shouldn't get too hung up on this. It's a bit of a red herring because the real and I think proper answer is the way the question should be resolved, not the way the regents did it in trying to dictate it. But in fact, the way the court acknowledged was very appropriate, which is by negotiation. By discussions between the institutions and their faculty to come up with reasonable rules, which is in fact, most of what's taken place these days. And I don't have any numbers on the percentages of academic institutions that have IT and copyright policies, but it's certainly my impression that most institutions do or are moving in that direction.

KENNEALLY: Moving in the direction of creating those policies.

ZAHAROFF: Yeah, so that rather than worrying about is there a teacher exception, is there not a teacher exception, the real question is, at this institution, what sorts of works are going to be deemed to remain the property of the faculty who create them, and what sorts of works are not, and are going to be the property of the institutions.

And when you actually start to analyze the types of works that are created in the institutional context, you find that there's really a pretty consistent set of understandings between institutions and faculty as to what should be faculty property and what shouldn't be faculty property.

The sort of traditional works, almost everyone continues to recognize, should be the property of the professors that create them. So, course ware, or rather additional course materials, textbooks, academic articles, and books, and aesthetic works such as Saul Bellow's writings. I think virtually everyone agrees that when faculty creates them, the intellectual property should remain with the faculty.

On the other extreme, when the institution assigns specific projects to individuals, pays individuals extra money to do certain things, where certain kinds of writings or creations are part of one's administrative jobs where you sit on the faculty committee, you have to write a report. And I think most people are willing to concede that the copyrights in those types of creations probably do belong to the university.

I think you see some disagreement, or sometimes there's some need for negotiation, is with some of the new media works, or software in particular where people will sometimes worry over that and debate who should own it. Should the –

if it's courseware that's being created for an online environment, should the faculty member own it or should the university own it?

And here, I think there are still these areas of disagreement and even there, I think that the ability to come up with solutions that work for everyone is pretty high. I mean, if people really want to cooperate and solve the problem, they can.

KENNEALLY: Well, it's interesting. When we chatted about this program before, you talked to me about these issues can be solved. I liked hearing that because so often today with so many subjects, and not just copyright, but often with copyright, it seems to be a very divisive issue. It's either all mine or it winds up all someone else's, whatever that may be. And there are winners and losers, there's no compromises getting to wins-wins-wins, and all of that seems to be so hard. But really, with copyright on campus, at least, if the various parties involved, the institution and the faculty, if they're willing to be reasonable on both sides, you can kind of get to a middle where it's a happy middle.

ZAHAROFF: Yeah, which is why as I think I was mentioning to you the other day, I think that sometimes we get a little too fixated on ownership, which is to use my favorite word of the day, another red herring. Ownership, the work for hire debate, is essentially one of who owns the copyright. But I don't think that that needs to be the be all and end all. And part of it just the nature of what is intellectual property.

Last night, my daughter and I were fighting over the television. She wanted to watch the Grammys and I wanted to watch "Lost." And at one point, I was considering asserting my ownership of the TV, but ultimately decided to give up, because I didn't think I really needed to watch that program and sympathized with her desire too see who was going to win.

Yeah, but the point is that only one of us could really have controlled that television. And we've have battles over a car, it's also because with physical property, if you own it, you get to use it and you get to exclude everyone else.

The beauty of intellectual property is that it doesn't have to be that way. There's plenty to go around. And again, as I said a moment ago, I think that the ownership question is a bit of a red herring. Ownership is really stand-in for I think a number of other things. Sort of the three principal things that count when you're talking about intellectual property, in my mind, are the scope of rights, who gets to do what with it, the question of attribution and credit, who gets to claim credit for having created it, in whole or in part –

KENNEALLY: Who gets the fame, as it were.

