[Note: This lawyer email thread is from newest to oldest.]

From: "Joshua, Sue - Chichester" <sjoshua@wiley.com>
Date: December 20, 2010 8:23:36 AM PST
To: Gerrit Lohmann <Gerrit.Lohmann@awi.de>
Cc: John Birks <John.Birks@bio.uib.no>, "Wright, Debbie - Oxford" <dewright@wiley.com>, "Ulrike.Herzschuh@awi.de" <Ulrike.Herzschuh@awi.de>, "xqliu@niglas.ac.cn" <xqliu@niglas.ac.cn>, "David J. Currie" <David.Currie@uottawa.ca>, "Christoph.Ruholl@awi.de" <Christoph.Ruholl@awi.de>, "cthresher@alaska.edu" <cthresher@alaska.edu>
Subject: RE: One question re GEB Herzschuh et al article, Thresher problem

Dear Herr Lohmann

Wiley-Blackwell took further steps to verify the identity of Claudia Kabatzki as a result of concerns raised by you. We now have no doubt that the Claudia Kabatzki we have spoken to and corresponded with is the co-author of the paper published in GEB.

The article has been retracted because the CTA signed on 20 January 2010 cannot be relied on as a valid legal instrument. The explanation of Herr Ruholl in relation to German copyright law is very helpful. However, the rights held by UWI in the work of Claudia Kabatzki amount at best to exploitation rights. The CTA signed by Dr Herzschuh purports to assign copyright in the work of all co-authors to a company based in a jurisdiction outside of Germany, which can only be done with consent.

It is widely accepted that legal restrictions and requirements can be grounds for retraction (see for example the IFLA/IPA and STM guidelines on retraction). I do not think that COPE could seriously maintain a different position. As a publisher, we have an obligation to investigate any instances of copyright infringement or other legal issues which are brought to our attention (at any time) and take appropriate steps.

Best wishes

Sue Joshua

From: Gerrit Lohmann [mailto:Gerrit.Lohmann@awi.de]
Sent: 17 December 2010 23:27
To: Joshua, Sue - Chichester
Cc: John Birks; Wright, Debbie - Oxford; Ulrike.Herzschuh@awi.de; xqliu@niglas.ac.cn; David J. Currie; Christoph.Ruholl@awi.de;cthresher@alaska.edu
Subject: Re: One question re GEB Herzschuh et al article, Thresher problem

Dear Joshua Sue,

thanks for the email.

I think you are not informed, several attempts were made to contact C. Kubatzki prior to submission of the article. I have asked Claudia Kubatzki (now Thresher) several times about the data and work she produced she did at AWI.
In 2007 and 2008, I have sent emails to Kubatzki/Thresher with no answer.
On the other side, Claudia Kubatzki (now Thresher) used my letter of recomendation where I explicitely mentioned the submitted article. (As I mentioned earlier, she was proud of the work.)

It is unbelievable that you start an action before a final proof of C. Thresher. You said that the identity was proven on the 16 Dec through a telefone call, one day later you start an action. This sounds very ad hoc and not very professional from Wiley. Still, I think a signed letter is a proper format.

I would be glad if you or/and your collegue can answer to my questions I formulated yesterday. Shall I send the email again?
I guess it will be ok to include cthresher@alaska.edu,kubatzki@o2online.de as cc. She may report on what has changed her mind (if the person from the emails and yesterdays phone call is the same person, but her/ his non-native German speaks against the same identity). Since we are working together with the University of Fairbanks, one may also think that her current employer and others should be informed about the process, also to avoid future complications.

Best regards
Gerrit Lohmann

Am 17.12.10 17:59, schrieb Joshua, Sue - Chichester:

Dear Herr Ruholl

Thank you for your email of 16 December which was forwarded by John Birks today.

Your clarification of the provisions of German law in relation to joint copyright ownership of employee works is helpful.

