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Spring 2015

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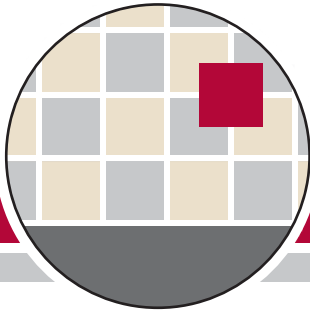


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# Kamil Kubik: The Artist and Copyright Observed

## **Cover Page Footnote**

Profs. Townsend Gard and Liebesman want to give special thanks to Eric Goldman and the 2014 WIPIP at Santa Clara Law, where we presented the work for the first time, and to Marshall Leaffer, for inviting us to present the work at the “Leveraging Creativity” Conference in 2014, as well as to Robert Brauneis who assisted us in our hunt for records at the Copyright Office. To Dan Collier, the Chief Legal Engineer for the Durationator® Copyright System, for all his assistance, as always and being willing to build crazy paths with me, as a result of this paper. And finally, to the staff at IP Theory, whose hard work is greatly appreciated. Many of the stories related in this narrative are from the personal memory of Prof. Liebesman’s from her family’s lifelong friendship with Kamil and Joanna Kubik. A number of the works depicted are from the collection of the co-author and her family. In addition to those thanked above, she is appreciative of Kassandra Garrison for her fine research assistance.



## Kamil Kubik: The Artist and Copyright Observed

*Elizabeth Townsend Gard\* and Yvette Joy Liebesman\*\**

### PROLOGUE: A PERSONAL STORY<sup>1</sup>



of artwork he had ever owned.

In 1969, my father, Bill Liebesman, began his lifelong friendship with Kamil Kubik. Bill was an ophthalmologist who volunteered each week teaching residents at the eye clinic at Mount Sinai Hospital in New York City. One day, while Bill was walking up Madison Avenue on his way to the hospital, he spotted what he thought was the most beautiful painting in the window of the Saint James Gallery. Each week, he would stop to gaze longingly at the object of his desire, and eventually he went inside and talked to the up-and-coming, but still unknown artist, Kamil Kubik. Thereafter, each weekly visit included a long conversation between Kamil and Bill. After a few months, Bill purchased the painting, which was the most expensive piece

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\*\* Assistant Professor of Law, Saint Louis University School of Law. Many of the stories related in this narrative are from the personal memory of Prof. Liebesman’s from her family’s lifelong friendship with Kamil and Joanna Kubik. A number of the works depicted are from the collection of the co-author and her family. In addition to those thanked above, she is appreciative of Kassandra Garrison for her fine research assistance.

1. The personal narrative about Kamil Kubik is written in the first person by Yvette Joy Liebesman.



**Figure 1: Winter in Central Park**  
*The first of many of Kamil's works that my father purchased.*

Bill continued to stop at the Gallery and chat with Kamil, eventually changing his routine so that his visits to the gallery were after finishing his work at the eye clinic. Kamil and Bill would bond over drinks and dinner before returning to their respective homes. The men learned that they were born two weeks apart—Bill in Bradley Beach, New Jersey, and Kamil in rural Czechoslovakia.

Kamil and Bill were both avid story-tellers, both loved to socialize, and they had similar interests and senses of humor. They always laughed at each other's jokes, even when the rest of us cringed. Their friendship blossomed, and the two men were always smiling in each other's presence. Kamil and his wife, Joanna, were fixtures in our household, and were essentially part of our family. We spent every Thanksgiving together. My parents vacationed with the Kubiks. Kamil painted my older sister playing Frisbee in Central Park, and frequently took my brother and me on outings to New York City. Kamil and Bill celebrated their 50th birthdays together with a memorable surprise party. For over forty years, Bill and Kamil were best friends, until illness and death claimed both of their lives within months of each other.

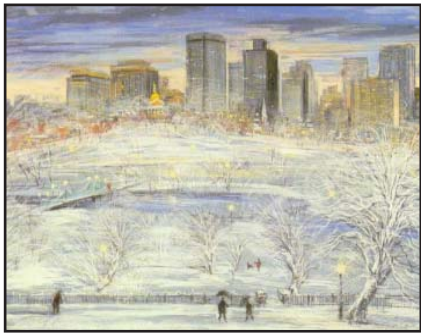
## INTRODUCTION



Artist Kamil Kubik's career lasted over 60 years, from the time he fled his native Czechoslovakia in 1948 until his death in August of 2011. This period spanned three distinct eras of copyright law in the United States, and Kamil created many of his works abroad, adding further complexity to their treatment under copyright law. Kamil's life presents an opportunity to observe how copyright law during the mid-20th through early 21st century

interacted with an artist's life and affected his rights.

Copyright law is the primary law that protects the artistic and economic interests of an author. As such, this essay looks at the parallel relationship between the artist's biography and the copyright law that affects his works. As the idea of international harmonization has taken hold, this essay hopes to show the lack of harmonization at the moment, or at least the complexity in sorting through the many changes in copyright law throughout the 20<sup>th</sup> century, that now affects copyright in the twenty-first century. The results of copyright law are dramatic—a work is either protected under copyright or it is in the public domain. There is no middle ground. The rules of copyright underwent major changes at least three times during Kamil's lifetime. This essay traces the impact of those changes in his life's work. The essay also suggests



**Figure 2: Boston Commons (oil)**



**Figure 3: Florals (pastel)**

*Note:* From the private collection of co-author Yvette Joy Liebesman. Date unknown.

Kamil became a well-known impressionist for his beautiful cityscapes and florals. He was immensely talented in both oil and pastel work. Kamil's artwork would eventually grace the walls of The Breakers in Palm Beach, Florida; the Old Ebbett Grill in Washington, DC; and the homes of Presidents, Governors, and celebrities.<sup>2</sup> Many of his oil paintings and pastel drawings were also printed as lithographs and serigraphs, and sold at more affordable

a novel way of looking at copyright—by looking not only at the individual works, but at the artist's entire body of work; each artist has a copyright profile, just as they have a biographical profile. Finally, this essay asks several questions: did the copyright status of a particular painting matter, in the end, to Kamil? What role does copyright law actually play in Kamil's life, and how does his relationship with copyright bring insight into our own relationships with copyright law?



**Figure 4: Central Park (oil)**

*Note:* Ruth Liebesman, sister of the co-author, is the female Frisbee player in the lower left corner. Kamil started painting this while watching her play during her sophomore year in college, in 1977, and finally completed it for her law school graduation, in 1986. Kamil often brought his easel and paints to Central Park, and would attract a crowd while he painted. He told my family that this is how he met Barbara Bush (who became one of his most famous patrons) while her husband, George H.W. Bush, was U.S. Ambassador to the United Nations.

