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Innocent Participants in Copyright Infringement

the statute would then be realized. The statute would then truly bind those who knowingly take the benefit of improvements on their land, for if not intending to be bound, it would give them not only the opportunity but the burden of showing a contrary intention.

INNOCENT PARTICIPANTS IN COPYRIGHT INFRINGEMENT

Copyright is the negative right to prevent the appropriation of the labors of an author by another. As otherwise expressed, "copyright is merely a special application of the command, 'Thou shalt not steal!' "[1] However, unlike larceny, the presence of *animus furandi* is no essential element to a literary piracy. The purpose of the copyright act is to secure to authors, composers and other artists the financial fruits of their intellectual labors. This purpose would be defeated if defendants were allowed merely to prove lack of guilty intention in order to escape liability for the infringement of copyright. However, with the advent of motion pictures, radio, and other scientific developments the mechanics of copyright infringement have become complicated and require the participation of many persons. Thus responsibility for infringement, in many cases, can no longer be traced to one person or a single combination of persons. Oftimes a corps of people contribute to a literary piracy without whose combined efforts the infringement could not have taken place. Thus far, scant attention has been directed to the question of the extent of liability of innocent persons who participate in an infringement of copyright.

Introduction

The author of an unpublished work, by the act of reducing the product of his thought to concrete form as a book, musical score, or other literary composition, obtains rights in the composition, conceived to be property rights.[2] These rights are essentially rights of exclusion. There vests in the author the exclusive right to possess, use and dispose of the intellectual production.[3] The common law affords such composition protection which in no great respect differs from that thrown about any other form of personal property.[4] However, the common

1. Zollman, *Radio and Copyright* (1927) 11 MARQ. L. REV. 146, 147.

2. See Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 188 (1909); Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N. Y. 241, 247, 49 N. E. 872, 873 (1898).

3. DRONE, THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS (1879) 97. These rights are incorporeal and exist separate and apart from the property in the paper on which the composition is written. At common law the intellectual property right may be in one person while title to the physical thing is in another. Werchmeister v. Am. Lithographic Co., 142 Fed. 827 (C. C. S. D. N. Y. 1905), *aff'd*, 148 Fed. 1022 (C. C. A. 2d, 1906); Baker v. Libbie, 210 Mass. 99, 79 N. E. 109 (1912). See 35 STAT. 1084 (1909), 17 U. S. C. A. § 41 (1934). This also is true with regard to the rights granted the author by the Copyright Act, Stephens v. Cady, 14 How. 528 (U. S. 1852).

4. See Paige v. Banks, 13 Wall. 608, 614 (U. S. 1871); Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N. Y. 241, 247, 49 N. E. 872, 873 (1898).

law rights are limited to unpublished works, and all common law property rights therein are lost on publication.[5]

After publication, the author may obtain rights in his composition somewhat akin to common law rights by complying with the terms of the copyright act.[6] The rights granted by the copyright act are *de novo* and are not an extension of the author's common law rights in the literary product.[7] These rights also are generally thought to be property rights.[8] Therefore, any violation of the rights by infringement is a tort and, except as modified by statute, is governed by the rules applicable to torts generally.[9]

Notice

The copyright grant is more pervasive than that of any other legally recognized property right. It is a right to exclude, not directed to any object in possession, but is *in vacuo,* so to speak. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed by persons thousands of miles away from the owner.[10] In order, therefore, not to make the prohibitions of the statute harsh beyond measure, protection to the public is afforded by a strict requirement that notice of copyright,[11] in the manner provided for by statute,[12] be affixed to each copy of the work published or offered for sale in the United States. The purpose of the requirement is to give notice of the copyright in the work to the public and thereby prevent innocent persons from suffering the penalty of the statutes for reproduction of the copyrighted work.[13] Since statutory copyright is an original grant of rights to the author, compliance with the provisions for notice is a condition precedent to the vesting of the rights in the author.[14] Therefore an omission of the re-

5. Note 2, *supra.* To constitute "publication" there must be such a dissemination of the work of art itself among the public, as to justify the belief it took place with the intention of rendering such work common property. See American Tobacco Co. v. Werchmeister, 207 U. S. 284, 299 (1907).

6. The exclusive rights granted an author by the Copyright Act are set forth in 35 STAT. 1075 (1909), 17 U. S. C. A. § 1 (1934). They endure for twenty eight years and may be renewed for a similar period. 35 STAT. 1080, 1088 (1909), 17 U. S. C. A. §§ 23, 24 (1934).

7. Wheaton v. Peters, 8 Pet. 591 (U. S. 1834). See American Tobacco Co. v. Werchmeister, 207 U. S. 284, 291 (1903). The common law rights and the rights granted by the Copyright Act do not co-exist in the same composition. See Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 346 (1908).

8. COPINGER, THE LAW OF COPYRIGHT (7th ed. 1936) 110. For a recent discussion on the nature of the property interest involved in the word "copyright" see Umbreit, *A Consideration of Copyright* (1939) 87 U. OF PA. L. REV. 932.

9. See Ted Browne Music Co. v. Fowler, 290 Fed. 751, 754 (C. C. A. 2d, 1923); 2 LADAS, INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938) 820.

10. See concurring opinion of Justice Holmes, White-Smith Music Publishing Co. v. Apollo Co., 209 U. S. 1, 18 (1912).

11. 35 STAT. 1077 (1909), 17 U. S. C. A. § 9 (1934).

