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Contributors to the May Issue/Notes

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CONTRIBUTORS TO THE MAY ISSUE

CARL WILLIAM DOOZAN, A. B., University of Notre Dame, 1938. Senior in the College of Law, University of Notre Dame. This article was the prize winning article in the Nathan Burkan Memorial Competition, sponsored by the American Society of Composers, Authors, and Publishers.

THORVALD SOLBERG, for biographical notice and list of contributions, see "WHO'S WHO IN AMERICA." Was in charge of the Copyright Office, as the first Register of Copyrights, from 1897 to 1930, and was active during that period and all the years since in trying to secure advanced and honorable international copyright relations between the United States and foreign countries.

RICHARD SPENCER, member of the Illinois and Missouri bars and actively engaged in the practice of patent, trade-mark and copyright law in the City of Chicago; U. S. Naval Academy 1919-23; A. B. George Washington U. 1924; LL. B. Harvard, 1927; First Assistant Commissioner of Patents 1933-36; Lecturer on Law Faculty of Northwestern University; Member Advisory Council to Committee on Patents of the United States House of Representatives.

WILFRED S. STONE, member of the Illinois bar and actively engaged in the practice of patent, trade-mark and copyright law in the City of Chicago; A. B. Harvard, 1926; LL. B. Harvard, 1929.

NOTES

COPYRIGHT LEGISLATION — A PLEA FOR FAIRNESS.—There *is* positive need for revision of our present copyright laws. All interests are universal in their admission that there must be a determined and intelligent effort made towards uniformity and fairness. At the outset, it must be appreciated by all concerned that what they perhaps deem now as necessarily conflicting interests are not, in the final analysis, absolutely inimical. Fairness and a tolerance of the others' needs are essential to the ultimate solution of the matter. Nor is there required a complete re-codification of our present law — rather only a certain few amendments will suffice to set into operation a workable and just plan.

Let us glance over some of the more alarming evils of the copyright law situation today. First in importance, there is the continual working at cross-purposes of the various groups involved. There is the omnipresent struggle between the National Association of Broadcasters and the American Society of Composers, Authors and Publishers — both groups having carried their vendetta into the halls of our national and state legislatures. Then we witness oft-repeated conflicts between the same American Society of Composers, Authors and Publishers, and various firms in the moving-picture industry, notably Warner Brothers.¹ Is this strife inevitable? I say most emphatically “No! And let’s stop it before it is too late!” Why do I sound such a warning note? Because there is another interest, which will, in the long run, be accorded the priority — namely that of the interest of the general consuming public which enjoys the results of the joint endeavors of these various groups. Senator Ryan Duffy, of Wisconsin, recognized this interest when he said, before the House Patents Committee in public hearings on his Copyright Bill (to which specific reference will be made later): “I think it is incorrect in considering copyright to talk about only the persons who get the copyright. I don’t think the courts would hold that you must not consider the great mass of people who are the consuming public. It is up to Congress to see that the consuming public has some protection.” To protect this interest there will be re-enacted the old, old story of the government’s stepping in first to regulate and then to control. So let’s put our respective houses in order, take a page from the books written by the leaders of other fields of human endeavor, reform within our own ranks before we become the victims of the coldly objective and quite often misunderstanding reform from the outside. Let’s demonstrate to the public that we ourselves can amicably settle these internecine squabbles and render to the people a maximum of artistic worth plus a most efficient method of distribution at a reasonable cost. Sound business judgment dictates no other course. All too late did the members of the stock exchanges in this country appreciate the value of this suggestion — made to them long before they finally acted upon it. Before the “reforming groups” succeeded in influencing the entire membership, the Federal Government, through the medium of the Securities Exchange Commission (Securities Exchange Act—1933), today regulates and controls every activity of the exchange members with regulations, orders and decisions. If the members themselves had taken the initiative and agreed as to policy and methods of reform, the necessity for such serious action could have been forestalled, and even perhaps obviated. And now the endeavors of the dominant factions within the exchanges to reform, savor somewhat of a typical illustration of the pathetic old story of “locking the barn door after the horse is stolen.”

¹ 7 AIR L. REV. 78 *et seq.* (January, 1936).

In our field, witness the splendid opportunity missed when, at the time of the proposed passage of the ill-fated Duffy Copyright Bill,² instead of recognizing this as an expedient occasion for "ironing-out" of differences by joint representative meetings while hearings were being held on the Bill, the sundry organizations concerned saw fit to do otherwise. They mapped their respective campaigns, perhaps in the desperation of self-preservation, to vitiate the claims of other groups — with the easily predicted result of all being unsatisfied with the final draft of the Bill, and, consequently, its final death in legislative adjournment without revival in successive sessions of Congress.

In the main, the Bill having been favorably reported out of the Senate Committee on Patents, its merits outweighed its disadvantages. But instead of recognizing this, and insisting on inserting their own needs into the Bill, the factions which considered detrimental to their interests the provisions suggested by the other groups merely succeeded in sounding the death-knell of the Bill in its entirety — "cutting off their nose to spite their face!"

I quote from Senator McAdoo's Committee Report on the Duffy Copyright Bill to substantiate my statement that amendment and not re-codification is sufficient:

"For a number of reasons, the Committee on Patents deems a series of amendments to the present law preferable to a re-codification of effort at complete revision. In the first place, where many great interests are at stake, it is desirable to proceed cautiously, testing certain steps through experience before taking other steps. . . . There should be an immediate end of delay in starting reform, but it does not follow that all desirable reforms should be accomplished immediately.

"The present bill is intended to take the most urgent steps toward bringing the statute law of the country into line with what has occurred during the last twenty-five years."

It must be remembered that the Duffy Bill was "intended also and primarily to accompany, reenforce, and bring the statute into harmony with the general copyright treaty with foreign nations which was favorably reported to the Senate on April 18, 1935 and approved by the Senate without dissent on April 19, 1935."³

For brevity, I shall refer to the one group, namely, the authors and composers, as "producers;" and to other various organizations and individuals using the copyrighted works as the "consumers."

It would seem to the impartial observer that this Bill contains advantages to both groups, and I repeat that very likely it was only because the other side received these considerations that each group may

² S. B. 3047 Report No. 896. 74th Congress, 1st Session No. 12753.

³ Ex. Rept. No. 4, 74th Congress, 1st Session.

have restrained from every possible effort to obtain passage of the measure—a very foolish and short-sighted procedure indeed.

Senator McAdoo, making his committee report, pithily summarizes the benefits as follows:

For the Producers:

“American authors have for decades been seeking certain reforms in the law which will be accorded if the present bill is enacted.

“The chief of these advantages for authors consists in what is known as the ‘right of divisibility.’ While it is possible under present law to license the use of a copyrighted work for certain purposes, without parting with the copyright itself, the procedure is awkward and unsatisfactory. Under the present bill, it is expressly provided that the copyright itself may be divided and that the sale of the right of user for one purpose does not include the right of user for any other purpose.

“At present, if a novelist sells his copyright to a publisher, he normally has parted with everything. Under the bill, he will naturally sell to the book publisher, book rights; to the magazine publisher, serial rights; to the motion-picture producer, motion-picture rights; to the theatre owner, dramatic rights; and to other consumers such further rights as his unlimited copyright may include. Moreover, he may specify the time of the enjoyment of any rights he may grant, and also the territory within which they may be enjoyed, selling to others the same rights for other periods of time or other territories. These provisions afford to authors very large positive benefits, which they will use every day, and are far more important than a diminution of remedial measures, if such exist in the Bill, which in any event are properly used only under abnormal circumstances.

“Among the lesser provisions included for the particular purpose of strengthening the position of authors are the right of registration of unpublished manuscripts, now permitted in only a very limited number of cases, the single term of 56 years instead of a 28-year term renewable for a similar period; additional specifications of the kinds of works which are copyrightable, numerous instances of the rephrasing of language in order to make clearer the rights of authors and the definite stipulation that copyright originally exists in authors and in them alone. . . .”

For the Consumers:

“The bill, accordingly, includes a considerable number of provisions definitely for the purpose of preventing any undue advantage to be taken by the owners of copyright in respect of the consumers of copyrighted works. Among other provisions of this kind, those particularly noteworthy are in the section of the bill which deals with remedies for infringement. . . .

"In regard to the infringement portions of the bill, the outstanding problem is that of statutory damages. Under the present law, for most types of literary and artistic works, an author or composer, whose rights have been infringed, is allowed a minimum of \$250 without proving any actual damage from the infringement.

"The existence of such a provision, as well as some others of the remedial provisions, has a significance much larger than the mere matter of collecting damages. Producers and consumers of literary and artistic works make use of these provisions as bargaining points in their original contracts of purchase and sale. It is believed that such use goes far beyond what should be expected from the normal reliance of property owners upon the law to defend them against unauthorized uses of their property. Indeed, it is believed that both producers and consumers find their chief use for these provisions of law as aids to the ulterior purpose of endeavoring to extract better bargains in their dealings with one another. It is believed, further, that this constitutes the true reason why the producing and consuming interests exhibit such profound concern regarding them.

"The committee is firmly of the opinion that to eliminate the statutory minimum of \$250 for infringement without proof of damage is to eliminate the chief factor in the use of the law for bargaining, sometimes for coercive purposes, between producers and consumers of copyrighted works. The range of the use of such works has correspondingly increased. . . . For the law to attempt to fix a specified sum as minimum damages in view of the breadth of this usage, would seem wholly unreasonable.

"Accordingly, entirely apart from the ulterior use of the minimum statutory damages under the present law, it is deemed necessary to make the change which the bill contains. This change does not lessen the value of the section so far as its purpose is concerned. That purpose is to accord a remedy for infringement, not a weapon under which the owners of copyright may stimulate the sale of their works.

"In place of the stated minimum, the bill provides that the courts shall award sufficient statutory damages to prevent infringements and such as may be just, proper, and adequate in view of the circumstances of the particular case. The maximum is fixed at \$20,000, four times the amount specified in the present law. This seems appropriate in view of the vast increases in recent years in the value of copyrightable works.

"Producers of copyrighted works have been persistent in their assertion that this takes from them an essential remedy. The Committee on Patents believes that the reverse is true. So many palpable injustices have arisen from the present law that courts have acquired a dislike for handling such cases and have come to feel that the law is wrong. It is believed that, with the enactment of this provision of the

bill, the courts will realize that the statute lays a foundation under which they can do justice and that they may be relied upon to utilize their full powers and abilities to such end.

"There would seem to be little doubt but that, given the opportunity, the courts will accept with enthusiasm the task of preventing infringements and that the cases which actually come before them will prove clearly that the authors and composers of the country are far better off than they were before. It may be noted in this connection that the provision of the bill is based upon confidence in the ability of the courts to pronounce justly between plaintiff and defendant. A stated minimum sum, fixed by statute, indicates distrust of the courts. Plaintiffs who start suits distrusting the courts are likely to have an equal distrust in the merits of their causes. It has been said, that in order to feel that he can bring suit for infringement, a poor author must be assured of a certain minimum of damages. If the use of the copyright work is worth anything at all to the user, the court must, under the terms of the bill, award something. Since it must award enough to stop such infringements, it must award at least enough to cover what infringement is worth to a user.

"The other remedial provision about which there has been important controversy is that of injunctive relief. Producers of copyrighted works claim that, unless full rights of injunction are accorded them, users of copyrighted works will pay no attention to their rights and will simply remunerate them in damages after having callously used their works in whatever manner was desired. Users of copyright works, on the other hand, claim that unless given a large exemption from the full implications of the law of injunction, they may be put to vast and unwarranted losses in cases that would be of small use to copyright owners and might, indeed, enable copyright owners to indulge in practices differing little from blackmail.

"For instance, a publication about to go to press might, under present law, be enjoined because of the appearance of a single small item which infringed some copyright. Or a radio broadcaster might be about to begin a program and have that program seriously interfered with through the deletion of some part in which, quite unknown to the broadcaster, claim of copyright existed. In such cases, it is obviously better that the copyright holder should run the risk of some loss, which could in all cases be reimbursed in damages, than that the copyright user should be thus placed in jeopardy in the course of his business. Accordingly, the present bill reduces the injunctive remedy, but quadruples the maximum of statutory damages, and continues the present unlimited amount of damages recoverable when actually proved."

Offhand I would say this last paragraph is an excellent illustration of the time-honored and oft-utilized rule of "balancing the equities."

A humorous twist is added to fill out the picture of the different defects of our present law. It will be of especial interest to men in public life. Section 28 of the Duffy Bill reads: "Copyright in the photograph of a single individual shall not be had except with the written consent of the person photographed." This feature was inserted because under the presently effective Copyright Act ⁴ a photographer may copyright the portrait which he has made of an individual with the result that the individual photographed cannot publish or permit his friends to publish his own photograph! Consequently we easily see the need for revising the law so that copyright in individual photographic portraits should be limited to the consent of the subject of the portrait.

Once again quoting the Chairman of the Senate Committee on Patents (Senator McAdoo), we find his conclusion:

"In reporting favorably the present bill to amend the copyright law, the Committee on Patents is confident that it has framed a *measure which will establish equity among the various interests concerned. There is every reason to believe that no interest will suffer injury from any provision of the bill. There is every reason to believe that everyone interested in copyright will obtain positive benefit from the bill.* This does not mean that every request of every person concerned has been followed in the drafting of the bill. It does mean that practically everyone concerned with copyright will be better off under the law as amended by the Bill than under the law as it now stands. The Committee believes that the great industrial undertakings, the authors' organizations, and the individual creators of literary and artistic works will alike find in the amended law a firmer basis than they have ever before enjoyed for the encouragement of sound methods of conducting their business and pursuing their professions and for the maintenance of wise and progressive economic policies."

