

A RE-EXAMINATION OF LITERARY PIRACY*

I.

INTRODUCTION

This article is intended to be expository in nature. Its scope includes a concise account of the law of copyright infringement as it exists now. This purpose would seem justified in view of the fact that there is a disproportionately large amount of periodical literature dealing with suggested changes in copyright law, while the material of an expository nature attempting to define copyright infringement and demonstrate the practical application of the rules of law to particular sets of facts is inadequate. Suggestions for change in the law or for better administration of existing law may appear incidentally.

The courts can better serve to protect literary property by approaching the problem more intelligently and understandingly not only from a legal point of view, but also from the viewpoint of the author. Knowledge of the minds and ways of authors, of literary criticism, and of the great literature of the world, furnishes an excellent, if not necessary, background for the mental processes of any judge attempting to apply the law of plagiarism.

It should be noted that "plagiarism" as used here means infringement of copyright. Piracy of literary property of the kind which the law notices, tries to prevent, and gives redress for if committed, is the subject matter to be treated.

II.

APPROACH

If a court is to decide properly whether actionable plagiarism has occurred or not, it should have clearly in mind the

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uncontradictable fact that there is a vast amount of plagiarism which is not actionable at law because of inherent reasons. Too strict an interpretation and an aptitude to find for the plaintiff would too often serve only to stifle literary development. This is an old argument, to be sure, but, nevertheless, one still of prime importance.

Even a very superficial examination will disclose great similarities between most of the world's masterpieces. There is no dispute on this point among the literary critics. A modern Diogenes, confining his searches to things literary, would find originality only with the greatest difficulty. Mr. W. R. Inge quite aptly asked, "What is originality?" And his answer: "Undetected plagiarism. This is probably itself a plagiarism, but I cannot remember who said it before me." With the millions who have been writing, talking and thinking through the ages, it is not likely that one will hit upon anything entirely new "unless he is inspired to utter something either transcendently wise or most abnormally foolish."¹

A minority view of literary criticism based upon the idea that literary excellence depends upon doing something before some one else does it is shattered by the fact that the world's greatest authors in their greatest works are merely reworking old themes and old situations.² Writers of the Middle Ages, deeming originality dangerous, would invent authorities in order to cite them if none existed in fact.³ If there had been a stringent copyright law applied strictly to Shakespeare, the world would probably have been deprived of much of his genius. Professor Barnett Williams is quoted as saying, "When anyone else had done a popular thing, Shakespeare (sic) was pretty sure to

1. Inge, W. R., "Stolen Epigrams," in *Labels and Libels*, pp. 227-233, at p. 227.

2. Erskine, J., "Originality in Literature," in *American Character and Other Essays*, pp. 47-87.

3. Grandgent, C. H., "As the Feller Said," in *Prunes and Prisms*, pp. 315-364.

imitate him and to do it better. But he hardly ever did anything first."⁴ It is said that "Wordsworth was at his best when he was most Miltonic."⁵

"What did Darwin do but unfold the thought of the ancient Heraclitus," asks Mr. F. M. Colby, "and what would John Stuart Mill have been without Hippias of Keos? Nietzsche's philosophy came straight from Oriental antiquity via Aristotle and Carlyle, and Poe's Raven was written twenty centuries ago by Kia Yi, the Chinaman. . . . Every respectable thought, like every valuable trotting horse, has its pedigree."⁶ Anatole France aptly advises: "When we see that ideas have been stolen from us let us consider, before we cry out, whether they are really ours."⁷ G. K. Chesterton wisely cautions against an eagerness to find parallels and plagiarism.⁸

"Any reader with a real turn for literature," says Mr. J. C. Bailey, "will get a better notion of the 'power and charm' of Dante the poet from learning by heart the opening of the third book of *Paradise Lost* than from going through the whole of Cary's version (Cary's translation of Dante's *Divina Commedia*) admirable and excellent though it is."⁹

The same thought, in addition to being found in the higher realms of learning, may also be found in more common and lowly circumstances, as evidenced by the oft-told story of the colored man entertaining his pastor. When the pastor saw the