2. Among the owners of his artwork are President George H.W. Bush, New Jersey Governor Tom Keane, and Donald Trump.



prices than the four-to-five figures that he received for the originals. Fortunately, he was not dependent on the sale of the prints, as most were not protected by copyright. While we could find only anecdotal evidence of Kamil's works being printed without his authorization, this was an important issue for artists' works during the "formalities" era of U.S. Copyright Law, and as such, will be analyzed in detail.

The complexity of the relationship between the prevailing copyright law and Kamil's artwork is not unique. Though this article chronicles Kamil Kubik's travels, his art, and how his rights under copyright law changed through time and location, it could be the story of many visual artists. The essay is important not only for 20th century visual artists themselves and their estates, but also may provide critical information for museums and others interested in digitizing artists' works. As museums enter the business of copying and distributing works, copyright law plays an important role in decision-making and liability questions. By focusing on one author's journey, we hope to illuminate the intricacies, peculiarities, and sorrows that make up the copyright story of 20th century artists.

Part I of this essay chronicles the beginning of Kamil's art career, starting with his flight from Soviet-controlled Czechoslovakia. This section explores how the works from his birth to his escape would have been protected, both at the time of his escape and today. This section also discusses how his works were protected once he became a stateless person. Part II explores Kamil's time in Australia while he was painting sets for the Sydney Opera House. It analyzes the copyright status of the works at the time, as well as now, in both the US and Australia. How are we to understand the work of one individual as they move from one jurisdiction to another over a lifetime?

In Part III, Kamil and his wife Joanna move to the United States, then return to Europe, living in London and Germany. It ends with Kamil and Joanna settling again in New York City in the late 1960s. Part IV examines how Kamil's settling in New York during the regime of the 1909 Copyright Act affected his status as a copyright holder for works created through 1977. This section looks at his work over the next several years, followed by the question of what happens when the copyright transitions to a new measurement system in 1978. Part V considers the strange era of 1978-1989, again examining how the new copyright act affected the legal status of Kamil's works. Part VI considers Kamil's works and rights after 1989, including potential restoration of any of his earlier works via Section 104A of the Copyright Act.

Finally, Part VII discusses the potential status of Kamil's many undated works, and Part VIII looks at the implications of the study on copyright duration, namely the methods we currently use to approach a body of work. We then conclude with suggestions on how to approach mid-to-late 20th century artists in determining copyright status of works.

## I. ESCAPING OVER THE MOUNTAINS

Kamil was born on February 9, 1930 in Olomouc, Czechoslovakia,<sup>3</sup> and while he came from a family of talented artists, he was the first to pursue it as a vocation.<sup>4</sup> As a child and teenager during World War II, Kamil endured the arrest and confinement of his parents by the Nazis. The family was relatively lucky as he, both his parents, and his sister managed to survive the war.<sup>5</sup> After the conflict ended, Kamil attended art school while working as an accountant for a local grocery store chain.<sup>6</sup>



In 1930, when Kamil was born, Czechoslovakia had been a sovereign state for just twelve years, having gained its independence from the Austrian-Hungary Empire after World War I.<sup>7</sup> His parents, who had been artists themselves, had already lived under two copyright regimes. When the Nazis invaded in 1938, the government fled to London.<sup>8</sup> At the end of the war, the Third Republic lasted three years,<sup>9</sup> and it was in 1948, when Kamil was 18, that the communists took power.<sup>10</sup> Over his first eighteen years, Kamil lived under three legal regimes. How did these dramatic changes affect copyright law? Does copyright law stay constant? Does it change radically? We know that Italy passed its major copyright law in 1941 (and this is still its law today),<sup>11</sup> deep into the fighting of World War II. We know that one of the first acts passed in Israel under the British Mandate was copyright law.<sup>12</sup> These are just two examples. How important was copyright law to the new sovereign state in Czechoslovakia? How important did the Nazis take copyright law, in either passing new laws or dismantling

3. In 1992, the country was divided into the Czech Republic and the Slovak Republic. Olomouc is located in the Czech Republic.

4. *Chapter 1: Born into a Bad Time*, KAMIL KUBIK (last accessed Feb. 9, 2014), [http://web.archive.org/web/20041207214557/http://www.kamil-kiubik.com/other/artist/bad\\_time\\_1/index.html](http://web.archive.org/web/20041207214557/http://www.kamil-kiubik.com/other/artist/bad_time_1/index.html). The work was originally one of 15 chapters published at <http://www.kamil-kubik.com/other/>, and contained interviews whereby Kamil told his life story, but the site has since suffered from “link rot,” (see Raizel Liebler and June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link* (1996-2010), 15 *Yale Journal of Law and Technology*: 275 (2013)). However, the web page is available through the Internet Archive’s “Wayback Machine” (<http://archive.org/web/>), and the coauthors retain hardcopies.

5. See *supra* note 6.

6. *Chapter 2: Escape from Czechoslovakia*, KAMIL KUBIK, [http://web.archive.org/web/20041207190355/http://www.kamil-kubik.com/other/artist/escape\\_czech\\_2/index.html](http://web.archive.org/web/20041207190355/http://www.kamil-kubik.com/other/artist/escape_czech_2/index.html). See *supra* note 6 regarding link rot.

7. H. STUART HUGHES, *CONTEMPORARY EUROPE: A HISTORY*, at 107 (1961).

8. Milan Hauner, *Beginnings of the Czechoslovak Government in Exile: 1939-1941*, in *EXILE IN AND FROM CZECHOSLOVAKIA DURING THE 1930S AND 1940S* 103, 200 (Charmain Brinson & Marian Malet eds., 2009).

9. WILLIAM M. MAHONEY, *THE HISTORY OF THE CZECH REPUBLIC AND SLOVAKIA, 196-201* (2011).

10. *Id.*

11. LAW No. 633 OF APRIL 22, 1941, FOR THE PROTECTION OF COPYRIGHT AND NEIGHBORING RIGHTS, available at <http://www.wipo.int/wipolex/en/details.jsp?id=2569>.

