



Volume 9 | Issue 3

Article 7

1964

A Study of the Version: A Reflection on the Copyright Law's Policy of Protection

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Recommended Citation

James M. Salony, *A Study of the Version: A Reflection on the Copyright Law's Policy of Protection*, 9 Vill. L. Rev. 467 (1964).

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be significant, however, that since proximate cause is a question of law, the *Polemis* rule allows an appellate court considerable leeway in reviewing cases on appeal, since any fact question can, with some slight manipulation, be converted into a question of proximate cause. The *Wagon Mound*⁶⁸ rule, foreseeability, sounds more like a question of fact, not easily reviewable, or, if reviewable, review is of necessity limited to the extent of the liability issue only. In short, it does not afford a convenient device with which to revise jury tried results. It should be borne in mind, moreover, that whereas the English courts have adopted this rule, as a parochial matter, the English have discontinued the jury in the trial of negligence cases. Thus, the seeming intellectual confusion may be a false issue: what is really involved here is the control over jury tried negligence cases. Further, if this analysis is correct, the proximate cause cases will never be susceptible to precise analysis along conceptual lines because we are not dealing with pure law, but perforce with reanalyzing the factual setting by the appellate courts under the guise of proximate cause. If this is true, therefore, proximate cause cases do not reveal rules of law per se, but merely illustrate in which factual contests the appellate judges will or will not sustain jury findings below. Indeed, the proximate cause cases are in fact very nearly the recorded deliberations of a second jury, the proximate cause language merely serving as a anodyne to those who believe the jury supreme in the arena of facts.

Francois R. Cross

A STUDY OF THE "VERSION": A REFLECTION ON THE COPYRIGHT LAW'S POLICY OF PROTECTION*

I.

INTRODUCTION

The word copyright evokes in the layman and also in the average lawyer a feeling of monopolistic security. Authors¹ endeavor to produce new works encouraged by the belief that a copyright will secure to them alone the benefit of their labor. As of late, however, there has been voiced

68. This rule was set forth in the case of *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineer Co., Ltd.* (*The Wagon Mound*), and limits the liability of the defendant to those results which are within the risk giving rise to his negligence. See note 30 *supra* and accompanying text.

* This Comment is being entered in the 1964 ASCAP Nathan Burkan Memorial Competition at Villanova University School of Law.

1. The term author as used herein will designate one who has created a product which contains something meritorious from the author's own mind, "embodies the thought of the author . . . and would not have found existence in the form presented, but for the distinctive individuality of mind from which it sprang." *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 297-8 (7th Cir. 1902).

much dissatisfaction with the quantity and quality of the protection offered by a copyright. The most vehemently dissatisfied are authors who try to build upon, improve, or vary subjects in the public domain. Works fall into the public domain and become available to all members of the public whenever there is an authorized publication without reservation, or if the publication is not in conformity with the statutory requirements for copyright protection. A work published either in this or in any foreign country prior to July 1, 1909, for which a United States copyright had not been previously secured now rests in the public domain. "A work will also fall into the public domain upon the lapse of time — after twenty-eight years if renewal is not sought (or is not sought within the time limited), after fifty-six years if renewal is had."²

This comment will deal exclusively with "versions" of works in the public domain, on the theory that all the dissatisfaction with copyright protection is reflected and magnified in this narrow area. Through analysis of the statutory language of title 17 of the United States Code, the policy behind the code, and the results the courts have reached by an interplay of one upon the other, an effort will be made to determine what protection is afforded a "version." And of much more fundamental importance, will be an attempt to determine whether, when its core has been laid bare by the analytical knife, copyright protection will prove to be anything more than a proverbial wax carrot leading the author on by enticing him with the anticipation of copyright protection, only to have him find when he secures the copyright and seeks to enjoy its protection that it is not at all as good as it looked.

II.

PROTECTION OF A VERSION UNDER THE LANGUAGE OF THE CODE

Literally, a copyright grants to its owner the sole right to reproduce copies of the work he has registered. The protection necessary to secure this exclusive right is first invoked when the copyright holder charges infringement of his copyright. In the typical case the alleged infringer answers that he has merely used the same public works that had been used by the copyright holder. The defendant cites section 8 of title 17 of the United States Code³ claiming that any person may freely use all the works in the public domain because under no circumstances can an author brand any of the public works with the label of copyright. The copyright owner invariably contends that the prohibitive effect of section 8 is legislatively limited by section 7's⁴ pronouncement that a version of works in the public domain should be regarded as a new work subject to copyright. The defendant counters with section 3's⁵ declaration that

2. HOWELL, COPYRIGHTS 9 (1949).
3. 17 U.S.C. § 8 (1952).
4. 17 U.S.C. § 7 (1952).
5. 17 U.S.C. § 3 (1952).

protection is extended only to "the copyrightable parts of the work copyrighted," relying on the inference that there may exist in the version for which the copyright claim is made, material to which the copyright protection does not apply.

Unfortunately no lexicographer has glossarized the terms of the U.S.C., and it is quite evident that reliance on the literal wording of the code results in little more than a stalemate. Therefore, we must look to the courts to decipher this cryptic "code" and through an analysis of the judicial treatment of various type versions attempt to isolate the common factors on which courts rely in granting copyright protection. These common factors when grouped together should form a standard against which may be measured the protection which will be afforded a version.

III.

