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December 2, 1996

Dear Mr. McLeod:

This responds to your letter dated February 26, 1996, on behalf of Sarah E. Allen, requesting that the Copyright Office reconsider its decision not to register a renewal claim in Ms. Allen's name for the work DON AND DONNA GO TO BAT, a children's book written by Albert Perkins.

The Copyright Office Appeals Board has carefully examined the applications[1] you submitted and correspondence between you and the Office. The Board has considered the arguments you raised in your second appeal as well as those raised in your previous correspondence. For the reasons given below, the Board of Appeals must refuse to register the renewal claim on behalf of Sarah E. Allen.

Background

The record shows that a renewal application for this work naming Sarah E. Allen and Diana Tiffany Lamanec as children of the "deceased co-author Jane Perkins" was received in the Copyright Office December 29, 1994. The renewal application further states that the original registration was made by Random House, Inc., and that the book was registered October 17, 1966, Registration No. A884154.

Copyright Office Renewals Section Examiner Rosa Scotton wrote to you on March 8, 1995, because Mrs. Jane Perkins did not appear in our original registration records as an author. Ms. Scotton explained that the Office could not register a renewal claim in Mrs. Perkins' daughter's name without further information supporting Mrs. Perkins' co-authorship. Because Mrs. Perkins did not appear on the original registration records as an author, Examiner Scotton noted the necessity for some documentation to support the assertion of a claim by her daughter, Ms. Allen.

In your response, received August 15, 1995, you wrote that Ms. Allen was neither a natural nor adopted child of Mr. Al Perkins, and you requested reconsideration of the validity of Ms. Allen's renewal application on the basis of co-authorship allegedly accorded by California community property law. You wrote that community property law, as defined in the statutes and courts of California, provides that each spouse is automatically

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[1] The Board also considered other related renewal applications.

endowed with an equal interest in community property from the instant of its creation. You cited In re Marriage of Worth[2] as support for this assertion.

Mr. Frank Vitalos, Section Head of the Copyright Office's Renewal Section, stated in his October 27, 1995, letter to you that "Jane Perkins is not a joint author of the work for Copyright renewal purposes." He explained that Compendium II, Compendium of Copyright Office Practices, defines "author" for renewal purposes as "the individual who personally wrote or created 'renewable matter' in the work" and states that "author" "does not include employers in the case of works made for hire ... [or] partnerships."[3] Mr. Vitalos noted that a non-author spouse can claim the renewal copyright only in the capacity of a "widow" or "widower."[4]

On February 26, 1996, the Office received your letter addressed to the Board of Appeals, in which you again requested renewal registration for Ms. Allen in Mr. Perkins' work on the basis of ownership provisions in California's community property laws.

Appeals Board's Decision

In your second letter you asserted that the Office's second refusal to register was based on a definition of "author" that is in direct conflict with the intent and express wording of 17 U.S.C. 304(a)(1)(B). The Board does not find this argument persuasive or reflective of the extent of the Office's second refusal. Section 304(a)(1)(B) refers to renewals for certain kinds of work and §304(a)(1)(C) addresses renewal in all other works, including those authored by Mr. Perkins.

Moreover, the primary issue in this case regarding registration of this renewal claim is authorship, not ownership, since authorship is the touchstone on which the federal renewal provisions are premised. The Appeals Board does not, therefore, find the question of whether California community property law is preempted by federal copyright law to be the correct focus of attention in this case.

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[2] 195 Cal. App. 3d 768, 241 Cal. Rptr. 135 (1987).

[3] Compendium II §1313.03 (1984). See also Compendium I, Compendium of Copyright Office Practices §11.7.1, II (1973). Compendium I covers Copyright Office practices under the Copyright Act of 1909, under which DON AND DONNA GO TO BAT was originally registered. Most of the principles set forth in the first Compendium are repeated in Compendium II, which provides direction for administration of the Copyright Act of 1976. The 1976 Act followed the intent the 1909 Act displayed for protection of authors and their works.

[4] See 17 U.S.C. §304(a)(1994); 17 U.S.C. §24 (1909).

Authorship contrasted with ownership of work. Authors and owners are not necessarily the same under the Copyright Act. Authorship lies in the creation of fixed, original expression; the term "author" means creator -- either one who actually created the work or the employer in the case of a work made for hire. Ownership, on the other hand, is a concept that applies to the title to property. Under the copyright law, ownership is placed initially in the author of the work.