12. 35 STAT. 1079 (1909), 17 U. S. C. A. §§ 18, 19 (1934).

13. See Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 55 (1884); Bentley v. Tibbals, 223 Fed. 247, 253 (C. C. A. 2d, 1915).

14. Note 7, *supra.*

quired notice on any published copy amounts to a forfeiture of the copyright and dedication of the work to the public.[15] To mitigate the harsh effects upon the author, of the rule regarding notice in 1909, Section 20 was added to the Copyright Act, preserving the copyright to proprietors who sought to comply with the provisions of the Act with respect to notice but who omitted by accident or mistake the prescribed notice from a particular copy or copies.

To balance the protection given to the author with the protection that should be extended to the public Section 20 provides also for limited exemption from liability for an innocent infringer who has been misled by the omission of the copyright owner to attach proper notice to all copies of the work. The section does not extend the innocent infringer's freedom from liability, but actually serves to bar what would otherwise have been his unlimited right to copy or deal in the work. The section operates to "prevent the recovery of damages against an innocent infringer" and, in addition, provides that "in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct." Although, thereunder, an innocent infringer may not be assessed for the damages suffered by the copyright owner as a result of the infringement, it has been held that the copyright owner may have an accounting of the profits made by the infringer.[16] The innocent infringer, however, may recover reasonable outlay, incurred as a result of the copyright proprietor's omission to affix proper notice, if the court so directs.[17] Whatever protection the section affords innocent infringers

15. Universal Film Mfg. Co. v. Copperman, 212 Fed. 301 (S. D. N. Y. 1914), *aff'd*, 218 Fed. 577 (C. C. A. 2d, 1914); Atlantic Monthly Co. v. Post Publishing Co., 27 F. (2d) 556 (D. Mass. 1928). Publication of the composition, of course, operates to forfeit the common law property which the author had in the work. However, a sample is not a published copy of the work, and omission of copyright notice thereon will not cause a forfeiture of copyright in the principal work. Gerlach-Barklow Co. v. Morris and Bendiere, 23 F. (2d) 159 (C. C. A. 2d, 1927); Stecher Lithographic Co. v. Dunston Lithograph Co., 233 Fed. 601 (W. D. N. Y. 1916). However, in a recent case, the Supreme Court held, three justices dissenting, that the requirement of Section 12 of the Act that two copies of the work be "promptly deposited" in the copyright office is not in the nature of a condition precedent. The argument that copies of copyrighted works are kept on file at the copyright office for the purpose of permitting the public to be able to ascertain the existence of copyright in any work is rejected. Washingtonian Publishing Co. v. Pearson, 59 Sup. Ct. 397 (1939). But see (1939) 52 HARV. L. REV. 832.

16. Strauss v. Penn Printing & Publishing Co., 220 Fed. 977 (E. D. Pa. 1915). The court arrived at its conclusion by interpreting this section in the light of Section 25 of the Copyright Act. Section 25 provides that an infringer of copyright shall be liable "to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from the infringement." Since Section 25 separately mentions profits and damages and Section 20 specifically prevents the recovery of damages but does not mention profits, the court ruled that the legislature in framing Section 20 did not mean to exclude the innocent infringer from paying over to the copyright owner profits made from the infringement.

17. Wilkes-Barre Record Co. v. Standard Advertising Co., 63 F. (2d) 99 (C. C. A. 3d, 1933).

is denied to deliberate infringers and to persons who persist in the infringement after actual notice of copyright is given.[18]

Intent

The rules of law generally applicable to torts govern copyright infringement.[19] Intention to infringe is not a necessary ingredient to an actionable infringement.[20] The author's property is absolute when perfected by copyright, and the innocent intent or purpose of invasion is nowhere made an excuse for it.[21] It is the result of the act, not the intention with which it is done, that determines the question of infringement. Honest intention, accordingly, constitutes no defence. Thus one who intending to make a recording of the plaintiff's copyrighted musical composition, as he lawfully might,[22] made a copy of the song,[23] had it orchestrated and made the record, was held to have infringed the copyright by making the copy of the song. All the records of the song made by him, which otherwise would not have infringed copyright, were held to be infringing copies.[24] Also, ignorance of copyright is no defence.[25] One who copies from a plagiarist, without knowledge of copyright, is himself an infringer.[26] It was so held in a case

18. Shellberg v. Empringham, 36 F. (2d) 991 (S. D. N. Y. 1929); Stecher Lithographic Co. v. Dunston Lithograph Co., 233 Fed. 601 (W. D. N. Y. 1916).

19. Note 9, *supra*.

20. M. Witmark v. Calloway, 22 F. (2d) 412 (E. D. Tenn. 1927); see Buck v. Jewell-LaSalle Realty Co., 283 U. S. 191, 198 (1931).

21. DRONE, *op. cit. supra* note 3, at 406.

22. Prior to the amendment of Section 1 of the Copyright Act of 1909, by COMP. STAT. (1916) 9517, the unlicensed manufacture of mechanical recordings of copyrighted compositions was not an infringement. White-Smith Music Publishing Co. v. Apollo Co., 209 U. S. 1 (1912).

23. Copying is prohibited by the act. 35 STAT. 1075 (1909) 17 U. S. C. A. § 1 (a) (1934).

24. Chappell & Co. Ltd. v. Columbia Gramaphone Co., [1914] 2 Ch. 745. Accord: Macmillan Co. v. King, 223 Fed. 862 (D. Mass. 1914).