One more salutary amendment found in the Duffy Bill reads:

"In the event that advertising matter of any kind carried by a newspaper, magazine, or periodical, or broadcast by radio shall infringe any copyrighted work, where the publisher of the newspaper, magazine, or periodical, or the broadcaster, shall *show that he was not aware that he was infringing and that such infringement could not reasonably have been foreseen*, the person aggrieved shall be entitled to an *injunction only* 1. before work of manufacture of the issue has commenced, or, in the case of broadcasting, before the rehearsal of the program has begun; or 2. against a continuation or repetition of such infringement in future issues or such newspaper, magazine, or periodical, or in future broadcasts; and shall not be entitled to any profit made by such pub-

⁴ The Copyright Law of the United States of America. Act passed March 4, 1909. Title 17, U. S. C. A. (Amended later. Stat. Vol. 35).

lisher or broadcaster from his contract of employment to carry such advertising matter, or to damages, actual or statutory, against him.

Studying that provision I cannot help but realize its practical worth in curing such a situation as arose in a very recent case—*Buck v. Dacier*⁵ wherein the Federal Court found “It is settled that knowledge of the particular selections to be played is immaterial and *intention to infringe* is unnecessary—referring to citations found by the same Court in the case of *Buck v. Henry Della Russo*,⁶ and where the statutory minimum damages of \$250 (17 U.S.C.A. Sec. 25) were awarded, as well as an injunction, on each of two counts—one count for each of the two songs played by an orchestra in the defendants’ dine and dance establishment! Observe the alleged “justice” of such a decision! Damages of \$500 for the playing once of two songs by an orchestra without the knowledge of the defendants as to what musical compositions the orchestra would or would not play!

Granting, therefore, that, in the main, the Duffy Bill was a sincere and constructive measure, the fact remains that it failed of passage and that *the various defects and needs are still unremedied and unfilled.*

There are very likely many reasons for the failure of the Bill’s passage. I submit that the attack on the Bill centered on its broad restriction of the exclusive rights granted to the holder of the copyright for the time during which the copyright subsists.

Copyright laws are enacted pursuant to Article I, Section 8, Clause 8 of the Constitution of the United States, which provides that:

“The Congress shall have power . . . to promote the progress of a science and the useful arts, by securing for limited times to authors and inventors the *exclusive right* to their respective writings and discoveries.”

The basic enabling Act of Congress, giving effect to this section of the Constitution, provides:

“Section 1. Exclusive rights as to copyrighted works. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work;

(e) To perform the copyrighted work publicly for profit if it be a musical composition and . . . to make . . . any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . .”

The grant of these exclusive rights to authors does not take anything away from the public. The intellectual property protected by a

⁵ *Buck v. Dacier*, 26 Fed. Supp. 37 (1938).

⁶ *Buck v. Russo*, 25 Fed. Supp. 317 (1938).

copyright is enjoyed by the author for but a limited period, during which time the author must reap the benefits of his labors. After the expiration of the copyright the public is allowed unrestricted access to and use of his literary property. *Because he enjoys his property rights for only a limited period of time, the framers of the Constitution made the right exclusive.*

The copyright owner cannot be forced to surrender any part of this exclusive right except upon such terms as the copyright owner may fix.

The true nature of copyrights and patents was explained by Justice Roberts in *United States v. Dubilier Condenser Corp.*:⁷

"Though often so characterized, a patent is not accurately speaking, a monopoly, for it is not created by the executive authority at the expense and to the prejudice of all the community except the grantee of the patent. *Seymour v. Osborne.*⁸ The term monopoly connotes the giving of an exclusive privilege for buying, selling, working, or using a thing which the public freely enjoyed prior to the grant. Thus a monopoly takes something from the people. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge. *He may keep his invention secret and reap its fruits indefinitely.* In consideration of its disclosure and the consequent benefit to the community, the patent is granted. An exclusive enjoyment is guaranteed him for 17 years (28 years for copyright), but upon the expiration of that period, the knowledge of the invention enures to the people, who are thus enabled without restriction to practice it and profit by its use."

"The title of a patentee is subject to no superior right of the Government. The grant of letters patent is not, as in England, a matter of grace or favor, so that conditions may be annexed at the pleasure of the executive. *To the laws passed by Congress and to them alone, may we look for guidance as to the extent and the limitations of the respective rights of the inventor and the public.* And this Court has held that the Constitution evinces no public policy which requires the holder of a patent to cede the use or benefit of the invention to the United States, even though the discovery concerns matters which can properly be used only by the Government; as, for example, munitions of war. *James v. Campbell,*⁹ *Hollister v. Benedict Mfg. Co.*¹⁰

The copyright owner is entitled to the full benefits of the statutes in existence at the time he secures his copyright. *Nothing can be added to or subtracted from those rights.* It is of vital importance and forms

⁷ *U. S. v. Dubilier Cond. Co.*, 289 U. S. 178 (1933).

⁸ *Seymour v. Osborne*, 11 Wall. 516, 533, 78 U. S. 516 (1871).

⁹ *James v. Campbell*, 104 U. S. 356, 358 (1882).

¹⁰ *Hollister v. Benedict Mfg. Co.*, 113 U. S. 59 (1885).

the very base for the reasonable and equitable solution of our problem. No statute, Federal or State, can impair rights granted under existing copyrights.

Chief Justice Baker in *Rubber Tire Wheel Co. v. Milwaukee Rubber Company*¹¹ said:

“Use of the invention cannot be had except on the inventor’s terms. Without paying or doing whatever he exacts, no one can be exempted from his right to exclude.”

In *United States v. Bell Telephone Co.*¹² an action was brought to cancel a patent on the ground that the inventor delayed securing it for thirteen years, and thereby extended the period of the patent; and that the purchase of the patent by the Bell Company extended its monopoly on the telephone through the ownership of other patents. It was argued that the Bell Company, as an assignee of the inventor had less rights than the original inventor and that it held the patents as a quasi trustee for the public. Justice Brewer stated in overruling these contentions:

“The inventor of the latest addition is entitled to full protection, and if the telephone company buys that invention it is entitled to all the rights which the inventor had. All that the patent law requires is that when a patent expires, the invention covered by that patent shall be free to every one, and not that the public has the right to the use of any other invention, the patent for which has not expired, and which adds to the utility and advantage of the instrument made as the result of the combined inventions.

“Counsel seem to argue that one who has made an invention and thereupon applies for a patent therefor, occupies, as it were, the position of a quasi trustee for the public; that he is under a sort of moral obligation to see that the public acquires the right to the free use of that invention as soon as is conveniently possible. We dissent entirely from the thought thus urged. The inventor is one who has discovered something of value. It is his absolute property. He may withhold the knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention. He does not make the law. He does not determine the measure of his rights. The legislative body, representing the people, has declared what the public will give for the free use of that invention. He cannot be heard in the courts to say that it is of such value that he is entitled to a larger and longer monopoly; that he is not fully compensated by the receipts during seventeen years (28 years for copyright under present Act), for the great benefit which his invention has bestowed. No representative of the public is

¹¹ *Rubber Tire Wheel Co. v. Milw. Rubber Co.*, 154 Fed. 358 (1907).

¹² *U. S. v. Bell Telephone Co.*, 167 U. S. 224 (1897).

at liberty to negotiate with him for a new and independent contract as to the terms and conditions upon which he will give up his invention. He must come under the dominion of the statute, and take that which the public has proffered its willingness to give. *As the lawmaking power has prescribed what the public will give, specified the terms and conditions of purchase, indicated the time and methods of determining the right of compensation, he on his part has an absolute legal right to avail himself of all the provisions thus made.*"

The doctrine of exclusivity applied in the patent cases cited above is of equal force in the field of copyrights as seen in the following cases: *Lithograph Co. v. Sarony*,¹³ *American Tobacco Co. v. Werckmeister*¹⁴ and *Caliga v. Inter Ocean Newspaper*.¹⁵

All the above lends weight to the criticism that the Duffy Bill was regarded, at least by some authorities as unconstitutional, inasmuch as any provision of the new Bill would attempt to give the author anything but an exclusive right, and Congress has no power to permit third parties to use the private property of the copyright-holder, without his consent.¹⁶

Two provisions in Section 17 of the Duffy Bill were attacked as being unconstitutional. One eliminates the liability for performance of a copyrighted work the manufacturers of disc records and music rolls and coin-operated instruments. It would appear that this invades the exclusive right of the author since the manufacturers certainly operate these devices for their own private gain and certainly not in the public interest — resulting in the appropriation of private property for private use and a violation of the due process clause.¹⁷ The other provision permits the use by motion picture producers and broadcasters of a copyrighted work without payment of royalty as long as the use is incidental. This clause was inserted to circumvent the effect of a decision of the English Court of Appeals where an exhibitor of a news-reel motion picture used 28 bars of accompanying musical march, lasting only 50 seconds, and was held to have infringed the copyright of the music.¹⁸ The same constitutional objections, due process and taking of private property for private use, would seem to apply. It would seem feasible, therefore, that in prospective revision of our Copyright Law we strike out these provisions.

An alarming tendency is the growing prevalence of state statutes having for their purpose the regulation and control of the operations of copyright holders and their licensees within the respective jurisdic-

¹³ *Lithograph Co. v. Sarony*, 111 U. S. 53 (1884).

¹⁴ *American Tobacco Co. v. Werckmeister*, 207 U. S. 284 (1907).

¹⁵ *Caliga v. Inter Ocean Newspaper*, 215 U. S. 182 (1909).

¹⁶ 7 *AIR L. REV.* 85 (1936).

¹⁷ *Missouri Pacific Rwy. v. Nebraska*, 164 U. S. 403 (1895).

¹⁸ *Hawkes v. Paramount Film Service, Ltd.*, 151 L. T. R. 298 (1934).

tions of each state. There is no denying that the states have, through their police power, the "right to enact legislation which affects copyrights — that is upon the use and transfer of those rights, providing that these restrictions are placed on purely local — intrastate — activity, and that they are reasonable under the Fourteenth Amendment. In the nineteenth century the Supreme Court sustained a state patent statute which was designed to eliminate the fraudulent practices of that era. The statute, a typical one, provided that the patentee must file with the county clerk a copy of the letters patent and an affidavit stating their genuine quality and his authority to assign them. Thus the burden on the patentee was slight and did not, in any substantial fashion, interfere with his right to vend."¹⁹ Justice Harlan of the United States Supreme Court states in the first of these cases, *Patterson v. Kentucky*:²⁰ that the rights conferred upon a patentee and his assigns to use and vend, created by the application of a patented discovery, must be exercised in subordination to the police regulations which the state established by such statute. Here there was a Kentucky statute regulating the inspection and gauging of oils and fluids. He held that the statute did not contravene the Federal Constitution. Then in *Allen v. Riley*,²¹ the majority opinion ruled that a Kansas statute compelling one selling a patent right in any county of that state to file with the clerk of such county an authenticated copy of the letters patent, together with an affidavit of the genuineness of the letters patent did not violate Article 1, Section 8 of the Federal Constitution. However, a vigorous dissent by Chief Justice White and Justice Day stated "We think the requirements as to recording the patent and affidavit are void, because repugnant to the power delegated to Congress by the Constitution on the subject of patents, and because in conflict with the legislation of Congress on the same subject."

Please do not misunderstand me. There is no doubt that "An attempt by a state legislature, in good faith, to regulate the conduct of a portion of its citizens, in a matter strictly pertaining to its internal economy cannot be regarded but as a legitimate exercise of such power, although such law may sometimes *indirectly* affect the enjoyment of rights flowing from the Federal government."²² and "The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself."²³ But this certainly does *not* mean that a state statute is valid if in effect it nullifies the legislation passed by Congress by which Congress "occupies the field."

¹⁹ 33 ILL. L. REV. 554 (1939).

²⁰ *Patterson v. Kentucky*, 97 U. S. 501 (1878).

²¹ *Allen v. Riley*, 203 U. S. 347 (1906).

²² *Jordan v. Overseers of Dayton*, 4 Ohio 295.

²³ *Stevens v. Gladding*, 17 Howard 530.

