NOW WE ALL CAN TAKE THAT ROAD NOT TAKEN: THE COPYRIGHT FREEZE HAS MELTED!

Posted on January 31, 2019 by Michael A. Kahn

Tag: Michael A. Kahn

January 1st marked the start of a truly happy new year for those who make their livings in the creative arts and for those who seek their pleasures there. That's because January 1st marked the end of a 20-year lockdown on hundreds of important works of art that have now entered the public domain and are free to all.

First, a little background:

Copyright protects original expressions that are reduced to a tangible medium (such as a book, a photo, a movie, a song). Those tangible expressions are known as "works," and under the copyright law the owner of such a "work" has the exclusive right to make (or license others to make) copies of the work, derivative works (such as a movie based on the copyrighted novel), public performances of that work (such as a play), and public displays of that work.

While these rights are exclusive to the copyright owner, that ownership has never been perpetual. Instead, as the drafters of the U.S. Constitution made clear, the grant of these temporary monopolies

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

are part of a tradeoff for the betterment of all of us. As stated in Article I, Section 8, Clause 8 of the Constitution (emphasis added), "The Congress shall have the power . . . to promote the progress of science and useful arts by securing for ***limited times*** to authors . . . the exclusive rights to their respective writings."

The key words are "limited times." The Founders viewed copyright primarily as a vehicle for achieving social benefit based on the belief that encouragement of individual effort by personal gain is the best way to advance the public welfare. That encouragement would be in the form of a grant of a monopoly in the rights in their creations for a limited time. And once that limited time expired, the copyright would vanish and the work would fall into the public domain, free for anyone to access or exploit.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

We can all see the benefits this strategy has conferred on our culture. Stroll down the aisles of your local bookstore and check the prices of two of the Great American Novels—*The Adventures of Huckleberry Finn* and *Moby Dick*, both available in several print editions and for free online on several websites—versus the higher price for the latest Stephen King or John Grisham novel (both still under copyright).

Think of all the movies based on Shakespeare plays and Jane Austen novels—including all those creative derivative works, such as the movies *Ten Things I Hate About You* (based on *The Taming of the Shrew*) and *Clueless* (based on Austen's *Emma*) and the novel *Pride and Prejudice and Zombies*. Because the original works are in the public domain, anyone is free to copy them verbatim or make a

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

derivative work (such as adding some creepy reanimated human corpses to the quaint world of Elizabeth Bennet and Mr. Darcy).

Which raises the question of what is the appropriate "limited time" to achieve that societal goal? Back in the beginning, it was 28 years from the date of creation—but over the years Congress has passed one law after another lengthening the duration of a copyright. In 1978, under the new Copyright Act, 17 U.S.C. § 1 et seq., the life of a copyright was extended from 56 years to the life of the author plus 50 years or 75 years total for a work of corporate authorship (such as a motion picture).

As you might imagine, these legislative extensions have been a source of tension between those who wish to exploit the underlying works (such as new screenplays or sequels or T-shirts) versus those who want to continue to exploit their exclusive rights in the underlying works, such the Hollywood studios that own the copyright in (and thus continue to make profits on) classic movies, such as *The Wizard of Oz* or *Gone with the Wind*, or the original cartoon staring Mickey Mouse.

Ah, yes. Mickey Mouse.

Which brings us to 1998 and "The Sonny Bono Copyright Term Extension Act," also derisively labeled "The Mickey Mouse Protection Act" by critics who viewed it as a money-grubbing attempt by The Walt Disney Company to maintain their monopoly over Mickey Mouse, who was teetering on the edge of the public domain back then.

This 1998 Act added another 20-year term to all works made during or after 1923 that were still under copyright. In other words, copyrighted works created in 1923, which would have fallen into the public domain on January 1, 1999, would now remain under copyright for another two decades.

That 20-year lockdown has now expired, and hundreds of works protected by copyright since 1923 are now in the public domain. This is a significant positive development for our culture.

> *As Glenn Fleishman wrote in the Smithsonian Magazine, "After January 1, any record label can issue a dubstep version of the 1923 hit "Yes! We Have No Bananas," any middle school can produce Theodore Pratt's stage adaptation of The Picture of Dorian Gray, and any historian can publish Winston Churchill's The World Crisis with her own extensive annotations. Any artist can create and sell a feminist response to Marcel Duchamp's seminal Dadaist piece, The Large Glass (The Bride Stripped Bare by Her Bachelors, Even) and any filmmaker can remake Cecil B. DeMille's original The Ten Commandments and post it on YouTube."*

And now any of us can republish (on a t-shirt, greeting card, or poster) one of the most beloved poems in American literature, Robert Frost's "Stopping by Woods on a Snowy Evening." You no longer need anyone's permission to do so. To shamelessly paraphrase another Frost poem in the public domain, the unlicensed use of "Stopping by Woods" is no longer the road not taken. You are now free to head down that road previously less traveled, and I hope "that has made all the

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

difference."

The choice of a lawyer is an important decision and should not be based solely upon advertisements.