12. See generally, MICHAEL D. BIRNHACK, *COLONIAL COPYRIGHT: INTELLECTUAL PROPERTY IN MANDATE PALESTINE* (Oxford Univ. Press, 2012).



old ones? How quickly did the Communists alter copyright laws? What kind of transitional laws were in place? How much did the copyright status within Czechoslovakia alter with all of the political changes that occurred? As Elst points out, “Copyright law is thus intimately connected with both the political and economic systems within which it functions. It is, therefore, to be expected that any major change in the political-economic order of society will influence the legal nature, the content, and/or the function of copyright within the system.”<sup>13</sup>

We do not have a clear picture of Kamil’s early life—his parents’ artwork or his own—nor how they were legally protected during this time of great legal change. This is true for many artists whose lives began in Europe during the early or mid-20th century. These questions would seem merely academic if it were not for copyright restoration in many places around the world, including in the United States. One of the curious requirements of U.S. copyright restoration is that an author must be a national or domiciliary of a country that is considered “eligible” at the time of creation, or more directly, a member of the Berne Convention.<sup>14</sup> Czechoslovakia did not join the Berne Convention until 1993;<sup>15</sup> therefore, under a strict reading of Section 104A,<sup>16</sup> works before that country joined the Berne Convention would not qualify for restoration.<sup>17</sup> How does this relate to Kamil’s family story? Any published works by him or his family before 1993 would not receive copyright protection in the United States under restoration under a strict reading of the statute.<sup>18</sup>

What about their unpublished works? That, of course, is another story. If unpublished works created by Kamil or his parents were discovered, they would be protected under United States law for the life of the author plus seventy years, regardless of their citizenship status.<sup>19</sup> Section 303(a) provides for additional time if a work was published for the first time between 1978 and

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13. MICHAEL ELST, *COPYRIGHT, FREEDOM OF SPEECH, AND CULTURAL POLICY IN THE RUSSIAN FEDERATION* 2 (Martinus Nijhoff Publishers, 2005).

14. 17 U.S.C. § 104A(h)(6)(D) (“The term “restored work” means an original work of authorship that . . . has at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, was first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country”).

15. UNITED STATES COPYRIGHT OFFICE, *CIRCULAR 38A, INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES*, available at <http://www.copyright.gov/circs/circ38a.pdf>. Czechoslovakia (or as the Czech Republic) joined the following international copyright treaties at the indicated dates: Berne (Paris) Jan. 1, 1993; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms: Jan. 1, 1993; Universal Copyright Convention (UCC) Geneva: Mar. 26, 1993; UCC Paris: Mar. 26, 1993; World Trade Organization: Jan. 1, 1995; World Intellectual Property Organization (WIPO) Copyright Treaty: Mar. 6, 2002; WIPO Performances and Phonograms Treaty (WPPT): May 20, 2002. *Id.*

16. 17 U.S.C. § 104A (2012).

17. UNITED STATES COPYRIGHT OFFICE, *CIRCULAR 38B, COPYRIGHT RESTORATION UNDER THE URAA*, available at <http://www.copyright.gov/circs/circ38b.pdf>.

18. *See supra* note 16.

19. 17 U.S.C. §§ 302–304 (2012) (providing that unpublished works created before January 1, 1978, are protected by copyright for the life of the artist plus seventy years). Thus, lost unpublished works that surface will be protected through 2081 (70 years after Kamil’s death).

2002, or December 31, 2047, whichever is longer.<sup>20</sup> However, no research has turned up such examples. Therefore, lost unpublished works that surface for Kamil that were created in his youth (or throughout his life, actually), will be protected through 2081, as Kamil died in 2011.

In 1948, when Kamil was 18 years old, Czechoslovakia was enveloped in the Iron Curtain and Soviet control,<sup>21</sup> and he decided to escape to West Germany.<sup>22</sup> Kamil was an avid hiker, and to set his plan in motion, every weekend for several months he would take a train towards the border, and prior to reaching the last stop, would disembark at a random station and hike for a few hours. He hoped that this would allay any suspicions from the armed soldiers who were charged with preventing escape from the Czech borders.

On the day that Kamil had chosen for his escape, he boarded the train as usual. A few stops later, an elderly woman sat next to him, and began a conversation.<sup>23</sup> She started with small talk—“oh, I see you hike!” as well as other pleasantries. Then she mentioned that there were many guards stationed at the last station before the West German border, and that if he wanted to avoid too much scrutiny, he would be better off disembarking one station prior. It was what she said next that saved Kamil’s life: she informed him that the Soviet soldiers had marked a false border one mile before the actual West German border, and that many fleeing refugees had been killed in this zone because of the subterfuge.

Following the woman’s advice, Kamil exited the train at the second-to-last stop, and when he reached the false border, started to run while bullets flew all around him.” After crossing the actual border, he was taken to a refugee camp, where his talent as an artist first landed him in trouble.

Apparently, European refugee camps in the 1940s were rather boring places, so to pass the time, Kamil painted murals of Czech landscape scenes on the walls of his barracks.<sup>24</sup> He also used his talent to bypass the stamp system used to determine when a refugee had completed their work assignment and could be fed. The administrators of the facility didn’t care for the fraud, or having their buildings defaced; Kamil was placed in the camp’s jail. However, he was not there for long. A short time into his imprisonment, Red Cross contingent as well as journalists and politicians toured the facility. When they saw Kamil’s artwork on the walls of the barracks, they insisted on meeting him. Kamil was thus spared any punishment for his antics. Eighteen months later, Kamil immigrated to Australia, where he was indentured for two years of manual labor as a condition of accepting him as a refugee.

Kamil’s barracks murals no longer exist, and there are no photographs or other documentation. However, if they had been preserved, two copyright questions would persist.

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20. *Id.* Section 303(a) provides for additional time if the work is published between 1978 and 2002.

21. *Mahoney, supra* note 11, at 200.

22. *See Kubik, supra* note 8.

23. Kamil recalled his escape many times to co-author Liebesman.

24. *Kubik, supra* note 8.

Kamil was a refugee. When one becomes a refugee, what happens to the copyrighted work that is left behind? Is it considered abandoned? When one becomes a refugee, how does that change one's legal status in relation to the copyright laws of the world? Works created while an artist is stateless are treated differently in some cases, with fewer requirements to meet to obtain copyright.<sup>25</sup> This was true in the United States, where a stateless person was not required to meet the bilateral treaty requirements in place at the time. But what makes someone a stateless person? Does the status of statelessness only apply to current works, or is the state of statelessness retroactive? What happens when one becomes stateful again? How does that affect the copyright status of works created while stateless? In the United States, the question of "statelessness" was ironically settled by a case involving Hitler's "Mein Kampf", finding that at the time of first publication, he was not a citizen of any country.<sup>26</sup> If the images on the walls were considered published, and Kamil was considered "stateless," then the works would have been protected in the U.S. with a caveat: the works would have had to meet the formalities requirements in the U.S. at the time of publication, and for works of art, this included at least the name or identifying mark of the author, the © symbol and the date.<sup>27</sup> This was likely not the case.<sup>28</sup>

As the typical copyright story goes, these works, then would have an opportunity for restoration in the United States under Section 104A.<sup>29</sup> Ironically, Section 104A requires that the author be a national or domiciliary at the time of creation in a Berne member country—so Kamil, on a technicality, might not qualify.<sup>30</sup> Moreover, "statelessness" was not included as part of the Section 104A formula.<sup>31</sup> So, while the US protects refugee and "stateless" works both under the 1909 and 1976 Copyright Acts, there are some flaws in our system, namely restoration of copyright to these works for stateless persons does not seem to have been considered. These are some of the questions surrounding the drawings in the refugee camp all those years ago. These questions, of course, are relevant today, as refugees talented in the visual and literary arts still exist.