25. Edison v. Lubin, 122 Fed. 240 (C. C. A. 3d, 1903), *appeal dismissed*, 195 U. S. 625 (1904) (where defendant without knowledge of copyright reproduced motion picture film from which the notice of copyright had been detached by unknown persons); Gilmore v. Anderson, 38 Fed. 846 (C. C. S. D. N. Y. 1889) (where defendant had good reason to believe that the plaintiff's work had become public property).

26. American Press Ass'n v. Daily Story Pub. Co., 120 Fed. 766 (C. C. A. 7th, 1902), *appeal dismissed*, 193 U. S. 675 (1904); Norris v. No-Leak-O Piston Ring Co., 271 Fed. 536 (D. Md. 1921), *aff'd*, 277 Fed. 951 (C. C. A. 4th, 1921). These decisions have been attacked by a dictum contained in a very recent case, Barry v. Hughes, 103 F. (2d) 427 (C. C. A. 2d, 1939). The court, *per curiam*, said: "It has been held that one who copies from a plagiarist is himself necessarily a plagiarist, however innocent he may be (Am. Press Ass'n v. Daily Story Pub. Co., 7 Cir., 120 Fed. 766), but that would be a harsh result, and contrary to the general doctrine of torts. The wrong is copying; that is, using the author's work as a source. A copy of a copy does indeed do just that, but one is ordinarily liable for only those consequences of one's acts which a reasonable person would anticipate. Laying aside a possible action for unjust enrichment, or for an injunction after discovery, we should hesitate a long while before holding that the use of material, apparently in the public demesne subjected the user to damages, unless something put him actually on notice." *Id.* at 427.

where the defendant obtained permission to copy from the infringer, who was the one having apparent property in the work.[27]

If the copyright proprietor acts to mislead the public, it has been suggested that then an innocent infringer might escape liability. Thus where an author copyrights a play under one title, produces it under another, a person who has been misled by his action may be exempt from liability. But if the defendant was aware of the change or was not misled by the copyright proprietor's action, the defense would not hold.[28]

The British Parliament, in the Copyright Act of 1911, sought to throw some measure of protection about the innocent infringer by exempting him from liability to pay damages where he was not aware and had no *reasonable ground* for suspecting that copyright subsisted in the work infringed.[29] However, the statute is framed in such language that, as one British writer points out,[30] it is difficult to imagine a case in which it can be invoked in aid of the infringer. For within its construction there is a *reasonable ground* for suspecting almost every published work to be copyrighted.[31]

The courts have not found it too difficult to justify liability attaching to an innocent infringer. There is no hardship in holding liable a person who innocently uses another's copyrighted material . . . "because the defendant knows the work is not his, and that he has no original right to publish it. At his peril, therefore, he undertakes to give the edition; he does it with his eyes open and 'whether it was property renounced or not', it was his business to inquire".[32] The defendant, having done what he intended, is liable for the consequences of his act. Purity of intention does not exculpate a tortious act.

Principal Infringers

Infringement of copyright is a tort and all persons concerned therein are jointly and severally liable.[33] Participants in the infringement may be principal or contributory infringers. A person who organizes and sets into motion a venture which results in an infringement is the principal infringer. Although he may act innocently there is every justification for holding him liable in damages to the complainant. The act done was intended by him, and for all the consequences, anticipated as well as unanticipated, the responsibility should be his.

27. Insurance Press v. Ford Motor Co., 255 Fed. 896 (C. C. A. 2d, 1918).

28. Collier v. Imp Films Co., 214 Fed. 272 (S. D. N. Y. 1913).

29. 1 & 2 Geo. V, c. 46 § 8 (1911): "Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defense alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no *reasonable ground* for suspecting that copyright subsisted in the work." (*Italics inserted.*)

30. COPINGER, *op. cit. supra* note 8, at 160 *et seq.*

31. Byrne v. Statist Co. [1914] 1 K. B. 622. See COPINGER, *loc. cit. supra* note 30.

32. See Millar v. Taylor, 4 Burr. 2303, 2346, 98 Eng. Reprints 201, 224 (K. B. 1769); American Press Ass'n v. Daily Story Publishing Co., 120 Fed. 766, 769 (C. C. A. 7th, 1902), *appeal dismissed,* 193 U. S. 675 (1904).

33. Note 9, *supra.*

The profits are his and liability for torts committed are also his. Thus where a publishing company prints and circulates an article submitted by one of its contributors which infringes copyright the publisher, who acted innocently in accepting the article, is liable equally with the infringer.[34] The publishing company may not escape liability on the plea of innocence. It printed and circulated the infringing article; it profited thereby; it was responsible therefor. In another case unauthorized copies of a copyrighted photograph were struck off by a lithographer. Notice of copyright was omitted from the infringing copies. A newspaper publisher who obtained and published a copy of the photograph, without knowledge of the copyright, was held to be liable in damages to the owner for infringement.[35]