In this case, our records for the 1966 registration of DON AND DONNA GO TO BAT reveal that Al Perkins is the author of the text and B. Tobey is the author of the illustrations. There is no evidence of authorship by Mrs. Perkins in DON AND DONNA GO TO BAT. Also, there is no documentation demonstrating that the relationship between Ms. Allen and Mr. Perkins meets the requirements set forth in the federal copyright statute on which to base a renewal claim. Although the spouse may be the co-owner of a work and enjoy the profit, only another creator of the work can be a joint author. Under the facts of this case, Mrs. Perkins is not the co-author of the work for purposes of copyright registration and renewal.[5]

Statutory preferential ranking of renewal rights. As Mr. Vitalos wrote in his October 27, 1995 letter, there is nothing in the legislative history of the copyright statute that indicates congressional intent to treat a spouse who is not the author or co-author of a work as a joint author of the work. To the contrary, section 304(a) of the 1976 Copyright Act, which reflects section 24 of the 1909 Copyright Act, specifies successor renewal claimants, in the order of preference. Although a non-author spouse is entitled to renew when the author spouse is no longer living, neither the 1909 nor 1976 Act considered a non-author spouse to be an actual or a presumptive joint author of a work. As the widow of the author, Mrs. Perkins would have been able to claim the renewal had she been alive at the time the renewal interest vested. Since she was not, the renewal interest can only pass to other statutorily-provided claimants under the terms of the federal copyright statute.

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[5] See Neva, Inc. v. Christian Duplications International, Inc., 743 F.Supp. 1533 (M.D. Fla. 1990)(The essence of joint authorship for purposes of copyright ownership is joint laboring in furtherance of preconcerted common design); Ashton-Tate Corp. v. Ross, 728 F.Supp. 597 (N.D. Cal 1989), affirmed 916 F.2d 516 (9th Cir. 1990)(Under federal copyright law, a "joint work" is 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; for an author to obtain an interest in a "joint work," the law requires that the contribution made by that author is, by itself, protectable under the federal Copyright Act).

Courts have recognized that the copyright statutes have established a hierarchy within which renewal rights may vest.[6]

> The right to obtain a renewal copyright and the renewal copyright itself exist only by reason of the Act and are derived solely and directly from it....The hierarchy of people granted renewal rights by §24 [of the 1909 Copyright Act] are first, the author if living; second, the widow, widower, or children, if he or she is not living; third, his or her executors if the author and the widow, widower, or children are not living; fourth, in the absence of a will, the next of kin.[7]

Congress was precise in vesting renewal rights. Renewal may be claimed by the author's widow or widower, in his or her own name; by the author's executors, if the author, widow/widower, and children are deceased; or, in the absence of an author's will, by the author's next of kin. If living, Mrs. Perkins would have qualified to file a renewal claim. The renewal claimant, Nancy Rella Perkins Andrews, was, at the time she timely filed a valid renewal application, a surviving child of the author.

Courts have recognized that the purpose of the renewal right in copyrighted works is to give authors a second chance to enjoy and benefit from remuneration for use of their works. This intent was described in detail by the court in Stewart v. Abend[8]:

> In its debates leading up to the Copyright Act of 1909, Congress elaborated upon the policy underlying a system comprised of an original term and a completely separate renewal term...."It not infrequently happens that an author sells his copyright outright to a publisher for a comparatively small sum." H.R. Rep. No. 2222, 60th Cong., 2d Sess. 14 (1909). The renewal term permits the

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6 See, e.g., Saroyan v. William Saroyan Foundation, 675 F.Supp. 843, 846 (S.D.N.Y. 1987).

7 Miller Music Corp. v. Daniels, Inc., 362 U.S. 373, 375-376 (1960).

8 495 U.S. 207 (1990). See also Corcovado Music Corp v. Hollis Music, Inc., 981 F.2d 679 (2d Cir. 1993); Woods v. Bourne, 858 F.Supp. 399 (S.D.N.Y. 1994).

> author, originally in a poor bargaining position, to renegotiate the term of the grant once the value of the work has been tested...."If the work proves to be a great success and lives beyond the term of twenty-eight years, ... it should be the exclusive right of the author to take the renewal term, and the law should be framed ... so that [the author] could not be deprived of that right." H.R. Rep. No. 2222, supra, at 14.[9]

The Copyright Office does not have discretion to deviate from the long-standing provisions of the old law, which were carried into section 304(a) of the 1976 Copyright Act without any substantive change.