If the works were considered, unpublished, the copyright term follows a different path. Unpublished Works—at the time of the creation of the works through today—have been protected in the US, regardless of nationality or origin.<sup>32</sup>

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25. See 17 U.S.C. Section 104(b).

26. See Copyright L. Rep. (CCH) P 655.90 (C.C.H.), 2009 WL 3707457 (citing *Houghton, Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306 (2d Cir.1939), which notes that *Mein Kampf* was entitled to U.S. copyright protection because at the time the work was first published, Hitler was a "stateless person and not a national of any country with which the United States had reciprocal copyright relations).

27. 17 U.S.C. Section 23 (repealed as of January 1, 1978) available at <http://copyright.gov/history/1909act.pdf>

28. The Universal Copyright Convention would not make © a standard occurrence worldwide until its passage in 1955.

29. 17 U.S.C. 104A.

30. 17 U.S.C. 104A(h)(6)(D)

31. 17 U.S.C. 104A.

32. See 17 U.S.C. 104(a).

Then, there is a hypothetical question: what if a photograph of the murals was taken? How does this alter the term? All of the same kinds of questions would be asked again—published or unpublished, the country of origin of the publication and the author, etc. So, the underlying work could be in the public domain, but the photograph of the underlying work might still be protected.

## II. SETTLING IN AUSTRALIA



After working first as a butler for a Member of Parliament and then as a cowboy in the Outback, Kamil settled in Sydney, where he worked as a stage manager and painted sets at the Sydney Opera house.<sup>33</sup> In addition, Kamil collaborated with some fellow artists to create a series of popular Christmas cards.<sup>34</sup> It was in Sydney that Kamil met Joanna Bowers, a prima ballerina with the Australian Borovansky Ballet Company.<sup>35</sup> Joanna had been born and raised in India, and after being a member of various ballet companies in Europe, joined the Borovansky Company. Kamil was introduced to Joanna by a mutual friend; Kamil told Joanna that he painted at the Opera House down the street from where her company performed. She was a bit puzzled when he asked her if she wanted to see his painting—she assumed he was a manual laborer, and that he just painted walls.<sup>36</sup> She was amazed when he showed her the King Lear backdrops he had created for the current performance. They married in 1955.

By the time of Kamil's arrival, Australia had been its own federation since 1901,<sup>37</sup> but had only officially cut its constitutional ties to the United Kingdom in 1942.<sup>38</sup> Australia had copyright laws fairly early—by 1828— thanks to their colonial ties to the United Kingdom. It had been progressive, with the Copyright Act of 1905, but for the most part, Australia followed the lead of its mother country, adopting the United Kingdom's 1911 Copyright Act in 1912.<sup>39</sup> To determine the copyright status in Australia for these (or any) works, we look to current law in Australia, as well as potentially previous laws in some cases.<sup>40</sup> We would have to have a few more facts as well. The set paintings were likely work for hire. Were the Christmas cards joint works, or a collection of individual works? One can see that determining the copyright status of a work in the country of origin can be an arduous task, requiring potentially multiple layers of inquiry. We would also need to know if Kamil's legal

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33. Recollection of the co-author.

34. *Chapter 3: Tasting Freedom*, KAMIL KUBIK, [http://web.archive.org/web/20041216072243/http://www.kamil-kubik.com/other/artist/tasting\\_freedom\\_3/index.html](http://web.archive.org/web/20041216072243/http://www.kamil-kubik.com/other/artist/tasting_freedom_3/index.html). See *supra*, note 6 regarding link rot. A hard copy of this website is on file with the coauthors.

35. *Id.*

36. Recollection of Joanna Kubik to co-author Liebesman.

37. AUSTRALIA'S HISTORY, available at <http://www.australia.com/about/culture-history/history.aspx>.

38. *Statute of Westminster Adoption Act 1942* (Cth) (Austl.).

39. BEN ATKINSON, *THE TRUE HISTORY OF COPYRIGHT: THE AUSTRALIAN EXPERIENCE, 1905-2005*. (Sydney Univ. Press 2007).

40. *Copyright Act 1968* (Cth) s 4 (Austl.).

status impacted on the copyright status at the time of creation or later.

The same work in the United States is potentially a two-pronged query: the copyright status at the time the work was created, and if injected into the public domain at the time of publication, whether the work was restored. Unless these work were properly renewed in the United States with the U.S. Copyright Office, the Christmas cards were likely in the public domain in the US, either from the 28th year from publication (with proper US formalities), or more likely from publication abroad.<sup>41</sup> The Christmas cards Kamil painted in Australia would most likely qualify for restoration in the United States.<sup>42</sup> Kamil was domiciled in a country that qualified as “eligible” under Section 104A at the time of creation.<sup>43</sup> Australia had joined the Berne Convention in 1928<sup>44</sup> but also qualified through the United Kingdom—one of the original signatories.<sup>45</sup> If the works survived, or were photographed (and therefore qualify as underlying work), the works would now be protected in the United States for ninety-five years from first publication abroad.<sup>46</sup>

As for the opera sets, we would have to do further investigation into who holds the copyright. Under Section 104A, ownership of the restored copyright is a matter to be determined by the country of origin, and so we look again to Australia law at the time of restoration, or January 1, 1996.<sup>47</sup> Likely the opera sets were restored for ninety-five years from first publication. The question would be did performance qualify as publication in Australia? If not, the term would be different, based on its unpublished status.<sup>48</sup>

### III. TO NEW YORK, LEAVING NEW YORK, THEN BACK AGAIN



In 1960, the Kubiks were able to obtain visas and left Australia for San Francisco, where Kamil worked for the Museum of Modern Art. Several months later, the couple drove to New York. There, Joanna became a soloist at the Radio City Music Hall’s ballet company,<sup>49</sup> and Kamil found work as an art director at an advertising agency, and studied at the Art Student’s League.<sup>50</sup> When Joanna

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41. This is true except in the 9th circuit, where the *Twin Books* line of cases produces a different result. See *Twin Books v. Disney*, 83 F.3d 1162 (9th Cir. 1996).

42. 17 U.S.C. § 104A.

43. 17 U.S.C. 104A(h)(6)(D).

44. UNITED STATES COPYRIGHT OFFICE, CIRCULAR 38B, COPYRIGHT RESTORATION UNDER THE URAA, available at <http://www.copyright.gov/circs/circ38b.pdf>

45. *Id.*

46. 17 U.S.C. § 302(c) (2012).

47. § 104A(b) (“A restored work vests initially in the author or initial rightsholder of the work as determined by the law of the source country of the work.”).