Contributory Infringers

The attitude of the courts today is to hold everyone liable who in any manner has helped to create the infringing work.[36] All such persons, except the principals, are contributory infringers. Thus, the printer, the vendor and the binder of an infringing work are all liable for the full extent of damages suffered by the copyright owner.[37] Liable also as a contributory infringer is the person who induces or aids another to infringe a copyright,[38] or to violate the conditions on which his license to sell depends.[39] The sale of an infringing play to another with a view to its public presentation makes the seller a participant in causing the play to be publicly presented and is liable therefore as an infringer.[40] The vendor of moving picture films is liable as a contributory infringer of the dramatic performing rights in the work whose incidents are reproduced, although taking no part in the exhibition of the pictures.[41] Also the unauthorized sale or distribution of copies of copyrighted work is an infringement.[42] It is im-

34. Douglas v. Cunningham, 294 U. S. 207 (1935).

35. Altaman v. New Haven Union Co., 254 Fed. 113 (D. Conn. 1918).

36. Belford v. Scribner, 144 U. S. 488 (1892); Gross v. Van Dyk Gravure Co., 230 Fed. 412 (C. C. A. 2d, 1916).

37. Belford v. Scribner, 144 U. S. 488 (1892); American Code Co. v. Bensinger, 282 Fed. 829 (C. C. A. 2d, 1922); Browne v. Fowler, 290 Fed. 751 (C. C. A. 2d, 1923); Greene v. Bishop, 10 Fed. Cas. No. 5763 (C. C. Mass. 1858). Dealers who make profit or commission upon the sale of infringing copies are also liable. Stevens v. Gladding, 23 Fed. Cas. No. 13,399 (C. C. R. I. 1866).

38. Fishel v. Lueckel, 53 Fed. 499 (C. C. S. D. N. Y. 1892).

39. See Scribner v. Straus, 210 U. S. 352, 355 (1907).

40. Daly v. Palmer, 6 Fed. Cas. No. 3,552 (C. C. S. D. 1868).

41. Kalem v. Harper, 222 U. S. 55 (1911); Falcon v. Famous Players Film Co. [1926] 2 K. B. 474.

42. Macmillan Co. v. King, 223 Fed. 862 (D. Mass. 1914), applying 35 STAT. 1075 (1909), 17 U. S. C. A. § 1 (a) (1934); Warne v. Seebohm, 39 Ch. D. 73 (1888). Under the English Act, 1 & 2 Geo. V, c. 46 § 2 (a) (1911), which deems a copyright to be infringed by any person who "sells or by way of trade exposes or offers for sale" any work which to his knowledge infringes copyright, it has been held that a person who simply attempts to effect a sale does not infringe copyright unless "he by way of trade exposes or offers for sale" the infringing article. Britain v. Kennedy, 19 T. L. R. 122 (1903). See note 41, *supra*.

material that the copies are distributed gratuitously and not sold for profit,[43] or that distribution is to a limited class of persons.[44]

The lithographer who innocently did the mechanical work of lithographing is a guilty participant to the infringement.[45] One who sells or furnishes to another a lithograph plate, intending or expecting such other to use it in the production of infringing copies, is liable as a contributory infringer.[46] But it is otherwise where the plate is capable of an innocent or non-infringing use, and it was sold or furnished without intent or knowledge that it was to be put to an unlawful use.[47] In order to escape liability in such case the burden is upon the defendant to prove that he did not promote a guilty use of them.[48]

Master and Servant

The general rules of agency apply to cases of copyright infringement. The master or principal is liable for infringement committed by his servant or agent within the scope of employment, although the particular act may have been done without express authority of the master or even against his orders.[49] The compiler of a street directory is liable in damages for copyright infringement where several of the canvassers employed by him disobeyed the instructions given to them, and made up their returns largely from the complainant's copyrighted publication instead of from their own investigations.[50] Also, the knowledge gained by an agent during the course of his employment that a certain thing has been copyrighted is imputed to his principal. Thus, although he may have had no actual knowledge of the copyright in the work, in an action for copyright infringement where innocence would constitute a valid defence, the principal cannot successfully plead ignorance of facts learned by his agent.[51]

An employee is also liable if he participates in an infringement, although acting under the instructions of his employer. An agent is always personally liable for torts committed by himself during the course of employment. It is no defence that he acted under his employer's instructions, since the latter could not give

43. Novello v. Sudlow, 12 C. B. 177, 138 Eng. Reprints 869 (1852); Hotten v. Arthur, 1 Hem. & M. 603, 71 Eng. Reprints 264 (Ch. 1863); Warne v. Seebohm, 39 Ch. D. 73 (1888). However, one who had received infringing copies as a gratuity and without knowledge of their infringing nature, is not liable for infringement even though he had made use of the copies. Morris County Traction Co. v. Hence, 281 Fed. 820 (C. C. A. 3d, 1922).

44. Ager v. Peninsular & Oriental Steam Navigation Co., 26 Ch. D. 637 (1884). See note 42, *supra*.

45. Gross v. Van Dyk Gravure Co., 230 Fed. 412 (C. C. A. 2d, 1916).

46. Harper v. Shoppell, 28 Fed. 613 (C. C. A. 2d, 1886).

47. See Harper v. Shoppell, 26 Fed. 519, 521 (C. C. S. D. N. Y. 1886), *rev'd on other grounds*, 28 Fed. 613 (C. C. A. 2d, 1886).

48. See Harper v. Kalem, 169 Fed. 61, 64 (C. C. A. 2d, 1909), *aff'd*, 222 U. S. 55 (1911).

49. Witmark v. Calloway, 22 F. (2d) 412 (E. D. Tenn. 1927); McDonald v. Hearst, 95 Fed. 656, (C. C. S. D. N. Y. 1899); WEIL, AMERICAN COPYRIGHT LAW (1917) 446, 456.