JUDICIAL PROTECTION AFFORDED A VERSION

A. *Intention*

The creation of a version is not precluded by a lack of intention to make something different. One may intend to make an exact copy of something in the public domain when the implement slips or some outside force or inner defect intervenes, and a version is created. Here the courts, reasoning with overtones of practicality, often find it too difficult "to ascertain what is intended and what inadvertent in the work of a genius: that a man is colorblind may make him a master of black and white art; a painter's unique distortions, hailed as a sign of genius, may be due to defective muscles."⁶

But every slip of the chisel, brush, or pen does not create a version entitled to copyright protection. When the board for an *Acy-Ducy* game was copied from the traditional backgammon board there were some inadvertent defects in shading present in the final product. The Second Circuit admitted that if an error were made in copying which added a distinction to the finished product, the author might obtain a valid copyright on his version. However, the court found in the case of the misshaded board that the error yielded "nothing new of substance or distinction" since it was "so minute as to escape the attention of the ordinary observer,"⁷ and in general added nothing to the board's worth.

B. *The Copy*

A copy may be defined as "that which comes so near to the original as to give every person seeing it the idea created by the original."⁸ The

6. *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 n.4 (2d Cir. 1945).

7. *Ibid.*

8. *West v. Francis*, 5 Barn. & Ald. 737, 743, 106 Eng. Rep. 1361, 1363, (K.B. 1822), quoted with approval in *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 17, 28 S.Ct. 319, 323 (1908).

courts have been unanimous in denying copyright protection to that which is merely a copy of a work which exists in the public domain.⁹ A game constructed by merely printing the rules for the game of Acy-Ducy and copying the traditional backgammon board, all of which had been in the public domain for years was held not to be a version meriting copyright protection.¹⁰ Facts, whether concerning the actual life of an historic character¹¹ or the geography of a country¹² are all in the public domain, and no matter what use is made of the facts, they are not rendered a version. Nor can a version of existing knowledge be created by the mere recording of that which is available in the fund of common knowledge. Hence the names and numbers of baseball players combined in a program were held to be simply copies of information already in the public domain as to what the lineup had been in other places in prior games played by the team, even though such program had required labor of assemblage.¹³

The courts differentiate those cases where the subject is a copy of a work in the public domain that has been transformed by means that allow the creator's personal reaction to be manifested in the final version. This differentiation originally pertained to cases involving portraits and was later extended to photographs. In both types of cases, the courts held that when the subject of the work was in the public domain others were free to copy the original. They were not free to duplicate the copy. It is the "something irreducible, which is one man's alone" that will be protected under the Copyright Code.¹⁴

9. "A copy of something in the public domain will not, if it be merely a copy, support a copyright." *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927). A "word" when used by an author, is but an exact reproduction of a most basic segment of mankind's common property and does not constitute a version so as to secure the right to its exclusive use to the author through copyright protection. "Neither ideas nor phrases nor ordinary English idioms or words are protected by copyright. They are all in the public domain." *Park v. Warner Bros.*, 8 F. Supp. 37, 39 (S.D.N.Y. 1934). "The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight." *Holmes v. Hurst*, 174 U.S. 82, 86, 19 S.Ct. 606, 607 (1899).

10. *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945). The court in *Briggs v. New Hampshire Trotting & Breeding Ass'n*, 191 F. Supp. 234 (D.N.H. 1960), believed that the extent to which a sport or game is performed prior to someone codifying it and seeking copyright protection is an important test as to whether it will be given copyright protection. Using basketball as an example, the court decided that, although the organization of the rules and explanation of the technique would involve a degree of creative thought, the game is played so universally that protection of the copyright in one person would unfairly hinder the public interest.

11. *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957).

12. The location of township, county, and municipal lines were held to be in the public domain. *Christianson v. West Pub. Co.*, 149 F.2d 202 (9th Cir. 1945). The shape of the continental outlines, the lines of longitude and latitude, and the principal cities of the world are not subject to copyright protection. *Sawyer v. Crowell Pub. Co.*, 46 F. Supp. 471 (S.D.N.Y. 1942), *aff'd*, 142 F.2d 497 (2d Cir. 1944), *cert. denied*, 323 U.S. 735, 65 S.Ct. 74 (1944).

13. *Penn Sportservice, Inc. v. Goldstein*, 35 F. Supp. 706 (W.D. Pa. 1940).

14. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250, 23 S.Ct. 298, 300 (1902). Such reasoning is no doubt the basis for § 5 of title 17 which allows a copyright claim for "reproduction of a work of art." See *Leigh v. Gerber*, 86 F. Supp. 320 (S.D.N.Y. 1949), which holds that a reproduction of a work of art constitutes a distinct class of copyrightable material.

C. *The Idea*

The idea is the beginning of all projects, of all that is new in business, art or in the general culture. An idea conceived by the distillation of knowledge in the public domain may, if properly planted, be the foundation of a new business or the beginning of a great fortune.¹⁵ Yet title 17 offers no protection from theft of this seed.¹⁶

The divergent theories advanced to explain this lapse in the area of copyright protection divide most readily into the public policy school and the practical impossibility school. The former relies on the premise that absent a "means of communicating them [ideas] they are of value to no one but the author."¹⁷ Before an author publishes his ideas he has perfect dominion over them. His possession is exclusive. But as soon as his ideas are crystallized and published, they are given to the world and his exclusive domain over them ceases.¹⁸ The ideas become the common property of his audience and can be communicated by them in their own language.¹⁹

The practical impossibility school, on the other hand, believes that an idea is valuable and should be protected. But this school must face the problems of just what is an idea and what distinguishable marks can be fixed upon a set of intellectual ideas so that one man may call himself a proprietor thereof.²⁰ Although each school has had its eloquent disciples history has shown that it is the public policy school which rules the judicial roost. Every solution offered²¹ to answer the practical problems involved in copyrighting ideas has made precious little headway before being squelched by a strong public policy argument.