48. 17 U.S.C. 303(a).

49. She was a Rockette!

50. *Chapter 4: America, KAMIL KUBIK*, [http://web.archive.org/web/20041207214315/http://www.kamil-kubik.com/other/artist/america\\_4/index](http://web.archive.org/web/20041207214315/http://www.kamil-kubik.com/other/artist/america_4/index).

was offered a position with the London Dance Theatre in 1964, the two abandoned New York for Europe, and Joanna's career.



In London, necessity led to Kamil's now-signature style of painting outdoors, in front of his cityscape subject, and gathering crowds to watch him at his craft.<sup>51</sup> He and Joanna were struggling financially, and he could not afford a good art studio, so the world became his studio. It was in this manner that he met authors such as Graham Greene and the Count Robin DeLaLanne, the latter of whom became Kamil's patron.<sup>52</sup> As Kamil continued his tradition of painting outdoors, admirers continued to buy or commission works.<sup>53</sup>

Let's look at the copyright status of the outdoor paintings in the United States while Kamil was still in New York. First, before they were sold, they were protected by state common law protection,<sup>54</sup> which in many cases, gave the author the "right of first publication," but in practice, provided for perpetual copyright until federal protection was triggered.<sup>55</sup>

For paintings, the trigger was publication, and this trigger occurred when a painting was sold. At that point, the paintings were required to meet several proper formalities.<sup>56</sup> We must look to each painting to see if Kamil had included the proper notice requirements.<sup>57</sup> If he did not, then the works entered into the public domain upon publication. Because the works were created in the US, they would not qualify for restoration later.<sup>58</sup>

If the works could qualify as unpublished, their fate might be different.<sup>59</sup> Therefore, let's reexamine the qualifications for publication with paintings under the 1909 Copyright Act. Under the 1909 Copyright Act, publication was defined by the courts, and each category had different requirements to be considered published. According to Nimmer,

'Publication' was a term of art under the 1909 Act. The relevant decisions under this enactment indicated that publication occurred when, by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when

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51. *Chapter 5: Signs of Success*, KAMIL KUBIK, [http://web.archive.org/web/20041216071238/http://www.kamil-kubik.com/other/artist/success\\_5/index.html](http://web.archive.org/web/20041216071238/http://www.kamil-kubik.com/other/artist/success_5/index.html).

52. *Kubik*, *supra* note 56.

53. *Chapter 6: The New Germany*, KAMIL KUBIK, [http://web.archive.org/web/20041207191218/http://www.kamil-kubik.com/other/artist/new\\_germany\\_6/index.html](http://web.archive.org/web/20041207191218/http://www.kamil-kubik.com/other/artist/new_germany_6/index.html).

54. Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC'Y U.S.A. 585, 586 (2011).

55. *Wheaton v. Peters*, 33 U.S. 591 (1834).

56. 17 U.S.C. Section 19 (repealed as of January 1, 1978).

57. *Id.*

58. 17 U.S.C. 104A.

59. 17 U.S.C. 303(a).



an authorized offer is made to dispose of the work in any such manner, even if a sale or other such disposition does not in fact occur.<sup>60</sup>

For artwork, the offer for sale was enough. Therefore, the works in the gallery were likely considered published.

One potentially problematic issue is the display of the works in the window of the gallery. Nimmer explains,

[t]his principle was qualified by the Supreme Court, which held that a general publication of a painting does not occur, although it is publicly exhibited, if the public is admitted to view the painting on the express or implied understanding that no copying shall take place, provided further that measures are taken to enforce this restriction.<sup>61</sup>

One of the questions, then is whether the public display of the works constituted publication Nimmer noted that the court in *Werckmeister v. American Lithographic* seemed to embrace the opinion that public display did not qualify as publishing, but avoided reaching a ruling on that matter.<sup>62</sup> He went on to observe that more recently, the court in *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.* stated that “a general publication may occur if the work is exhibited or displayed in such a manner as to permit unrestricted copying by the general public.”<sup>63</sup> Therefore, although it seems that public display did not constitute publishing under the 1909 Act, the answer is far from definitive.

So, the second question to ask is whether there were proper formalities in each of the paintings? For paintings under the 1909 Copyright Act, formalities were not as arduous as for other categories of works. The work must have included, at least, an indication of the artist’s name and the copyright symbol: “In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor.”<sup>64</sup> So, the question is whether Kamil’s name was included on the works in some form, and whether they included a copyright symbol (or something to that effect). If they did, the works would have been protected for twenty-eight years, and if published after 1963, would be automatically renewed.<sup>65</sup> Otherwise, if the proper formalities were not present upon publication, the works would have fallen into the public domain.

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60. Melville B. Nimmer & David Nimmer, *1-4 Nimmer on Copyright* § 4.03[A].

61. *Id.* § 4.09.

62. *Id.* (citing 134 F. 321 (2d Cir. 1904)).

63. *Id.* (citing 194 F.3d 1211, 1215 (11th Cir. 1999)).

64. 17 U.S.C. Section 19 (repealed).

65. 17 U.S.C. § 304.

If these works fell into the public domain, they could still be eligible for copyright restoration.<sup>66</sup> In fact, one of the three reasons for restoration was failure to originally meet the formal requirements.<sup>67</sup> The problem, however, is meeting the requirements for Section 104A. Was Kamil, at the time, a national of a country other than the United States? Being domiciled in the United States, was he precluded from obtaining restoration? Kamil was actually a citizen of Australia until 1992, as we will later see in the story. So, he would meet the nationality requirement. The problem would be the publication prong. Was the work first published abroad? That is, could it be that if he sold the painting abroad, even though created in the United States, then it would have qualified for restoration.<sup>68</sup> These are some of the questions that would have to be answered in order to know whether the works had been restored.



In 1968,<sup>69</sup> Joanna was offered the role as Prima Ballerina with the famous Essen Opera House in Germany.<sup>70</sup> Joanna danced with the company for a few months, which gave Kamil the opportunity to surreptitiously visit his family in Prague for the first time in 20 years.<sup>71</sup> Kamil continued his practice of painting scenes outdoors, and traveled all over Germany to be in front of the cityscapes he was capturing on canvas. As in London, passersby quickly bought whatever he was painting. However, after a short while, both were anxious to find a permanent home, and even though it meant recreating his reputation in a new city, they chose to settle in New York.

These paintings, unlike the works painted in the United States, have a better chance of being restored as of January 1, 1996.<sup>72</sup> A few outstanding questions would have to be reviewed, including where publication first took place and whether Kamil was considered a domiciliary of an eligible country at the time of creation.<sup>73</sup> One can see how intensive the investigation becomes. In the case of Kamil, it is easier, because he painted outside, marking the country of creation quite easily. But this is not usually the case. One can see the details necessary to determine the copyright status under restoration in the United States.