"Congress has provided the procedure by which a composer may obtain the benefits of the Copyright Act, it has also provided the remedies for its violation. The desired and necessary uniformity of the Act in its application is lost if any one state is allowed to set up different rules for its enforcement. To redefine what constitutes a public performance, as the state statutes have done, to the extent of making meaningless the words of the federal statute seems likewise objectional. Such new definitions have taken the form of 1. granting to all purchasers of copyrighted music, within or without the state, the right to perform that music for profit, within the state, or to permit others to do so, and 2. giving to rebroadcasters within the state the right to publicly perform copyrighted music over the protest of its owner. As the Copyright Act provides that each and every unauthorized public performance of a copyright piece is an infringement,²⁴ the state grant of a perpetual right is clearly inconsistent with the Act. Likewise, the grant to the rebroadcasters seems inconsistent with the view taken that each broadcast of music is a performance, whether it is a rebroadcast or not.²⁵ Although the Supreme Court has made no affirmative ruling that such rebroadcasting is intrastate commerce, the indication in its dicta and analagous holdings would seem to indicate that this would be its view. Such a determination, however, is not conclusive of the rights of the states to regulate this commerce, since the rebroadcasting would nevertheless come within the exclusive federal copyright act, although not within the exclusive interstate commerce grant. It seems fair to conclude that these state statutes are in conflict with the Federal Copyright Act and hence invalid."²⁶

Justice Story, in his famous Commentaries, Section 1152, warned against this trend:

"It was beneficial to all parties, that the National Government should possess this power; to authors and inventors because, otherwise they would have been *subjected to the varying laws and systems of the different states on this subject, which would impair and might even destroy the value of their rights*; to the public as it would promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint. In short, the only boon which could be offered to inventors to disclose the secrets of their discoveries, would be the exclusive right and profit of them, as a monopoly for a limited period. And authors would have little inducement to prepare elaborate works for the public, if their publication was to be at a large expense, and, as soon as they were published, there would be an unlimited right of depredation and piracy of their copyright."

²⁴ Remick & Co. v. American Auto Acc. Co., 5 Fed. (2) 411 (1925).

²⁵ Buck v. Jewell-LaSalle Realty Co., 283 U. S. 191 (1931).

²⁶ 33 ILL. L. REV. 556-557 (1939).

If the several states are permitted to make the inroads upon the author's exclusive right which these various statutes attempt, it will not be long before authors will lose all power of controlling the manner in which and the terms upon which their property is disposed of; and the instances in which their property can be used without compensation will constantly grow.

Encroachments upon constitutional rights and guarantees is at first subtle and scarcely noticeable. And that is why we must firmly deal with these beginnings of multifarious and diverse methods and means of government control. The Supreme Court said in *Monongahela v. United States*:²⁷

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that Constitutional provisions for the securing of person and property should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

There is an improving array of authority to the effect that since Congress has the power to enact and *has enacted* copyright laws designed to give notice to the public that a work has been copyrighted or that the copyright has been assigned, the several states are precluded from legislating in that field.²⁸⁻³¹ In *Napier v. Atlantic Coast Line Company*, one of the authorities, Justice Brandeis, ruled that Congress had power to preclude state legislation regulating locomotive equipment for use in interstate commerce after occupying the field itself. Congress occupied the field by passing the Boiler Inspection Act; hence state legislation regulating equipment of locomotives used in interstate commerce is precluded. The decision read:

"The Federal and the state statutes are directed to the same subject — the equipment of locomotives. They operate upon the same object. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the states are precluded, however commendable or however different their purpose."

²⁷ *Monongahela v. U. S.*, 148 U. S. 312 (1893).

²⁸ *Napier v. Atlantic Coast Line*, 272 U. S. 605 (1926); 47 S. C. 207, 71 L. Ed. 432.

²⁹ *Erie Ry. Co. v. New York*, 233 U. S. 671 (1914).

³⁰ *New York Central Ry. Co. v. Winfield*, 244 U. S. 147 (1917).

³¹ *Penn. Ry. Co. v. Pub. Serv. Com.*, 250 U. S. 566 (1919).

In *Atlantic Coast Line Ry. Co. v. Georgia*,³² it was held that "In the absence of federal legislation, the states are at liberty, in the exercise of their police power, to establish regulations for securing safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce, and that the Safety Appliance Acts of Congress, since they provided no regulations for locomotive headlights, showed no intent to supersede the exercise of state power with respect to this subject." But this decision is no longer controlling because Congress has since then by the Act of March 4, 1915³³ "exercised its power as to equipment over the entire locomotive and tender and all parts and appurtenances thereof."³⁴

By analogy therefore, we can see that the best way of clarifying this situation of conflict and confusion would be a construction by the Supreme Court that the Federal Copyright Act operates in the same manner as the Boiler Inspection Act "occupying the field and precluding state legislation," or by inserting this express provision in an amendment to the Federal Copyright Act. Such a provision is not only constitutional but logical and practical.

The fact that resort should be had only to the Federal Congress and not to the various state legislatures for needed and desired revisions of our copyright laws and their operations is self-evident. It is to the mutual advantage of all interests concerned that there should be removed the possibility of 48 different legislative bodies acting arbitrarily in the matter of the preservation and regulation of these valuable and supposedly-guaranteed copy-rights.

Uniformity is essential. "Laws regulating copyrights must operate uniformly throughout the United States, just as in the case of maritime legislation under Article III, Section 2, of the United States Constitution."³⁴

Uniformity is the practical solution. The different groups then have only the one governmental body to which to present their needs and reasonable wants. If the states are permitted to legislate broadly on copyrights, the particular interests responsible for certain state statutes now restricting rights of copyright owners should not forget that the same states or other states could also expand the rights of the copyright owner if they see fit to do so. It seems only reasonable, therefore, that the one national legislature, viewing the problem in its entirety, and not merely from the standpoint of peculiarly local conditions, should enact the laws dealing with such fundamental rights. Let's not "heap coals upon our own heads" by erroneously insisting that appeal for relief or improvement of our copyright laws should be made to our state govern-

³² *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280 (1914).

³³ Boiler Inspection Act. March 4, 1915 c. 169, 38 Stat. 1192 amendatory of Act of Feb. 17, 1911, c. 103, 36 St. 913.

³⁴ *Vandalia Ry. Co. v. Pub. Serv. Com.*, 242 U. S. 255 (1916).

ments. Observe the universally satisfactory regulation of our bankruptcy laws under the authority of Congressional legislation as against the confusion and uncertainty previously existing under state regulation. Could we countenance the proposition that Federal Court decisions and pronouncements of rights under the Federal Bankruptcy Act would not be final and conclusive until there was a strict compliance with local administrative detail? Yet that is what, in effect, the exponents of the states' jurisdiction seriously maintain.

Let us arbitrate our various differences, and if, for the ultimate general good, there is necessity, we should proffer intelligent and reasonable adjustments, thereby achieving the universally-desired objective—a simple, unambiguous, universal and justicial Copyright Law. The satisfaction all will derive—producers, consumers, and general public—will be well worth our joint and whole-hearted effort.

Edward Francis O'Malley.

INFINGEMENT OF COPYRIGHT MUSICAL COMPOSITIONS BY RADIO BROADCASTING.—In the early development of radio law, the right to broadcast copyright productions was seriously questioned. Bills in equity were brought to enjoin radio stations from reproducing copyrighted musical compositions, by radio broadcasting.¹ The main point in controversy was whether or not the broadcasting of copyrighted musical compositions constituted an infringement of the Copyright Act.² Section 1 of the Copyright Act provides:

“Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right; (e) To perform the copyright work publicly for profit if it be a musical composition and for the purpose of public performance for profit . . .”

At first, there was no objection by authors to the broadcasting of copyright productions by radio. The courts believed that the advertising value to the owner of the musical composition was adequate compensation. One court said:³

“ . . . Our opinions of the possibilities of advertising by radio leads us to the belief that the broadcasting of a newly copyrighted musical composition would greatly enhance the sales of the printed sheet. But the copyright owners and the musical publishers themselves are perhaps the best judges of the method of popularizing musical selections.” As time went on, it seems that the American Society of Composers, Au-

¹ *Witmark & Sons v. Bamberger & Co.*, 291 Fed. 776 (D. C. N. J. 1923); *Remick & Co. v. General Electric Co.*, 16 F. (2d) 829 (S. D. N. Y. 1926).

² Copyright Act of March 4, 1909, c. 320, sec. 1, 35 Stat. 1075.

³ *Witmark & Sons v. Bamberger & Co.*, 291 Fed. 776, 780 (D. C. N. J. 1923)

thors, and Publishers⁴ began to set up an opposition to the use of copyright material without permission of the owners.

The exclusive right of the copyright owner is not, according to the Statute, related to public performances not for profit, nor to private performances, but only to public performances for profit. Consequently, in considering the litigation, two questions must be considered: (1) whether the broadcasting of the musical composition is a "public performance;" and (2) Concluding that it is a performance, whether it is one "for profit." The query as to whether any particular performance is for profit, depends upon the circumstances of the performance. A radio broadcast might be made for a philanthropic purpose by an eleemosynary organization, for scientific purposes by an educational institution, by an enthusiastic amateur merely for the hobby, or by a hotel or restaurant for the purpose of advertising its business. In only the last named case would there be the purpose of making a pecuniary profit for the benefit of the person instigating the performance. In 1915, the Federal Circuit Court of Appeals⁵ interpreted the words "for profit" to mean a direct pecuniary charge for the performance, such as an admission fee, and was held not to bring within this scope a performance in a hotel dining room, where no admission was charged. *Hubbell v. Royal Pastime Amusement Co.*⁶ laid down an explanation of what was meant by a "performance for profit." The court said that Section 1, (e) "is a protection of those persons who do not perform publicly for profit the musical composition — as in the case of street parades, school, educational, or similar public occasions and exhibitions."

An early test case⁷ set up the foundation for later questions which were to arise from a radio broadcasting. The defendant conducted a public restaurant in New York City where he had paid performers who sang for the entertainment of customers visiting the restaurant. Injunctive relief was sought by the owner of a copyrighted song entitled, "Sweethearts," who alleged that his property rights were being invaded. The question presented was whether the performance of a copyrighted musical composition in a restaurant or hotel without a charge for admission to hear it infringed the exclusive right of the copyright to perform the work publicly for profit. Relief was denied by the Federal District Court⁸ and the Circuit Court of Appeals⁹ on

⁴ The American Society of Composers, Authors and Publishers is a voluntary non-profit association of American citizens, qualified and recognized composers, authors and publishers of musical works. It was organized in 1914 by the late Victor Herbert to protect the rights of individuals in enforcing their musical copyrights against illegal public performance for profit.

⁵ *John Church Co. v. Hilliard Hotel Co.*, 221 Fed. 229 (C. C. A. 2d 1915).

⁶ 242 Fed. 1002 (S. D. N. Y. 1917).

⁷ *Herbert v. Shanley Co.*, 242 U. S. 591, 37 Sup. Ct. 232, 61 L. Ed. 511 (1917).

⁸ 222 Fed. 344 (S. D. N. Y. 1915).

⁹ 229 Fed. 340, 143 C. C. A. 460 (1916).

the ground that there was no direct charge to the public. The United States Supreme Court reversed the decision, and the Court through Mr. Justice Holmes said:

"If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiff to have. It is enough that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough."¹⁰

Thus, the *Shanley* case established that an indirect charge would amount to a profit, although no admission fee was exacted. This was but the foundation for the landmark case of *M. Witmark & Sons v. L. Bamberger & Co.*¹¹ Here, the court held that a department store selling radio equipment and conducting a radio broadcasting station, the cost of which is charged against the expenses of the business, in broadcasting therefrom a copyrighted song does so "for profit" within the Copyright Act. The station was transmitting for the publicity it would receive, and in as much as its business was the selling of radio sets, accessories, etc., and the cost of broadcasting was charged against the general expenses of the business, it was publicly for profit. An extremely opposite conclusion was reached by the United States District Court for the Southern District of Ohio, Western Division, in the case of *Jerome H. Remick & Co. v. American Automobile Accessories Co.*,¹² in which the court reached the conclusion that radio broadcasting performed within the confines of a broadcasting studio was not a public performance for profit. The court uniquely held:¹³

". . . We are familiar with the holding of the United States District Court for the District of New Jersey in the case of *M. Witmark & Sons v. L. Bamberger & Co.*, 291 Fed. 776, in which the court con-

¹⁰ 242 U. S. 591, 594.

¹¹ *Supra* note 3.

¹² 298 Fed. 628 (S. D. Ohio, 1924). Followed in Australian case of *Chappell & Co., Ltd. v. Associated Radio Co. of Australia, Ltd.*, Victoria L. R. 350 (1925).

¹³ 298 Fed. 628, 631.

cluded that the rendition of a song for broadcasting purposes was a public performance of the musical composition, and that such performance was unquestionably for profit within the decision of *Herbert v. Shanley Co.*, 242 U. S. 591, 37 Sup. Ct. 232, 61 L.Ed. 511. While considered seriatim, this opinion might be said to arrive at a logical conclusion, *viz.* that the singing was a performance, that it was public in the sense that those could listen who cared to and were equipped with receiving instruments, and that it was for profit because of its advertising value, and therefore every element of a public performance for profit had been disclosed, we have been unable to bring ourself to the conclusion that such broadcasting was within what Congress had in mind when using the language 'perform publicly for profit.'

"Funk & Wagnall's Standard Dictionary (1911) defines a performance:

'(2) Specifically a representation on the stage or before an audience or spectators; and exhibition of feats; any entertainment at a place of amusement; as, two performances daily.'

On appeal, the decision was reversed by the United States Circuit Court of Appeals.¹⁴ Judge Mack maintained the already advanced view that a performance is public although the listeners are unable to communicate with one another, or are not assembled within an enclosure or gathered in a public place. The learned judge repudiated the contention of the defendant broadcasting station that the performance was not for profit as no direct compensation was received, saying that the Copyright Act was directed against a *commercial* public use of another's composition, even though such use was for an indirect benefit.