4. Matthews, B., "Invention and Imagination," in *Inquiries and Opinions*, pp. 95-110.

5. Squire, J. C., "Limits of Imitation," in *Books in General*, 2d Series, pp. 218-222.

6. Colby, F. M., "Nothing New," in *Imaginary Obligations*, pp. 216-220.

7. France, A., "Apology for Plagiarism," in *Life and Letters*, Fourth Series, pp. 149-167.

8. Chesterton, G. K., "On Literary Parallels," in *Come to Think of It*, pp. 18-23.

9. Bailey, J. C., "Ancient Tragedy and Modern Imitations," in *Poets and Poetry*, pp. 170-180.

fine goose about to be served, he asked, "Whar you get um?" The host thoughtfully replied, "Ah doan ask you whar you get your sermons."

Though the courts may have been influenced to some extent by these considerations, seldom have they expressed them. One court, however, had this to say: "The way in which a few words, or one thought, happily phrased, is passed around the literary circle perhaps for centuries, has often been shown."¹⁰

Quite obviously there is a great amount of plagiarism that always has been approved by authors as well as the reading public. Only a relatively small part of this either should be or could be actionable at law because of inherent characteristics. It is, therefore, suggested that before approaching a specific case, a court should have a considerable understanding of parallels in literature as well as a knowledge of what literary experts have said on the subject. This should enable a court to draw a finer and more accurate balance between actionable and non actionable plagiarism.¹¹

10. *Frankel v. Irwin et al.*, D. C. 34 Fed. 2d 142 (1918).

11. The problem of plagiarism has been a living problem in the minds of literary men of every age. Much has been written in periodicals and books. The periodical literature is quite easily located through indexes. Essays in books are not always so easily found. The following selection should prove interesting to any judge who has had no training in literary criticism and who has plagiarism cases to decide. Disraeli, Isaac, "Poetical Imitations and Similarities," in *Curiosities of Literature*, vol. II, p. 92, also in the edition by B. Disraeli, vol. II, p. 260; Richardson, Mrs. E. R., "Ubiquitous Plagiarist," in Pence, R. W., ed., *Readings in Present Day Writers*, pp. 323-330; Young, E., "Conjectures on Original Composition," in Jones, E. D., ed., *English Critical Essays*, pp. 315-364; Grandgent, C. H., "As the Feller Said," in *Prunes and Prisms*, pp. 98-106; Erskine, J., "Originality in Literature," in *American Character and Other Essays*, pp. 47-87; Colby, F. M., "Nothing New," in *Imaginary Obligations*, pp. 216-220; Babbitt, L., "On Being Original," in *Literature and the American College*, pp. 215-245; Squire, J. C., "Limits of Imitation," in *Books in General*, Second Series, pp. 219-22; Matthews, B., "Invention and Imagination," in *Inquiries and Opinions*, pp. 95-110, also "Duty of Imitation" in *Gateway to Literature*, pp. 77-90; Gourmant, R. de, "Literary Influence," in Lewisohn, L. ed., *Modern Book of Criticism*, pp.

III.

NATURE OF THE PROBLEM

To determine whether or not there is actionable plagiarism is not an easy task. In general the approach must be through the facts. The rules of law are not particularly difficult, and their application is easy where there has been an outright verbatim copying of the copyrighted matter. Most copyright infringement cases are not so clear cut, but often are borderline cases. Here the application of the rules becomes extremely perplexing. Justice Story early recognized this difficulty when he said: "Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and sometimes, almost evanescent."¹²

In the terms of a recent writer, "Copyright law, like the Constitution, is a topic which makes fine conversational material among intelligent men, but concerning which very few have actual first hand information—surprisingly so in view of the fact that copyright concerns almost exclusively intelligent men and women."¹³