Relationship of California law to federal copyright law. The Copyright Office must implement the federal Copyright Act, which recognizes who can claim authorship and who can claim renewal rights. The statutory provisions specify very clearly who is eligible to renew a claim, and the Office cannot circumvent those provisions. The manner in which a husband and wife agree to treat ownership of literary property created by either spouse during the course of the marriage and while domiciled in California may be determined by California law when it does not conflict with federal copyright law.

Your argument is based on the premise that California community property law transfers rights to a non-author spouse making him or her a joint author. Such an interpretation of author status would be in conflict with federal copyright law. We can find no evidence of congressional intent to provide a mechanism for transfer or sharing of authorship status in the federal copyright law. Transfer of ownership is possible under copyright law; for purposes of basic copyright ownership, the copyright law acknowledges the right of an author to freely and voluntarily alienate his or her property without any special procedures under the copyright code. Transfer of authorship, however, by its very nature cannot take place.

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[9] Id. at 218.

The case In re Marriage of Worth,[10] which you cite in your correspondence, deals with community property ownership of copyrighted works, and distinguishes those cases where the Constitutional Supremacy Clause preempted state community property law.[11] Instead, the Worth court examines whether the copyright preemption provision preempts state community property law regarding transfer and disposition of copyrighted works. The Worth court asserts that the Copyright Act reveals an intent by Congress to supersede only state copyright laws and notes that "state law will be preempted only if the rights granted under state law are 'equivalent to any of the exclusive rights within the general scope of copyright as specified by 106. . . . '"[12] The court adds that "[r]ights of ownership and division of marital property are in no ways equivalent to rights within the scope of copyright under the federal Copyright Act."[13]

As discussed earlier, ownership and division of rights are not equivalent to authorship under federal copyright law. The authors of a distinguished copyright treatise note that Worth leaves many questions unanswered.[14]

In the Copyright Act Congress explicitly provided for the rights of surviving spouses in the renewal and termination provisions. The court in Worth found that the marital community property included ownership interests in copyrightable works. The Appeals Board does not find this holding to be inconsistent with its views on authorship versus ownership rights in works. Also, Worth is not directly applicable in your client's situation, because that case dealt with intervivos transfers of ownership not in conflict with congressional intent underlying 17 U.S.C. 201(d)(1). The case at hand deals with post mortem transfers of ownership in direct conflict with congressional intent in establishing the renewal framework of 17 U.S.C. 304(a)(1)(c). The principle of Worth is not determinative of renewal rights originally framed under the 1909 Copyright Act, and explicitly retained in the 1976 Copyright Act.

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[10] 195 Cal. App. 3d 768, 241 Cal. Rptr. 135 (1987).

[11] Where a conflict was found to exist between federal laws and community property laws, the United States Supreme Court has consistently held that federal laws prevail, with the resulting preemption of community property laws. See, e.g., Wissner v. Wissner, 338 U.S. 655 (1950)(The National Service Life Insurance Act, which gave the insured the right to designate the beneficiary of insurance proceeds, was held to prevail over state community property law which conflicted with terms of the Act); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979)(Benefits received under the Railroad Retirement Act of 1974 were held not subject to community property laws of California under the federal Constitution's Supremacy Clause).

[12] 195 Cal. App. 3d at 777-778.

[13] Id. at 778.

[14] See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §6.13[A] (1994).

The Appeals Board does not oppose the proposition that property acquired after marriage by either husband or wife, or both, is community property in California. The Board instead emphasizes that the copyright record for this work shows that Al Perkins is the author of the text of DON AND DONNA GO TO BAT. The Copyright Act specifically addresses both renewal and transfer of works; ownership in a renewal may be registered by a spouse or child of the author, but our records do not indicate that Sarah E. Allen is included in the renewal category. When the Office asked for documentation that would so include Ms. Allen, none was provided. Thus, we cannot make a renewal registration in Ms. Allen's name. To find otherwise would violate the specific provisions for renewal of copyright as legislated in the 1909 Act and as reaffirmed in the 1976 Act.

For the reasons stated above, the Appeals Board may not register a renewal claim on behalf of Sarah E. Allen in the work at issue. This decision constitutes final agency action. The final agency decision in this case applies also to the texts of the books THE DIGGING-EST DOG (A945432, August 22, 1967) and HUGH LOFTING'S TRAVELS OF DOCTOR DOLITTLE (A949644, August 11, 1967), for which you requested in a letter dated May 31, 1996, a renewal interest on behalf of Ms. Allen on the same legal grounds as you made your request in DON AND DONNA GO TO BAT.

Sincerely,

Marilyn J. Kretsinger

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