ZAHAROFF: It's the fame. And the question of sharing any financial benefit that may occur. And so, I think that sometimes people will fight on that – no I want to own it, no I want to own it, but it's easy to say, what do you need it for? What kind of

rights do you need? If I'm a faculty member and I'm creating a new course in my university, the university might not want me to own it, because they think they need to own it, because they want to continue to use it even if I leave and go to another university.

But in order to have the right and ability to do that, they don't need to own it. And for me to be able to take it and go to another place and use it, I don't need to own it either. We could, for example, co-own it. We could both ownership rights in it, undivided interest and the right and ability to each use it however we want, or one of us could own it and grant an unrestricted perpetual royalty fee worldwide non-exclusive license to the other, for the lawyer's phrase.

I mean, – and so there are all kinds of ways of parsing the rights so that each party gets what it wants and doesn't necessarily need to be identified as the owner of the work. The attribution, obviously, has a lot more significance in academia than it does in most of the rest of the world, but for that reason, often a faculty member's desire to be the owner, is really just to be sure that his or her name is always going to be associated with this book, or this course, or whatever.

And again, you can get that short of ownership. You don't have to have ownership to be promised that you'll always have proper attribution. And similarly, you don't need ownership to share in any financial benefit that may come from having created a work that then gets exploited commercially or within the institution. So.

KENNEALLY: You know, I think that's a good place to lead into another court case that you had mentioned to me about a photographer at Brown University.

ZAHAROFF: Yeah, the case of Foraste, I believe that's how you pronounce it, F-O-R-A-S-T-E, versus Brown University. This came down a couple of years ago. This actually goes back to a couple of points ago, talking about university policies. And there's also a pretty interesting cautionary tale in this one. From what I said before, from one's general thinking about it, you might assume that, well, OK, he's right. If all we need is to have good university policies that say faculty owns this and the institution owns that, once we have policies in place that make those statements, then everything is set and everybody can go their merry way.

And the Brown case, the Foraste case, reminds us that there are some specific requirements under copyright law, which you ignore at your peril. In that particular case, the plaintiff was not a faculty member; he was actually a staff photographer who, for many, many years, took all kinds of photos of Brown.

Brown at the time had a policy that basically said the copyrights and works created by their faculty or staff were the property of the employee. Foraste left Brown. After he discovered that Brown was continuing to use some of his works, he brought a lawsuit claiming that under the Brown policy, he was the owner of the

copyright, and therefore Brown, by continuing to use his works, was infringing his copyrights.

It wasn't a – I guess he wasn't the most sympathetic plaintiff, in that sense. It seemed a little, I don't know, needy of him, perhaps, to go after Brown that way. And there may be more facts I'm forgetting, so I don't want to smear Mr. Foraste too much here,. But it did seem a little bit underhanded that he was trying to take advantage of the policy in quite that way. Maybe he had good reasons for it.

But the point is, he was able to point to a policy that said, even though this may be a work for hire, and he, I think, believed – conceded it was, that under the Brown policy, he still walked away owning the copyright.

But what the court said was, look at this statute. And what the Copyright Act says is that in the case of a work-for-hire, all rights are owned by the employer unless the parties agree otherwise in a writing signed by them. That's about a direct quote. That's exactly what the Copyright Act says.

And when the court says is that, hey, nobody signed it. The plaintiff, in particular, never claimed that he signed anything. And so there wasn't a signed agreement between them, and therefore, notwithstanding the fact that there was a policy that seemed to suggest that he would walk away with ownership, he didn't because the copyright formalities had not been complied with.

Now so again, a cautionary note to faculty and representatives of institutions here: your heart can be in the right place, but if you don't do it in accordance with the law, you might fail to get the result that everyone intended and expects. I really think what this case suggests, and actually the case is right from the First Circuit, which is my territory here in the New England area, we don't know how other courts in other jurisdictions would come out on it, but the court – the case actually makes a lot of sense from a pure copyright perspective. And I think the lesson there is that again, if you're faculty member, if you're dealing with works which are pretty clearly within the scope of your employment, and therefore pretty clearly works owned by the institution, under the copyright law, if you really want to be sure that you have gotten the rights conveyed to you, don't simply rely on the written policy, but basically ask the institution to have someone sign and confirm the transfer of rights to you. Have an instrument that you both sign or at least an assignment or delegation that's in writing from the university to you.