50. Trow Directory, Printing and Binding Co. v. Boyd, 97 Fed. 586 (C. C. S. D. N. Y. 1899). Accord: West Pub. Co. v. Thompson Co., 169 Fed. 833 (C. C. E. D. N. Y. 1909), *modified*, 176 Fed. 833 (C. C. A. 2d, 1910).

51. Christian v. American Druggist Syndicate, 285 Fed. 359 (C. C. A. 2d, 1922).

sanction to an unlawful act.[52] However, a corporate officer is not personally liable for infringements done by the corporation, unless he participated in them as an individual.[53]

Independent Contractors

An employer, ordinarily, is not liable for acts done without his knowledge or consent by an independent contractor which result in the commission of a tort.[54] Logically this rule applies to copyright cases. But where the principal procured the infringement to be done he is jointly liable with the contractor.[55] Moreover a principal cannot contract so as to avoid liability when the act authorized is one for which, in the ordinary course of business, he would be responsible. Thus one, who employs a musician to perform in an exhibition for profit under a contract which gives the artist the sole right to determine the compositions to be played, is nevertheless liable if the musician performs a copyrighted musical composition without permission from the owner.[56] The employer cannot avoid liability on the ground that the selection of compositions was placed outside of his control. He has not the legal right to disclaim by contract responsibility for acts done under his management.[57] The employer is deemed to have taken part, and to have given general authority to perform copyright compositions.

In several cases, proprietors of restaurants and places of amusement interposed for their defence the fact that the bands which played the infringing songs were independent contractors.[58] The allegations were that they had no voice in the selection of the musicians, had no control over the players, nor could they determine the musical selections to be rendered during an evening's engagement. In all these cases the courts rejected the argument that the bands were independent contractors. Certainly a simple direction to play music does not request the performance of unlicensed songs. But the proprietors, by permitting the bands to be sole arbiters of the selections to be played, did not exercise the legal power of control which was theirs. An English court,[59] after a careful

52. Estes v. Worthington, 30 Fed. 465 (C. C. S. D. N. Y. 1887) (trademark). See WEIL, *op. cit. supra* note 49, at 456; AMDUR, COPYRIGHT LAW AND PRACTICE (1936) 947. But under REV. STAT. § 4965 (1875), which made the defendant liable to forfeit to the copyright proprietor one dollar for every infringing copy "found in his possession," it was held that an employee who was entrusted with custody of the infringing material does not have "possession" within the meaning of the section and is not subject to the penalties thereof. Thorton v. Schreiber, 124 U. S. 612 (1888).

53. Buck v. Newsreel, 25 F. Supp. 787 (D. Mass. 1938); Performing Rights Society v. Ciryl Theatrical Syndicate [1924] 1 K. B. 1.

54. HARPER, LAW OF TORTS (1933) § 292.

55. Fishel v. Lueckel, 53 Fed. 499 (C. C. S. D. N. Y. 1892).

56. Witmark v. Pastime Amusement Co., 298 Fed. 470 (E. D. S. C. 1924), *aff'd*, 2 F. (2d) 1020 (C. C. A. 4th, 1924); Harms v. Cohen, 279 Fed. 276 (E. D. Pa. 1922).

57. See Performing Right Society v. Mitchell [1924] 1 K. B. 762, 773; Monaghan v. Taylor, 2 T. L. R. 685 (1885).

58. Dreamland Ball Room v. Shapiro, Bernstein & Co., 36 F. (2d) 354 (C. C. A. 7th, 1929); Irving Berlin v. Daigle, 31 F. (2d) 832 (C. C. A. 5th, 1929); Buck v. Russo, 25 F. Supp. 317 (D. Mass., 1938). See Harms v. Cohen, 279 Fed. 276, 278 (E. D. Pa. 1922). But see (1930) 43 HARV. L. REV. 828.

59. Performing Right Society v. Mitchell [1924] 1 K. B. 762. See Comment (1937) 8 AIR L. REV. 239.

analysis of a case presenting an identical fact situation, soundly concluded that a master-servant relationship existed to which the ordinary rule of *respondeat superior* should apply.

In several cases,[60] owners of copyrighted compositions sought to join the lessors of the auditoriums, in which the infringing performances took place, with the artist in an action for copyright infringement. However it was held that the lessor cannot be a co-infringer when he is in no sense an inducing party to the infringement, and derives no profit from the infringement. Something more than the mere relation of landlord and tenant must exist to give rise to a cause of action against the lessor for infringement of copyright on the demised premises. The lessor is not liable even if he is notified in advance by the copyright proprietor that the lessee intends to play some infringing composition and is requested to bar the performance.[61]

Radio

Innocence as a defence in copyright cases has been offered most frequently in actions brought for infringement of the copyright in musical compositions. The early actions mostly involved proprietors of restaurants and places of amusement. However the appearance of radio on a large commercial scale has manifoldly increased the number of actions brought for the infringement of copyright in musical compositions against persons disclaiming liability because of innocence.

