Copyright Law

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Topics:

- Authorship and Ownership
- Section 201 of the Copyright Act

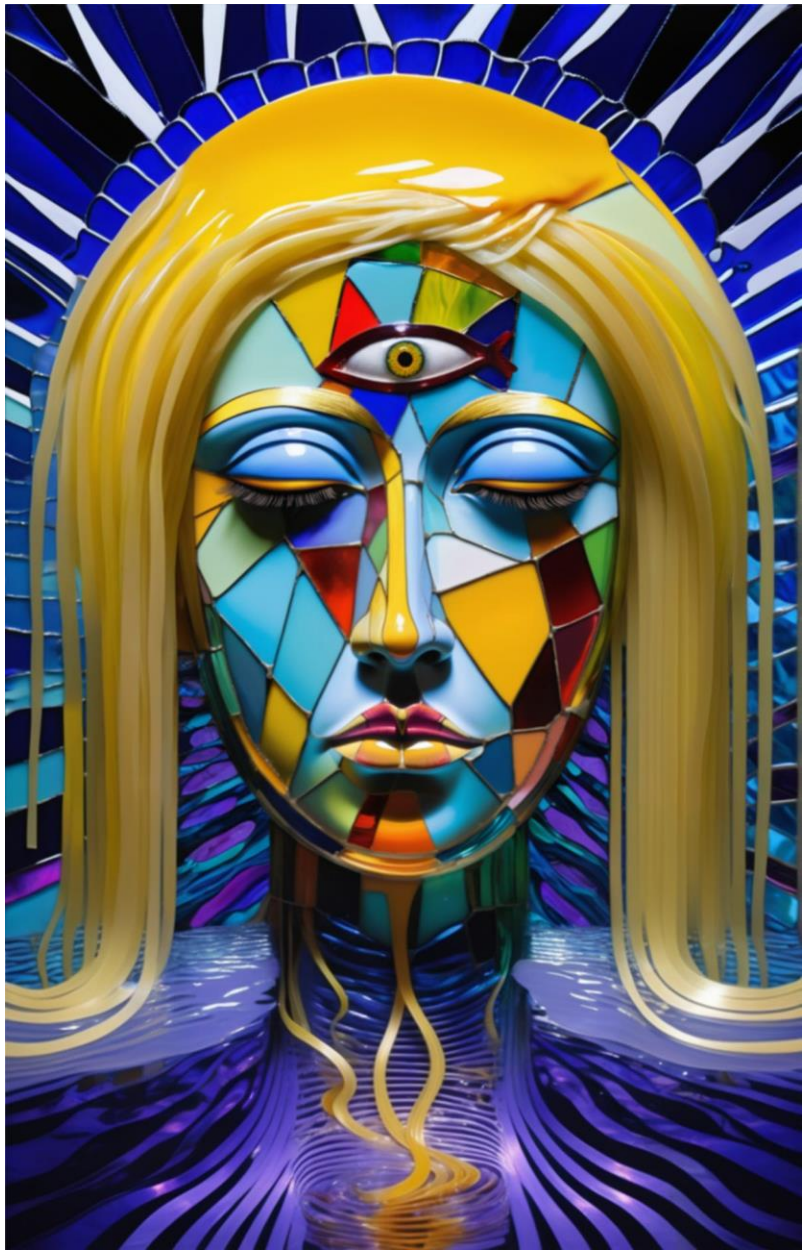
Breaking copyright news

February 10, 2025:

Image titled “A Single Piece of American Cheese” is registered (as a copyrightable work of authorship) by the US Copyright Office.

The image was produced by Kent Keirsey, CEO of Invoke, an “AI creation platform” (per CNET).

Lots of information about the work and the process here: https://www.invoke.com/post/invoke-receives-copyright-in-landmark-ruling-for-ai-assisted-artwork



Works of authorship have authors. Who – and why – are authors?
If copyright is meant to consist of a system of incentives, then who is incentivized? Who *should* be incentivized?
Are there *costs* to authorship?

