

## Net Briefs

### Scottish papers involve courts in hypertext link dispute

Two online papers cater to the 24,000 residents of the Shetland Isles near Scotland, the *Shetland Times* and the *Shetland News*. Citing copyright violations, the *Times* filed a summons in the Supreme Court of Scotland to prevent the *News* from providing its readers with a hypertext link to their site.

In October, a temporary judgment was issued and the *News* had to remove all links to the *Times*.

Editors at the *News* said the argument was whether a publisher or creator of intellectual property available on the Internet retains copyright to the material once offered online. The case could have global implications on the freedom with which information is available over the Internet.

A hypertext link is a simple web command which provides users access to another website simply by clicking a button so the user doesn't have to know the actual address.

### Computer leasing gains popularity

Some colleges and universities are turning to computer leasing to deal with the short lifespan of supposedly state-of-the-art technology.

Many college computer administrators say that with technology evolving so rapidly, leasing instead of buying seems to make the most sense. Finance directors at these colleges prefer capital leases, ones by which the equipment is financed at low interest rates then acquired for next-to-nothing at the end of the contract.

### Clinton wants Internet expanded

President Clinton is planning on proposing a half-billion-dollar, five-year Internet expansion plan. High speed access will be given to 100 universities and other institutions at up to 1,000 times faster than is currently possible.

## Don't let ownership of copyright be a question left unanswered

### AUTHORS ADVANTAGE



**Where the outsourcing involves the development of creative expression ... there is a danger ownership of the copyrights in the resulting work product might be open to question.**

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### BY STEPHEN GILLEN

The acquisitions, restructurings, and downsizings that have been endemic to publishing in recent years have resulted in a significant increase in the outsourcing of functions that had previously been done internally by company employees.

Where the outsourcing involves the development of creative expression—whether it be in the form of photos, layouts, product manuals, advertising copy and design, or custom programming for the company's information systems—there is a danger ownership of the copyrights in the resulting work product might be open to question:

- Will that photo of your top secret prototype wind up in the photographer's stock collection?
- Will the runner-up cover design (among several you commissioned) wind up on your competitor's college calculus book?
- Will you be asked to pay an additional fee for adapting collateral ad materials to a sequel?
- Will your state-of-the-art P&L template be licensed by the outside programmer who developed it to another publisher (at 1/10th your development cost)?

If these questions trouble you, the answers may well send you running for cover.

#### Who Owns What?

It may come as a surprise to many editors and managers that a copyrightable work developed at the instance of (and paid for by) a company belongs not to the company

but to the human creator unless 1) that human is also an employee acting within the scope of his/her duties or 2) there is a written transfer of rights.

This problem is best dealt with on the front end by adopting reasonable, written ownership policies and by establishing procedures and documents for routinely implementing those policies (and for making informed exceptions when the circumstances warrant).

For example, the publisher who uses a purchase order system for outsourcing creative work should take care to adapt its PO forms to address the intellectual property issues.

#### Always an Exception

There are two exceptions to the principle vesting initial ownership in a human creator that are as important as the rule from the perspective of employers who direct or commission the creation of a work of authorship—"works made for hire" and "joint works."

#### Works Made for Hire

The rationale for distinguishing works made for hire traces its roots to the precept wherein ownership of a work created at the instance, direction, and risk of an employer

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should belong to the employer, with the employee (retained for the purposes of creating the work) taking his or her compensation in the form of a salary or wage and the other associated emblems of employment.

According to the Copyright Act of 1976, a work made for hire is "a work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned for use as a contribution to a collective work...as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

The Act considers a supplementary work to be "a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forwards, afterwards, pictorial illustrations, maps, charts, tests, bibliographies, appendixes, and indexes...."

**Employee or Independent Contractor?**

It is clear a full-time employee—on the regular payroll, having the full complement of benefits, and being treated for tax purposes as an employee (with FICA contributions being made and income taxes withheld)—will be considered an employee.

The legal precedence also shows that it is a virtual certainty that those individuals working part-time, who do not receive employee benefits and who are treated for tax purposes as independent contractors, will not be deemed employees.

Notice that the Act *requires a written agreement* as to the for-hire characterization of the work.

Those employers insufficiently savvy or prescient to recognize this issue and provide for it will be precluded from curing the defect after a dispute surfaces.

**Joint Works**

The Act defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."

It is the intention of the parties *at the time the work is created* that is controlling. In terms of economic interests, joint authors, as co-owners of the copyright in the work which they jointly created, are treated generally as tenants in common, with each joint author having an independent right to exploit the work, subject to a duty of accounting to the other joint author for any profits.

An example can be seen in *Strauss v. Hearst Corp.*, Copyright L. Rep. (CCH) 26,244 (S.D.N.Y. 1988), where a magazine—having conceptualized the story, set up the layout, supervised the photography, retouched the photos, and written the captions—was viewed as joint author with a photographer of the resulting photographs.

**Bottom Line**

It is in the best interest of both publisher and contractor to recognize the kinds of work product that have copyright and other intellectual property implications, to sort out the ownership and rights issues up front (difficult as these negotiations may be), and to reduce their understanding to writing.

## Give a TAA membership as a unique gift for the holidays

There is still time to participate in a new membership program recently announced by TAA President Ron Pynn, one aimed at that hard-to-buy-for colleague. For first-year dues of \$30, you can buy a membership to TAA and we will send a card announcing your gift.

"A TAA membership is a terrific gift that keeps giving all year long," said Natalie Gillespie, TAA's director of member services. "It provides a new member with a year's subscription to the *Academic Author*, helpful insights into the world of publishing, and the professional support of TAA members throughout the world."

There is no limit on the amount of Holiday Gift Memberships a member can buy. Once textbook authors are made aware of the services TAA can offer, it is hoped they will then become a continuing part of the organization by renewing their memberships every year.

To buy a Holiday Gift Membership, send \$30 to TAA headquarters along with your name and the name and institutional affiliation, if any, of the recipient. We'll do the rest.