The owner of a copyrighted musical composition is given the exclusive right "to perform the copyrighted work publicly for profit."[62] Since radio did not exist for commercial purposes at the time of the last general revision of the Copyright Act in 1909, the question arose whether the unauthorized broadcast of a copyrighted song was an infringement. It was so held in the case of *Jerome H. Remick v. American Automobile Accessories Co.*[63] There the defendant operated a radio station for the purpose of advertising its product. The court decided the performance was public although the listeners were not gathered together.[64] "The artist," it was said, "is consciously addressing a great, though unseen and widely scattered audience, and is therefore participating in a public performance."[65] Secondly, although there was no direct charge for the privilege of hearing the entertainment, the performance was nevertheless held to be for "profit." The defendant received indirect payment by advertising its

60. Deutsch v. Arnold, 98 F. (2d) 686 (C. C. A. 2d, 1938); Fromont v. Aeolian Co., 254 Fed. 592 (S. D. N. Y. 1918).

61. Fromont v. Aeolian Co., 254 Fed. 592 (S. D. N. Y. 1918).

62. 35 STAT. 1075 (1909), 17 U. S. C. A. § 1 (e) (1934).

63. 5 F. (2d) 411 (C. C. A. 6th, 1925), *cert. denied,* 269 U. S. 556 (1925), *rev'g,* 298 Fed. 628 (S. D. Ohio 1924).

64. The District Court dismissed the complaint on the ground that there was no public performance. 298 Fed. 628 S. D. Ohio (1924). The court considered and rejected the opinion expressed in an earlier case that an unauthorized broadcast of a copyrighted composition may violate the statute. Witmark v. L. Bamberger & Co., 291 Fed. 776 (D. N. J. 1923).

65. See Remick v. American Accessories Co., 5 F. (2d) 411, 412 (C. C. A. 6th, 1925).

name in the expectation and hope of making profits through the sale of its products. Indirect profit is sufficient to cause a case to fall within the prohibition of the statute.[66] Thus the three ingredients necessary for an infringement of a musical composition were found to be present: an unauthorized, public performance, for profit, of a copyrighted song.

In the case of *Buck v. Jewell-LaSalle Realty Co.*,[67] the Supreme Court answered a question which arose as a corollary to the *Remick* case. The LaSalle Hotel maintained a master receiving set which was wired to loudspeakers connected in the public and private rooms of the hotel. On one occasion, which was made the basis of the suit, the hotel happened to tune in on its master set and relay to the rooms an unlicensed broadcast of the plaintiff's copyrighted composition. There was no arrangement of any kind between the broadcaster and the hotel. The Supreme Court certified this to be a "performance". Upon return of this answer to the Circuit Court of Appeals, the reception thus defined as a "performance" was held to be "public" and "for profit" and, in the particular case the original broadcaster being unlicensed, to be an infringement.[68] The defendant had argued that the acts of the hotel were not a performance, because no choice of selections was given to it. The operator of a radio receiving set must accept whatever program is transmitted during the broadcasting period. However, in order to predicate liability, intention to infringe is not essential under the act. Knowledge of the particular selection to be played is immaterial. One who hires an orchestra for public performance for profit is not relieved from a charge of infringement merely because he does not select the particular program to be played. Similarly, when he tunes in a broadcasting station, for his commercial purposes, he necessarily assumes the risk that in so doing he may infringe the performing rights of another.

A dictum expressed by the court in the *LaSalle* case[69] raised the question

66. Herbert v. Shanley Co., 242 U. S. 591 (1917). In this case the Supreme Court decided that there was a performance "for profit" by a band playing in a restaurant although there was no admission charge to hear it. The court pointed out that the music is an incident of other entertainment for which the public pays and therefore is "for profit."

67. 283 U. S. 191 (1931).

68. 51 F. (2d) 726 (C. C. A. 8th, 1931). If the broadcasting company was licensed to perform the copyrighted selection, the question remains open whether the license extends to those who receive the broadcast. To that effect is a dictum in the LaSalle case, 283 U. S. 191, 198 (1931): "If the copyrighted composition had been broadcast by Duncan with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied." *Cf.* Buck v. Debaum, 40 F. (2d) 734 (S. D. Cal. 1929), where the court held that the composer's license to the broadcasting company extended, as far as reception is concerned, not only to those who "pick up" the copyrighted musical composition from the air for their own private use, but impliedly sanctioned and consented to any "pick up" out of the air that was possible in radio reception. However, a recent case held otherwise. Society of European S. A. A. C. v. N. Y. Hotel Statler Co., 19 F. Supp. 1 (S. D. N. Y. 1937). Accord: Performing Right Society v. Hammond's Bradford Brewery Co. (1933), 150 L. T. 119; Canadian Performing Right Society v. Ford Hotel, Ltd. (1935) 2 D. L. R. 391.

69. See 283 U. S. 191, 198 (1931): "And since the public reception for profit in itself constitutes an infringement, we have no occasion to determine under what circumstances a

whether a broadcasting company which merely transmits the performance of a copyrighted composition by another is liable for infringement. The few cases decided concerning the question hold that where the performance transmitted was unlicensed, the broadcaster is a contributory infringer, and his lack of knowledge that there was going to be an unlicensed performance of a copyrighted song is unavailable as a defence.[70] Probably, therefore, a broadcasting company that broadcasts an athletic contest is liable for infringement of copyright if the band plays a copyrighted song without a license.[71] Certainly, the possible liabilities of a broadcasting company are too extensive, especially in view of the public service they perform in presenting broadcasts of so many events of public interest. Legislative attempts to exempt innocent infringers from liability in cases of radio broadcasting have as yet been unsuccessful, but such legislation would be desirable.[72]

Damages, Costs, and Counsel Fees

The same rules of damages apply to all copyright infringers. The innocent infringer is liable for money damages to the same extent as the deliberate infringer.[73] The contributory infringer is jointly liable with the principal.[74] However, where the defendants have acted severally, and not jointly or in concert, in committing an infringement, they cannot be sued jointly.[75] To sue different parties jointly there must have been a common participation or concert of action.