Keep in mind, as background considerations:

(1) Copyright as an economically-motivated system: incentivizing and rewarding investment in "Progress."

(2) Copyright as an aesthetically / culturally-motivated system: incentivizing and rewarding creative / expressive practice and works that represent / advance "Progress."

(3) The possible role(s) of contracts / bargaining in resolving conflicts / differences of perspective within and between "economics of expression" and "personal expression" perspectives.

(4) There is no general "right to attribution" (right to claim credit for creating the work) or "duty to name the author(s)" in US law.

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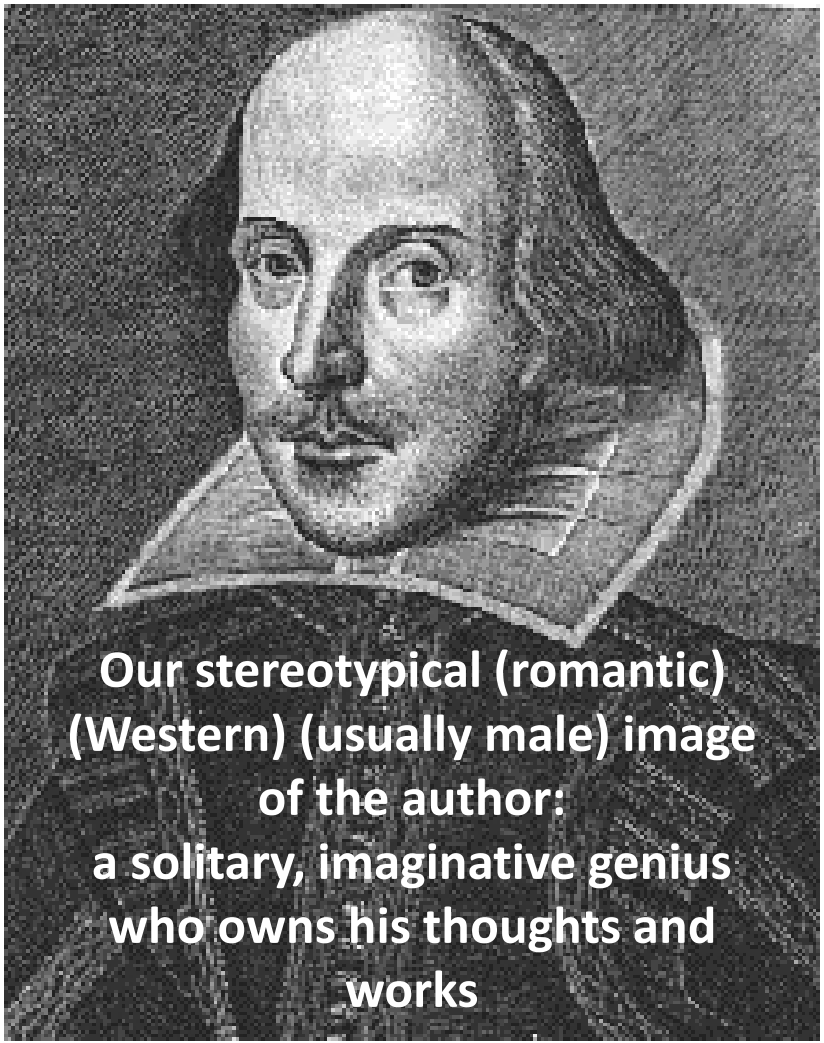