These decisions seem to well settle the question of the broadcaster's liability when an unauthorized composition is disseminated over the air from his studio. The rendition would be both a performance "for profit" and a "public performance for profit," within the meaning of the Copyright Act. But another problem is confronted when one who has no connection with the rendition of the copyrighted musical composition picks up another's performance. In determining whether such person is an infringer, two questions arise: (1) Was the original broadcast authorized, or (2) Was it unauthorized? In *Jerome H. Remick & Co. v. General Electric Co.*,¹⁵ Judge Knox in the lower court said that if the performance is that of an unauthorized person, then the broadcasting of this performance merely gives the authorized performer a larger audience and is not separate performance of the broadcaster. Two years later, on a final hearing of the same case in the

¹⁴ *Remick & Co. v. American Automobile Accessories Co.*, 5 F. (2d) 411 (C. C. A. 6th 1925), reversing 298 Fed. 628.

¹⁵ *Remick v. General Electric Co.*, 4 F. (2d) 160 (S. D. N. Y. 1924).

federal district court,¹⁶ it was disclosed that the performance by the hotel orchestra was unauthorized, and the defendant was liable as a *contributory infringer* on the ground that it was engaging in the transmission to the radio audience of the original unauthorized production. The court said: ¹⁷

"Certainly those who listen do not perform and therefore do not infringe. Can it be said with any greater reason that one who enables others to hear it participates in the unauthorized performance, so as to be a contributory infringer? Surely not, if, as is argued by analogy, he merely leaves the windows open, so that the strains of the music may be heard by those in the street below. Such is not the case of the broadcaster, equipped with instruments animated by electricity constantly furnished, who throughout the performance of the orchestra picks up each note. . . . Certainly, if he broadcasts without authority from the owner of the copyright a private rehearsal of a copyrighted production, he contributes to the resultant infringement. If, in the case at bar, the public had not been present in the public ballroom of the hotel while the orchestra continued to play, and the broadcaster to broadcast, he would have contributed to the infringement while the public was absent; but the presence or absence of an audience in the hotel cannot change the character of his acts of contributory infringement." It is interesting to note that the conclusion in the earlier case that it was not a separate performance, was not disturbed. The results of the case seem to indicate that if the performance in a public place is authorized, the broadcaster is actively engaged in the infringement. As yet, no court considered the possibilities of contributory infringement by a *receiver* of a radio program.

In 1929, two courts, that of California and Missouri, decided on the question of reception. Both were similar in fact. In *Buck v. Debaum* ¹⁸ and *Buck v. Duncan*,¹⁹ the actions were by the American Society of Composers, Authors, and Publishers, for infringement against hotel proprietors operating ordinary master radio receiving sets to which were attached loud speakers permitting copyrighted musical compositions to be made audible to its patrons. In the former case, the station had permission to broadcast the composition, and in the latter, it was unauthorized. The court in the *Bebaum* case ²⁰ held that the reception and distribution of "Indian Love Call" by the hotel, although done "publicly" and for "profit," did not constitute a separate performance. They went on to say that the receiver does not perform within the meaning of the Copyright Act, but that the performance takes place

¹⁶ *Remick v. General Electric Co.*, 16 F. (2d) 829 (S. D. N. Y. 1926).

¹⁷ *Supra* note 16.

¹⁸ 40 F. (2d) 734 (S. D. Cal. 1929).

¹⁹ 32 F. (2d) 366 (W. D. Mo. 1929).

²⁰ *Supra* note 17.

in the broadcaster's studio, and when owners of the copyright licensed the broadcasting station to disseminate the copyright composition, they impliedly sanctioned and consented to any "pick up" out of the air that was possible in radio reception. In *Buck v. Duncan*,²¹ the court held for the defendant on the ground that the reception of the unauthorized broadcast was not a performance of the copyrighted composition. The Federal District Court for Missouri said:²²

"In this case the defendant did not intentionally perform the copyrighted musical composition, even if it be granted that radio reception is performance. The defendant has a right to have a radio in its hotel for the entertainment of its guests and to operate that radio. If, while it was operating, some other than the defendant, wholly without defendant's participation, put upon the ether and so threw into defendant's radio electric impulses which came out of the radio as an audible rendition of a copyrighted musical composition, that was not in any sense the act of the defendant. The intent of the defendant did not enter into that act. If it was performance of a musical composition, it was a performance, not by the defendant, but by the broadcaster, on the defendant's instrument."

The district court entered a decree *pro confesso* against Duncan, but dismissed the bill for lack of equity as to the hotel. On appeal, the Circuit Court of Appeals for the Eighth Circuit certified the following question to the United States Supreme Court:²³

"Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance within the meaning of Paragraph 1 (e) of the Copyright Act of March 4, 1909?"

The Supreme Court answered this question in the affirmative in an opinion handed down by Mr. Justice Brandeis.²⁴ It was already seen that the owner of a private radio receiving set, who in his own home invites friends to hear a musical composition which is being broadcast, would not be liable for infringement. But here, the contention is that the hotel is not guilty of a performance within the meaning of the Copyright Act. This is urged on three grounds. The opinion of the Court was reached by the elimination of the arguments set up by the defendant, rather than by any positive assertion of what constitutes performance.

²¹ *Supra* note 18.

²² 32 F. (2d) 366, 368.

²³ 51 F. (2d) 726 (C. C. A. 8th 1931).

²⁴ *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, 51 Sup. Ct. 410, 75 L. Ed. 971 (1931).

(1) The defendant contends that the Act could not reasonably be construed to apply to one who merely receives a composition which is being broadcast. The defense urges that it did not perform, because there can be but one performance each time a copyrighted selection is rendered, and if the broadcaster is held to be a performer, one who receives and distributes the transmitted selection cannot also be held to have performed it. Justice Brandeis rejected this theory relying upon the original act for his interpretation of the term "performance." Nothing in the Copyright Act circumscribed the extent of construction to be attributed to "performance," nor does it prevent a single rendition of a copyrighted selection from resulting in more than one public performance for profit. The defendant further maintains that the acts of the hotel company were not a performance because no detailed choice of selections was given to it; the operator of a radio receiving set cannot render at will a performance of any composition, but must accept whatever selection is transmitted during the broadcasting period. This argument was also discarded, in as much as knowledge of the particular piece to be played or received is immaterial. The opinion stated: "One who hires an orchestra for a 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 on a broadcasting station for his own commercial purposes, he necessarily assumes the risk that in so doing he may infringe the performing rights of another."

(2) In answering the second argument of the defendant that reception of a radio program was mere audition, Justice Brandeis submitted that reception was essentially reproduction, and the reproduction amounted to a performance. In the words of the court:²⁵

"There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where by means of the radio set and loud speakers here employed, it furnishes the same music, for the same purposes. In each the music is produced by instrumentalities under its control."

(3) In the third argument, the defendant contends that there was no performance within the meaning of the Act because no profit was shown as a result of the hotel operating the receiving set and loud speakers. This was disposed of, as the establishment of performance does not depend upon the existence of the profit motive.

The *Jewell-LaSalle* case may be said to have laid down the rule that a radio reception of a copyrighted musical composition for profit, is a separate performance of the receiver, making him liable as an infringer, when the reception and broadcast were made without authority of the copyright owner. Much of the law must be left to inference

²⁵ *Supra* note 23.

from the opinion of Brandeis, because the only question certified to the United States Supreme Court was whether radio reception constituted a separate performance. There is no question that the Court answered this in the affirmative. But, on the facts of the case, neither the reception nor the original broadcast was authorized, and hence, there was no license whatever. The question as to whether there is an infringement, already concluding that it is a separate performance, depends on whether there is a license. In a footnote to the opinion, Mr. Justice Brandeis speculates as follows: ²⁶

“If the copyrighted composition had been broadcast by Duncan with plaintiff’s consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied. Compare *Buck v. Debaum* (D. C.) 40 F. (2d) 734. But Duncan was not licensed; and the position of the hotel company is not unlike that of one who publicly performs for profit by the use of an unlicensed phonograph record.”

The latest case in point is *Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co., Inc.*,²⁷ decided in the District Court for New York in 1937. The complainant was a corporation authorized to carry on the business of administering various performing, production, and publishing rights in copyrighted works. They entered into diverse license contracts with the various users of music, authorizing the public performance for profit of musical compositions published or represented by it. The defendant company operated a hotel in New York City known as the Hotel Pennsylvania. For the accommodation and entertainment of such members of the general public as were its guests and patrons, they had installed and maintained a two channel radio system. These master radio receiving sets allowed no more than two broadcastings to be made available to the hotel guest listeners at any one time, and the selection of the two stations was accomplished through tuning in a different station on each of the two master sets. The above radio system covered only individual rooms and did not extend to any other rooms, lobbies, lounges, or restaurants in the hotel. The contract with the defendant read as follows: ²⁸

“Nothing herein contained shall be construed as permitting the LICENSEE either expressly or by implication to grant to others the right to reproduce or perform publicly for profit or otherwise, by any means, method or process whatsoever, any of the said compositions or works, so broadcast, or in any way so permitting any receiver of the broadcast of any of said compositions or works to publicly perform or reproduce the same for profit or otherwise, by any means, method, or process whatsoever. The LICENSEE shall have no right to perform or

²⁶ *Supra* note 23.

²⁷ 19 F. Supp. 1 (S. D. N. Y. 1937).

²⁸ *Supra* note 26.

otherwise utilize any works covered under this agreement except as herein specifically granted."

What must be determined according to the aforesaid facts is whether what was done by the Hotel Pennsylvania was a public performance for profit of the plaintiff's musical composition. The only difference in facts in the *LaSalle* case²⁹ and the case at bar is that in the former, broadcast programs were reproduced in the public rooms of the hotel as well as in about two hundred of the private guest rooms — while in the instant case, the master receiving sets of the hotel were connected only with the bedrooms. The counsel for the defendant contended that the control of the loud speaker in each room by the guest occupying it, made it impossible to properly maintain that there was a performance by the hotel when a guest turned on the loud speaker in his room. In the opinion of Judge Woolsey, that was nevertheless a performance. He said:³⁰

"I find that when the owner of a hotel does as much as is done in the Hotel Pennsylvania to promote the reproduction and transmission within its walls of a broadcast program received by it, it must be considered as giving a performance thereof within the principle laid down by the Supreme Court in the *LaSalle Hotel* case."

Inasmuch as there was a performance of the plaintiff's copyrighted song by the hotel, the next questions are whether that performance was "public" and "for profit," and thus complied also with the other two requisites constituting infringement. The law recognizes that a hotel is a place a public accommodations, and, in this respect, occupies a status, in regard to the public, analogous to that of a common carrier. However, the defendant maintains that in spite of this characteristic of an hotel, and even if there was a performance by the Hotel Pennsylvania, it could not properly be claimed to have been a public performance because it was not broadcast in any public room of the hotel, and because the loud speakers which made the program audible to guests were in each bedroom and severally under the control of the guest or guests occupying it. The case of *Jerome H. Remick & Co. v. American Automobile Accessories Co.*,³¹ already discussed, was cited as an answer to defendant's argument. Judge Mack's opinion was quoted in substantiation of the courts holding.³²

"A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an enclosure, or gathered together in some open stadium or park or other public place. Nor can a performance be deemed private because each listener may enjoy it alone in the privacy of his home.

²⁹ *Supra* note 23.

³⁰ *Supra* note 26.

³¹ *Supra* note 14.

³² 5 F. (2d) 411, 412.

Radio broadcasting is intended to, and in fact does, reach a very much larger part of the public at the moment of rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience and is therefore participating in a public performance."

Consequently, the rule of this case may be stated that the reproduction by the hotel's master receiving sets, of the electric impulses of the broadcast, is a public performance for profit of the broadcast program, and is made at the hotel's risk in so far as copyrighted musical compositions are concerned.

Foreign courts have arrived at the same determinations as have our American tribunals. Foresight on the part of the drawers of the English Copyright Act³³ has prevented much of the dispute and litigation which has arisen in this country, on the definition of "public performance." In England, the Act specifically defined "performance" as "any acoustic representation of a work—including such a representation made by means of any mechanical instrument." The Australian court in 1925 in *Chappell & Co., Ltd., v. Associated Radio Company of Australasia, Ltd.*,³⁴ held that broadcasting by radio was a public performance. This decision was followed two years later by *Messenger v. British Broadcasting Company*,³⁵ where the defendant had broadcast the performance of "The Little Michus," a copyrighted composition. It was held that one who turns on a radio in public is performing and is guilty of an infringement of the composer's copyright, even though the original performance is authorized. The facts of the British case of *Performing Right Society, Ltd., v. Hammond's Bradford Brewery Company, Ltd.*,³⁶ and the Canadian case of *Canadian Performing Right Society v. Ford Hotel, Ltd.*,³⁷ were not unlike those of the *Statler* case,³⁸ already discussed. The defendant in the *Brewery* case,³⁹ a hotel proprietor, received a broadcast of copyrighted songs on his radio for the amusement of his guests. The radio station was licensed to broadcast the music "for domestic and private use only," and the plaintiff owner of the music, claimed a violation of the Copyright Act. The court held that the reception was a public performance. The same conclusion was reached by the Canadian court in the *Ford Hotel* case.⁴⁰

The following conclusions of the present status of copyright law in regard to the broadcasting of musical compositions are submitted:

³³ English Copyright Act (1911) 1 & 2 Geo. V, c. 46, sec. 35.

³⁴ Victoria L. R., 350 (1925).

³⁵ 2 K. B. 543 (1927), reversed on other grounds.

³⁶ 49 T. L. R. 410 (1933), *aff'd.* 50 T. L. R. 16 (1934), 1934 Chancery 121.