As I think about it, I suspect the better solution may be a little bit more universal. And I don't mean going back and amending the copyright law. But I do mean that institutional policies probably should build in a little procedural thing that says that – gee, a couple of procedures occur to me. One is to basically build in a procedure that says that any faculty or staff member that would like to be assured of its rights per this policy can ask the department chair to execute a writing that confirms that. That would be one way to do it.

I suppose Actually, another way to do it would be to embody the institution's intellectual property policies or refer to it in some kind of more or less employment contract that's signed by the institution and the faculty member. There are hundreds of ways of getting to the end result, but the end result, if people really want to be cautious about it and make sure that they come away with the ownership of property that they think they're supposed to own, is to make sure that you've complied with the Copyright Act, and in the case of works that almost certainly would be the employer's property under the work for-hire-doctrine, get something signed in writing, that makes clear that no, no, no, no, no, we own it or you own it.

KENNEALLY: OK. Howard, that's great and it's, I think, raised a number of really important points, and I know we probably have a number of questions from the audience. There's somebody I'd like to bring on here who certainly can kind of speak to the issues you've just talked about, about the policy and about the written assignment of things. And I wonder if Cathy, the operator, can bring on board Dr. Susan Keys? Cathy, can you help us do that?

CATHY: At this time, if you do you have a question, please press star one on your touch tone phone. You will be announced prior to asking your question. Again press star one on your touchtone phone.

KENNEALLY: And Cathy, it's Chris Kenneally. Can you hear me?

CATHY: Yes, sir.

KENNEALLY: Can you bring up first, though, for us, Susan Keys? Can you see that person there? Are you able to tell who's there?

CATHY: Yes, let me find her here. Susan, your line is open.

KEYS: Oh, thank you.

KENNEALLY: Well, thank you, too, Susan. Susan Keys is the technology transfer executive at Northeastern University. And welcome to Beyond the Book, Susan.

ZAHAROFF: Hi, Susan.

KEYS: Hi, Howard.

KENNEALLY: And Susan, you've got a background rather like Howard. You have a Ph.D. Yours is in pharmacology and you also have a law degree as well. And when we chatting earlier, you were telling me about some of the things that Howard was just going into and why you feel they're so important. Can you tell the audience about that?

KEYS: Well, I think that what we were discussing in some sense is a – maybe a narrower issue, but it does go along with the traditional idea that universities have allowed the professors, or at least, under this tradition, to own the rights to works that they have written. And the particular issue that Howard and I were talking about were journal articles. And under this Brown University case, there may be some question or a gray area on whether when professors assign their copyright in a journal article to the publisher, does the publisher really own it.

KENNEALLY: And what you're speaking about there, Susan, is something that's, if you will, a time-honored tradition in many peer-reviewed academic journals. It's a matter of course that these journals request that the copyright be assigned to them by the contributor who, more often than not, is a professor or on faculty at some university.

KEYS: Right. And I've certainly done it myself on journal articles that I've written. And the thing comes – the question now is what is the policy at the university say about this? And it really is, in this area, pretty gray, because it says that if you use significant resources of the university, that it belongs to the university.

I think that one thing you – is excluded – at least under our policy, because it talks about just using your own typewriter, or computer in your office, that if you wrote a book in there, that wouldn't be considered significant use of resources.

But in scientific papers, you're also – you definitely are using significant resources of the university because you have done a lot of work under grants that come under the definition of significant resources. So this now becomes a gray area on who actually owns the copyright to this paper.

KENNEALLY: So if, in fact, it is gray – and now, we're speculating here, but I –

KEYS: Right, we are.