29-31; Chesterton, G. K., "On Literary Parallels," in *Come to Think of It*, pp. 18-23; Bailey, J. C., "Ancient Tragedy and Modern Imitations," in *Poets and Poetry*, pp. 170-180; Ascham, R., "Of Imitation" from *The Schoolmaster*, in Smith, G. G. ed., *Elizabethan Critical Essays*, vol. I, pp. 1-45; Matthews, B., "Theme with Variations," in *Recreations of an Antihologist*, pp. 13-36, and "Second Hand Situations," in *Rip Van Winkle Goes to the Plays*, pp. 101-121; Le Gallianna, R., "Life in Inverted Commas," in Ward, B. E. ed., *Essays of Our Day*, pp. 243-248; Inge, W. R., "Stolen Epigrams," in *Labels and Libels*, pp. 227-233; Howells, W. D., "Psychology of Plagiarism," in *Literature and Life*, pp. 273-277; Gardiner, A. G., "On Plagiarism," in *Many Furrows*, pp. 67-74; France, A., "Apology for Plagiarism," in *Life and Letters*, Fourth Series, pp. 149-167; Brooks, C. S., "In Defense of Plagiarism," in *Like Summer's Cloud*, pp. 33-41; Butler, E. P., "Pigs Is Pigs and Plagiarists Are Thieves," in Salzman, M., *Plagiarism, The Art of Stealing Literary Material*, pp. 67-74.

12. *Folsom v. Marsh*, 2 Story 100 (1841).

The courts have gone to great extremes in deciding infringement cases. In a recent English case the plaintiff owned the copyright to a march called "Colonel Bogey." As boys marched past the Prince of Wales at the opening of a new naval school, this selection was played. The defendant took sound pictures used in a news reel. The news film picked up a part of the tune. It was later shown in moving picture houses where admission was charged. Though the defendant claimed that the reproduction of part of the tune lasted only twenty seconds and consisted of but twenty-eight bars of music, the court held that a substantial part had been reproduced whether the test was "quantity, quality or occasion," and granted relief.¹⁴

On the other extreme, a plaintiff owned the copyright to a drama based upon "The Wandering Jew" by Eugene Sue. Two scenes were added to the drama. The defendant produced another adaptation, but included the two scenes which the plaintiff had added. Otherwise, the alleged infringing drama was based entirely upon the novel itself. The court held that the two added scenes were immaterial and were not a substantial part of the plaintiff's drama. Relief was denied.¹⁵

A compiler of a directory was not permitted "to copy any part, however small, of a previous directory, to save himself the trouble of collecting the materials from original sources."¹⁶

It has also been held that a member of an audience may sing gratuitously or for profit, from memory a copyrighted tune which he has heard though he would have no right to reproduce a copy of it.¹⁷

13. Doozan, Carl W., "Pre-copyright Rights," 14 Notre Dame Lawyer, 391 (1939).

14. Hawkes & Son, Ltd. v. Paramount Film Service, Ltd., 1 Ch. 593 (1934).

15. Chatterton v. Cane, 3 App. Cases 483 (H. L. 1878).

16. Jeweller's Circular Publishing Co. v. Keystone Publishing Company, C. C. A. 281 Fed. 85 (1922).

17. Keene v. Kimball, 1860, 16 Gray (Mass.) 545; 77 Am. Dec. 426 (1860).

Technical infringement should not be carried so far as to deprive the purchasers of the benefits which they expect and are rightfully entitled to.¹⁸ It appears that correct decisions cannot be reached in copyright law if the courts slavishly and in a wholly material manner attempt to apply the technical rules of law to a particular case. A certain amount of art is necessary in making the decisions here even more than in other branches of law.

Writers, especially those who have not reached great success, often bring infringement suits that are unfounded. Every budding author is quick to see in the works of others similarities to his own brain child. He jumps quickly to guard his production from encroachment at the slightest indication of piracy whether there is in fact piracy or not, lest he be deprived of the fruits of his much hoped for success. The watchfulness and bias of the writer where his own work is concerned is excusable,—in any event it is a fact that should be recognized by the courts when approaching a plagiarism suit. At least, one court has expressed this thought, perhaps less charitably. "In this cause," said the judge, "as is usual in plagiarism causes, obscurity is taking a long shot at success." Furthermore, the court felt so strongly on the matter that it allowed the defendant to recover his attorney's fees, saying, "Having failed to reach its mark, the plaintiff must be made to pay for the expense to which he has put the defendants."¹⁹

IV.