³⁷ 2 Dom. L. R. 391 (1935).

³⁸ 19 Fed. Supp. 1 (D. C. N. Y. 1937).

³⁹ *Supra* note 36.

⁴⁰ *Supra* note 37.

1 The radio broadcasting of musical compositions, protected by copyright, from a radio broadcasting station, constitutes a public performance for profit. This was pointed out conclusively in *Jerome H. Remick & Company v. General Electric Company*.⁴¹

2 The radio broadcasting of a copyrighted musical composition from a hotel or restaurant, or the rebroadcasting of such composition after reception from the original broadcast, is a separate performance and must be licensed separately unless there is an implied license.

3 Radio reception of a copyrighted musical composition constitutes a performance, and must only be public and for profit to make the receiver an infringer of the Copyright Act. Where the original broadcast is unauthorized, the receiver is unlicensed and is guilty of infringement.

* * * * *

The Constitution of the United States expressly provides in Article 1, Section 8, that Congress shall have the power "to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries." Pursuant to this power, Congress enacted the Copyright Act of March 4, 1909.⁴² Upon compliance with the Act, one was given exclusive right, "To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit." There was no attempt at a definition of "performance" or "performance for profit." Our learned framers did not have the foresight that our English brothers had in drawing the English Copyright Act. At the time of the enactment of the American Copyright Act, radio broadcasting was merely a conception, as the first radio station was built eleven years later in Pittsburgh. The cases, already discussed, show the lack of certainty in determination and interpretation of the Act.

In the writer's opinion, the courts have placed an unwarranted and unintended meaning on the words "performance" and "performance for profit." The provisions of the Act are designed to accord the most absolute protection to the composer, not only against broadcasting and rebroadcasting of a copyrighted work, but also communication of the composition by loud speaker and otherwise, to the public. An unnecessary burden is placed on the broadcaster and on the person operating a loud speaker in a public place. Suppose the local radio station broadcasts a school basketball game, and during the intermission, the school band plays certain numbers which are protected by copyright. The radio station is liable and the band would also be guilty of infringe-

⁴¹ *Supra* note 16.

⁴² Act of March 4, 1909, c. 320 sec. 1. 35 Stat. 1075.

ment. Every hotel, restaurant, candy store, and drug store, which has its radio on at the time and is heard by the patrons, would be liable for an infringement of the Copyright Act in "publicly performing for profit." It hardly seems equitable to punish the innocent infringers, as they have no knowledge of what is to be played or whether it is a restricted number. The trouble lies mainly in unintentional infringement by a public receiver for profit. Even though a public place should secure licenses from the American Society of Composers, Authors, and Publishers and the copyright owners, the duty to keep up to date on all music is nothing short of impossible. The receiver must either eclipse himself behind the radio station and rely on their judgment and knowledge not to infringe a copyright, or else not play the radio at all. If the broadcaster would announce that they are playing a musical composition *without permission* of the copyright owners, that would be the only protection the proprietor of the place where the unauthorized broadcast is received would have. It has been very difficult in the past to get the broadcaster to so warn the receiver.

The danger of infringement is so imminent as to render the use of the radio precarious. The proprietor of a public place must select either of two alternatives: he might not play the radio at all, or hire musicians over whom he would have more immediate control in the selection of the musical numbers. Both would be inadequate for the entrepreneur of limited capital.

Therefore, the writer submits that new laws and revisions are essential to exempt innocent infringers of the Copyright Law. Legislative attempts have been made in the past to lessen the burden placed on the broadcaster and on the person operating a loud speaker in a public place. A determined effort was made to pass the Vestal Bill,⁴³ which substituted for the term "public performance for profit" the more apt expression "to have communicated said work for profit to the public by radio broadcasting." Under the Bill, the receiver of the broadcast is relieved of liability except where he has specifically charged an admission fee. The Act provides *inter alia*:

"such copyright includes the exclusive right

"To copy, print, reprint, publish, produce, reproduce, perform, render, exhibit, or transmit the copyright work in any form by any means, and/or transform the same from any of its various forms into any other form, and to vend or otherwise dispose of such work; and shall further include the exclusive rights . . .

"(g) To communicate said work to the public by radio broadcasting, rebroadcasting, wired radio, telephoning, telegraphing, television, or by any other methods or means for transmitting or delivering sounds, words, images, or pictures whether now or hereafter existing." On June

⁴³ House Rep. 12549, 71st Cong. 2nd Sess.

28, 1930, the bill was argued in the House of Representatives and several amendments were added to the bill, among which was that the bill should not apply to reception by radio unless a specific admission fee was charged. Finally, the Vestal Bill passed the House, but failed to receive the approval of the Senate. On December 9, 1931, Mr. Tydings introduced a bill (S.1035) to amend Section 1 of the Act of March 4, 1909, so as to provide that the sale of a piece of sheet music should carry with it the right of performance in public for profit; also providing that a royalty once paid on articles or devices reproducing thoughts or music shall free the articles or devices from further contributions to the copyright owner except in case of performance for profit. Subsequently, in 1935, a bill was introduced in the Senate as "An Act to amend and consolidate the acts respecting copyright," and was referred to the Committee of Patents. Among the new provisions of the bill was a plan to exempt radio receiving sets from infringement of copyright, except where admission fees were charged, or cover charges made. The bill (S.2465) was followed by Senate bill 3047 introduced in the Senate by Mr. Duffy on June 14, 1935.⁴⁴ This bill came up for consideration and was passed over on objections of Senator

⁴⁴ The bill read as follows:

"Sec. 25.

(d) In the event that advertising matter of any kind carried by a newspaper, magazine, or periodical, or broadcast by radio shall infringe any copyrighted work, where the publisher of the newspaper, magazine, or periodical, or the broadcaster, shall show that he was not aware that he was infringing and that such infringement could not reasonably have been foreseen, the person aggrieved shall be entitled to an injunction only (1) before work of manufacture of the issue has commenced, or, in the case of broadcasting, before the rehearsal of the program has begun; or (2) against a continuation or repetition of such infringement in future issues of such newspaper, magazine, or periodical, or in future broadcasts; and shall not be entitled to any profits made by such publisher or broadcaster from his contract or employment to carry such advertising matter, or to damages, actual or statutory, against him.

(h) There shall be no liability, civil or criminal, under this act, on the part of any person for the following:

- (1) The performance of a copyright musical work by a recognized charitable, religious, or educational organization where the entire proceeds thereof, after deducting the reasonable cost of presenting the same, are devoted exclusively to charitable, religious, or educational purposes;
- (2) The auditory reception of any copyrighted work by the use of radio receiving set, wired radio, or other receiving, reproducing, or distributing apparatus, or the performance, other than by broadcasting, of any copyrighted work by a coin operated machine or machine mechanically or electrically operated or by means of a disk, record, perforated roll, or films, manufactured by or with the consent of the copyright owner or anyone claiming under him, except where admission fees, other than the ordinary occupation by a guest of a hotel or lodging-house room, are charged to the place of operation or, in the case of restaurants, cover charges distinct from the charges of food, or other minimum charges, are made; . . ."

Wagner and Senator Copeland. On June 19, 1935, the bill was presented to the House of Representatives by Sol Bloom as House bill 8557.

As yet, there has been no material modification or revision of the Copyright Act of March 4, 1909. However, it is more than likely that the Legislature will rewrite certain sections of the Act overruling judicial constructions of what is meant by "performance" and "performance for profit."

David A. Gelber.

LEGAL PROTECTION FOR THE AUTHOR.—Adolf Hitler wrote a book which made him famous. He has already netted over three million dollars in royalties from the sale of the book, but his future earnings are jeopardized by publishers who have taken his book, printed it up in abridged form and are selling it without in any manner accounting to Hitler for the profits. Moreover, the firm has been protected in its action by the courts. Toward the last of February this year, a federal court denied a petition for a temporary injunction to enjoin the printing and sale of an English translation of Hitler's, "Mein Kampf."¹ The firm of Reynolds and Hitchcock had been very careful to comply with all of the copyright laws, to gain Hitler's permission for exclusive production, probably at considerable cost and on payment of a substantial royalty, and then with sales going smoothly, a competitor brazenly printed the translation, offered it for sale, and escaped legal remonstrance by invoking the well-recognized technicality that the book is in the public domain, and hence available to anyone. It can be used in any manner with impunity.

The average author, the movie producer, the theatre owner, and any other person who is wont to enter fields of endeavor within the jurisdiction of copyright law, will wonder when they see a news item like this. What will happen to me if I write a book that is successful? Will I be able to protect the profits? Who can infringe on my rights, pirate the fruits of my labors, and garner my profits, and how can I stop them? On the other hand the question is being asked by publishers, movie producers and others, just how far can we go in using the works of others, what will happen to us if we infringe, and how will we know when we are infringing. The average author worries little about infringement until he has written a successful book, but the tremendous need of knowing just what is and what is not infringement of a copyrighted work is only too evident to every famous author, and to every big-money producer, who invariably, through bitter experience,

¹ Time, Vol. 14, No. 11, March 13, 1939.

learn of the possibility of being subjected to incessant petty attacks by unsuccessful authors who have an obsession that the successful work of another is really the product of their minds, and is becoming famous while attached to the star of a plagiarist. On the other hand, the genius may have to be protected against an actually malicious plagiarist. The unique holding of the courts on the matter of damages in this type of case is conducive to the bringing of suits, since not only can damages be collected for harm done to the author if it is found that his work has been pirated, but he may also collect all of the profits that the successful author has gleaned from the sale of the work. Suits for damages and profits ranging from \$150,000 to \$1,500,000 are numerous against producers of successful plays and movies and private authors whose work has become a best seller.

The purpose of this treatise is to attempt to take the person aspiring to delve into fields of endeavor which come within the jurisdiction of copyright law through a labyrinth of nebulous principles, in the hope that he may collect a sufficient fund of them to serve as a guide in his future efforts. The principles are nebulous because they are so necessarily bound up with factual situations, subjective intentions, popular opinion and other intangible foundations that clearly defined legal boundaries cannot be marked.

The author who has no knowledge of what he can or cannot do to keep from infringing another's work is apt to entertain the erroneous belief that if he did not intend to copy another's work he cannot be liable. Nothing is farther from the truth, and in fact most of the suits involving large amounts of damages, such as those against the big movie producers, never have a chance of proving an intent to infringe. These suits are based on the now well-settled rule that intention to infringe is not essential under the act.² An example of how intent may become immaterial is in the case of *Harold Lloyd v. Witwer*³ where the court said: "If, however, they had read the story or knew of its contents, and if there was a subconscious memory of the story derived from such knowledge, and if the evidence was such that some unconscious and unintentional copying was disclosed by the play, when produced, there might be an infringement, notwithstanding the intention of the parties to avoid infringement." From this it will be seen that the courts apply the general proposition that the "intention to deceive may be inferred from the inevitable consequences of the act complained of."⁴ The list

² *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, 51 S. Ct. 410, 75 L. Ed. 971, 76 A. L. R. 1266 (1931); *Sheldon v. Metro-Goldwyn Pictures Corporation*, 81 Fed. (2d) 49 (CCA 2) (1936). See also C. J. 1121.

³ 65 Fed. (2d) 1 (1933).

⁴ *Meccano v. Wagner*, 234 Fed. 912 (1916); *Elgin Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365, (1901); *Sampson Cordage Works v. Puritan Cordage Works*, (CCA 6) 211 Fed. 603, 608, 128 C. C. A. 203, L. R. A. 19152, 1107 (1914).

of authorities is unbroken in support of the rule that intent plays no part in the question of liability if it has been decided that there is an infringement, but, of course, the harsh effect is softened by taking into consideration the lack of intent when fixing the damages. The courts have also allowed the presence of intent to have some weight as a part of the circumstantial evidence. This has been very well stated in the case of *Harold Lloyd Corporation v. Witwer*⁵ where the court said: "In considering the weight of the circumstantial evidence of copying derived from an analysis of similarities between the play and the story, the question of intent to copy is an important factor, although as has been stated, an intentional copying is not a necessary element in the problem if there has been a subconscious but actual copying." This proposition is not new, as is seen in a statement made in *Moccano v. Wagner*:⁶ "But I take it that when intention also appears, it is a valuable fact when construing language, figures and illustrations. . ." From these excerpts of court opinions, both old and new, it will readily be seen that lack of intention to infringe does not immediately relieve an author from liability; rather, this lack of intention merely relieves him from having all the presumptions held against him when somebody does sue him for infringement. A resemblance of his play or story to that of another may leave him open to an infringement suit no matter how clean his motives, no matter how pure his intentions. Therefore, the conclusion is that whether or not there is an intention to infringe is really no test of infringement, but only a circumstance to be considered with all the rest of the evidence. It has one more effect in the decisions. If there be an infringement without plagiarism, that is, the intention to infringe, the result is usually the awarding of an injunction against further use of the work so copied, whereas when plagiarism is shown, money damages are awarded as well as an injunction.⁷

The first real test that the courts use when a case of infringement arises is whether or not the alleged infringer had access to the allegedly infringed work. Obviously the question must be disposed of first and if the answer is in the negative, the suit fails at once. This general proposition has been set out in *Lewys v. O'Neill*,⁸ where the court said: "The first question in a case of alleged literary larceny is whether there is any direct evidence of access by the defendant to plaintiff's book." In that case Eugene O'Neill testified that he had not seen plaintiff's book until after suit was filed by plaintiff for infringement, and in the face of this evidence, not seeing any reason to disbelieve the testimony, the court quickly dismissed the plaintiff's case.

