

Oh! What a Tangled Web We Weave When We First Practice to Infringe

I. Who Has What Rights?

a. "Sorrow"

Suellen's piece "Sorrow" is copyrightable as a pictorial work under §102(a)(5) because it is an original work of authorship and is fixed in a tangible medium of expression. Suellen created the work independently and as it is an original artistic creation, it possesses the modicum of creativity necessary under *Feist*. While it is a piece of digital art, it is sufficiently fixed in that it can be perceived for a period of more than transitory duration as an electronic file. (§101; *London-Sire Records*) As "Sorrow" is a copyrightable work and because the assignment giving Rigel certain rights in the image was written and signed, the transfer satisfies the §204 requirements. Rigel therefore owns any and all copyright rights "relevant to any use as cover art for any book, magazine, periodical, or other type of publication." Suellen retained any remaining rights.

b. *Spiderwork cover*

Among the copyright rights that Rigel was granted was the §106(2) right to create a derivative work. The *Spiderwork cover* is a derivative work and Rigel owns the associated rights, assuming that she either created the image herself or hired another as a work-for-hire to create it for her. The cover, while using certain aspects of "Sorrow", contains "sufficient nontrivial expressive variation" that makes "it distinguishable from the underlying work in some meaningful way" (*Schrock*): the cover is zoomed in from the original, cropping out significant portions of the painting, including the woman's dress and the majority of the background; color is added to what was otherwise a grayscale/sepia image, including the woman's hair; a spider replaces the upper straps of the woman's dress; and the bird is closer to the woman. This is similar to the Paddington Bear in *Eden Toys* where "'non-trivial contributions' to the underlying work" could be copyrightable if authorized, even if the works had the "same aesthetic appeal". Additionally, assuming that Rigel self-published *Spiderwork*, the cover would be distinct from *Steinberg* in that the overlain text would be included as part of the copyrightable work. The font is not that of a larger magazine or publishing company and such a company did not create the

cover for Rigel. We do not know for certain who created this altered image of “Sorrow”, but it is likely that Rigel controls the underlying rights to it as a derivative work.

If no sufficient originality is found in the changes made to the original, the cover would then be an authorized copy of “Sorrow” per the Suellen-Rigel assignment.

c. Bewitching cover

It is not clear what aspects of “More Sorrow” Tripleday altered in creating the *Bewitching* cover as the original is not provided. Because Suellen and Manjitu were hired to create a book cover, it is likely that the image was created in the correct proportions to use it as a book cover and that no significant changes were made. It is also likely that Tripleday, as the publisher, added the text to the image. This would make the image itself copyrightable but not the text. (*Steinberg*)

A work made for hire is either a work made by an employee in the scope of his or her employment (§101(1)) or a work that falls under certain statutory factors and is expressly agreed upon in writing (§101(2)). Whether Tripleday or Suellen and Manjitu are the author of “More Sorrow” hinges on whether §101(1) or §101(2) applies. A pictorial work may qualify as a supplementary work under §101(2). The problem here is that it is not clear whether the work made for hire contract that Tripleday, Suellen, and Manjitu entered into was a written agreement or an oral contract. If it was written, then “More Sorrow” is a work made for hire and Tripleday retains the copyright. If not, we must decide whether there was an employer/employee relationship under §101(1). The *CCNV* factors, while not all explicit from the prompt, lean towards finding Suellen and Manjitu as independent contractors, meaning “More Sorrow” was not a work made for hire. Creating digital art requires a great deal of skill. It is assumed Suellen and Manjitu used their own tools. They worked in their own studio. Suellen brought along Manjitu, her assistant. The only factors that lean toward an employer/employee relationship are that hiring artists to create cover art is probably part of the regular business of Tripleday and they are also a business. If Suellen and Manjitu are independent contractors, they would be the copyright owners. The issue would then become whether the permanent assignment from the two of them to Tripleday was in writing, a requirement for exclusive

licenses under §204(a). If it was, Tripledax would own the copyright outright; if not, it would stay with Suellen and Manjitu.

If neither the contract nor the permanent assignment were in writing, we then look to whether Suellen and Manjitu are joint authors. This requires that each of them must have made independently copyrightable contributions to “More Sorrow” and fully intended to be co-authors. (*Childress*, as stated in *Larson*) We are told that they both did their job, and as Manjitu was Suellen’s protégé, it may be that they both made independently copyrightable contributions. The second prong is more difficult. As a protégé, Manjitu’s job may have simply been to observe and assist Suellen and she may never have intended to be a co-author. Manjitu could have been a mere amanuensis, taking specific orders from Suellen. (*Lindsay*) This differs from *Larson*, however, in that they entered into both contracts as a pair; Suellen did not do it alone. If they each made independently copyrightable contributions, the two would most likely be joint authors given that they both agreed to assign their copyright rights to Tripledax. Whether or not that assignment is valid, this is not something Suellen would likely do if she wished to be the sole author of the work.