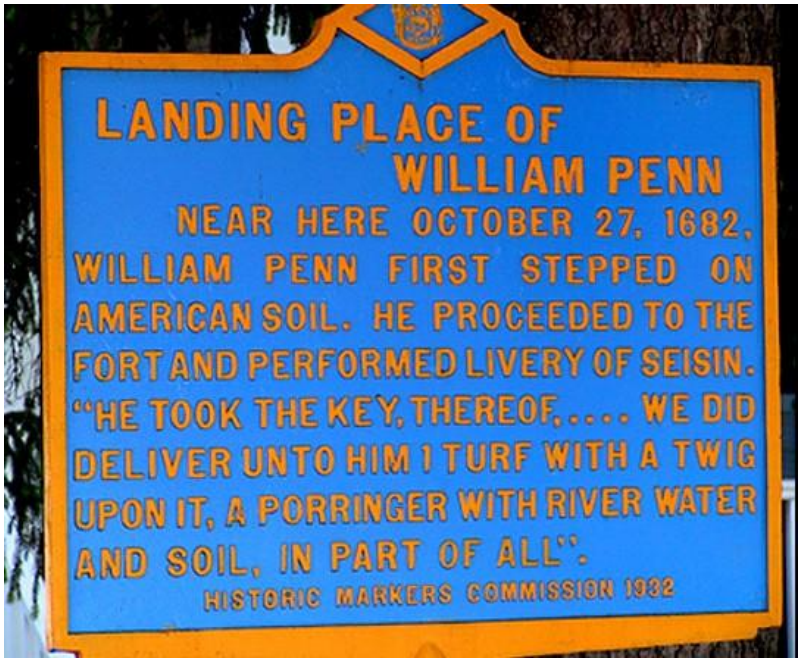
Initial Ownership. - Copyright in a work protected under this title vests initially in the **author or authors** of the work. The authors of a joint work are co-owners of copyright in the work.

17 U.S.C. § 201(a) (2022)

Works of authorship have authors, who are *initial* owners.
Copyright ownership may be transferred, and it often is.
Who – and why – are owners? Are there *costs* to ownership?

"**Copyright owner**", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

17 U.S.C. § 101 (2022)



(Delaware marker commemorating the common law "turf and twig" ceremony denoting a transfer of ownership)

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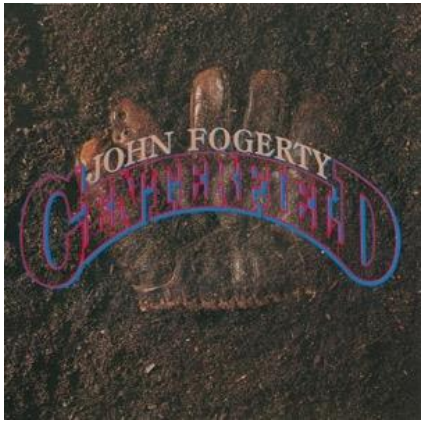
Who – and why – are owners? Are there *costs* to ownership?

Watch out for divided ownership.

Authors frequently transfer (sell / assign) their copyrights to others (publishers, motion picture studios, etc.) in exchange for one-time payments, royalties paid over time, and so on. Authors may have continuing rights in their works (look ahead to *termination* issues) … or may not.

John Fogerty was the leader of a famous and successful band called Creedence Clearwater Revival, or CCR...

The band was known for Proud Mary, Down on the Corner, Bad Moon Rising, and Run Through the Jungle. John Fogerty was the composer of those songs, but the copyrights were assigned to the band's label, Fantasy Records.



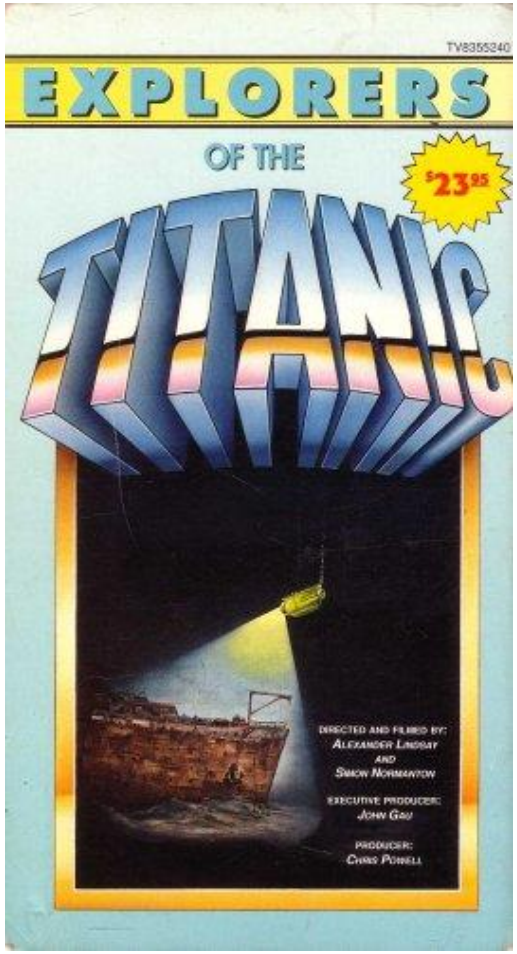
Years later, after CCR broke up, Fogerty released a solo album that included tracks that zinged the (hated) owner of Fantasy Records, Saul Zaentz. Fantasy sued Fogerty, arguing that The Old Man Down the Road improperly copied Run Through the Jungle. Fogerty argued that he did not commit copyright infringement by composing new songs that sounded like his old songs. The case went to a jury trial.