⁵ 65 Fed. (2d) 1, (1933) at page 17.

⁶ 234 Fed. 912 (1916), at page 921; citing *Reed v. Holliday*, 19 Fed. 325, 326 (1884).

⁷ *Simonton v. Gordon*, 12 Fed. (2d) 116 (1925), at page 124.

⁸ 49 Fed. (2d) 603, 608 (1931).

If there is access by the alleged infringer to the literary work of the complainant, it does not mean that he is guilty. As the court said in *Shipman v. RKO Radio Pictures*,⁹ "Whilst access is a *sine qua non* in a copyright cause, the fact that under the procedure followed herein the defendant had, by hypothesis, access to the plaintiff's work is obviously not fatal to the defense."

After it has been determined that access was possible, the next inquiry is what criterion should be used to establish actual infringement. The answer to this question has now been settled. All the recent cases seem to quote from Learned Hand's opinion in *Nichols v. Universal Pictures Corporation*,¹⁰ the cynosure of legal statement on the matter: ". . . for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naive, ground of its own considered impressions upon its own perusal." In the case of *Wiren v. Shubert Theatre Corporation*¹¹ the court refused a motion by plaintiff to allow her, "an opportunity to explain her analysis of the two plays and to point out the identities." Therefore it is apparent that the court will not pay too much attention to expert analysis nor to the plaintiff's interpretation, but will decide the question on the basis of what the average reasonable man would think. The court puts it nicely in *Dymow v. Bolton*.¹² ". . . The copyright, like all statutes, is made for plain people; and that copying which is infringement must be something which ordinary observation would cause to be recognized as having been taken from the work of another," and stating it slightly differently, "A copy is that which comes so near to the original as to give every person seeing it the idea created by the original."¹³ Such statements by the courts indicate that expert analysis and comparisons are wholly irrelevant and that the real criterion rests in the common sense and reactions of the common man, reactions which are spontaneous and immediate. "Infringement of a work of imagination is determined by the result of comparative reading on the imagination of a reader, not by a dissection of the sentences and incidents. . ." ¹⁴ In the last analysis, this means of testing whether there is an infringement is really an application of nothing but a general rule that runs all through the law, and yet it should be comforting to the author to know that he is not going to be tried by some complicated formula nor by his accuser, but only by that well-known, though somewhat indefinable "ordinary

⁹ 20 F. Supp. 249 (1937).

¹⁰ 45 Fed. (2d) 119 (1930), at page 123.

¹¹ 6 F. Supp. 358 (1933).

¹² 11 Fed. (2d) 690 (1926), at page 692.

¹³ *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U. S. 18, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cases 628; *Roe-Lawton v. Hal E. Roach Studios*, 18 Fed. (2d) 126, 128 (1927); *Frankel v. Irwin*, 34 Fed. (2d) 142 (1918); *Nichols v. Universal Pictures Corporation*, 34 Fed. (2d) 145 (1929); *King Features Syndicate v. Fleisher*, (C. C. A.) 299 Fed. 533 (1924).

¹⁴ *Harold Lloyd Corp. v. Witwer*, 65 Fed. (2d) 1 (1933), at page 19.

and reasonably prudent man." However, in this connection it might be well to notice that after all the courts' protestations about using their "ordinary observer," the cases very often go into elaborate comparisons of the two plays or books.¹⁵ Some of these will be dealt with later on in the treatise. It looks as if when the decisions get close that the courts will make their "observer" sit up in his chair and observe very scrupulously just how similar each part is. Nevertheless, it may be prudent to do this, since by it the courts can cut out many of the psychopaths who get into court on trumped-up charges emanating from fevered minds and without any basis in fact, and also do away with the possibility of becoming involved in intricacies of expert testimony in some cases.

One case shows a slight deviation from the popular-observer attitude. In *Sheldon v. Metro-Goldwyn Pictures Corporation*,¹⁶ the court said: "In such a situation as I have here, however, I must, as a trier of the fact, have a more Olympian viewpoint than the average playgoer. I must look at the two opposing productions, the play and the picture, not only comparatively, but, as it were, genealogically." This Judge did not get a chance to make his "Olympian view" stick, however, since the case was reversed.¹⁷

Just how much can be copied from the work of another? Of course, to be safe, one should not copy at all, but this admonition doesn't help much after the author has actually done it in the eyes of the law, and is already involved in litigation. It is obvious that the whole book need not be copied or even a large part of the book or other work. It is enough if a material or substantial part has been copied, even if it be a small part of the whole.¹⁸ A substantial part is needed on the general legal principle of *de minimus non curat lex*.¹⁹ Naturally, the mere slight changing of some words is not sufficient to absolve an author from the charge of infringement because, "the reproduction need not be literal and exact; it is a piracy if it appears that the copyrighted work has been copied, although altered or paraphrased."²⁰ The general test used is whether the value of complainant's work has been lessened, or as the courts say, "If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially

¹⁵ *Bachman v. Belasco*, 224 Fed. 817, 140 C. C. A. 263 (1915); *Simonton v. Gordon*, 12 Fed. (2d) 116 (1925); *Wiren v. Shubert Theatre Corp.*, 5 F. Supp. 356, affirmed (CCA) 70 Fed. (2d) 1023, certiorari denied 55 S. Ct. 105, 293 U. S. 591, 79 L. Ed. 685.

¹⁶ 7 F. Supp. 837 (1934), at page 842.

¹⁷ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 Fed. (2d) 49 (1936).

¹⁸ *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (1938); *Lawrence v. Dana*, 15 Fed. Cas. pp. 26, 60, No. 8, 136, 4 Cliff. 1 (1869); *West Pub. Co. v. Lawyers Co-op. Pub. Co.*, 79 Fed. 756, 35 L. R. A. 400 (1897).

¹⁹ *Kelly v. Hooper*, 4 Jur. 21; see also 13 C. J. 1116.

²⁰ *Supra* note 18; see also *West Pub. Co. v. Edward Thompson Co.*, 176 Fed. 833 (1910).

to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy, *pro tanto*.”²¹ This test is beyond doubt the best one and is as near as a court can come to an adequate generality apart from the facts of each case. And especially is this true where the court is not dealing with actual copying, but is dealing with slight changes in the copying, as in the case of *Fendler v. Morosco*,²² where the court said: “As soon as literal appropriation ceases to be the test, the whole matter is necessarily at large so that the decisions cannot help much.”

One thing that should be straightened out before we go any further is the widespread misconception that if an author puts quotation marks around what he is copying or if he even goes further to cite the source of the quotation that he is then protected from any and all accusations of infringement. Unfortunately, it happens that the rule is exactly the other way.²³ The Copyright Act gives the writer protection against anybody else copying in whole or in part, and if quotations are used it is obvious that it still is copying the other author's work. In fact, it might well be that the quotations used in this article might leave the author of this paper open to a suit for infringement were it not for the rule that Judges' opinions (from which the quoting herein is done) are part of the public domain and hence are not copyrightable. The theory is that the judge works for the government and people and whatever he does in the public service should not inure to his own benefit.²⁴ Therefore, let the quoter beware. He is not justified in thinking his quotation marks are an insuperable shield against infringement proceedings.

We still have not settled how much can be quoted and at this time it should be readily apparent that no definite answer may be given. In the Henry Holt case,²⁵ *supra*, it was held that a copying of three lines from a doctor's book was an infringement when placed in a cigarette advertisement. And perhaps the opposite extreme was reached in *Oxford Book Company v. College Entrance Book Co.*,²⁶ where the court said: “no need exists for analyzing in detail the fairly numerous places in the text of each book where substantially the same thing on the same subject had been said in different words.” Here the excuse for allowing so much copying was that both books were history books and historical facts were necessarily similar. “Mere similarity of phraseology which has, indeed, become more or less stereotyped in some respects in school histories is a weak support for a charge of infringement.”²⁷ From these

²¹ *Folsom v. Marsh*, 9 Fed. Cas. pp. 343, 348, No. 4, 901, 2 Story 100 (1841).

²² 171 N. E. (1930); cited in 45 Fed. (2d) 119 (1930).

²³ *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (1938).

²⁴ *West Pub. Co. v. Edward Thompson Co.*, 169 Fed. 833 (1909), at page 847.

²⁵ *Supra* note 23.

²⁶ 98 Fed. (2d) 688 (1938).

²⁷ *Sampson & Murdock v. Seaver-Radford Co.*, 140 Fed. 539 (1905).

examples, we learn that very much depends on the type of works that are to be compared. In some cases only the slightest copying will be held an infringement, while in others, the copying may be a large proportion of the second work. "Whether an appropriated publication constitutes a substantial portion of that which is copyrighted cannot be determined alone by lines or inches which measure the respective articles."²⁸

This statement leads into a discussion of the question of fair or unfair use of another's literary work, which enters the picture here as another test used by the courts, although it should be noted that these several tests are not necessarily applied according to any definite sequence. The courts have used this test to bring some order out of the confusion surrounding the question of how much can be copied. Here the courts seem to be torn between two opposing forces, the desire to aid the author to reap some gain from his efforts and the desire to advance science and art. If the courts prohibit any use of another's work it would greatly hinder the dissemination of knowledge, but if they allow too wide a quoting or copying range, then the author will have little or no remuneration for the labors of his mind. The "fair use" test is not nearly as helpful as the test which depends on a diminished value, which we have heretofore considered. But nevertheless, the courts find occasion to use it constantly.²⁹ They have used the test to allow critics to quote passages so as to make an intelligible comment.³⁰ But of course criticism will not be a fair use if extended to reproduction as in the case just cited where the "Mutt and Jeff" cartoon was held infringed by the similar cartoon with characters called, "Nutt and Giff." In such cases the fair and unfair use test may be of some value, though the much more accurate test of diminished sale value could easily be substituted. The two reasons why a fair use is allowed are that the public policy requires it and the author impliedly authorizes such use by giving the fruits of his labor to the public for their edification. The public policy is found in the constitutional provision which authorizes copyright legislation by Congress, i. e. "to permit the progress and use of science and the useful arts. . ."³¹ In the preface to many books we see the statement, "all rights are reserved," or "no part of this book is to be used without written permission of the author or publisher." What these statements would seem to do is to negative one of the reasons for permitting fair use, namely, that the author impliedly intended to permit quotation for comment and criticism, but nevertheless the public policy would still override the author's wishes and permit a fair use in spite of all his protests to the contrary.

²⁸ Chicago Record-Herald Co. v. Tribune Ass'n, 275 Fed. 797 (1921).

²⁹ W. H. Anderson Co. v. Baldwin Law Publishing Co., 27 Fed. (2d) 82 (1928).

³⁰ Hill v. Whalen, 220 Fed. 359 (1914).

³¹ U. S. Constitution, Art. 1, sec. 8, cl. 8.

In a discussion of a fair use, the question of the legality of an abridgment is sure to rise in the reader's mind, especially because of the recent widespread popularity of all kinds of digests, from the Reader's Digest to the several Digests of articles of a more technical nature. The old rule was stated in the case of *Folsom v. Marsh*:³² "An abridgment which is a substantial condensation of the materials of the original work, and which requires intellectual labor and judgment, does not constitute piracy; but an abridgment consisting of extracts of the essential or most valuable portions of the original work is a piracy." From this it appears that if intellectual labor was used then it was treated as a new work and so a fair use of the old work. And such an abridgment is fair, though it cut down the sale of the unabridged books.³³ This doctrine has been criticized and limited, so that if there is the least bit of copying then it is an infringement.³⁴ However the publishers of the present digests can not rely on this old and criticized rule but must get permission from the owners of copyrights on articles so as to be sure of protection, for by the present law the exclusive right to make other versions of a copyrighted work is given to its owner.³⁵ Abridgments, digests and other versions of a copyrighted work are regarded as new works and may be copyrighted if made with the consent of the original copyright owner.³⁶ Therefore an unauthorized abridgment or digest is considered an infringement of the work on which it is based.

To narrow the amount question down to another important but rather supplemental question, it is necessary to bring in the question of copying names or titles. We shall do this without in the least attempting to enter the vast field of trade marks or trade names, which are a distinct form of copyright, but merely confine it to that part which is inseparable from literary infringement. It is well settled that names or titles cannot be copyrighted,³⁷ but it is also true that where a production is copyrighted, and the name is one which has received notoriety with the reading public, and has become identified in the public mind with the name given it by the author, the author has a right in that name that will be protected in equity, and if it is used by another even though the use involves none of the incidents of the story, the equity court will term it unfair competition. Thus by the equitable protection against unfair competition, a subject which is not copyrightable, namely, a name or title—can be protected. Names which have received this notoriety in connection with the name of a particular author warranting its protection for him are said to have acquired

³² (C. C. Mass., 1841) Fed. Cas. No. 4, 907.

³³ *Story v. Holcombe*, (CC. Ohio, 1847) Fed. Case No. 13,497.

³⁴ *Ibid*; see also *Gray v. Russell*, (CC. Mass. 1839) Fed. Case No. 5,728.

³⁵ Sec. 1, Act of Mar. 4, 1909.

³⁶ Sec. 6, Act of Mar. 4, 1909.

³⁷ *Atlas Mfg. Co. v. Street*, 204 Fed. 309, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002; 13 C. J. 1112.