The Copyright Code does secure the right to use an arrangement of words which the author has selected for the purpose of expressing his ideas in concrete form.²² Lord Mansfield describes that which is protected as "an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of

15. For an able analysis of the area see Callmann, *Unfair Competition in Ideas and Titles*, 42 CALIF. L. REV. 77 (1954).

16. *Taylor v. Metro-Goldwyn-Mayer Studios*, 115 F. Supp. 156 (D.C. Cal. 1953). Ideas may be appropriated with impunity since they are free to the world. The idea of how to stage a show is not protected by copyright. *O'Brien v. Chappel & Co.*, 159 F. Supp. 58 (S.D.N.Y. 1958) (actors were to wear costumes of only black and white); *Richards v. Columbia Broadcasting Sys.*, 161 F. Supp. 516 (D.D.C. 1958) (a quiz program was to be based on the recognition of motion pictures).

17. *Holmes v. Hurst*, 174 U.S. 82, 86, 19 S.Ct. 606, 607 (1899).

18. *Barton Candy Corp. v. Tell Chocolate Novelties Corp.*, 178 F. Supp. 577 (E.D.N.Y. 1959). The copyright gives no exclusive protection to an idea once it has been disclosed.

19. *Stowe v. Thomas*, 23 Fed. Cas. 201 (No. 13514) (C.C.E.D. Pa. 1853).

20. These queries were first advanced by Judge Yates dissenting in *Millar v. Taylor*, 4 Burr. 2303, 2366, 98 Eng. Rep. 201, 235 (K.B. 1769).

21. For a recent suggestion of a "palatable formula . . . our courts can cope with" see Callmann, *supra* note 15, at 88.

22. *Funkhouser v. Loew's, Inc.*, 208 F.2d 185 (8th Cir. 1954), *cert. denied*, 348 U.S. 843, 75 S.Ct. 64 (1954).

expression. It is equally detached from the manuscript, or any other physical existence whatsoever."²³

The analogy drawn by Lord Earle in 1854, still remains apt today in delineating the policy that prompts the courts to decide as they do. He opined: "the subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by these words, they existing in the mind alone, which is not capable of appropriation."²⁴

A most common way to arrive at a protected version is to express an idea in a medium other than the medium within which the idea resides while resting in the public domain. A Santa Claus decoration produced in life size, three dimensional plastic was held to be protected by copyright as to those traits which were contributions to prior treatment of the same subject and were recognizably the author's own. The features of the figure were held to be part and parcel of the idea of Santa Claus and hence not protected, but the three dimensional form and the plastic medium were subject to protection under title 17 since the author was the first to reproduce the traditional character in this particular way.²⁵

A printed fabric was held to be a protected version of an embroidered design in the public domain where the latter had been photographed and transferred to the former by an engraving and printing process. The Southern District of New York²⁶ reasoned that the print of a fabric is a variation from embroidery on a fabric even though the arrangement of the figure and the other characteristics are elements which may be the same on both, since otherwise it would be impossible to obtain protection for a different version of the same work.²⁷

However, a copyright monopoly granted to an author whose product is merely a further formal development of a generic idea which long ago had been expressed in concrete form and has long since taken its place in the public domain would "infringe unduly on public use of the ideas or objects of that expression. . . . [In such cases] copyrightability may be altogether denied, or, if copyright is upheld, restrictively protected by

23. *Millar v. Taylor*, 4 Burr. 2303, 2396, 98 Eng. Rep. 201, 251 (K.B. 1769).

24. *Jefferys v. Boosey*, 4 Clark 814, 867, 10 Eng. Rep. 681, 702 (H.L. 1854).

25. *Doran v. Sunset House Distributing Corp.*, 197 F. Supp. 940 (S.D. Cal. 1961); *Barton Candy Corp. v. Tell Chocolate Novelties Corp.*, 178 F. Supp. 577 (E.D.N.Y. 1959).

26. *Millworth Converting Corp. v. Slifka*, 180 F. Supp. 840 (S.D.N.Y. 1960), *rev'd on other grounds*, 276 F.2d 443 (2d Cir. 1960); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951). (Mezzotints were held to be versions of paintings.) See COPINGER, COPYRIGHT 46 (7th ed. 1936). Engravings reproducing designs of works in the public domain are versions which are protected from infringement under copyright law.

27. The great majority of courts recognize the technique of embodying a public idea or theme within a novel medium as a means of achieving a distinguishable version, but the recognition is not universal. When a miniature version of the theme of a religious shrine which existed in the public domain was rendered in plaster, a district court found no cause to give copyright protection sufficient to prevent a second rendition of the same theme also in plaster. *Allegrini v. DeAngelis*, 59 F. Supp. 248 (E.D. Pa. 1944), *aff'd per curiam*, 149 F.2d 815 (3d Cir. 1945).

requiring almost verbatim copying to constitute infringement."²⁸ Thus, the New Hampshire District Court²⁹ denied copyright protection to one who used an IBM machine to sort and process betting cards as part of a race track system. The court held that a product developed for a very specific purpose by the use of a machine which had been previously used many times for analogous purposes was not considered a version worthy of copyright protection.