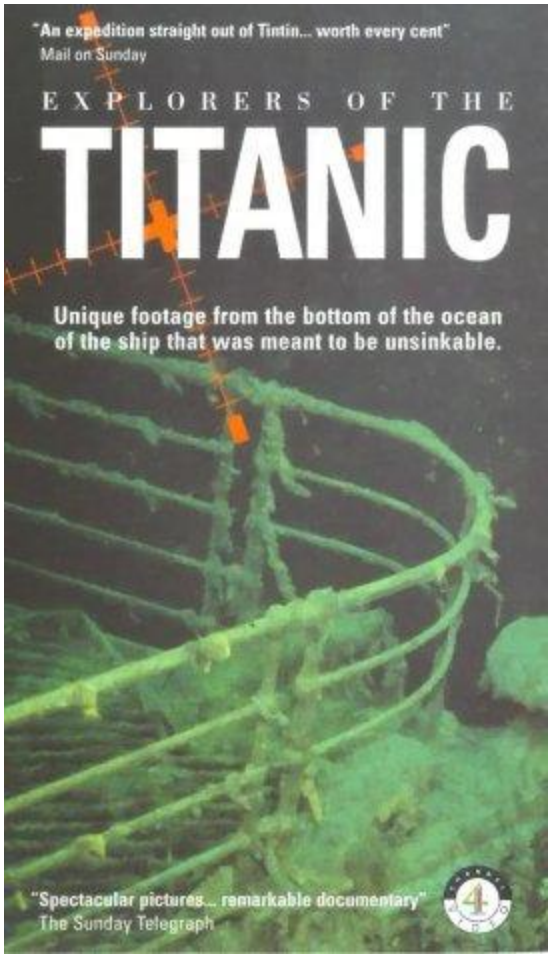
Works of authorship have authors. Who – and why – are authors? If copyright is meant to consist of a system of incentives, then who is incentivized? Who *should* be incentivized? Are there *costs* to authorship?

The reality of modern life is that most creative practice & expressive products are collaborative and/or corporate or institutional.

How to resolve [avoid] conflicts between the developer of the concept and the team that executes the vision?

Was Lindsay an author? Did Lindsay exercise “a high degree of control over [the] film operation … such that the final product duplicates his conceptions and visions of what the film should look like”? [Compare Napoleon Sarony] [Compare ChatGPT]





Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic (S.D.N.Y. 1999)

How to resolve [avoid] conflicts between the "master creator" (author?) of a complex or collaborative work, and (unhappy) participants?

Is Cindy Garcia the "author" of her film performance?