KENNEALLY: – I think the point, though, is one worth being aware of. What you're suggesting, then, is that even if I, Professor Kenneally, assigned a copyright to the *Journal of the Left Eyeball*, I may not have had the right to assign it because it may be that my work has been so substantially underwritten by the institution that it would indeed be the institution's.

KEYS: Right. And the thing is there is no written assignment as you would seem to be implied in the Brown University case, where you've – the university has, in a written assignment, said that the professor would own the copyright. There's also a gray area in the policy of the university on who would own the copyright or the ownership. And so, this makes – this gives you some – there may be some question about whether scientific journals, for instance, really do own the papers now that they are publishing.

KENNEALLY: So I guess, once again, to kind of echo what Howard had said earlier, Susan, written policies are the best thing. Clarity is the desired goal here. If we can get a written policy, or a written assignment, this is something that we can rely upon rather than simply trusting in tradition.

KEYS: Right. And the other question you have to – or the thing that you need to look at here, or that may play into it, is what each party needs for itself. And part of it is, for instance, in a lot of scientific journals, the person who is publishing the paper has also paid charges to the publisher. Then, after the paid charges have been paid, then the library has to pay another charge to even bring it into the university. So there are competing interests here, because the costs of these publications keeps going up, and university library budgets may stay the same or go down. So this is where it could come in later on where people could have some concerns later on when money gets tight. And so there are some competing interests that could arise to cause some concerns later on in the future.

KENNEALLY: Well, Susan, thanks for sort of amplifying what Howard was saying. This reminds me as a – in a previous lifetime, I was a freelance journalist and often did work in Northern Ireland. And we used to say that if you were confused, you were beginning to understand the problem. And I think some of that is true here. Howard, is there anything you want to add to what Susan was just saying?

ZAHAROFF: No, I think she covered it pretty well. I mean, I think the point is that, at least through the present time, the system has worked reasonably well. Faculty has, I'm encouraged to assume and reasonably assume, they own the intellectual property, at least in their writings. Academic journals have assumed when they get an assignment of rights from the faculty, they're getting it from the copyright owner, and there's never been much reason for anyone to challenge that. But I think the message is there's a little bit of a sleeping dog lying here, and if the situations were to change, if the cost of an institution reacquiring its own faculty's writings from a journal goes up too high, or if journals find ways of exploiting them financially, perhaps by online uses that no one ever thought of before, or certain other kinds of situations, people might actually have cause to start questioning whether the transfer of ownership really did take place.

And so I wouldn't be surprised if, at some point, we do see the issue raise itself. But for now, people seem to be content with it. It's just sort of, again, a cautionary note for the, particularly the journals that are represented here listening to us, that maybe at some point you want to consider taking slightly different steps in order to be sure that you really have covered all bases in terms of there being no doubts that you do in fact have the proper rights from the proper owner of those rights.

KENNEALLY: Right. It's a fascinating topic. Thank you, Susan.

KEYS: OK, thank you.

KENNEALLY: Cathy, have we got some questions from the audience?

CATHY: OK, at this time, we do have Daniel Lee. Your line is open.

KENNEALLY: Yes, let me just welcome you first of all. Really appreciate you being on board. And Daniel, can you tell us where you're calling from?

LEE: This is from Roanoke, Virginia.

KENNEALLY: OK. Welcome to the call.

LEE: Thank you. I have a question about the copyright on the translations. The time period since the translation was done or the publication was issued 'til it expires.

KENNEALLY: OK, so when does a copyright expire? Is that your question?

LEE: Yeah, yeah.

KENNEALLY: For a translation?

LEE: Yes.

KENNEALLY: I would say – well, Howard – I'm going to flip it to you, but I'm going to lead in by saying, I would suggest that a translation, if it's copyrighted, has the same life as any written work. Isn't that true?