A court's grant of restrictive protection to the development of generic ideas in the public domain is illustrated by the Southern District of Illinois' refusal to grant protection against anything but a verbatim copy of the copyrighted label showing asparagus, since the generic idea of the label showing a picture of the vegetables contained within the can had long been reduced to concrete form and now resided in the public domain.³⁰

D. *The Mechanical Improvement*

In the law of patents any improvement which a good mechanic can make is not the subject of a patent.³¹ So also, is copyright protection not extended to any work that differs from a work in the public domain due to a variation caused by an act which could be performed by anyone in the particular field.³² In order to receive copyright protection a version of a musical composition in the public domain cannot merely be a copy of a piece already produced with additions and variations which any writer of music with experience and skill might readily make. The addition of an alto part to a piece of music already having the other three parts would not make it the subject of a legal copyright, even though the addition resulted in improvement of the original composition.³³

The change of the length of certain notes in a Russian hymn in order to accommodate the different number of syllables in the English translation, and the rhythmic changes which were required for the purpose of adopting the music to the translated text, were not such changes as would constitute a version entitled to protection when no change was made in the original harmony or pitch of the notes, and the same tune was retained.³⁴ When the contribution consisted of an introduction, a repetition of the same theme in the breaks, several bars of harmony and an ending, the district court in California held that this was merely the addition of certain inconsequential melodies and harmonistic embellishments such as are frequently

28. *Continental Cas. Co. v. Beardsley*, 151 F. Supp. 28, 32 (S.D.N.Y. 1957), modified on other grounds, 253 F.2d 702 (2d Cir. 1958), cert. denied, 79 S.Ct. 25, 358 U.S. 816, 79 S.Ct. 25 (1958).

29. *Briggs v. New Hampshire Trotting & Breeding Ass'n*, 191 F. Supp. 234 (D.N.H. 1960).

30. *Rochelle Asparagus Co. v. Princeville Canning Co.*, 170 F. Supp. 809 (S.D. Ill. 1959).

31. *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 62 S.Ct. 37 (1941).

32. *Cooper v. James*, 213 Fed. 871 (N.D. Ga. 1914).

33. *Id.* at 872, applying the rule laid down in *Jollie v. Jacques*, 13 Fed. Cas. 910 (No. 7437) (C.C.S.D.N.Y. 1850).

34. *Norden v. Oliver Ditson Co.*, 13 F. Supp. 415 (D. Mass. 1936).

improvised by any competent musician and was "as commonplace . . . as the fairy story beginning, 'One upon a time.' . . . Such technical improvisations which are in the common vocabulary of music and which are made every day by singers and other performers, are *de minimis* contributions and do not qualify for copyright protection."³⁵

Where a photograph is in the public domain, the photographer's effort to create a distinguishable version by having a walking cane engraved in the plate from which the photo was printed failed to create a version that would be protected by copyright. The Seventh Circuit³⁶ reasoned that the etched contribution was one which any skilled engraver could have easily done and which was so slight that it was quite likely to be overlooked by the casual observer. Furthermore, to allow copyright protection of so minor a variation would contravene public policy by encouraging deceit and rewarding chicanery.³⁷ The court espoused what might be called a sauce-for-the-geese-sauce-for-the-gander type test by proposing that since infringement of a valid copyright could not be evaded by slight and colorable changes, the copyright protection should not be granted for merely slight and colorable changes in works already existent in the public domain.³⁸

The courts have moved away from their "Once upon a time" and "merely mechanical change" reasoning when confronted with certain combinations of factors. The federal court for the Eastern District of New York,³⁹ when faced with a Hebrew Prayer Book the contents of which had been plucked bodily from publication in the public domain, (the author's contribution being limited to the addition, deletion, and rearrangement of letters, words, and sentences), pronounced the work worthy of copyright protection. The court acknowledged the work was the product of much labor, judgment, money, and skill on the part of the author, but their decision rested mainly on the fact that, although the process used could have been employed by anyone, the finished product in this case was different from any other book published up to the time, and the differences were "sufficiently substantial and multitudinous to meet the standard of a 'distinguishable variation'."⁴⁰ There seeps through the façade of the court's reasoning the policy of rewarding one who has helped the public by making a useful contribution. The new text was clearer, more legible, and could be employed far more purposefully in advancing the culture of the people.⁴¹ Because the standard by which a work is adjudged a version is so nebulous, the courts are frequently constrained to bolster their decision in close cases by relying on a form of estoppel. The court here maintained that since the infringer had shown that he considered the copyright holder's book a sufficiently improved version by his action of photographing it almost in

35. *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681, 683 (S.D. Cal. 1958).

36. *Snow v. Laird*, 98 Fed. 813 (7th Cir. 1900).

37. *Id.* at 817.

38. *Ibid.*

39. *Zelgelheim v. Flohr*, 119 F. Supp. 324 (E.D.N.Y. 1954).

40. *Id.* at 327.

