

**HEIRS TO ANNE OF GREEN GABLES AUTHOR HAVE VALID REVERSIONARY
COPYRIGHT INTEREST, ONTARIO SUPERIOR COURT RULES IN SUIT
AGAINST LICENSEE**

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A recent decision of the Ontario Superior Court of Justice determined the fate of a copyright going back to 1908 in the famous character of Anne of Green Gables described in the fictional work bearing the same name and authored by Lucy Maud Montgomery (*Anne of Green Gables Licensing Authority Inc. v. Avonlea Traditions Inc.*, [2000] O.J. No. 740, Court File No. 95-CU-89192, Ontario Superior Court of Justice, March 10, 2000, J. Wilson J.).

The character Anne in Lucy Maud Montgomery's novel *Anne of Green Gables* is a young orphan girl whose appeal to residents of Prince Edward Island and to the rest of Canada has survived intact the 20th Century.

During the mid 1980's, the heirs of Lucy Maud Montgomery (who had passed away on April 24, 1942) became aware of and claimed a reversionary copyright interest in *Anne of Green Gables* and any sequels written by the author. These heirs initiated a licensing program including a license which was granted to the defendant. This license allowed defendant Avonlea Traditions Inc. to merchandise souvenirs which bore the names and likeness of characters derived from the 1908 book. The license agreement was concluded in August 1988 but was terminated by the plaintiffs in April 1994 due to defendant's failure to pay royalties or provide an accounting thereof as contemplated by the license agreement.

Various negotiations occurred between the parties with a purpose to amicably resolve their differences. However, these negotiations failed and legal action was taken by plaintiffs in August 1995. In its suit, plaintiffs sought damages for unpaid royalties prior to and after termination of the license agreement in April 1994 and also requested an injunction preventing defendant from continuing to deal in merchandise related to Anne of Green Gables. In its defence, Avonlea Traditions Inc. raised several IP issues to contest plaintiff's action. One of the issues raised by the defendant was whether the heirs had a valid reversionary copyright interest under

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Canada's *Copyright Act* (R.S.C. 1985, c. C-42) at the time the license agreement was entered into by the parties in 1988.

Section 34.1 of Canada's *Copyright Act* provides that copyright is presumed to exist in a work unless the contrary is established. Canada's *Copyright Act* provides that the term for which copyright shall subsist in a work shall be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty (50) years following the end of that calendar year.

As Lucy Maud Montgomery passed away in April 1942, the copyright in the work *Anne of Green Gables* expired in 1992. The undisputed facts of the case revealed that copyright in *Anne of Green Gables* had been registered on June 11, 1908 by L.C. Page & Company Inc. as assignee of that right. Copyright was further assigned to publishers Farrar, Straus & Giroux, Inc. who thereafter held all rights in *Anne of Green Gables*.

Canada's *Copyright Act* allows "reversionary rights" with respect to the heirs of an author. In summary, the copyright in any work "reverts" to the author's estate 25 years after the author's death, notwithstanding any assignment agreement made during the author's lifetime. These rights are described in the following fashion by Richard, H.G. et al. in the *Canadian Copyright Act Annotated*, Carswell, Toronto, 1993 at p. 14-3: "Subsection 14(1) is not the best example of legislative clarity. According to this section, subject to certain conditions where the author of a work is the first owner of the copyright therein, no assignment of the said copyright nor grant of any interest made by him, is operative to vest in the assignee or grantee rights relating to the copyright for more than 25 years after the author's death. Upon the termination of this 25-year period, the title or interest in the copyright devolves on the author's legal representatives as part of his estate." These reversionary rights can however be limited if the assignee of the copyright (in this case Farrar, Straus & Giroux, Inc.) provides written notice of a claim in accordance with statutory requirements outlined at subsection 60(2)(a) of the *Act*.

In this case, the heirs asserted the validity of their reversionary copyright when they concluded the license agreement with the defendant in 1988. Additionally, there was no evidence before the Court that L.C. Page & Company Inc. or its successor filed the appropriate notice or claim to register or renew the copyright interest under subsection 60(2)(a) of the *Copyright Act*. Quite the contrary, in a 1986 agreement between Farrar, Straus & Giroux, Inc. and L.M. Montgomery's heirs, the former acknowledged the latter's reversionary rights. In the absence of a notice filed by any of the copyright's assignees as provided by the *Copyright Act*, the reversionary rights in favour of Lucy Maud Montgomery's heirs came into effect in 1967, 25 years after the author's death. In rejecting the defendant's argument, the Court concluded that the heirs had a valid reversionary copyright which had "reverted" to them back in 1967.

As an additional argument, defendant questioned whether a copyright interest over a literary work included the right to license two- and three-dimensional objects which

bore a resemblance to characters described in *Anne of Green Gables*, undoubtedly a literary work. The Court reviewed caselaw which extended copyright protection to descriptions of characters found in literary works. The Court noted the comments of McKay J. in *Preston v. 20th Century Fox Canada Ltd.* (1990), 33 C.P.R. (3d) 242 (F.C.T.D.) to the effect that a "requirement for copyright of characters in a literary work is that the description in the work be sufficiently clearly delineated such that the character subsequently becomes well-known and widely recognized".

In the case under consideration, the Court analysed Lucy Maud Montgomery's description of Anne and the situations in which she is featured in the book as "clearly delineated, distinctive, thorough and complete". The Court concluded that during its duration, the copyright in the literary work *Anne of Green Gables* extended to the two-and three-dimensional images that were sold by the defendant.

The Court rejected all the arguments brought forth by the defendant (including trademark challenges) and allowed plaintiff's claim. Outstanding royalties owed between 1988 and April 1994 along with damages for the common law tort of passing off after April 1994 were awarded to the plaintiff. An injunction was also granted restraining defendant from any dealings in the "Anne of Green Gables" merchandise.

At paragraph 274 of her decision, the Court noted that at the heart of defendant's failure to pay royalties was its irrational yet firmly held view that the heirs did not deserve payment of royalties, as it was defendant who was exerting all of the effort and work. This "irrational view" fundamentally undermines the concept of copyright and even the purpose of a license agreement. Obviously, in this case, defendant's challenge was not allowed in light of the Montgomery heirs' clear rights.