ZAHAROFF: That should be the case. I mean, a translation is a derivative work. You can only do it with the permission of the owner of rights in the original work. And except to the extent that anything that's truly new that the translator put it, but if the job is simply to do an accurate translation, there really shouldn't be anything new in there. I would assume that the copyright on the translation would expire at the time that the original expires which is normally the life of the author plus 70 years.

KENNEALLY: OK, at the time of the original's expiration?

ZAHAROFF: I would think. Again, it's the – it's funny, I've never thought of it in that context. The translation poses a little bit of an issue. Other kinds of derivative works, what makes them derivative is that you're usually adding something more to it, and there that more, the life will be that author of the new stuff. But I think for translation, the assumption is that there really is nothing new other than translating the original into the foreign language.

You know, it's interesting, I really – let me – I'm going to give my iron-clad guarantee here. If anyone asks a question that I'm not sure of the answer of, I will look it up after the call. I will send Chris my considered final answer, and he's free to transmit it to everyone who signed up for the call.

KENNEALLY: Wonderful. That sounds like a good idea.

ZAHAROFF: Let me think about that one a little bit. Clearly, it will last for at least the life of the author of the original, I would think, as a derivative work of the original, but whether it varies because of the fact that it is a derivative work by someone else, I'll need to think about.

KENNEALLY: Good question. Thank you very much –

LEE: May I add a little bit to it, because I did some research on it. Original publication was published in and author was passed away, let's say, a hundred years ago.

ZAHAROFF: I'm sorry, OK. I was kind of assuming we were talking about works created under the new Copyright Act, where the term is life plus 70, or the works made-for-hire and certain other kinds of works, it's 95 years from publication or 120 years from creation, whichever comes sooner.

LEE: That applies from which year?

ZAHAROFF: '78 on.

LEE: '78 and on?

ZAHAROFF: Yeah. Anything that was actually published before, I think the year is 1923. I have to double-check, I believe it's '23 or '26, is now in the public domain, so there's no copyright on things that were published before then. And then there's – there's actually a couple of sites on the Internet that – measuring the term of copyright for works that were created before '78 can get fairly complicated because of the interaction of the old rules. The rules in effect before 1909, the rules that went into effect after 1909, and the rules that went into effect after '77. And so there are a number of places where you can – if you actually went to Google and put in copyright term, you would probably be directed within a couple of hits to one of the sites that will actually chart the term of copyright, and I think you probably want to start there for the specific answer to your interesting question.

KENNEALLY: Yeah, and if I can just add, Howard, let's say it's a work by Dostoevsky or something, which I presume is in the public domain, and I have a new translation of it. I can copyright my new translation of that work in public domain or am I not able to do that.

ZAHAROFF: No, you're right, you're right. Which sort of contradicts what I said earlier, which is why I kind of paused and decided I needed to think about it.

KENNEALLY: Well, Daniel, thank you for your fascination question. We will get you more on that and to everyone else in the audience. So as I mentioned at the start of

the call I want to try to share as much of Howard with the entire audience as we can and to also keep to a strict time, so we'll move along, but again, thank you Daniel.

LEE: All right, thank you.

KENNEALLY: Cathy, do we have another question from the audience?

CATHY: We have a question from Carol Schwalberg. Your line is open.

KENNEALLY: Carol Schwalberg, welcome to Beyond the Book. You're calling from California, I think.

SCHWALBERG: That's right.

KENNEALLY: Well, welcome to our call and to our national audience here. What's your question for Howard?

SCHWALBERG: Well, I had two questions. The first one was is there any problem with – I copyright a Schwalberg that's not my current husbands' name, and I was wondering if there's any problem with that in terms of an estate. You know, claiming he would inherit the copyright.

ZAHAROFF: I'm sorry, it was, who was the author of the work?

SCHWALBERG: I am.

KENNEALLY: So you're saying you copyright and you are known to the world, in print at least, as Carol Schwalberg, but today your name may be Carol Jones.