41. *Ibid.*

its entirety and placing the copy on the market for sale, he was estopped to deny the contrary.⁴²

In the field of music, when the contributions veer away from strictly mechanical additions and turn more toward the addition of something unique, the courts are willing to grant copyright protection to products that differ in words and music from the original, though there exists some music in the public domain that is quite similar. Under this theory copyright protection was granted the work of a Sicilian sailor⁴³ when, while playing his guitar, a folksong he had heard and forgotten came back to his memory. Since he could not read music, the words and music he could remember he played by ear, and what he could not remember he improvised. Here the district court invoked an estoppel principle, contending that there must have been something which the sailor added since his version brought the song back into popularity with his own people.⁴⁴

E. *The Compilation*

1. *The Exactitude*

The term exactitude is this writer's and is used herein to denominate that phenomena which occurs in cases involving directories, maps, guide-books, or dictionaries; that is, anytime there are certain common objects of information which must, if recorded correctly, exist in the same terms.⁴⁵ The map is chosen for discussion in this section, not only because it is most clearly illustrative of the distinctive features of this subgroup, but also because of its overwhelming proportional prominence over other exactitudes in cases raising the issues discussed herein. The unique judicial treatment given a map makes it appear that today, although other works may claim the label exactitude, only a map will receive the treatment that this label calls forth.

42. *Id.* at 328. In the same year as the Hebrew prayer book case, a Hebrew bible case came before the federal court for the Southern District of New York. The changes this time consisted of corrections to the accents and cantillation marks over the Hebrew characters made on photographic reproductions of pages of a bible in the public domain. The corrected negatives were made into plates from which a book was printed. The rules for the work done were well known, and anyone with the requisite scholarship could have made the corrections. The court's prime reason for holding the bible a distinguishable variation subject to copyright protection was that the work had never been done before with complete accuracy. *Shulsinger v. Grossman*, 119 F. Supp. 691 (S.D.N.Y. 1954); see also *Consolidated Music Publishers v. Ashley Publications, Inc.*, 197 F. Supp. 17 (S.D.N.Y. 1961); where a compilation consisting of selections copied from piano literature in the public domain had as its distinguishing characteristic a considerable amount of editorial matter such as marks for fingering, phrasing, and expression. The court found "at least a modicum of creative work" which was sufficient to constitute a protectible version although it amounted to a little more than a mere trivial variation. The court was impressed by the public benefit.

43. *Italian Book Co. v. Rossi*, 27 F.2d 1014 (S.D.N.Y. 1928).

44. *Ibid.* That the differences made by the sailor were of "some importance may be inferred from the plaintiff's commercial success in selling it, and the defendant's desire to appropriate it."

45. *Kelly v. Morris*, L.R. 1 Eq. 697, 701 (1866).

In *General Drafting Co. v. Andrews*⁴⁶ the court, after finding a new map was individual and useful as well as "manifestly different," went on to find that variation in the road numbering, the shore lines, the position of towns, the population symbols, and the general scale were those usual variations necessary to transfer the information into printed form.⁴⁷ After diluting the "manifestly different" rationale, the court found that detailed road information was obtained from engineers in each county, and the physical conditions of the road were verified by travel, thus denoting the map a product of a great deal of skill, labor, and expense.⁴⁸

In the area of exactitudes, the skill, labor, and expense the court is concerned with is not that expended in the use of judgment, selection, preparation, and assemblage of information shown on maps already in existence. In *Amsterdam v. Triangle Publications, Inc.*,⁴⁹ although there was a considerable expenditure of time and effort, it was proven that all the information, with the exception of the names of a few secondary roads which had been obtained from a real estate agent, had been gleaned from other maps. The court held that the publication of information available to everyone, such as that found on maps, could be secured by copyright only when the author gathered more than an infinitesimal amount of the information in the field so that the map's presentation involved at least a modicum of creative work.⁵⁰

Some cases dealing with exactitudes call for a much higher degree of original research.⁵¹ The district court of Virginia in *Marken & Bielfeld v. Baughman Co.*,⁵² required that a "reasonably substantial portion" of the information to be used on the map be collected in the field. Other cases go to the extreme of requiring the compilation to be the sole product of the maker. This result is prompted by dicta found in the case of *Kelly v. Morris*, the first English directory case, to the effect that the author of a map of an island "must go through the whole process of triangulation just as if he had never seen any former map."⁵³

Whatever else be the reason behind this latter rationale, one thing is certain; the courts are not seeking uniqueness in the final product since two map makers collecting data at first hand would naturally make the same map.⁵⁴ If each author is accurate, identity is inevitable since each seeks only to set down the same facts in precisely the same relation to each

46. 37 F.2d 54, 56 (2d Cir. 1930).

47. *Id.* at 55.

48. *Ibid.*

49. 189 F.2d 104 (3d Cir. 1951).

50. *Id.* at 106.

51. *Axelbank v. Rony*, 277 F.2d 314 (9th Cir. 1960).

52. 162 F. Supp. 561, 563 (E.D. Va. 1957); see also *Carter v. Hawaii Transport Co.*, 201 F. Supp. 301 (D. Hawaii), holding that the outline map of Hawaii, on which was indicated the sites of cities and hotels along with descriptions of points of interest and information as to activities on the island, was not subject to copyright production since a really substantial portion of the information had not been acquired by the author from the field.