One of the reasons we include the warranties at clause G of the CTA is that provisions re copyright ownership vary between jurisdictions. The warranties therefore ensure that all co-authors are aware of the publication of their work and for that reason we also require valid email addresses for all co-authors. At the time of signature of the CTA in January 2010, it should have been clear to Dr Herzschuh that she was not in a position to sign the warranties in relation to the work of Dr Kabatzki as she had not been in touch with her since November 2007, four months after Dr Kabatzki had left AWI. The contact email address given at submission for Dr Kabatzki was fabricated, as Dr Kabatzki had left UWI some years earlier and could therefore no longer be contacted at UWI. By the admission of the co-authors no formal attempts were made to contact Dr Kabtatzki prior to submission of the article to GEB or at any time thereafter, until a complaint had been made when it did prove possible to obtain a contact email from Martin Claussen, Dr Kabtatzki's former supervisor at the Max Planck Institute. Neither were any attempts made to inform the editor of GEB or Blackwell Publishing Ltd of the failure to comply with the warranties in the CTA, to explain the fabricated email address, or to present the co-authors arguments in relation to German copyright law. In all the circumstances of this difficult case, we no longer feel able to rely on the copyright transfer agreement signed by Ulrike Herzschuh on 20 January 2010 as a valid legal instrument.

We have not made the decision to retract the article lightly and we understand that the co-authors may wish to ask COPE to investigate the retraction decision. You should be aware however that David Currie followed the COPE guidelines (which are non-binding) in relation to seeking a correction or notice of concern before turning to the publisher for legal advice in this matter.

Once the article is retracted, the co-authors will of course be able to submit or publish it elsewhere.

Yours sincerely

Sue Joshua

-----Original Message-----

From: John Birks [mailto:nbojb@uib.no] On Behalf Of John Birks
Sent: 17 December 2010 09:40
To: Wright, Debbie - Oxford
Cc: John Birks; Gerrit.Lohmann@awi.de; Ulrike.Herzschuh@awi.de; xqliu@niglas.ac.cn; David J. Currie; Christoph.Ruholl@awi.de; Joshua, Sue - Chichester
Subject: RE: One question re GEB Herzschuh et al article

Dear Ms Wright,

Here is the message I received yesterday afternoon at 1717. I hope you receive it now.

John Birks

From Christoph.Ruholl@awi.de Thu Dec 16 17:22:29 2010
Date: Thu, 16 Dec 2010 17:17:26 +0100
From: Christoph Ruholl <Christoph.Ruholl@awi.de>
To: David.Currie@uottawa.ca, Debbie.Wright@oxon.blackwellpublishing.com
Cc: Christoph.Ruholl@awi.de, Ulrike.Herzschuh@awi.de
Subject: 2nd AWI letter

[The following text is in the "windows-1252" character set.]
[Your display is set for the "ISO-8859-1" character set.]
[Some characters may be displayed incorrectly.]

Dear Dr. Currie and Ms. Joshua,

I am responding to your letter that we received on 13th December 2010. With this letter we want to demonstrate that according to German copyright law Dr. Kubatzki has no right to refuse the publication of her working results.

To bring a successful action for breach of copyright, the claimant must demonstrate that they own the copyright and can hinder that other exploit it. As we show below, Dr. Kubatzkiâ€™s previous employer AWI has the right to exploit her copyright. Even if Dr. Kubatzki had solely the right for exploitation, it would be as a joint copyright shared amongst all authors. In neither scenario can Dr. Kubatzki unreasonably refuse consent to publication. Three points are applicable.

1. According to German copyright law (Â§43) AWI as Dr. Kubatzkiâ€™s employers has the right of exploitation of her work:

Â§ 43: The provisions of this subsection shall also apply if the author has created the work in execution of his duties under a contract of employment or service provided nothing to the contrary transpires from the terms or nature of the contract of employment or service.

The work for the GEB article of Claudia Kubatzki was clearly in the scope of her employment at AWI.

A basic decision (Grundsatzurteil) by the BGH (Bundesgerichtshof, the highest

federal court dealing with civil law matters) in interpretation of Â§43 copyright law states clearly that â€žin those cases, in which no explicit regulation made for the disposition of rights between employee and employer is made in the contract, a mute consent to the use of his/her works by the employer is to be assumedâ€œ (BGH, GRUR 1952,257/258; restated more recently in BAG, BB 1997,2112) (inofficialÂ translation).

The German Courts and legal literature both emphasize that:

According to art. 12 (1) (of Copyright law), the author has the right to decide, if and how his work should be published. Yet, as far as the employer has obtained the right to use the work of the author as its employee, the employer must have the possibility to decide about the publication of the work (Dreier/Schulze/Dreier $43 Rn35; Wandtke/Bullinger/Wandtke Â§4 Rn87).

Otherwise, the employee would have the chance to block the employer from using his legal rights for usage of the work. Therefore, it is principally at the hand of the employer to decide about when and how to publish it, and whether the work is ripe for publication. (Dreier/Schulze/Dreier Â§43, Rn 35) (Gunda Dreyer et al: â€žUrheberrechtâ€ (the leading scientific commentary on German Copyright law)(inofficial translation).