SCHWALBERG: Exactly.

KENNEALLY: And this is akin, I suppose, Howard, to a pen name or something like that.

SCHWALBERG: Exactly.

ZAHAROFF: You published under a different name than your actual legal name?

SCHWALBERG: Yes.

ZAHAROFF: And the question is what happens after you die? Is it – ?

SCHWALBERG: Yes.

ZAHAROFF: There's sort of a little bit of a factual question. Someone's going to have to be able to show what works were created by you and in your estate at the time of your demise. But subject to that, there shouldn't be a problem.

KENNEALLY: I mean, as long as you can prove that Carol, that you are the Carol Schwalberg that published all those books, then there shouldn't be –

SCHWALBERG: Well, of course, it'd be a little hard after I'm dead.

ZAHAROFF: Which is why, actually, there is a procedure. You could consider going to the copyright office now, registering your works an identifying your true name and your pseudonym.

SCWALBERG: OK.

ZAHAROFF: You can actually do the registration while you're alive and that would in fact make it a bit easier after you pass away.

SCHWALBERG: OK, next question.

ZAHAROFF: You go to the – just to finish up, copyright.gov, as it was mentioned before, they do have – it's not a circular, but it's some kind of an announcement, if you scroll down the page, down below, you'll see that they have miscellaneous informational releases and they do have one on pseudonyms.

SCHWALBERG: Oh, wonderful.

KENNEALLY: Carol, just because we're coming up to three o'clock, and I don't want to keep us too over the time, if you have a second question, why don't you e-mail that to chrisk@copyright.com and we'll get you an answer? OK?

SCHWALBERG: All right. I'll do that. Thank you so much. Bye.

KENNEALLY: Thank you, Carol. Thank you for calling. Cathy, do we have another call from the audience –

CATHY: At this time, if you do have a question, press star one on your touch-tone phone.

KENNEALLY: You know, we had an e-mailed question while people are thinking about what they might want to ask Howard, and I want to just call your attention to it, because it's something that is very much a question of the times here. And it was from some folks in Ann Arbor at Washtenaw Community College. They were asking about fair use for a library to podcast readings from copyrighted books. What's your sense about podcasts, and streaming audio, and so forth as to whether or not you can do that under the fair use protection?

ZAHAROFF: Yeah, the podcasting piece, which I assume means actually creating a copy of it in an iPod or MP3 storage device, must throw a little bit of monkey wrench into the analysis. Putting that aside for a moment, there is a specific provision under the Copyright Act that deals with this to some degree.

Actually, work going back – there is the general fair use standards in Section 107 of the Copyright Act, which is what most people think about. But Sections 108 and 110 have some very special permissions that are given to libraries, archives and other non-profit organizations.

In Section 110, there is a specific permission to perform a non-dramatic literary or musical work other than in a transmission to the public, as long as there's no purpose of commercial advantage, there's no payment of the fee to any of the performers, and there's no admission charge, or nothing charged and retained above and beyond the cost of production.

So if we're talking about taking a work and reading it out loud and broadcasting it, not to the public, but to a sort of a more select group, that in itself is OK, again, subject to the other conditions: non-profit purposes, no commercial gain. It looks like you can do that.

I suspect that the question, then, under the newer technologies, can people copy them into their iPods for later playing? I'm going to assume the answer to that is probably yes. The recent Grokster case in the Supreme Court last year was an elaboration of the Sony Betamax case of about 20 years before that where the court said that individuals can record entire programs for the purposes of time shifting them for later hearing.

But my assumption is if you kind of add together that sort of general principle of fair use with this specific exception, that as long as we're talking about a non-commercial broadcast to again, a class or some – a group less than the entire public, that podcasting, in that context, should probably be OK.

KENNEALLY: But you don't want to make that available on a Web site for 99 cents or $2.99.

ZAHAROFF: Definitely not.