53. L.R. 1 Eq. 697, 701 (1866).

54. *BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW* 225 (1912).

other.⁵⁵ It would seem that in the area of exactitudes the courts are most interested in accuracy. If the only source material used is other maps, there is reflected in the finished version all the errors of the source and not conformity with reality. Therefore, since accuracy can best be incorporated into a map by field work, and since accuracy is the quality that makes a map beneficial to the public, it is logical that protection be given only to those who seek accuracy in the maps they make by direct reference to the original sources.⁵⁶

2. Arrangements and Collections

The basic rationale originally governing the question of whether a compilation (excluding exactitudes) was to be given copyright protection seemed to hinge upon whether the author had expended labor in its preparation. The early courts were not concerned with whether the materials which the author had collected consisted of matter already in the public domain, or whether such material showed literary skill, or was unique in thought or expression, or was anything more than the result of industrious collection.⁵⁷ However, as late as 1920 some courts still refused to recognize that arrangement of any kind or degree was such labor as would be worthy of copyright protection as a distinguishable variation of works in the public domain. In a Second Circuit case⁵⁸ there was suspicion that the defendant's printer had set up his pamphlet from a copyrighted pamphlet. Both pamphlets contained pictures of Pershing on the cover, both contained the same poems (permission for publication having been secured from the author), and both had the same number of pages, as well as an identity of pagination. The court held that although the defendant's conduct may have been "mean" he was not guilty of infringement since the copyright holder's attractive "get-up" and sequential distribution were not protected against infringement under the copyright.⁵⁹ But in only a few years⁶⁰ most courts

55. *Fisher, Inc. v. Dillingham*, 298 Fed. 145 (S.D.N.Y. 1924).

56. The biggest difficulty in including maps under the heading of compilation arises when a map is constructed solely on the basis of field work, since then it must be technically termed an original work and not a compilation. When the courts are faced with an exactitude of a work in the public domain, the exactitude in question having been produced by the author in conformity with the sole product theory (requiring the author to start from scratch) as prescribed by *Kelly*, they turn not to the version theory under § 7 of the Copyright Code, but rather depend on a literal interpretation of § 8. The prohibition in § 8 against a copyright subsisting in the original text of any work in the public domain is held to be totally inapplicable to an exactitude produced wholly from field work "because such a work is not the 'original' text of any work in the public domain, but a second equally 'original' text of a work never published before its copyright." *Id.* at 149.

57. See the analysis of early cases collected in *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 Fed. 83 (2d Cir. 1922).

58. *Eggers v. Sun Sales Corp.*, 263 Fed. 373 (2d Cir. 1920).

59. *Id.* at 375.

60. There existed even in the earliest cases decided under the Copyright Code an underlying sentiment that the arrangement of compilations was labor productive of a variation subject to copyright protection. In *Banks Law Pub. Co. v. Lawyers' Co-op. Pub. Co.*, 169 Fed. 386 (2d Cir. 1909), the court, while denying a court clerk protection for his arrangement of cases, it being done as part of his employment, acknowledged that "the trend of some of the decisions and of the text-writers indicates that

had evolved to a position of extreme liberality, the extent of which may be judged by the holding of the Second Circuit⁶¹ that, although trade mark illustrations were not copyrightable in their own right, when they were gathered together and arranged in a compilation, their arrangement became subject to protection under the copyright of the compilation.

There has always been a very liberal policy regarding what constitutes a protected version when there is only limited source material available. Goethe is believed to have said, "Gozzi maintained that there can be but 36 tragic situations. Schiller took great pains to find more, but he was unable to find even so many as Gozzi."⁶² Thus it has been held that, although a plot set in the Canadian Northwest with the Royal Mounted Police as characters was in the public domain, the situation might be so manipulated as to constitute a version worthy of copyright protection, thereby preventing another from making use of the same sequence of events to excite by representation the same emotions.⁶³

Probably every conceivable plot has been the subject of many books, however, people will continue to write books, and the public will continue to read them because of the new characters and setting in which the authors shroud the old plot. These settings, which are the independent production of the author, are protected by copyright. The courts have held that in such situations it is not the subject that is protected, but rather the treatment of the subject that is secured by the copyright.⁶⁴

Facts concerning the actual life of an historic character are in the public domain and not entitled to copyright protection,⁶⁵ however, the fictionalization of events and incidents in the life of an historic figure is subject to protection against appropriation by others.⁶⁶ The association, arrangement, and combination of historic data is a distinguishable variation⁶⁷ of the treatment of such data and as such, is worthy of copyright protection against a mirroring of the style and manner in which the author has chosen to set down the factual and historical materials.⁶⁸ In such case

an arrangement of the material matter of a book [in the public domain] may be the subject of a valid copyright." *Id.* at 390; see also *Hoffman v. Le Traunik*, 209 Fed. 375, 379 (N.D.N.Y. 1913), where the court admitted that the format and sequence of a monologue was the subject of copyright protection, but limited the protection so that it was effective only against substantial appropriation.

61. *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 Fed. 83 (2d Cir. 1922).

62. *International Film Service Co. v. Affiliated Distributors, Inc.*, 283 Fed. 229, 233 (S.D.N.Y. 1922), quoting from POLTI, *THE THIRTY-SIX DRAMATIC SITUATIONS* (1921).

63. *Id.* at 234, citing *Daly v. Palmer*, 6 Fed. Cas. 1132, 1138 (No. 3552) (C.C.S.D.N.Y. 1868); see also *Chappell & Co. v. Fields*, 210 Fed. 864 (2d Cir. 1914). Even a single scene of a play might display so marked a series of incidents productive of dramatic effect as to be singularly worthy of copyright protection. *Daly v. Webster*, 56 Fed. 483 (2d Cir. 1892).

64. *Stephens v. Howells Sales Co.*, 16 F.2d 805, 808 (S.D.N.Y. 1926); see *McCaleb v. Fox Film Corp.*, 299 Fed. 48 (5th Cir. 1924), where the dramatization of a Hawthorne book was held not to confer on its author protection against another author's use of that part of Hawthorne's book that was in the copyright owner's play.