II. What Claims Can Rigel Bring and Against Whom?

Rigel, as copyright owner of “Sorrow” is as much as the use is relevant to any use as cover art for any book, will state that the author of the *Bewitching* cover (whether Tripledax or Suellen and Manjitu) infringed her §106(1) reproduction rights and §106(2) derivative work rights. The distinction between these two claims is whether the *Bewitching* cover has enough originality to be considered a derivative work. While there are slight differences between “Sorrow” and the *Bewitching* cover, the right of reproduction protects more than just an exact copy. (*Sheldon*) To analyze the originality of the work, we use the two-prong *Arnstein* test. First, Suellen offered to create a “similar” image to “Sorrow”. While this may not be an explicit admission of copying, she certainly had access to “Sorrow” and the probative similarity of the two works is very high. Both pictures depict a woman standing in the right third of the foreground, a building blurred in the distance, her head looking to the right, wearing an open-backed black gown, a bird flying to her left, the whole picture in a sepia-like tone, with

essentially the same aesthetic and mood. Second, “More Sorrow” clearly rises to the level of improper appropriation. A lay observer would likely find substantial similarity between the *Bewitching* cover and “Sorrow”, beyond the general Suellen style. The artistic expression taken from “Sorrow” passes the de minimis threshold; factual copying is clear and the copying is actionable in that it is both qualitatively and quantitatively sufficient. (*Ringgold*) Tripleday or Suellen and Manjitu would argue against the fragmented literal similarity test in that the woman’s hair is up, she is in a different dress, the bird is slightly higher, the building is different in the background, and the aspect ratio is different. However, under the comprehensive non-literal similarity test, the “total look and feel” of the two works is the same. Looking at the *Bewitching* cover would certainly conjure up “Sorrow” in the mind of the ordinary observer.

If Suellen and Manjitu are found to be the authors of the work, Tripleday may be liable as a third party under contributory and vicarious infringement. (*Fonovisa*) Under contributory infringement, even though Suellen did not explicitly tell Tripleday that Rigel held the rights to “Sorrow”, Tripleday had reason to know that use of a work so similar would constitute infringement. As a book publishing company, they are most likely aware of basic copyright laws, enough to determine that using an image with such striking similarity would be an infringement. Tripleday was certainly guilty of vicarious infringement. They had the right and ability to control the reproduction of the work and had a direct financial interest in such activities. (*Fonovisa*) Intent or knowledge is not required for vicarious infringement.

Additionally, Rigel can bring a claim for infringement of her §106(3) distribution rights and §106(5) display rights against Tripleday. Flinn likely assigned whatever distribution and display rights she had to Tripleday, as is the custom in book publishing. 25,000 physical copies of *Bewitching* were distributed and it can only be assumed the covers were displayed in various promotional materials, as well as online. If Flinn is a well-known author, these types of limited releases of alternative covers will likely become sought after, meaning the images will remain displayed on the Internet for a long period of time.

Flinn will not be liable as a third party in that she did not know of any infringement and did not have any right or ability to control the infringing activities.

III. What Are the Possible Defenses for Different Parties?

Tripleday may claim that the *Bewitching* cover is a fair use of “Sorrow”. The first factor, the purpose and character of Tripleday’s use, weighs against fair use. They are a commercial venture and the work is not sufficiently transformative. It merely supersedes the original creation as opposed to adding something new. The second factor, the nature of the copyrighted work, also weighs against a fair use finding. The copyright of the original work is thick in that it is pure creative expression. The third factor, the amount and substantiality used, weighs against a fair use finding. The taking was both qualitatively and quantitatively extensive, taking the heart and soul of the work. (*Campbell*) The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, also weighs against a fair use. Rigel has all rights in “Sorrow” as they pertain to use as a cover of a book. Tripleday directly infringed this specific right and devalued Rigel’s right in the work. Tripleday’s use as a book cover is exactly the market to which Rigel’s right pertains. When the factors are taken as a whole, they weigh against a finding of fair use and towards finding Tripleday as an infringer.

Suellen may also argue that the woman depicted in “Sorrow” is a sufficiently delineated character and that she only granted the copyright rights surrounding “Sorrow”, not the woman herself. Suellen even describes her paintings as characters and states that in them, “something sad is about to happen, as if they were trapped in a bad dream.” This argument would ultimately fail. *Nichols* tells us that “[t]he less developed the characters, the less they can be copyrighted”. *Gaiman* also tells us that there is a difference between literary and graphic expression, but there is also a difference between graphic expression in a film or comic book and graphic expression in a piece of art. The woman depicted in these pictures is distinct from the the character of Sam Spade, Rocky, or Cogliostro in that we do not know her name and she has no speech. While a picture may be worth a thousand words, the seemingly sad state that she is in is something that Suellen admits is common in her work. That is not enough to make her “specifically delineated”. (*Anderson*) Furthermore, it is not entirely clear that it is even the same woman in the different pieces.

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