KENNEALLY: That would change it.

ZAHAROFF: That would change the analysis.

KENNEALLY: It's a fascinating question, and it only goes to illustrate the point that the creation of new technologies and new uses that these technologies allow us to make

of works, just keeps copyright law as dynamic as any topic. Thank you for that answer. Cathy do we have any other calls?

CATHY: We do have a question from Larry Moss. Your line is open.

MOSS: Thank you.

KENNEALLY: Larry, welcome.

MOSS: Thank you, I'm enjoying it very much. I am speaking with what's called an electronic larynx. So if you don't understand me, please ask me to repeat.

KENNEALLY: OK, fine. It seems reasonably clear to me. Where are you calling from, Larry?

MOSS: Babson – Babson College in New England.

ZAHAROFF: Oh, my home turf.

MOSS: Yeah, yeah, we're neighbors. Not too far from 128.

KENNEALLY: Right, well welcome to the call. And what's your question?

MOSS: Well, I'm calling in my capacity as a journal editor, and I'm transferring the copyrights to the publisher of the journal, and I was wondering what the – what I would take the idea of modifying the copyright transfer form to make the author promise to indemnify the editor and or the publisher in case it turns up that the university has a problem with the transfer.

ZAHAROFF: My answer is that that's a little bit of an ouch for me. I'm kind of sympathizing with the academics who are being asked to do that since I'm assuming they're not getting paid for the transfer either. So from the journal's point of view – I think there are things that it is fair to ask of the author.

That one, which I actually assume that that kind of language probably appears in a fair number of forms anyway, I feel just a little bit uncomfortable with. I guess my thought would be to maybe have the author responsible for getting institution signoff. I mean, that would be an actually much neater way to do it, because if the institution signs off there can't be an question about it anyway. So maybe a slightly more fair and balanced approach would be to just impose on the author the responsibility to get someone from the institution to sign and agree that the rights have been properly transferred, etc., etc., etc.

KENNEALLY: Indemnification clauses are common enough in book publishing contracts, isn't that correct?

ZAHAROFF: That's certainly true. And they're not that uncommon, I think, in the context of magazines, newspapers, journals. I mean, I think – again, I work both sides of the aisle here, and certainly when I'm representing a publisher, I'm going to want my authors to – or my author contract to protect the publisher from claims.

I guess the thing that makes me a little bit uncomfortable about this one is that now that we've identified it, we have 70 of us, or however many are on this phone call, who appreciate it, but it's a little bit of a trap for the unwary, and so I guess I'd be more of an advocate of a direct approach.

If you've got a concern, to tell the author why and give the author an opportunity to fix it rather than know that there's a problem, know that the author may not appreciate it, and then get the author to agree to indemnify you as sort of a backup liability, why not deal with it straightforward.

So I guess I'd be an advocate, of a little bit more direct, up-front approach that the back door approach. But again, for certain things, I certainly think it's appropriate. I mean, for the author to acknowledge that he or she created the work originally, didn't copy it from any other source. That's certainly a fair representation, and I think you could get a, or should get an indemnity from an author who lies to you about whether he or she was the original creator of the words that he's selling you, so.

KENNEALLY: Right, and I know from my own experience that in contracts for magazine articles and, I assume, in my book contracts, that that sort of language was common. That I asserted I was the creator of the work and so forth and so on.

ZAHAROFF: Absolutely. And Chris, can I take a moment to just now go back over my translation answer?

KENNEALLY: Sure.

ZAHAROFF: Save myself the time of having to write a letter. I think that – I withdraw what I said before, and I know what I was thinking of. I think the answer is that, yes, the translation copyright would be measured by the author of the translation, unless there's a contract that says there's some sort of a funky assignment or otherwise.

What I was thinking of, is though, when the copyright in the original does expire, then anyone else, of course, is free to translate it. And if their translation happens to be substantially like the original translator's translation, because there are only limited number of ways of translating the book, it's kind of an assumption that may not be true, but to the extent that that is true, then the original translator really doesn't have a complaint against the second translator.