65. See text *supra* at note 11.

66. *Greenbie v. Noble*, 151 F. Supp. 45, 65 (S.D.N.Y. 1957).

67. *But see*, *Lake v. Columbia Broadcasting Sys.*, 140 F. Supp. 707 (S.D. Cal. 1956), where the sequence of historical events of Wyatt Earp's life was not protected on the rationale that sequences of historical events are literally in the public domain.

68. *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921 (S.D. Cal. 1963).

the copyright does not protect the entire work,⁶⁹ but extends only to those matters which are the result of the author's independent labor, skill, and ingenuity.⁷⁰

The liberality shown by courts in extending copyright protection to versions in the field of music no doubt stems from the difficulty in arriving at something completely new, the range of possible variations being so limited.⁷¹ "Similarity of tone succession, which is, to a certain degree, inevitable in all musical composition, because of the limits of the chromatic scale,"⁷² is most likely to appear within the narrow pattern of the chorus in a popular song. Slight variations in the use of rhythm or harmony — accent or tempo — or any spontaneous result of the author's imagination, may transform the version of the work in the public domain into a distinguishable variation worthy of copyright protection.⁷³

Just because the field is narrow does not always mean that the arrangement and the sequence of the material will be protected. However, flash cards consisting of basic number combinations have been protected as to their selection, arrangement, and combination.⁷⁴ But there were additional factors present in the case that permitted the court to skirt the issue of considering the cards as merely products of a mechanical process. The set was held to be more than a mere compilation since the combination of problems plus test sheets, together with instructions constituted an educational book.⁷⁵ But the resemblance of the whole method to a mere mechanical procedure compelled the Seventh Circuit to strengthen their argument with a form of estoppel, to wit: "the commercial success of plaintiff's flash card sets . . . [indicates] they were new and useful";⁷⁶ although in reality the success was due to the plaintiff's appeal to a previously untapped market by promoting the card sets as toys.⁷⁷

3. *The Abridgment*

An abridgment is the highest order of compilation. By gathering, assembling, and synthesizing data relevant to a particular area the abridger produces not just a collection of selected extracts, but rather a miniature epitome of the work in the public domain. Where an auto-supplier gathered details as to the specific features of auto supplies which he sold, condensed the mass of data, and synthesized the condensation, the resulting description which was printed in a catalogue was held to be protected by copy-

69. *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632 (S.D. Cal. 1935).

70. *Greenbie v. Noble*, 151 F. Supp. 45, 65 (S.D.N.Y. 1957).

71. All popular songs are built on the rather simple pattern of a three part chorus consisting of "an opening strain which usually runs for eight bars, a middle tune of eight bars, and a concluding eight bars which repeat the first strain." SHAFNER, *MUSICAL COPYRIGHT* 155, 171 (1939).

72. *Hirsh v. Paramount Pictures, Inc.*, 17 F. Supp. 816, 817 (S.D. Cal. 1937).

73. *Ibid.*

74. *Gelles Widmer Co. v. Milton Bradley Co.*, 313 F.2d 143 (7th Cir. 1963), *cert. denied*, 373 U.S. 913, 83 S.Ct. 1303 (1963).

75. *Id.* at 147.

76. *Ibid.*

77. *Id.* at 145.

right.⁷⁸ The more familiar subject of an abridgment is a literary work in the public domain. It is clear, that a mere selection, or different arrangement of parts of an original work, so as to bring it into smaller compass, will not be held to be abridgment subject to copyright protection. "There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work."⁷⁹ To constitute a true and proper abridgment of a work, the whole account must be preserved in its proper sense.

IV.

THE COPYRIGHT LAW'S POLICY OF PROTECTION IN PERSPECTIVE

As a survey of the cases shows, most of the confusion and dissatisfaction with copyright protection arises because authors have failed to grasp the primary purpose prompting the government to issue copyrights. The belief has developed that the primary purpose for the copyright law is to secure to the author a monopoly, more or less in the nature of a reward for his genius and industry. Unfortunately, this belief erroneously puts the emphasis on personal gain rather than on the common good. The all pervading public policy emphasis employed by the courts throughout the area of copyright stems from article one of the United States Constitution which authorizes the issuance of copyrights "To promote the Progress of Science and the useful Arts by securing for limited Times to Authors . . . the exclusive Right to their respective Writings. . . ."⁸⁰ The primary purpose of title 17, as even the most cursory reading of the authorizing clause in the Constitution will show, is to grant the valuable copyright in order "to afford greater encouragement to the production of literary works of lasting benefit to the world."⁸¹ The reward to the owner is of secondary importance.⁸² In the analysis of every copyright case the interplay of the author's rights against the public benefit must be considered in determining just what rights are secured to the author by his copyright. The way the copyright-protection equation is set up the author is fully protected up until the time his monopoly infringes on the master scheme of public benefit. To retain this delicate balance the courts employ two doctrines whenever the author's monopoly is disproportionate to his product's benefit to the public. Depending on the circumstances at the time of trial the monopoly will either be limited by the doctrine of fair use, or augmented by the estoppel principle.

A thorough analysis of the enigmatic doctrine of fair use will not be attempted here. The subject is treated only to the end that some clarity

78. *B&B Auto Supply, Inc. v. Plessner*, 205 F. Supp. 36 (S.D.N.Y. 1962).