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broadcaster will be held to be a performer." On the basis of this dictum, counsel for the National Broadcasting Co., blithely concluded that broadcasters do not render public performances for profit, and therefore licenses from the copyright owners to broadcasters would seem unnecessary. Sprague, *Copyright-Radio And The Jewell-LaSalle Case* (1932) 3 AIR L. REV. 417.

70. Remick v. General Electric Co., 16 F. (2d) 829 (S. D. N. Y. 1926). See Bladek, *Radio Broadcasting As An Infringement Of A Copyright* (1939) 27 KY. L. REV. 295, 302. It appears to this writer that "picking up" and broadcasting even a licensed performance of a copyrighted composition should constitute such a "performance" by the broadcasting company which would make it liable for copyright infringement, unless separately licensed. The LaSalle case held that the initial rendition does not exhaust the monopolies conferred by statute and that a single rendition of a copyrighted piece may result in more than one "performance." From the opinion in a recent case, Society of European S. A. A. C. v. Hotel Statler Co., 19 F. Supp. 1 (S. D. N. Y. 1937), it appears that where the defendant maintains elaborate mechanical equipment for the purpose of broadcasting or rebroadcasting any transmitted program it gives a "performance" thereof. Consequently the broadcasting company would be deemed to have "performed" the piece "for profit", and not being separately licensed, it infringes copyright.

71. Where twenty bars of a copyrighted song were included in a motion picture it was held that the entire picture infringed copyright. Hawkes & Son v. Paramount Film Serv. [1934] Ch. 593 (C. A.)

72. See (1931) 31 COL. L. REV. 1044, 1045; (1934) 47 HARV. L. REV. 703.

73. Buck v. Jewell-LaSalle Realty Co., 283 U. S. 202 (1931).

74. Belford v. Scribner, 144 U. S. 488 (1892); Gross v. Van Dyk Gravure Co., 230 Fed. 412 (C. C. A. 2d, 1916); American Code Co., v. Bensinger, 282 Fed. 829 (C. C. A. 2d, 1922).

75. Ted Browne Music Co. v. Fowler, 290 Fed. 751 (C. C. A. 2d, 1923).

Persons infringing the copyright in any work protected by the act are liable to an injunction restraining such infringement,[76] and to pay to the copyright proprietor such damages as he may have suffered due to the infringement, as well as all profits which they shall have made from such infringement.[77] However, in lieu of actual damages and profits, the plaintiff may be awarded such damages as to the court shall seem just but which shall not exceed the sum of $5,000 nor be less than the sum of $250.[78] In the greater number of actions brought against innocent infringers, the complainants have found it difficult to prove damages. Consequently, in such cases the interpretation of this clause figures prominently. The Supreme Court has decided that in all cases, even where no provable damages were suffered by the complainant, the award must not be less than the statutory minimum.[79] Where no actual damages are shown the court generally limits itself to an award of minimum damages.[80] Occasionally when such award appeared too burdensome, the court has reduced attorney's fees allowed the complainant.[81] Whether statutory damages should be allowed or an award of actual damages and profits, is not a choice resting with the plaintiff,[82] but with the court.[83] Where actual damages and profits can be proved, statutory damages ordinarily will not be awarded.[84] In awarding statutory damages the act gives the court a yardstick which it may use in fixing the damages between the minimum and maximum sums allowed.[85] The court, however, is not bound

76. 35 STAT. 1081 (1909), 17 U. S. C. A. § 25 (a) (1934).

77. 35 STAT. 1081 (1909), 17 U. S. C. A. § 25 (b) (1934).

78. *Ibid.* Before passage of the present statute proprietors of copyrighted works were not protected where they could not prove actual damages. This was especially true in the case of copyrighted musical compositions. Although the damage done to the owner of a song by a single unauthorized rendition of his work is nominal, yet when a number of infringements are accumulated, the damage to the proprietor is important. See Caplan, *The Measure of Recovery in Actions for the Infringement of Copyright* (1939) 37 MICH. L. REV. 564.

79. Westerman Co. v. Dispatch Printing Co., 249 U. S. 100 (1919) (copying); Jewell-LaSalle Realty Co. v. Buck, 283 U. S. 202 (1931) (public performance).

80. Cunningham v. Douglas, 72 F. (2d) 536 (C. C. A. 1st, 1934), *rev'd on other grounds*, 294 U. S. 207 (1935).

81. Fisher v. Dillingham, 298 F. 145 (S. D. N. Y. 1924); Cravens v. Retail, 26 F. (2d) 833 (M. D. Tenn. 1924).

In copyright actions the court may award to the prevailing party a reasonable attorney's fee, 35 STAT. 1084 (1909), 17 U. S. C. A. § 40 (1934). In one case where the court felt that the statutory maximum of $5000 was too small, the attorney's fee was correspondingly increased to fill out the deficiency. Cory v. Physical Culture Hotel Inc., 14 F. Supp. 977 (W. D. N. Y. 1936), *aff'd*, 88 F. (2d) 411 (C. C. A. 2d, 1937). But see Witmark v. Calloway, 22 F. (2d) 412, 415 (E. D. Tenn. 1927).