Nevertheless, I do think that the original translator does have a copyright in his or her translation, assuming that he's retained ownership. I mean, again, in a way, this is a little bit of a unusual hypothetical. I think the typical translation, the rights would be assigned back to the owner of the original work anyway –

KENNEALLY: Rather like a foreign – well, there's involved in translation, of course, is foreign publication, and that's another part of that bundle of rights you were talking about. So you could assign something to a foreign publisher and the same way assign someone to create that translation, you would still retain copyright.

ZAHAROFF: You would still retain copyright in the original. And it is actually worth mentioning that once you go outside the boundaries of the U.S., I mean, most of the conversation we've had today is dealing with U.S. law, so other countries do have some other legal principles, and in particular, the joint morale in European law often makes it impossible for the translation – or any author – author of a translation, author of anything – to actually convey all rights to the original owner. Moral rights generally can't be waived, and therefore, you get a very complicated potential situation when you are trying to deal with translations created outside the U.S.

But as long as you stay in the U.S., I think the rule is that the copyright on the translation is going to measured by the life of the translator or by the work-for-hire rules, if it's a work-for-hire, but that the term of copyright in the original is going to be quite relevant to the scope of rights available in the translation after the copyright on the original expires. So that's a complicated way of trying to answer the question.

KENNEALLY: OK.

ZAHAROFF: If anyone has any further questions about it, please just e-mail the Copyright Clearance Center. They'll forward it to me and I'll be more than happy to give you an answer.

KENNEALLY: Right. And Larry Moss from Babson, thank you for your question, I hope that was helpful to you.

MOSS: Yeah, thank you very much.

KENNEALLY: Cathy, we can take, I think, one more call from the audience and then we'll wrap things up. Appreciate everybody's attention. We're not going to get to all the questions, but as Howard has said, there are – we will forward the questions we can't get to if you e-mail chrisk@copyright.com, we'll see what we can do to get you an answer off the program and then share that with people on the line.

FYI, we will be making available to anyone in the audience both a transcript of the call as well as an audio version of the call. We are recording the call. So if you

would like copies in either form, we'll be happy to provide them to you or anyone you suggest. So just let us know about that. So Cathy, last question, please from the audience.

CATHY: At this time, sir, we have no further question.

KENNEALLY: OK, well then, that's good timing, then, I think, because it is, as I say, just after three o'clock. We know people are very busy and we want to respect your time.

Howard, I've enjoyed chatting with you. Howard Zaharoff from Waltham at Morse, Barnes-Brown and Pendleton, P.C., thank you very much for joining Beyond the Book this afternoon and for your thoughtful and candid answers.

ZAHAROFF: Well, you're very welcome and thank you for the opportunity to participate in this, my first conference call talk, which is a – I give a talk from the comfort and relative privacy of my own office is a real treat – so thank you.

KENNEALLY: Well, and you know, the conference calls that we do are a great opportunity for Copyright Clearance Center to reach a national audience with Beyond the Book programs. We do hold conferences around the country in various sites. We were recently down at the National Press Club in Washington, D.C., and we've been in San Francisco and Chicago and around the country. But of course, we can only draw from the immediate area, and what I really like about these calls is that we can get people, as we have heard from, Roanoke, Virginia, and Wellesley, Massachusetts, and California, and just everywhere, involved in what is a very important discussion on campus and off campus, and that is about what copyright means to academic authors.

So again, thank you all for joining me, Christopher Kenneally. And again, if you have questions, would like to receive copies of the transcript or the audio transcription of the program, please, you can e-mail at chrisk@copyright.com or any questions about Beyond the Book programs to beyondthebook@copyright.com.

So thank you again, all best wishes from Boston and have a good day.

ZAHAROFF: Good afternoon.

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