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66. 17 U.S.C. § 104A.

67. 17 U.S.C. § 104A(h)(6)(C)(i)-(iii).

68. 17 U.S.C. § 104A104A(h)(6)(D).

69. There is some confusion as to dates—the events of 1968 may have occurred in 1965, depending on the source. Kamil and Joanna give both dates and recollections. However, for the purposes of this article, the discrepancy is not significant.

70. *Kubik, supra* note 55.

71. *Id.*

72. 17 U.S.C. § 104A(h)(2)(A).

73. 17 U.S.C. §104A.

As the court in *Troll Co. v. Uneda Doll Co.* summed it up, the Uruguay Round Agreements Act (URAA)

restores copyrights as of January 1, 1996, for original works that (1) are not in the public domain of their source countries through expiration of their copyright terms, (2) are in the public domain in the United States because of non-compliance with legal formalities, (3) have at least one author who was a national or domiciliary of an eligible country, and (4) were first published in an eligible country and were not published in the United States within thirty days of first publication.<sup>74</sup>

During the Kubiks' sojourn to Europe in the early 1960s, their domiciliary was London, England, then Essen, Germany. Both of these countries were members of the Berne Convention, and their copyright laws vested rights in Kamil's works. Works published abroad then would be eligible for restoration. However, works published (or in this case, sold) in the United States would not. Therefore, the works he transported to the United States in the 1960s and sold in the U.S. were not eligible for copyright restoration under Section 104A of the 1976 Copyright Act.



**Figure 5:**  
unpublished pencil  
drawing, circa 1972.

*Note:* From the private collection of co-author Yvette Joy Liebesman. Kamil drew it on the back of one of his business cards from the Saint James Gallery during Thanksgiving dinner when she was 8 or 9 years old.

Another way his works could have qualified was under the Universal Copyright Convention, but that would have required complying with formalities for the first twenty-eight years of protection, with automatic renewal for works published after 1963.<sup>75</sup>

#### IV. FORMALITIES OF LIFE IN NEW YORK, 1968 - 1977

In 1968, Kamil and Joanna returned to New York; Kamil soon opened the Saint James Gallery on Madison Avenue. Although he named it after the church across the street Saint James happens to be the patron saint of the arts.<sup>76</sup> Kamil continued to paint in Central Park during the day, selling some on the spot and displaying others in his new gallery.<sup>77</sup> In the gallery, he displayed and sold works of cityscapes in New York, Chicago, Los Angeles, London, Paris, and other cities that he and Joanna had either

74. *Troll Co. v. Uneda Doll Co.*, 483 F.3d 150, 156 (2nd Cir. 2007) (citing 17 U.S.C. § 104A(h)(6)).

75. In 1992, works first published in the US with proper notice under the 1909 Act—either through the traditional means or the copyright requirements under the UCC, as incorporated into the 1909 Act, were given automatic renewal without additional formality requirements.

76. *Chapter 7: Starting Over*; KAMIL KUBIK, [http://web.archive.org/web/20041216072614/http://www.kamil-kubik.com/other/artist/starting\\_over\\_7/index.html](http://web.archive.org/web/20041216072614/http://www.kamil-kubik.com/other/artist/starting_over_7/index.html).

77. *Id.*

lived or visited, as well as his florals.<sup>78</sup> He sold works to the public, created commissioned works, and made lithographs and serigraphs from both.

Art created in New York from the time of his and Joanna’s return to the United States until the new measurement system went into effect in 1978 were governed by the regime of the 1909 Act. None of these works contained proper notice, and many original paintings and pastel drawings were displayed in his gallery for sale to the general public. In addition, some of his privately commissioned works were also printed as limited-edition lithographs for sale to the general public.

Prior to selling a piece of art, it was protected by common law copyright:

Under the 1909 law, publication was the dividing line between perpetual protection under state law and either two possibilities under federal law: publication with a valid copyright notice would terminate or “divest” the common law copyright and “invest” federal statutory copyright for the limited period specified in the statute. Alternatively, publication without notice would also terminate the common law copyright, but operated as well to forfeit any federal statutory copyright and inject the work into the public domain.<sup>79</sup>

Without the required formalities under the Copyright Act of 1909, those works Kamil sold to the general public immediately entered the public domain. What requirements were needed to obtain federal protection, and when did publication occur? Again, name and copyright notice. The date was not required for works of art. The question remains whether the two requirements were included on each painting.

Those works which were privately commissioned and never sold as lithographs to the public prior to 1989 could be given the benefit of being “limited publications,” and classified as unpublished works, thus retaining their common law copyright protection. When determining the formality of publication, courts distinguish between general and limited publication. Courts define a “general publication” as occurring “when a work is made available to members of the



**Figure 4: New York—Central Park in Fall, lithograph, circa 1972.**

*Note:* Lithograph from the private collection of co-author Yvette Joy Liebesman. It was a gift from the artist when Liebesman was about 8 years old, though Kamil sold these lithographs at his gallery.

78. *Id.*

79. ROBERT BRAUNEIS & ROGER E. SCHECHTER, COPYRIGHT: A CONTEMPORARY APPROACH, at 471 (West 2012).

public regardless of who they are or what they will do with it.”<sup>80</sup> In contrast, a “publication is ‘limited’—and does not trigger the loss of common law copyright—when tangible copies of the work are distributed both (1) to a ‘definitely selected group,’ and (2) for a limited purpose, without the right of further reproduction, distribution or sale.”<sup>81</sup> This distinction is important—general publication without notice injects the work into the public domain.<sup>82</sup> Works for which there is only limited publication, however, retain their common law copyright protection as “unpublished works.”<sup>83</sup>

The potential impact on the value of Kamil’s lithographs—and even his original paintings and pastels—cannot be understated. Often, the value of such works is found in part in their scarcity. Most of Kamil’s lithographs and serigraphs are limited-edition prints, usually with no more than 300-500 created in total. The creation of additional prints by others would affect the value of those authorized by Kamil. Their value would also decrease if works by Kamil flooded the art market through the creation of prints from Kamil’s oils and pastels that he sold to the general public, but from which he did not choose to use to create limited-edition prints. Before 1978, however, to protect these works under copyright, proper notice was the first major step in determining whether the works gained protection at all.<sup>84</sup>



**Figure 7: 1985 Presidential Inauguration**

## V. BETWEEN THE LINES—1978 THROUGH 1989

With the enactment of the Copyright Act of 1978, the rules concerning formalities changed. Notice was still required between 1978 and 1989, but failure to include notice could be cured within five years (and required registration as proof) via the statute.<sup>85</sup> This era saw an upsurge in the popularity of Kamil’s art. Among his commissions were the New Jersey Gubernatorial Inaugural Ball of 1986, the 1985 Presidential Inauguration (Figure 6),<sup>86</sup> the U.S. Open for both Tennis and Golf, and

80. *Academy of Motion Picture Arts and Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1452 (9th Cir. 1991) (citing *Burke v. National Broadcasting Co., Inc.*, 598 F.2d 688, 691 (1st Cir. 1979)).