79. *Folsom v. Marsh*, 9 Fed. Cas. 342, 345 (No. 4901) (C.C.D. Mass. 1841).

80. U.S. CONST. art. I, § 8.

81. *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30, 36, 59 S.Ct. 397, 400 (1939).

82. *Loew's, Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd*, 239 F.2d 532 (9th Cir. 1956), *aff'd*, 356 U.S. 43, 78 S.Ct. 667 (1958).

may be brought to the ramifications of the interplay of the doctrine and copyright protection. Fair use has been defined as "a privilege granted by the court to those other than the owner of the copyright to use the copyrighted material in a reasonable manner."⁸³ It should be noted that the doctrine is not a modification of the copyright protection sanctioned by the copyright statute. In fact, the term fair use is not even mentioned in title 17. It is a court created doctrine.

The estoppel doctrine is also court created, having no basis in title 17. In an infringement case the court is deciding whether to sustain a copyright claimed in time past; its attention is thus directed at the time when the copyright was registered. The question should be "at the time this version was offered for copyright did it meet the standards of public benefit"? That is what the question *should* be; however, as a reading of the foregoing sections will make quite evident, the deciding factor in many cases is merely the public acceptance of the work as a version; an occurrence that may post-date the application date by years. Yet this acceptance (whether the court finds it exemplified by the infringer's act of copying a prayer book, or evidenced by the natives whistling a song, or parents buying a toy) is held sufficient to estop the infringer from denying that the work from which he copies was a version.⁸⁴

A survey of the cases also points up a second cause for the dissatisfaction with the protection afforded copyrighted versions. The stalemate caused by a literal interpretation of the language in the Copyright Code best illustrates the necessity for distinguishing the two different levels of the copyright procedure with which the word protection has been ambiguously associated. If an author takes matter from the public domain and adds to it matter which resulted from his own endeavors, combining the two into a work which he copyrights, "the copyright is not void because of the inclusion therein of the uncopyrightable matter, but is valid as to the new and original matter which has been incorporated therein."⁸⁵ So the courts have held that a copyright will be granted to a whole version if any portion of the version is found to be a "distinguishable variation";⁸⁶ however, "the degree of protection afforded by the copyright is measured by what is actually copyrightable in it; that is, by the degree and nature of the original work."⁸⁷ Just what constitutes this "original work" is determined by a standard that glides chameleon-like through the many mansions in the house of copyright. In the compilation suite it is labor; in the map room it is accuracy; in the library, difference; in the conservatoire, imagination; and in the game room it is distinction. Only in the

83. BALL, COPYRIGHT AND LITERARY PROPERTY 260 (1944); see also *Crume v. Pacific Mut. Life Ins. Co.*, 140 F.2d 182 (7th Cir. 1944), *cert. denied*, 322 U.S. 755, 64 S.Ct. 1265 (1944); HOWELL, COPYRIGHTS 13 (1949).

84. See text *supra* at notes 42, 44 and 76.

85. *American Code Co. v. Bensinger*, 282 Fed. 829, 834 (2d Cir. 1922).

86. "A 'copy of something in the public domain' will support a copyright if it is 'a distinguishable variation.'" *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951), quoting from *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.2d 159, 161 (2d Cir. 1927).

87. *American Code Co. v. Bensinger*, 282 Fed. 829, 834 (2d Cir. 1922).

hall of mirrors does the chameleon see his true reflection as the something irreducible which is one man's alone.

V.

CONCLUSION

The standard which the courts apply in determining whether a version is copyrightable may be said to be two-fold. Protection is extended to that material within the version which meets the very liberal test of being the author's alone. But the degree and nature of that protection will be reflective of the extent to which the "something irreducible" is the materialization of an endeavor which deserves encouragement because its product is beneficial to mankind. The courts in applying this binate standard use the equalizers of fair use and estoppel to keep the scales of copyright justice in a balance that is in keeping with the policy underlying the whole of copyright law.⁸⁸

Confronted with the standard used by the courts to determine what is protected in a copyrighted version it becomes impossible to deny that the protection given by a copyright is anything more than the proverbial enticing carrot. But is the carrot wax? Only to the unknowing, the uncomprehending — for satisfaction is only the realization of anticipation — and anticipation under the copyright law must only be for a reward of secondary importance as provided for in the authorizing clause of the Constitution. "Copyright property under the federal law is wholly statutory and depends upon the rights created under the acts of Congress passed in pursuance of authority conferred by . . . the Federal Constitution."⁸⁹ Copyright protection should not be confused with any common law right. Congress created a new and independent right and did not simply sanction a pre-existing one.⁹⁰ Thus the protection given to the copyrighted version is only such as the statute confers,⁹¹ and may be enjoyed only on the terms and conditions specified therein.⁹²

The courts have been given the task of interpreting this statute; they have also been provided with a policy in whose light the interpretation is to occur. As has been shown, the courts, in the main, have been very faithful in effectuating that policy. When viewed in this perspective the copyright law's protection is far from waxen.

James M. Salony

88. "The copyright statutes ought to be reasonably construed with a view to effecting the purpose intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant." *Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co.*, 59 F.2d 70, 76 (1st Cir. 1932).

89. *Id.* at 72.

90. *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182, 30 S.Ct. 38 (1909); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 589 (1834).

91. In the last analysis all copyright cases turn upon the construction of the statute. *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 28 S.Ct. 319 (1908).

92. *New York Times Co. v. Star Co.*, 195 Fed. 110 (S.D.N.Y. 1912).