It should be clear from these citations, that Dr. Kubatzki is not at all likely to be successful should she sue. Claudia Kubatzki, as an employee, has the only right to claim not to be named as author.

2.Regardless of above argumentation that applies to employer-employee relationship; it is written in Â§34 (Transfer of Exploitation Rights) in German copyright law that

(1) An exploitation right may be transferred only with the author's consent. The author may not unreasonably refuse his consent.â€

3. Furthermore, even if one doubts Dr. Herzschuh had the full right to use Dr. Kubatzkiâ€™s contribution for publication on behalf of AWI, there is another Article clearly restricting Dr. Kubatzkiâ€™s right to refuse publication of it, since she is not solely the owner of the copyright. Article 8 of German Copyright Law states that:

(1) If several persons have created a work jointly, and their respective contributions cannot be separately exploited, they shall be deemed the joint authors of the work.

(2) The right of publication and of exploitation of the work shall belong jointly to the joint authors; alterations to the work shall be permissible only with the consent of the joint authors. However, a joint author may not unreasonably refuse his consent to the publication, exploitation or alteration of the work. Each joint author shall be entitled to assert claims arising from infringements of the joint copyright; however, he may demand payment only on behalf of all joint authors.

We urge you to reconsider your decision in the light of this information on German legal theory and practice. If you need to seek further clarification, we ask you to postpone the retraction of the article.

Yours sincerely

Christoph Ruholl

Head of legal department

On Fri, 17 Dec 2010, Wright, Debbie - Oxford wrote:

Dear John, We have not received Christoph Ruholl's message.
Best Regards,
Debbie

-----Original Message-----

From: John Birks [mailto:nbojb@uib.no] On Behalf Of John Birks
Sent: 17 December 2010 09:14
To: Wright, Debbie - Oxford
Cc: John Birks; Gerrit.Lohmann@awi.de; Ulrike.Herzschuh@awi.de; xqliu@niglas.ac.cn; David J. Currie; Christoph.Ruholl@awi.de; Joshua, Sue - Chichester
Subject: One question re GEB Herzschuh et al article

Dear Ms Wright,

In connection with your email of December 16 (arriving here at 16.22 CET), I ask if you and your Senior Legal Adviser received the message from AWI's lawyer Christoph Ruholl sent 16 December at 17.17 CET. It seems to me that Ruholl's message contains important and relevant legal information that relate to your clear decision at 16.22 yesterday to go ahead with the retraction without delay today.

John Birks

Dear Debby Wright,

Claudia Kubatzki (now Thresher) agreed on the publication. Why? Because she has not said something different after she was asked to. It cannot be our fault that she did not answer emails or wanted to leave science. (In one of your emails you said that nowadays everything is via emails and you do not want to have written letters.) In my letter of reference for Claudia Kubatzki, I explicitely wrote and acknowledge her contribution on the Herzschuh et al paper. She was proud of that and applied with this letter of reference to other jobs.

Claudia Thresher came more than 6 months later when the paper was already published online. Can you say how long a co-auther can stop a paper? Can a person can come 1 year, 5 years, 10 years later? Is there any time limit?

If this person has reasons which change her mind, why she does not want to tell us? Even now, she does not want to say anything about it. Attempts have failed to reach her although the editor of GEB Dr Currie, and her supervisor Dr Taylor at the new position in Alaska handed my email to her. Also the attempt to contact her via a neutral person failed (Dr Eicken, Alaska). Shall we include her as cc for these email conversations, do you think that would help?

Still I have difficulties to believe that the person which is in contact with you is the same person who worked at our institute. Why she sent a confuse email to Ulrike Herzschuh with brocken German? If this is really written by her, she probably needs

urgent help. Why is she/he not able to write an ordinary letter including address and signature explaining the issue what has changed her mind? An ordinary letter can be also sent by fax, I guess.

Is there any reason to come up with such an ad hoc procedure by Wiley? The things are not clarified (COPE, copyright) and persons spend some time to try to clarify the issue. From my understanding of a professional publisher, it would be more useful to solve the things first and then go to the public. Do you have any pressure from C. Thresher? or: Why do you risk your good reputation as publisher?

I would be glad if you can answer the questions.
Thanks in advance
Gerrit Lohmann