"secondary significance." An interesting example is the case of "Yukon Jake." For years, the author of the ballad, "Yukon Jake," had circulated his poem in book form and in periodicals. It had gained considerable notoriety and popularity, and the author had the poem copyrighted. Mack Sennett, Inc. made a picture, called it "Yukon Jake" after the plaintiff's poem. In the case of *Paramore v. Mack Sennett Inc.*³⁸ for damages for infringement of plaintiff's copyright, the court held that the plaintiff had such a property right in this name as to have it protected for him, and they awarded an injunction and \$2,500 damages for the infringement. Another illustrative case is the *Oxford Book Company, Inc. v. College Entrance Book Co., Inc.*³⁹ where plaintiff charges the defendant with unfair competition for using the word, "visualized" in a title "Visualized Units in American History." Plaintiff had previously published a history book called, "Visualized American History." The court held that this was not an infringement, since the word visualize is a mere descriptive word which the publishing company cannot appropriate to its own use unless it can show that its use of the word has been of such duration and character as to have acquired a secondary significance. Of course, the company had not made such use of the term.

The *Raggedy Ann*⁴⁰ case lends a great deal of light on the intricacy of the law hovering around copyrights. The defendants were manufacturing dolls similar to Raggedy Ann Dolls, a creation of Gruello, who sued them for infringing on his doll, which had a trademark, Raggedy Ann, and also for unfair competition in using the names Raggedy Ann and Andy. The court found that these names had gained secondary significance, were loved by millions of children, who had seen them in books, cartoons, drawings, and heard them in songs. Peculiarly, since the plaintiff's assignor had discontinued manufacturing dolls, and since a trade mark cannot be held in gross unattached to some business, the defendant could not be liable on the ground of infringement of the trade mark, but he was held enjoined from the use of the names because it would be unfair competition if he used them. They were copyrighted in the syndicated cartoons, books, songs, and other mediums. It is interesting to note that if the plaintiff had sued on copyright, the court states that he might well have prevailed in trying to prevent the manufacture of the similar doll. As it was, he succeeded only in stopping the use of the name. The court stretched the rule a little in the case of *Amusement Securities Corporation v. Academy Pictures Distributing Corporation*⁴¹ by holding that the word Zombie had acquired a secondary meaning suggestive of the photoplay "White Zombie" by association with such title in the public mind, as to warrant a holding that

³⁸ 9 Fed. (2d) 66 (1925).

³⁹ 98 Fed. (2d) 688 (1938).

⁴⁰ Gruelle v. Molly-'Es Doll Outfitters, 94 Fed. (2d) 172 (1937).

⁴¹ 294 N. Y. S. 279, 162 Misc. 608 (1936).

the owner of the rights of "White Zombie" was entitled to an injunction against the exhibition of a rival picture under the name of "Revolt of the Zombies." The unfair competition theory is a common law principle which is invading, in these cases, the jurisdiction of statutory construction. Statutes control the copyright law today, but in this particular situation, when the copyright statute fails to protect the author, the doctrine of unfair competition can be invoked. As stated in the case of *West Publishing Company v. Edward Thompson Company*:⁴² "While a similarity may be traced in the principles on which actions for infringement of copyright and for unfair competition can avoid, copyright is based on statute, while unfair competition, except as affected by legislative enactment in connection with patents, trade-marks, and trade names, etc. is dependent on abstract principles of law. Copyright relates to the printed material of a publication, while unfair competition may be concerned with any article of trade, whether having words or letters in its composition and appearance or not."

The most comprehensive test availed of by the courts in copyright cases is the question whether or not material used by two authors is in the "public domain" so definitely as to be immune from attempts to copyright it. The author can rest assured that if he has written about something that is in the public domain, he will be beyond the scope of suits for infringement. There are general principles within this general test. For example, historical facts are within the public domain, and so are the opinions of judges, the customs, habits, and traditions of a locale, human prototypes, racial prejudices, religious traditions, as well as the comparatively few plots and situations around which all stories are really written, and which exist in human nature itself. To show definitely what is and what is not in the public domain can only be done by showing factual situations where the question has arisen and show how the courts have determined the various cases. To introduce these examples, I believe it apropos to quote from a passage written by Dr. Johnson as far back as 1754, in the *Adventurer*. He was talking about the subject of literary piracy and the limitation of sources for writers. After pointing out that history, religion and morality are general fields which must be drawn on by authors he said: "The same observation may be extended likewise to the passions; their influence is uniform, and their effects nearly the same in every human breast; a man loves and hates, desires and avoids, exactly by the same symptoms in minds distant a thousand years from one another. . . . Nothing therefore, can be more unjust than to charge an author with plagiarism, merely because he assigns to every cause its natural effect; and makes his personage act, as others in like circumstances have always done. There are conceptions in which all men will agree, though each derives them from his own observations."

⁴² 169 Fed. 833 (1909).

Again we might quote Mr. Augustine Birrell, K.C. M.P. English barrister from his lecture entitled "Literary Larceny"; "The literary larcenist must do more than filch ideas, imitate mannerisms, repeat information, borrow phrases, utilize quotations; you must be able to attribute to him the felonious intention of appropriating without independent labour a material part of a protected work. To do this is, in the eye of the law, to infringe copyright, to misuse your brother author."

We come then to the interesting factual situations which give rise to the legal problems stated above. Under the general law that the test of infringement is whether similarities are merely coincidence or are sufficient to reveal plagiarism, and, if piracy is not shown, whether there is such unintentional infringement as to justify equitable relief, and the additional law that for a play to infringe on a novel there must be a substantial number of incidents, scenes, and episodes, which are in detail, arrangement, and combination so nearly identical with those to be found in the book as to exclude all reasonable possibility of coincidence, and lead to the conclusion that they were taken from the book.

An interesting example of a specific application of the law is the case where the play, "White Cargo," was held to infringe on the novel, "Hell's Playground."⁴³ In this case these two stories are fully set out and show how a court determined an infringement in one of the leading cases on the subject. The court decided that a substantial number of incidents and words were similar, but let us look at some of those the court emphasized. Special stress was made of the fact that both play and novel mentioned that the "niceties of civilization are absolutely absent on the West Coast of Africa;" one referred to an "unvarnished sideboard" while the other referred to "a crude sideboard;" both called the locale "Godforsaken;" in the play a servant was rewarded with a "cuff on the head from the skipper's huge hand," while in the novel the skipper "raps him viciously over the head;" in the play the hero's movements were referred to as "languid," while in the novel the hero was overcome with a "vampire's languor;" in both the hero was told not to fight against the African "damp rot." After a summation of such similarities, the court concluded there was an infringement, holding that the only big dissimilarity was that in one the hero took the native girl as a mistress whereas in the other he married her. The reviewer of these similarities could easily imagine many of these scenes as just what would occur to a playwright who had never read the novel. Certainly such cases present too close a question for any author to gain any idea about infringement by reading the general rules of law without seeing the actual similarities which constitute the infringement when they become so numerous as to preclude the possibility of coincidence.

It is a general rule that the ideas of an author cannot be copyrighted, although there may be such a similarity of plots as to constitute in-

⁴³ *Simonton v. Gordon*, 12 Fed. (2d) 116 (1925).

fringement. It is also true that the use of human prototypes in a play characterizing the traits of a particular race or religion as they have stood for decades or even centuries cannot be monopolized by one author who thinks out characters for his work along the lines of this characterization. An interesting example bringing out these points, and showing what cannot be monopolized by a writer in the way of character traits, characteristic prejudices, and ideas is the case wherein it was alleged that the "The Cohens and Kellys" a motion picture was an infringement of the play, "Abie's Irish Rose."⁴⁴ The comparative stories and character sketches are as follows: "Abie's Irish Rose" presents a Jewish family living in prosperous circumstances in New York. The father, a widower, is in business as a merchant, in which his son and only child helps him. The boy has philandered with young women, who to his father's great disgust have always been Gentiles, for he is obsessed with a passion that his daughter-in-law shall be an orthodox Jewess. When the play opens the son, who has been courting a young Irish Catholic girl, has already married her secretly before a Protestant minister, and is concerned to soften the blow for his father, by securing a favorable impression of his bride, while concealing her faith and race. To accomplish this he introduces her to his father at his home as a Jewess, and lets it appear that he is interested in her, though he conceals the marriage. The girl somewhat reluctantly falls in with the plan; the father takes the bait, becomes infatuated with the girl, concludes that they must marry, and assumes that of course they will, if he so decides. He calls in a rabbi, and prepares for the wedding according to the Jewish rite.

Meanwhile the girl's father, also a widower, who lives in California, and is as intense in his own religious antagonism as the Jew, has been called to New York, supposing that his daughter is to marry an Irishman and a Catholic. Accompanied by a priest, he arrives at the house at the moment when the marriage is being celebrated, but too late to prevent it, and the two fathers, each infuriated by the proposed union of his child to a heretic, fall into unseemly and grotesque antics. The priest and the rabbi become friendly, exchange trite sentiments about religion, and agree that the match is good. Apparently out of abundant caution, the priest celebrates the marriage for a third time, while the girl's father is inveigled away. The second act closes with each father, still outraged, seeking to find some way by which the union, thus trebly insured, may be dissolved.

The last act takes place about a year later, the young couple having meanwhile been abjured by each father, and left to their own resources. They have had twins, a boy and a girl, but their fathers know no more than that a child has been born. At Christmas each, led by his craving to see his grandchild, goes separately to the young folk's home, where

⁴⁴ Nichols v. Universal Pictures Corp., 45 Fed. (2d) 119 (1930).

they encounter each other, each laden with gifts, one for a boy, the other for a girl. After some slapstick comedy, depending upon the insistence of each that he is right about the sex of the grandchild, they become reconciled when they learn the truth, and that each child is to bear the given names of a grandparent. The curtain falls as the fathers are exchanging amenities, and the Jew giving evidence of an abatement in the strictness of his orthodoxy.

"The Cohens and the Kellys" presents two families, Jewish and Irish, living side by side in the poorer quarters of New York in a state of perpetual enmity. The wives in both cases are still living, and share in the mutual animosity, as do two small sons, and even the respective dogs. The Jews have a daughter, the Irish a son; the Jewish father is in the clothing business; the Irishman is a policeman. The children are in love with each other, and secretly marry, apparently after the play opens. The Jew, being in great financial straits, learns from a lawyer that he has fallen heir to a large fortune from a great-aunt, and moves into a great house, fitted luxuriously. Here he and his family live in vulgar ostentation, and here the Irish boy seeks out his Jewish bride, and is chased away by the angry father. The Jew then abuses the Irishman over the telephone, and both become hysterically excited. The extremity of his feelings makes the Jew sick, so that he must go to Florida for a rest, just before which the daughter's discloses her marriage to her mother.

"On his return the Jew finds that his daughter has borne a child; at first he suspects the lawyer, but eventually learns the truth and is overcome with anger at such a low alliance. Meanwhile, the Irish family who have been forbidden to see the grandchild, go to the Jew's house, and after a violent scene between the two fathers in which the Jew disowns his daughter, who decides to go back with her husband, the Irishman takes her back with her baby to his own poor lodgings. The lawyer, who had hoped to marry the Jew's daughter, seeing his plan foiled, tells the Jew that his fortune really belongs to the Irishman, who was also related to the dead woman, but offers to conceal his knowledge, if the Jew will share the loot. This the Jew repudiates, and, leaving the astonished lawyer, walks through the rain to his enemy's house to surrender the property. He arrives in great dejection, tells the truth, and abjectly turns to leave. A reconciliation ensues, the Irishman agreeing to share with him equally. The Jew shows some interest in his grandchild, though this is at most a minor motive in the reconciliation, and the curtain falls while the two are in their cups, the Jew insisting that in the firm name for the business, which they are to carry on jointly, his name shall stand first." The court held in this case that there was no infringement, because of the rules mentioned above.

Although plots following a particular sequence may infringe on other plots, yet a subsection of a plot, representing a human situation,

which any one of a hundred million people who all think with human minds about human situations might conceive, perhaps many in different parts of the earth at the same time, cannot be monopolized by one writer. Plots may be so close as to infringe, but to do so they must be more than the mere conception of a natural human situation. The case of *Dymow v. Bolton*⁴⁵ illustrates the type of plot which cannot infringe on a similar one handled in a different manner. Dymow who had written a play in the Russian language was suing Bolton who had access to a translation of Dymow's play and who had written and produced a similar play. In each of the plays there is presented an ambitious girl of at least potential charm, who is willing to have her ambition served by an ingenious young man, in financial straits. In each the man, though by wholly different means, sails very close to the winds of finance and veracity in exploiting the girl as a mold of fashion (in the Dymow play) or a movie star (in the Bolton play), the result being gratification of ambition by girl, and requited affection on the man's part. The court in holding there was no infringement said: "This incomplete skeleton (the plot) the two plays have in common but it is with real difficulty that the flesh and blood, the incidental yet essential, adornment and trimming of the plays can be cut away to show similarity between a few bones." Yet the vital question of where the "bone" stops and where the "flesh and blood" begin is still not solved even by so graphic an analogy. An instance of where more than the skeleton was kept is that oft-cited case of *Dam v. Kirk LaSalle*⁴⁶ where the court said: "It is, of course, true that the play has more characters than the story and many additional incidents. It is likewise true that none of the language of the story is used in the play and that the characters have different names. . . . But it is impossible to make a play out of a story—to represent a narrative by dialogue and action—without making changes, and a playwright who appropriates the theme of another's story cannot in our opinion, escape the charge of infringement by adding to or slightly varying his incidents."