81. *Id.* (citing *White v. Kimmell*, 193 F.2d 744, 746-47 (9th Cir. 1952)).

82. *Id.* at 1451 (“[I]f the creator exceeds the scope of a limited publication and allows the work to pass into the public domain, a ‘general publication’ of the work occurs. At that point, unless the creator has obtained a statutory copyright, anyone can copy, distribute or sell the work.”)

83. *Id.* (citing *Burke v. Nat’l Broadcasting Co., Inc.*, 598 F.2d at 688) (“Under the common law, the creator of an artistic work has the right to copy and profit from the work, and can distribute or show it to a limited class of persons for a limited purpose without losing that common law copyright.”).

84. 17 U.S.C. Section 19 (repealed January 1, 1978).

85. 17 U.S.C. § 405(a)

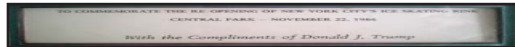
86. The 1984 Presidential Inauguration took place during a rather large ice storm in Washington, DC. But that did not stop Kamil from setting up his easel across from the Capitol Building and painting the scene. The



two paintings for Donald Trump—a commemoration of the reopening of the Central Park Ice Skating Rink in New York City (Figure 7), and a portrait of his three young children for Trump’s 40th birthday.<sup>87</sup> The former was also printed as lithographs and given as gifts by Mr. Trump. While the print contains gift language and a date, there is no copyright notice (Figure 8), either on the commemoration, or on the work itself (Figure 9). One wonders why a high profile artist is not being advised to put proper notice on his works. But unfortunately, without proper notice—and if no notice, registration within five years and proof that proper notice had been affixed—these works came into the public domain.<sup>88</sup>



**Figure 6: Commemoration of the Reopening of the Central Park Ice Rink, 1988**



**Figure 8: Signature on Ice Rink lithograph**

As Kamil’s career began to take off, his lithographs increased in popularity, but the potential for unauthorized copies increased in kind. During this period, Kamil sometimes remembered to include notice; there is no record of any works registered or deposited with the Copyright Office. Kamil would have no recourse against unauthorized copies for those works that did not comply with the formalities under the 1909 Act. One of Kamil’s works, a pastel created for the First Harlem Jazz Festival, was printed as both a poster and a lithograph. It was published with notice “© 1978 Kamil Kubik,” though not registered or deposited with Copyright Office within the statutory period; it is still protected by copyright. The term for the work is life of the author plus seventy years, or through 2081. Contrast this with another of his works (Figure 11), which was printed as a limited-edition without copyright notice. That work, without curing the formality defect within five years, is in the public domain now.



**Figure 9: Signature on Ice Rink lithograph**

Those works created with proper notice are still protected under copyright law in the United States, and if the copyright holder wanted, they could still be registered with the U.S. Copyright Office. Registration provides the copyright owner a number of statutory benefits.<sup>89</sup> First, and most importantly, statutory damages can only be awarded to copyright holders after the work was registered. But works that were published without notice prior to 1989 and were not cured in a timely manner (for example, for sale to the general public in third-party galleries) immediately fell into the public domain. The results can be dramatic.

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coauthor remembers standing next to him as he painted. Afterward, he and Joanna treated her to a very warm meal at the Olde Ebbett Grille, and a tour of the National Portrait Gallery.

87. Recollection of co-author having seen the portrait in progress in Kamil’s home in 1986.

88. 17 U.S.C. 401 (prior to March 1, 1989).

89. 17 U.S.C. § 504 (2012).





**Figure 10: First Harlem Jazz Festival (under copyright through 2081)**

*(published with notice, but never registered)*

\$600 per print when created,<sup>91</sup> and could be worth significantly more now. The unauthorized creation of prints would dilute the value of the limited-edition prints. But enforcing the copyrights without registration is very difficult—not statutory damages or attorney’s fees, and one cannot avail oneself of the courts without registration for domestic works/authors.<sup>92</sup>

What should a copyright holder do? For works published between 1978-February 28, 1989 without notice, not much can be done. These works are in the public domain. For works published on or after March 1, 1989, or created (and unpublished), these works can still be registered, with great benefits. The danger of not registering these works can be great. While the New York Skyline painting (Figure 12) is protected, any infringement before registration would be for actual damages, and the benefits of statutory damages would not apply.<sup>90</sup> It behooves a copyright holder to take the time to register the work to preserve the value or potential value of the painting. The 300 serigraphs that were printed of Wall Street (Figure 11, above), sold for



**Figure 11: Wall Street, circa 1988 (in the public domain)**

*(no copyright notice)*

## VI. AFTER 1989

Due to his traveling to paint commissioned works at events such as the wedding of Prince Charles and Lady Diana Spenser, in the 1980s, Kamil closed the Saint James Gallery and sold paintings



**Figure 12: New York Skyline from New Jersey, oil 1980**

*(published with notice, but never registered)*

90. 17 U.S.C. Section 412.

91. Advertisement and gallery appraisal, on file with co-author.

92. 17 U.S.C. 412.

either through shows at other galleries, from his home, or by commission.<sup>93</sup> Kamil continued to paint and draw until he suffered a stroke when he was in his late 70s.

In 1989, the penalties for improper notice disappeared.<sup>94</sup> All of Kamil's works after March 1, 1989 are protected by copyright, in the United States and abroad. But the problems do not end here. Without corroboration by others, it would be difficult to determine the date of first publication—and thus the copyright status—of many of Kamil's works. This section discusses the potential status of Kamil's many undated works, and the strange divide that is March 1, 1989.

Copyright rights immediately attached all of Kamil's works at the time of creation—whether these were his first works as a child, protected in the U.S. under common law protection at the time, or whether these were his later to-become more famous works in the 1980s under Section 302 of the 1976 Copyright Act. Copyright law always protected unpublished works. The question was what happened when the works were published. We have seen the divides already. March 1, 1989 presents one more. We must determine when the works were *first* published, and whether copyright notice was required.

For the most part, Kamil did not keep records indicating when his works were painted, drawn, or printed as posters, lithographs, serigraphs or greeting cards. If a work was created after March 1, 1989, one would not need to worry about the publication question. But for works created before March 1, 1989, the question we must ask is when was it published. Registration often helps, as we are told whether was considered published or unpublished, and the date of the publication. However, his earliest registered copyrights are for a set of greeting cards he created in 1994.<sup>95</sup> So, for most of his works, registration records are not very useful. Without corroboration by others, it would be difficult to determine the date of publication—and thus the copyright status—of many of Kamil's works.