"A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord *by or under the authority of the author*, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. . . ." 17 U.S.C. § 101 (2022)

(still from *Innocence of Muslims*, in which the plaintiff claimed a copyright in her performance and argued that the work was produced without her authorization *because she was deceived as to the character of the final film)*

Garcia v. Google (9th Cir. 2015)

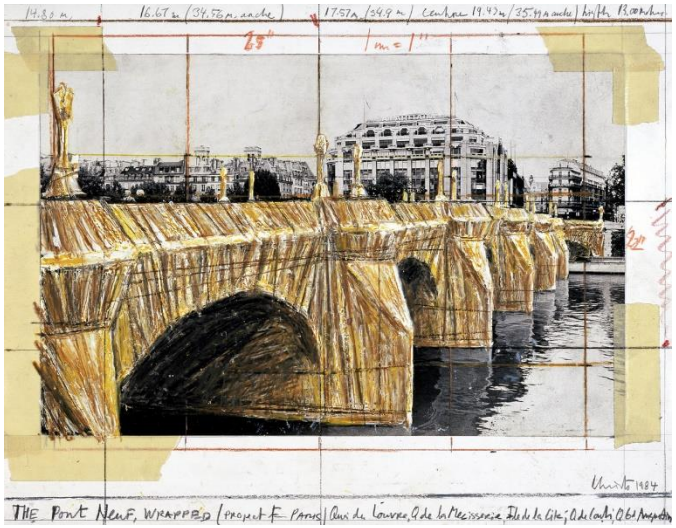
Would recognizing actors as "authors" turn films into "Swiss cheese" of copyrights – a mass of individually-authored "works"? Would that be a bad thing?

Who is the "author" of a work of conceptual art?

The "imagineeer" or the labor?

Damien Hirst, *The Physical Impossibility of Death in the Mind of Someone Living*

Christo, Pont Neuf Wrapped



Andy Warhol's actory (silk screen prints, mass produced)

Who owns *partial* or *incomplete* or *draft* works of authorship?

Who – and why – are authors and owners?

Are there *costs* to authorship and ownership?

When does someone become an "author" for copyright purposes? (Do contributors to "drafts" lose out on copyright ownership?)

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

17 U.S.C. § 101 (2022)

Who owns work produced collaboratively?

Initial Ownership. -
Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.
17 U.S.C. § 201(a) (2022)

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**.
17 U.S.C. § 101 (2022)

Who owns work produced collaboratively?

A finding of a "joint work" requires that [1] "each author intend that their respective contributions be merged into a unitary whole," [2] that "the parties intended to be joint authors," and [3] that each party's "contributions to the work[] were independently copyrightable."

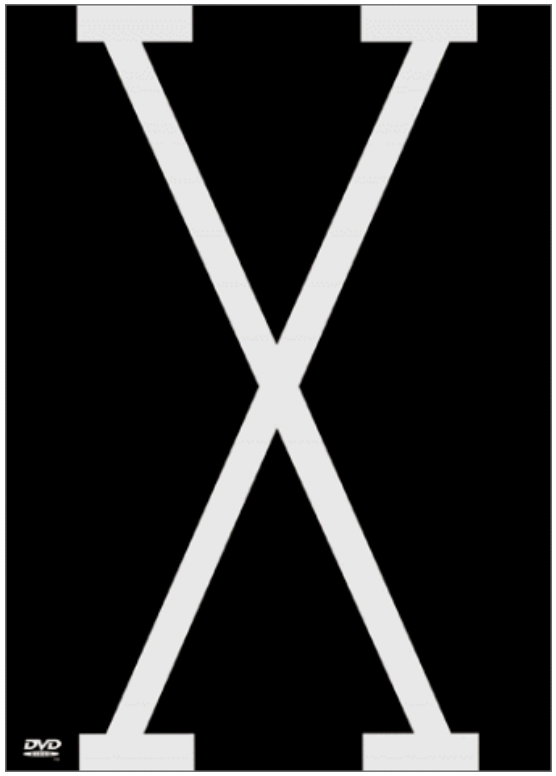
Erickson v. Trinity Theatre, Inc.

(7th Cir. 1994)

[Is this a fair reading of the statute? Is it consistent with copyright policy? Is it fair to all creators involved?]

