

## MINORITY MEMORANDUM

Prints

December 27, 1941

Remitter: The House of Art (73446 &amp; 73823)

Title: "Pals" &amp; "We Give Thee Thanks"

Question: The question in this case involves the ownership of these two prints, originally copyrighted in 1924 in the name of the author Jessie Wilcox Smith. Her copyright in these works is still extant, and should be the property of her legal heirs. Is it possible for the publishers with whom we are corresponding, and who describe themselves as the "exclusive publishers in print form of all her works," to make new, larger prints of the original and publish them with a copyright notice, conferring a later ownership upon themselves by reason of the making of new plates? If such is the case, any print may be rescued from the public domain forever as the general public is notified by the successive publications with notice that their (the public) right to copy has not yet matured.

It is the opinion of the undersigned that the making of a new plate and publishing prints therefrom does not constitute authorship, but is an infringement upon the copyright existing in that print.

In the case of King Features Syndicate v. Fleischer et al, 299 Fed. Reporter, where the copyright in a book of cartoons (prints) was held to be infringed by a doll, Judge Manton in his decision which was in favor of the appellant held that the reproduction of a cartoon (a print) in a different medium, i.e., a toy, was an infringement. A reproduction in the same medium would therefore be at least equally an infringement. Judge Manton referred to "the original conception of the artist" and to "his title to any lawful use of his property, whereby he may get a profit out of it." In the instant case, it appears to the undersigned that there would be at least an equal appropriation of the property rights of the heirs of the deceased author, which is not explained in the statement re contractual arrangements in the first paragraph of the letter of Nov. 28, 1941, received from this remitter. This statement is as follows:

"For a great many years we were always the exclusive publishers in print form of all her work and this royalty contractual arrangement has continued and remains in force and effect. The royalty was always paid until her death and is still being paid to her heirs."

The question should be asked if the reproduction of the author's prints by the publishers, bearing notice in their name, was a part of "the royalty contractual arrangement," as the right to print, reprint, publish, copy and vend is vested in the original author or proprietor by the Act. And further, it should be the subject of determination by the Register of Copyrights whether or not the making of a new plate and the reproduction therefrom by a new process and in a new size constitutes authorship and confers copyright upon the author of such reproduction.

Examiner would reject. Examiner sustained.  
W.H.W. after consultation with the Register.

*M. C. Brady*  
M. C. BRADY

Jan. 6, 1942.

NOTICE

MINORITY MEMORANDUM

December 31, 1941

Remitter: Events Publishing Co., Inc.

Title: "Events," January, 1941

Question: Whether the January issue of a periodical published on December 30, 1940, with a 1941 notice of copyright is registrable in this Office.

In this case the majority desires to reject the application for registration of the claim to copyright in the January, 1941, issue of a monthly review entitled "Events" on the ground that the notice of copyright upon the magazine gives the year date 1941, whereas the application for registration gives the date of publication as December 30, 1940.

The undersigned is well aware that Section 18 of the Copyright Act requires that the notice of copyright should include the year date of publication. He is also aware that the past practice of the Office has been to reject these applications under similar circumstances.

Numerous court decisions have held that an advance date in the notice of copyright invalidates the copyright upon a work. This is in line with the thought that where a monopoly is granted by means of statute it should be strictly construed in favor of the public. Publication of a work with an advance year date in the notice would mislead the public into thinking that the published work has an additional year of protection, which the courts have tended to consider to be a fraud against the public interest.

If a book were published in December with an advance year date in the notice, ostensibly with an eye to the Christmas trade, in the hope that the advance year date would give it an additional touch of currency, the undersigned would reject the application on the basis of the advance year date in the notice. In the instant case, however, publication of the pamphlet took place on Monday, December 30, 1940. The copyright owner was desirous, no doubt, of having the January issue of "Events" on the stands by January 1, 1941. However, as January 1 is a holiday, distribution would doubtless be difficult on that date. Therefore, the January, 1941, issue was published upon December 30, 1940, but with a 1941 copyright notice. There appears to the undersigned to be no reason in equity why this application for registration should not be entered. No fraud upon the public has been committed.

The undersigned entertains considerable doubt concerning the majority's action in declining to accept this application. He does not believe that this Office, in view of recent decisions, can safely tell this claimant that he has no copyright. In view of the above the undersigned contends that the application must be accepted.

Walter L. Foxheimer

Reject--advance year date in notice. Sustained W. H. Wise, Jan. 2, 1942.

policy of office later changed re postdated notice  
by RED