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Mark Twain's Autobiography: In the Public Domain Before the Public's Hands?

by Mark Tratos

Editor's note: The following blog post was posted on www.ipbrief.net on November 5th, 2010.

Mark Twain (a.k.a. Samuel Clemens) was a man of principle and people knew it. So when he said that he did not want his autobiography published until 100 years after his death, the world knew he meant it. Mr. Clemens died on April 21, 1910, giving the Mark Twain Foundation the "free and clear" to finally publish his autobiography this year. On November 15th, *The Autobiography of Mark Twain: Volume One* will be published and it is already on Amazon's and Barnes and Noble's bestsellers list. Techdirt.com saw beyond the bestsellers lists however and posed an interesting question: Is a book written over 100 years ago, but published in 2010, covered by copyright?

Before we look at the copyright protection of the autobiography, the story of Samuel Clemens and his autobiography is one worth noting. The autobiography is not a standard chronological telling of Mr. Clemens' life, but more of a train-of-thought dictation regarding things that tickled Mr. Clemens' fancy. Mr. Clemens' never pulled his punches either. According to Robert Hirst, curator of the Mark Twain Papers at UC Berkley, Mr. Clemens "liked to say nasty things – he's really good at it – but he didn't like the idea of being there when the person heard them, and was hurt by them!" Therefore Mr. Clemens told his publishers that the autobiography was not to be published until 100 years after his death, so that no one he hurt would actually know it. While everyone's feelings are spared however, our confusion over copyright protection is not.

At first glance, you might think that the autobiography is in the public domain. Section 303 of Title 17 describes the duration of copyright for works created but not published or copyrighted before January 1, 1978. That section of the code tells you that protection for the book would only exist (knowing that Section 302 protection expired) if the text was published before December 31, 2002. Since the autobiography was published, in its entirety, after that date, the work would have to be in the public domain. However, the copyright page of the autobiography states that "all texts by Mark Twain in *Autobiography of*

Mark Twain, Volume 1 have been published previously, by permission of the Mark Twain Foundation." The entire text of the work is available at the Mark Twain Library in Berkley and individual portions of the autobiography have been previously published in other books. If all or part of the work was published (seemingly against Mr. Clemens' wishes), we might assume that the previously published excerpts of *Volume 1* are protected by copyright. If they were not properly registered or renewed however, the works are back in the public domain. Clarity of the facts is obviously needed before duration can be determined here.

Another factor to consider however, the copyright page indicates that the sections of the autobiography that were previously published had not been published together. This would make sense when you consider Mr. Clemens' wish to publish the entire work long after his death. So could the copyright claimed be copyright protection for a compilation of all the texts that make up the autobiography or maybe it is a derivative work of the original autobiography? This would mean the scope of protection for the autobiography is not as great, but it is still protection. This is obviously something for the courts to decide, but it got the wheels in my brain turning.

What's the funniest part about this? Mr. Clemens was a proponent of infinite copyrights. He wanted his daughters to be taken care of by the money brought in from the copyrights "because I [Clemens] have carefully raised them as young ladies, who don't know anything and can't do anything." How would his family be able to profit from the sales of the autobiography though, when the entire manuscript is available online for free?