## VII. CITIZENSHIP

In 1992, Kamil became a U.S. Citizen—forty-four years after escaping from Czechoslovakia.<sup>96</sup> For copyright law, the status of one's citizenship matters a great deal. Works were only protected in the U.S. if published in an eligible country—through bilateral treaties until 1955, by being a member of the Universal Copyright Convention beginning in 1955, being a member of the Berne Convention beginning on March 1, 1989, or being a member of the WTO starting on January 1, 1996.

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93. Advertisements of gallery showings are on file with co-author.

94. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

95. Copyright search on copyright.gov for "Kubik, Kamil" revealed 22 registrations since 1978, for greeting cards and assignments of copyright; the earliest registration was 1995.

96. *Chapter 15: Ubiquity*, KAMIL KUBIK, [http://www.kamil-kubik.com/other/artist/ubiquity\\_15/index.html](http://www.kamil-kubik.com/other/artist/ubiquity_15/index.html).

One interesting question arises – how should we treat Kamil’s works that were published abroad, particularly with regard to restoration? If he was a national or domiciliary in a country other than the U.S. at the time of creation, the works would be restored.<sup>97</sup> Kamil was in fact an Australian citizen since age 18.<sup>98</sup> His works qualify for restoration, based on authorship, as long as they were first published abroad. By 1992, when he became a citizen, works created on or after this date did not need to be restored, as they were automatically protected for U.S. citizens for the life of their author plus seventy years.<sup>99</sup>

### VIII. LESSONS FOR DURATION<sup>100</sup>

When Yvette and I decided to collaborate, I was looking for a 20th century artist whose biography was varied so I could better understand the different aspects of time and geography related to copyright. Kamil was a perfect candidate, and Yvette’s personal connection made it that much better. What I take away from the exercise is the idea of a “Durationator Profile,” or a new way of looking at the relationship of one artist’s work to the copyrights that protect that work.

The story of Kamil is not unique, especially for lives lived during the 20th century, which saw tremendous changes in copyright law, political governments, and the movement of people. The story Yvette tells about Kamil brings to light the personal nature and relationship of one’s work to one’s life, and takes the dry calculations and places them into perspective. In many ways, it shows a portrait of an artist painting the cities of the world, and rising to prominence, painting for Queens and Presidents alike. And yet, tracing the story of the copyrights of those paintings is complex, filled with minefields, missing data, and unexpected, inconsistent results. His works are not merely protected for seventy years after his death. At least in the United States, the copyright status of his works is much more complicated and varied. His works were created under independent Czechoslovakia, the same territory occupied during World War II, in a refugee camp in 1948, and in many countries over the span of nearly fifty years including Australia, the United States, Germany, and the United Kingdom. He lived in many places. His life was one that mimicked the joys and struggles of the 20th century. His citizenship, where he was domiciled, whether, where and when a work was published, and other facts dramatically affect the copyright status of each work.

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97. 17 U.S.C. Section 104A(h)(6)(D): “...has at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, was first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country.”

98. See *Kubik*, *supra* note 100.

99. 17 U.S.C. Section 104A.

100. Written by Elizabeth Townsend Gard, whose research focuses on duration and copyright around the world, in the project the Durationator®, which has been licensed to Limited Times, LLC. The Durationator®, as of 2015, will be distributed worldwide by Thomson Reuters out of the Thomson CompuMark Division.

Today, many believe copyright has been harmonized, that the debate is whether a country has adopted “life of the author plus seventy years” or “plus fifty.” This essay, in part, starts to show the complexity of the inquiry, and perhaps points to a way out of the morass of term in the 21st century. A traditional approach to sorting through Kamil’s work would be to look at each work and determine copyright status of each work. But we see many instances where the works themselves have not survived, or at least are not currently known to be. How can we paint our own portrait—of the copyright history of his works?

One way to approach the question of term is not to look at the term of individual works, but to look to the life itself. Instead of looking at a particular painting from Kamil’s time in Australia, one looks to the category of works within a particular geographic-temporal space. We are painting an abstract painting to better see the larger terrain. Where before, term was approached from a pointillist style, one steps back to see the whole of the work. This approach, combined with specifics when needed in particular jurisdictions like the United States, may prove an efficient way to understand the role of copyright in any one artist’s body of work.

In Kamil’s case, his early works created between 1930-1948 are potentially restored in the United States, although more work would have to be done to confirm that works from Czechoslovakia during this period qualified. Then, he likely became a stateless person, meaning he had the same opportunity in the United States to qualify as U.S. citizens. Even so, it is unlikely the works were protected, as formalities (including renewal) would have been mandatory. It is not clear what happens regarding restoration to stateless persons’ works, and so more investigation must be done to determine whether the refugee works were restored. One would have to further research that issue.

When he lived in Australia, his works were likely protected under Australian law and eligible at the time for U.S. protection but did not qualify because of formalities, and therefore came into the public domain in the U.S. upon first publication. In the U.S., these works would qualify for restoration, although the ownership issues would still have to be resolved, and therefore, the works would be protected 95 years from publication. If the works were not considered “published,” they would be measured by a different part of the copyright law, and this would require a definitive answer to ownership/authorship questions.<sup>101</sup>

Once Kamil became a U.S. citizen, his works would not qualify for restoration. The works properly registered and renewed prior to 1963 are still protected, as are those with proper notice after 1963. His works created outside of the United States may or may not be protected, depending on Kamil’s status at the time, and also where the first sale took place. Simple. Duration is always simple.

But there is a way to make such observations more accessible to artists, scholars, and their estates. A profile that ties the biography to copyright, rather than specific works may provide

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101. 17 U.S.C. 303(a).

an answer. The next step is to translate the lesson of Kamil Kubik into a different way of thinking about duration, and to use the Durationator® Copyright System as a means of doing that. This will take careful thinking and strategy, but this study helps further this mission.

### FINAL THOUGHTS

Kamil was fortunate in that he was a widely regarded, successful artist who was able to sell his work for significant sums. He was not dependent on the sale of prints to provide for his family. He was generous, always wanting to help out both struggling artists, and those who show a true love for his art—he regularly undercharged or gave away his work. As Clarence the Angel told George Bailey in *It's a Wonderful Life*, “No man is a failure who has friends.”<sup>102</sup> Kamil was rich beyond belief, and a success in all facets of his life. And yet, his early struggles and the copyright issues that affected him, could mirror the challenges of many artists, most of whom did not have Kamil’s incredible luck and timing. We hope by telling Kamil’s story, we can provide insight to those facing similar copyright issues. Examining his life helps us to better understand how to communicate copyright information about his works and to strive to make the very complicated more accessible to the artist and his estate.

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102. Frank Capra, “It’s a Wonderful Life” (1946).