However, where there is a major change in the plot, the similarity of the rest of the story was held to be immaterial in *Barbadilla v. Goldwyn*,⁴⁷ in which the author of "The Christ of the Alley" alleged that the defendant caused a motion picture to be made from his play, with particular reference to a miracle scene which occurred in both. Without going into the factual situation, it is sufficient to quote the court's statement that: "To say that a spurious miracle was suggested, in a way such as falls within the prohibition of the copyright law by a genuine one is to argue that error is copied from truth, black from white, negation from affirmation, nadir from zenith."

⁴⁵ 11 Fed. (2d) 690 (1926).

⁴⁶ (C. C. N. Y. 1909) 166 Fed. 589, affirmed (1910) 185 Fed. 902, 99 C. C. A. 392, 41 L. R. A. (N. S.) 1002.

⁴⁷ 42 Fed. (2d) 881 (1930), at page 885.

The unwillingness of the courts to allow plots conjured up in human minds to be monopolized and kept away from others is illustrated very strongly in the case of the play, "Death Takes a Holiday", which was alleged to be an infringement on the prior play, "Most."⁴⁸ The similarity should be shown in the stories. In "Most" an immortal who wishes to rehabilitate himself to his old life of a mortal, falls in love with a mortal thus breaking the code of the immortals, has duels and does everything the mortals do, but with extraordinary power. The girl finds out his real nature, refuses to stop loving him, and finally dies, thus becoming a spirit with him so that they will be in heaven "as twin souls." In "Death Takes a Holiday" the Duke of Lamberto is having a gay party, death enters, induces the Duke to take him in as guest in human form, takes the form of a very handsome man, falls in love and is loved by one of the other guests so much so that when Grazia, the girl, finds out his true identity she refuses yet to leave him, and the play ends with death covering her with his mantle and supporting her through the door. The court held that there was no infringement, although from the outline, the plot certainly looks almost identical.

A writer is safe from just accusations of infringement if he use only what is in the public domain, and nothing can be said to be more in the public domain than historical fact. The interesting case of Zane Grey's "Thundering Herd" brings this out very clearly.⁴⁹ Zane Grey was sued for infringement of a prior publication by John R. Cook who had written an autobiography of himself in the old west in which he depicts scenes and events of the old southwest. He describes numbers and habits of buffalo, magnitude of hunting operations, intimate details of the hunt, of skinning animals and caring for the hides, and the strife between hunters and Indians. "The Thundering Herd" is a love story of Tom Doan, the principal character, and Milly, an orphan girl living with her stepfather among evil surroundings. Tom engages in buffalo hunting under conditions quite similar to those under which Mr. Cook worked. He learns of Milly's ill treatment. They meet secretly. He rescues her temporarily from her unhappy surroundings. She is compelled to return only to face dangers more sinister than before. She is miraculously preserved in a maelstrom of stampeding buffaloes and pursuing Indians, but Tom all the while believes her dead. The weight of his grief only heightens the happiness of their final reunion. The scene is laid in the region and time described by Mr. Cook. Necessarily there are many similarities. These are found mainly in the historical facts, and the infringement suit is based particularly on the description of

⁴⁸ *Wiren v. Shubert Theatre Corporation*, 5 F. Supp. 358 (1933), affirmed (CCA) 78 Fed. (2d) 1023, certiorari denied 58 S. Ct. 105, 293 U. S. 581, 79 L. Ed. 685.

⁴⁹ *Maddux v. Grey*, 43 Fed. (2d) 441 (1930).

the buffalo stories and Indian fights. The court refused to hold infringement on the ground that these historical facts are in the public domain.

The customs, habits, historic facts, common traditions about a particular locale are in the public domain. A case so close that a \$780,000 verdict was first awarded to the plaintiff and then reversed is portrayed in the "Bird of Paradise" infringement suit.⁵⁰ The two plays involved should be compared as to the story and the build. The play "Bird of Paradise," as copyrighted goes as follows: A young man fresh from college comes to Hawaii to work among the lepers of Milokai. The steamer stops at one of the other Hawaiian islands. There he meets and falls in love with a beautiful Hawaiian girl who has been brought up as his daughter by an Hawaiian priest. They marry, and instead of proceeding to Molokai, he stays on the island with her and her friends and family. There the young wife is happy, but the young husband loses his ambition and his self-respect. With a light heart she has accepted the religious and moral precepts of an American missionary, and has discarded the religious myths of the Hawaiians, yet the discarded myths and the rejected superstitions of her own people exercise a more potent sway over her than the accepted religious and moral precepts of an alien people. Joyous and beautiful as a bird of paradise in the tropical forest, she flutters about like a caged bird when the conventions of Western social life restrain her freedom. For love of her husband she follows him into a world of Western conventions, only to find that there she is an incubus upon her husband. She leaves him to cast herself into a volcano to appease the wrath of the goddess Pele. In the story of "In Hawaii" a young physician has come to Hawaii under an assumed name. There he discovers the germ of leprosy. He was married in America, but in Hawaii he falls in love with an Hawaiian princess, and, when she proudly spurns his offer of illicit love, he offers to marry her. She is the daughter of a foreign nobleman, but through her mother she is the last descendant of the royal line of Kamehameha. She is wealthy and socially sophisticated; indeed the leader of the cosmopolitan society of Honolulu. She has renounced the throne though the legitimate sovereign of the islands. At the risk of death she spurns the offer of marriage of the American doctor. Then the doctor's wife opportunely arrives to comfort him, and the Hawaiian princess triumphantly awaits the coming of another foreign nobleman whom she has promised to marry. In the two plays there are many similarities in detail. Both suggest the dread disease of leprosy, and make use of the hula dance, the flowers and sunshine and music of Hawaii, both make use of the tradition about the goddess of Pele. There was no infringement because where the two plays are similar those common subjects were so in the public domain that one author could not expect to have a monopoly of them.

⁵⁰ *Fendler v. Morosco*, 253 N. Y. 281, 171 N. E. 56 (1930).

The courts are so insistent on protecting certain things in the public domain that in a unique case where a news columnist represented as a true statement of fact a fiction from his own mind, and this apparently human interest news item was later used by an author as the basis of a play, they held that news cannot be copyrighted, and even though the story was in fact fictitious, yet having represented it as fact, he could not hope to succeed in a suit for infringement. The case was *Davies v. Bowes*,⁵¹ and involved a columnist of the Boston *Evening Sun*. The columnist told how two men had missed their connection with a Boston train, found themselves in a little interior Massachusetts town with four hours to be killed. Then is told how they observed the drama during the four hours, finding the same by sitting in the courthouse of the village, where was put on trial a woman accused of theft, and who, it appeared, had actually stolen. The husband asserted himself to be the thief, but she repudiated his assertion dramatically exclaiming that the father of her child was lying to save her. The defendant wrote the play, "Kindling," based on this plot, and the court justified his using the news item.

Authors may go to a common source, and still remain free from complaints of plagiarism, if their results lead to similarities between their respective works. An interesting example of this common source test appeared in *Bachman et al v. Belasco*⁵² wherein both parties had read John Corbin's, "How One Girl Lived Four Lives," which appeared in the *Ladies Home Journal*. The story dealt with hypnotism, and the plays of the parties dealt with the same thing. It was shown there was no access to the plaintiff's play by the defendant, and hence his merely going to the common source did not operate as an infringement of the plaintiff's work.

Infringement is by no means limited to plays, novels, movies, and other literary works. The ramifications of copyright with hundreds of branching tentacles pervade the innermost caverns of the human mind and grasp the ideas emanating therefrom, and infringement may be found in countless different aspects of human originality. A presentation of the classification of works for registration will give some idea of the scope of the field over which copyright extends its jurisdiction.

Sections 5, Title 17, U. S. C. A. Classification of works for registration:

"The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

- a. Books, including composite and cyclopedic works, directories, gazetteers, and other compilations;
- b. Periodicals, including newspapers;
- c. Lectures, sermons, addresses (prepared for oral delivery);
- d. Dramatic or dramatico-musical compositions;
- e. Musical compositions;

⁵¹ 219 Fed. 178 (1914).

⁵² 224 Fed. 817, 140 C. C. A. 263 (1915).

- f. Maps;
- g. Works of art; models or designs for works of art;
- h. Reproductions of a work of art;
- i. Drawings or plastic works of a scientific or technical character;
- j. Photographs;
- k. Prints and pictorial illustrations;
- l. Motion-picture photoplays;
- m. Motion-pictures other than photoplays.

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title."

Some of the more interesting recent problems which have arisen in extra-literary fields indicate how they may come from almost any one of numberless civilized devices. With the natural tendency of theatres to try to induce large audiences came the idea of "bank night." With the idea of bank night came an altercation over its use by others who saw in it an attractive plan to get audiences. In the case of *Affiliated Enterprises, Inc. v. Gantz*,⁵³ the court held that the plan and system involved in plaintiff's idea of bank night were not subjects of copyright, and hence the defendant did not infringe on his copyright by using the plan. The plaintiff could, of course have a valid copyright on the book in which he outlines the plan. In *Affiliated Enterprises, Inc. v. Gruber*,⁵⁴ it was again held that the bank night system originated and furnished to motion picture theaters by license could not be copyrighted since the system was in no sense a writing.

Another case arose in 1937 when to make things more convenient for telephone owners, someone thought of the idea of publishing a directory with the numbers of the telephones in town in their numerical order, to supplement the already published directory with names in alphabetical order. The telephone company, however, demurred to this plan and claimed it was an infringement on their directory, and surprisingly the court held that it was such an infringement in the case of *Leon et al v. Pacific Telephone & Telegraph Co.*⁵⁵ The defendants in the case admitted that they had copied, but contended it was a fair use of plaintiff's work. The court held that even though there would be no competition between the two books, there can be a use that is unfair and an infringement and that this was such an unfair use.

These are only two of hundreds of cases which arise from ideas which men conceive and which conceiving them and thinking them possibly worth something, copyright them. Following is a running summary of selected cases which indicate the variety and the comprehensiveness of infringement. One may well be led to believe that he can never venture to put an apparently original idea into operation without being accused

⁵³ 86 Fed. (2d) 597 (1936).

⁵⁴ 86 Fed. (2d) 959 (1936).

⁵⁵ 91 Fed. (2d) 484 (1937).

of infringing on someone else's materialization of the same idea or one so similar that it looks like an infringement. A book of cartoons picturing "Barney Google and Spark Plug" was infringed by a doll named "Sparky" made in exact imitation of the picture of the horse, "Spark Plug" in the cartoons.⁵⁶ Where, after an artist had copyrighted a photograph of a model and assigned his rights to complainant, he made a later photograph of the same model, the only marked difference being that in the first picture her face was in repose, while in the second she wore a cherry stem between her teeth, the second constituted an infringement.⁵⁷ A photograph of a street scene was held to be a proper subject of copyright, and infringed by a lantern slide reproduction.⁵⁸ Labels used on products were held to infringe copyrighted labels used by the plaintiff.⁵⁹ Where an artist painted a picture for the complainant and copyrighted it in the complainant's name, the defendant's publication of pictures from a sketch made by the artist before making the painting was held an infringement of the copyright.⁶⁰ Copying phonograph records from a matrix taken therefrom is an infringement and will be enjoined.⁶¹ Playing merely the chorus of a copyrighted song is an infringement.⁶²

But it is not within the scope of this article to go out into the myriad branches of the copyright field and try to reconcile, or draw any conclusion from, the special facts of the cases in these other fields, for it has been the purpose of this treatise to try to gain some knowledge from a treatment of the important cases in the field of literature so that an author will have an understanding of what he can or cannot do both at the time he is doing the research for his work and at the time that he is doing the actual writing. It is hoped that from this knowledge the author will have some idea of the general tests the courts use when the question of infringement is before them. He should realize that he may be sued for infringement whether he has intended to copy the works of another or not. He may escape any liability if he can show that he had no access to the allegedly infringed work. The criterion by which infringement will be tested will be that of the "ordinary observer." When it comes to the question of how much he might copy, whether literally or by way of paraphrasing, the test is: Was it a fair use? But since this test is too indefinite to be of much help, sometimes the courts have substituted the test, or rather stated the question in another way: Was the value of the work which is said to be infringed lessened to a sub-

⁵⁶ King Features Syndicate v. Fleischer (C. C. A. N. Y. 1924), 299 Fed. 533.

⁵⁷ Gross v. Seligman, 212 Fed. 930, 129 C. C. A. 450, (1914);

⁵⁸ Pagano v. Chas. Beseler Co. (C. C. N. Y. 1916), 234 Fed. 963.

⁵⁹ Nekritz v. Duberstein (D. C. N. Y. 1921) 271 Fed. 17.

⁶⁰ Beifeld v. Dodge Pub. Co. (C. C. N. Y. 1911) 198 Fed. 658.

⁶¹ Fonotopia Limited v. Bradley (C. C. N. Y. 1909) 171 Fed. 951.

⁶² M. Witmark & Sons v. Pastime Amusement Co., (D. C. S. C. 1924) 298 Fed. 470, affirmed Pastime Amusement Co. v. M. Witmark & Sons, (C. C. A. 1924) 2 Fed. (2d) 1020.