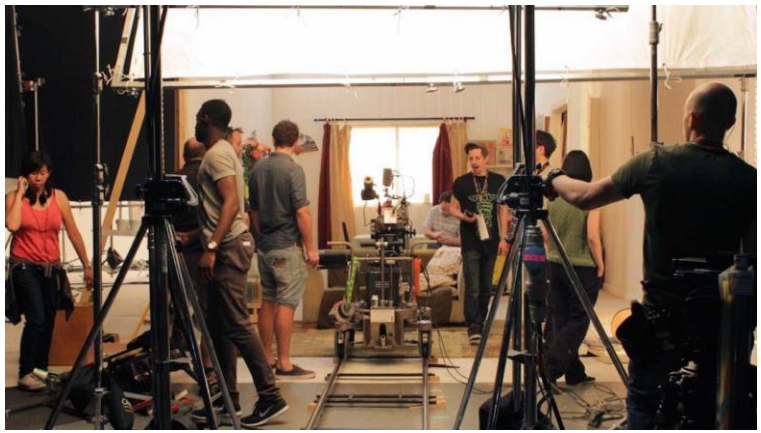
Who owns work produced collaboratively?

Factors relevant to a finding of a "joint work":
[1] "an author 'superintends' the work by exercising control';
[2] the authors "make objective manifestations of a shared intent to be coauthors"
[3] "the audience appeal of the work turns on both contributions and 'the share of each in its success cannot be appraised."



Aalmuhammed v. Lee (9th Cir. 1999)

[what legal standard best incentivizes the results that we want?]



Who owns work produced collaboratively?

An example:

Students in this class are permitted to "consult" others (students, friends, etc.) in preparing their memos.

Are memos produced with consultants "joint works"?

[Consider practical and public policy implications of "yes" and "no" answers.]

When and how do entities (companies, corporations, and associations) own copyrights?

Works Made for Hire. –

In the case of a **work made for hire**, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C. § 201(b) (2022)

[the work made for hire concept was added to the statute in the 1909 Act; the above definition was added in the 1976 Act]

When and how do entities (companies, corporations, and associations) own copyrights?

A "work made for hire" is -

> **(2) a work specially ordered or commissioned** for use as a contribution to a collective work, as a part of a motion picture or other audiovisual 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**. For the purpose of the foregoing sentence, a "supplementary work" is 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 forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

17 U.S.C. § 101 (2022)

When and how do entities (companies, corporations, and associations) own copyrights?

A ''work made for hire'' is –

(1) a work prepared by an employee within the scope of his or her employment; or
17 U.S.C. § 101 (2022)

[note that a different rule prevails in patent law for corporate *inventors*; individual inventors always own their inventions, subject (usually) to a contractual duty to assign them to their employers, and also subject to common law “shop rights” that usually permit the individual inventor to practice the invention]

When and how do entities (companies, corporations, and associations) own copyrights?

A theory and policy aside:

Can non-human entities be "authors" within the meaning of the Constitution? Should they be? Why / why not? Companies *cannot* be "inventors" for patent law purposes.

Looking ahead:

"Work made for hire" status affects the length of the relevant copyright.

"Work made for hire" status means that the creator of the work lacks "termination rights" that attach to transfers of copyrights in all other works.

When and how do entities (companies, corporations, and associations) own copyrights?

CCNV v. Reid (U.S. 1989)

When and how do entities (companies, corporations, and associations) own copyrights?

(1) *CCNV v. Reid* factors (is X an employee?): common law of agency framework →

--Right to control manner and means
--Skill required
--Source of tools
--Location of the work
--Duration of the relationship
--Right to assign additional work
--Discretion over working hours
--Method of payment
--Role in hiring others
--Whether part of the regular business of the hiring party
--Tax treatment

(2) Was the work produced within the scope of X's employment?

--Relevant evidence??

Famous examples of creative individual works owned (?) by companies rather than artists as works made for hire

Copyrights in comics characters and stories created by Stan Lee and others are owned by Marvel and DC and their predecessors as works made for hire.

E.g., **Marvel Characters Inc. v. Kirby** (2d Cir. 2013)

But see **Scorpio Music S.A. v. Willis** (S.D. Cal. 2012) (publisher drops claim that it owned copyright in lyrics written by Victor Willis, the police officer and lead singer of the Village People ("YMCA," "In the Navy"), as works made for hire).


THE END