82. Davella v. Brunswick-Balke Callender Co., 94 F. (2d) 567 (C. C. A. 2d, 1938), *cert. denied*, 304 U. S. 572 (1938).

83. See Fargo Merc. v. Brecket, 295 Fed. 823, 829 (C. C. A. 8th, 1924).

84. Davella v. Brunswick-Balke Callender Co., 94 F. (2d) 567 (C. C. A. 2d, 1938); see Atlantic Monthly v. Post Pub., 27 F. (2d) 556, 560 (D. Mass. 1928).

85. 35 STAT. 1081 (1909), 17 U. S. C. A. § 25 (b) (1934): "First. In the case of a painting, statue, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

to follow this method.[86] The statutory yardstick exists to enable the court to arrive at a fair estimate of the damages suffered by the plaintiff. It should not be applied where it is clear the copyright owner was not damaged to that extent.[87] In all cases, however, the statutory minimum must be awarded.

The copyright act provides that full costs must be allowed the prevailing party.[88] Also, the usual rule that each party must pay his own counsel fee has been deviated from in copyright cases, wherein the prevailing party may be awarded reasonable counsel fees in the court's discretion.[89]

Conclusion

Suits for infringement of copyright in which innocence is pleaded as a defence for the larger part have been directed against persons who have acted as principals. These persons cannot be fully protected against liability without defeating in measure the prime purpose of the Act which is "to promote the progress . . . of useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings. . . ."[90] The same injury is done the author whether the infringement be deliberatly or innocently motivated. Nor is there justification for applying a separate, more lenient, measure of damages to their case. The present provisions for money damages are, in the main, compensatory and any reduction thereof is at the expense of the copyright owner.[91]

Other considerations, however, should be directed to contributory infringers who violate a copyright only as an incident to their normal business or occupation. These include printers, binders, lithographers, processors of films and many others. In the ordinary course of business, they have no knowledge that the materials they are processing infringe copyright nor have they any practical means of ascertaining such violations. Since the last general revision of the Copyright Act, in 1909, there has been considerable change in these industries.

"Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold or found in the possession of the infringer or his agents or employees;

"Third. In case of a lecture, sermon, or address, $50 for every infringing delivery;

"Fourth. In the case of a dramatic or dramatico-musical or choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance."

86. Douglas v. Cunningham, 294 U. S. 207 (1935).

87. See Turner & Dahnken v. Crawley, 252 Fed. 749, 754 (C. C. A. 9th, 1918).

88. 35 STAT. 1084 (1909), 17 U. S. C. A. § 40 (1934).

89. *Ibid.*

90. U. S. CONST. Art. I, § 8.

91. The Copyright Act provides that the defendant be reimbursed for damages suffered as a result of the infringement and for profits made by the infringer. 35 STAT. 1081 (1909), 17 U. S. C. A. § 25 (b) (1934). The most recent interpretation of this section limits the recovery to that amount of the profits made by the infringer which are directly attributable to the use of the complainant's work. Sheldon v. Metro-Goldwyn Pictures Corp., 106 F. (2d) 45 (C. C. A. 2d, 1939), *rev'g* 28 F. Supp. 134 (S. D. N. Y. 1938). Thus, in theory, the profits which the complainant recovers are those which he himself might have made from the use of his own work. See (1939) 8 FORDHAM L. REV. 263.

They have become highly specialized. No longer is the publisher identified with the printer, or the artist with the lithographer. Each has become separate and distinct from the other. Moreover two large related industries have developed since then, namely, motion pictures and radio. It is certain that the present act was never designed to cope with the problems they raise.[92] The courts apply a flexible interpretation to the act,[93] but nevertheless its terms may not be distorted in order to arrive at the most practical solution for present conditions. The legislature is fully cognizant that a solution of the problem created by the contributory infringer should be sought. The two most recent bills proposed to Congress to amend the Copyright Act both contain provision for the exemption from liability of the innocent contributory infringer.[94] Of course, any general amendment of the Copyright Act is bound to affect the innocent infringer. However, with considerable pressure being brought by many groups whose interests in copyright legislation conflict,[95] all recent legislation to revise the Copyright Act has been defeated. Most groups ultimately seem to prefer to maintain the *status quo* rather than chance the loss of some of the benefit of the present act for possible greater gain by revision.[96] Certainly, the time has come for impartial examination of the present Copyright Act and for remedial legislation, in the light of the great change that has occurred during the last three decades.

92. See Bladek, *supra* note 70, at 313.

93. Remick v. American Automobile Accessories Co., 5 F. (2d) 411, at 412 (C. C. A. 6th, 1925).

94. Duffy Bill, H. R. 2695, H. R. 3004, 75th Cong., 1st Sess. (1937) § 17; Sirovich Bill, H. R. 11420, 74th Cong., 2d Sess. (1936) § 24 (c). See Legis. (1938) 51 HARV. L. REV. 906.

95. See Solberg, *Copyright Law Reform* (1925) 35 YALE L. J. 48 and *The Present Copyright Situation* (1930) 40 YALE L. J. 184.

96. See Legis. (1938) 51 HARV. L. REV. 906, 907.