Fair Use Settlement or a Mediation Heist? How a Stanford English Professor Settled a Copyright Action . . . And Then Recovered Her Attorneys' Fees from the Estate of James Joyce

By Michael D. Young

How did Stanford English Professor Carol Shloss, with the pro bono help of the Stanford Center for Internet and Society's "Fair Use Project," take down the estate of literary giant James Joyce and its sophisticated legal counsel? How did she successfully mediate her copyright lawsuit, dismiss the action, *and then* recover all of her attorneys' fees and costs as the "prevailing party?" The answer: through some very clever maneuvering at mediation.

The settlement earlier this year in the copyright declaratory relief action, and the subsequent motion for "prevailing party" attorneys' fees, provides litigators and mediators alike with an important lesson in crossing those settlement *t*s. It also raises some sticky ethical questions for mediators.

The Copyright Action

After years of research through primary and other sources, Shloss wrote a book focusing on the life of James Joyce's daughter, Lucia Joyce, "her unacknowledged artistic talent, her tragic life spent mostly in mental institutions, and the unrecognized influence she exerted over her father's work."[1] However, when Shloss was preparing her work for publication, the Joyce Estate refused her permission to quote from any of the materials controlled by the estate and threatened to sue her for copyright infringement if she tried. As a result, Shloss deleted from her book, *Lucia Joyce: To Dance in the Wake*, a number of passages objected to by the estate.

After publication, however, Shloss announced that she planned to publish the deleted portions in an online supplement to the book. The Joyce Estate again objected. However, this time, with the help of the Stanford Fair Use Project, Shloss filed a Copyright Act declaratory judgment action against the estate in the U.S. District Court for the Northern District of California, alleging a "fifteen year campaign of threats and intimidation from the Estate of James Joyce," and seeking the protection of the Fair Use doctrine.

The estate responded with a motion to dismiss or strike, which was largely denied by the court, thereby paving the way for mediation.

A Mediated Settlement, or a Mediated Setup?

In March, the mediation was held and proved successful. The settlement provided that the Joyce Estate would not sue Shloss for copyright infringement based on the professor's publication of her supplement, whether in print or online, and in return, Shloss would dismiss the action. The court was asked to retain jurisdiction to enforce the terms of the settlement agreement.

Noticeably absent from the settlement agreement was any mention of fees or costs. For reasons not expressly explained, the settlement agreement failed to include what is a pretty common term in settlements of litigated matters: "Each Party shall bear her or its own attorney fees and costs in connection with the Action." In addition, Shloss insisted that a copy of the settlement agreement be attached to the stipulation of dismissal, so that it would be part of the court record.

Following the mediation and dismissal of the action, Shloss filed a motion with the District Court seeking recovery of her attorneys' fees and costs. In her brief, Shloss argued (a) the settlement agreement was silent about fees and costs; (b) the Copyright Act provides for the award of fees and costs to the prevailing party; and (c) she was the "prevailing party." In fact, she not only recovered all that she had sought in the lawsuit—the unfettered right to quote from the Joyce materials—she received *more* than she asked for because the settlement allowed publication online *and* in print.

Was the settlement agreement's failure to address fees and costs just an oversight of the parties trying to hash out a quick settlement at the end of the day before the mediator and parties went home? Not according to the Joyce Estate, which complained *that it was set up* by Shloss and her Stanford attorneys. The estate pointed out that it was Shloss who insisted on attaching a copy of the settlement agreement to the dismissal, evidencing a premeditated intent to establish the record to support a subsequent fee motion. It also noted that Shloss failed to "meet and confer" prior to filing the fee motion. Shloss was likely also responsible for the language vesting the court with continuing jurisdiction to enforce the settlement agreement so that some court action was involved in the resolution of the lawsuit.

Michael D. Young *is chair of the Intellectual Property Practice Group at the Los Angeles law firm of Weston, Benshoof, Rochefort, Rubalcava & MacCuish, LLP. He is also a mediator with Judicate West. He is a fellow with the International Academy of Mediators, and an adjunct professor of negotiations and mediation at the University of Southern California Law School. He welcomes your comments at myoung@wbcounsel.com.*

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The District Court granted the motion for attorneys' fees, finding that Shloss was in fact a prevailing party under the Copyright Act. Noting that the fee issue was addressed by neither the settlement agreement nor the dismissal order, the court rejected the estate's "set up argument," insisting "that as parties well represented by counsel, Defendants had no basis to believe that the issue of attorney fees was disposed of by a Settlement Agreement that made no reference to attorney fees."

Lessons for Counsel and Mediators

How did a mediated settlement and dismissal end up not fully resolving the dispute, but actually creating another one?

It was the parties' failure to address the attorneys' fee issue during the mediation, and their subsequent failure to include the "bear own fees and costs" language in the written settlement agreement, that created the problem. Defendants have fallen prey to this in employment cases as well, where there is also a statutory basis for awarding prevailing party attorneys' fees.

The lesson not only for copyright litigators, but also for all parties involved in settlement where there is a basis for statutory fees, is self-evident. Whether on a pen drive, a laptop, or preprinted form, one should bring to his or her mediations a draft settlement agreement that contains a clause addressing attorneys' fees and costs. This is particularly true when the legal issues involve statutes like the Copyright Act that provide for fee-shifting to the prevailing party. Don't rely on a memory that, after 12 hours of difficult negotiations, may not be in its top condition. And if one is *not* including a clause disposing of the attorneys' fee issue, that omission should be intentional.

But this scenario also raises interesting, if difficult, issues for mediators as well. What does the mediator do when faced with a copyright case that is winding down toward settlement and no one has mentioned attorneys' fees? On the one hand, it might make for a more durable settlement agreement if the attorneys' fee issue were to be put on the table, discussed by the parties, and resolved. Hence, the mediator could raise the issue with each party and then mediate a resolution, saving everyone some postsettlement costs, uncertainty, and headache. The Joyce Estate would have certainly preferred this alternative.

On the other hand, assuming the Shloss camp had indeed set up the estate for just this result, wouldn't Shloss be upset to have a mediator raise an issue that neither party had put on the table? It is not necessarily the mediator's job to come up with new issues if the parties are happy to settle based on the issues then on the table. Additionally, by raising the attorneys' fee issue, the mediator could cause what otherwise would have been a settlement to fall apart. In that case, the mediator would have actually created a problem where one previously did not exist.

The dilemma forces the mediator to confront just what type of neutral he or she is. A mediator who leans more toward self-determinism might be quiet, allowing the parties to negotiate the issues they themselves put on the table, and declining to interfere even where it appears that one party may be outmaneuvering the other. After all, these parties are well represented, and mediation is not designed to be a forum for ensuring justice. It is a forum that allows the parties to resolve their disputes in their own way, very often with deals that are unavailable in the courts.

Countering this, a mediator who perceives his or her role as being a more active participant in the result of the dispute, believing that he or she has an obligation to the parties and possibly even to society to ensure that resolutions are just (or at least not unjust) and durable, would likely surface the attorneys' fee issue.

Is one style "right" and the other "wrong?" Or is this simply a difference in style that provides the marketplace with options in its selection of mediators? Shloss and the estate of Joyce surely have differing opinions on this question. ◆

Endnote

1. For more information, go to cyberlaw.stanford.edu/case/schloss-v-estate-of-joyce.