HISTORY

Most who write of copyright retell the legend of the first recorded case of literary piracy. The case, which could be en-

18. 20 Cornell Law Quart. 145-149 (1934).

19. Lowenfels v. Nathan et al., D. C. 2 Fed. Supp. 73 (1932).

titled *Finnian v. Columba*, was decided by King Dermott in 567. Finnian possessed a beautiful psalter, the envy of all who saw it. His student, St. Columba, surreptitiously made a copy of the psalter—doubtless in his pre-sainthood days. Steps were taken to recover the reproduction. Upon appeal, when ordering the copy returned, the King handed down to posterity the notable statement, "To every cow her calf." Whether fact or fiction, the expression embodies the essence of the common law theory of copyright, and for centuries has furnished a springboard from which innumerable writers have plunged into the endless web of copyright law²⁰

This ancient but picturesque pronouncement is a far cry from the beginnings of copyright law in the United States. The first copyright law in the United States, named "An Act For the Encouragement of Literature and Genius," was passed in Connecticut in 1783, as a result of the efforts of a pressure group headed by Dr. Noah Webster.²¹ Most of the other states followed with similar legislation.²²

In 1781, the Constitution of the United States gave Congress 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 writings and discoveries."²³ In 1790, Webster secured the passage of the first Federal copyright law.²⁴ In 1831, there was a complete revision.²⁵ In 1856,²⁶

20. The case is said to have been chronicled by Adamnan fifty years after it was decided. It was later referred to by Montalembert in his "The Monks of the West." The story is referred to in almost every writing which refers to early copyright history. See Bowker, R. R., *Copyright: Its History and Its Law*, 1912; p. 9; Pamphlet, *How The Public Gets Its New Music*, published by ASCAP, 1933, pp. 9-10.

21. Solberg, *Copyright Law Reform*, 35 Yale Law J. 48, 71 at 48-49 (1925).

22. Solberg, *ibid.*

23. Constitution, Art I, sec. 8.

24. Solberg, *ibid.*

25. Act of February 3, 1831; *Backus v. Gould*, 7 How. 798, 808, 811 (1849).

26. 11 Stat. 138 (1856).

and again in 1870,²⁷ there were further modifications, all of which were finally incorporated in the Act of 1909, entitled "An Act to Amend and Consolidate the Acts Respecting Copyright."²⁸

V.

INFRINGEMENT

Before there can be infringement of copyright, it is essential that the material is subject to copyright, that legal title is vested in the proper party, that all statutory requirements of notice and deposit of copies have been complied with, and that copyright has been preserved.²⁹ The question of just what is protected by copyright often becomes all important in deciding a plagiarism suit.

At common law there was no property right in ideas as such.³⁰ Where the ideas were similar but no lines had been appropriated, the court denied recovery for the alleged piracy of a play. The common theme was Congressional life in Washington and the court said, "There is no inherent property rights in ideas, sentiments, or creations of the imagination expressed by an author, apart either from the manuscript in which they are contained, or 'the concrete form which he has given them, and

27. 16 Stat. 214 (1870).

28. Solberg, *idem*; 35 Stat. 1075 (1909); 17 U. S. Code, par. 1-63 (1934). The Act of 1909 together with all subsequent amendments is conveniently available in Copyright Office Bulletin No. 14 entitled "The Copyright Law of the United States of America."

29. For a good article on the technicalities of securing copyright, see Spencer, Richard, and Stone, Wilfred S., *Creating and Preserving a Copyright*, 14 Notre Dame Lawyer 362 (1939).

30. *Bristol v. Equitable Life Assurance Society*, 52 Hun. 161, 5 N. Y. S. 131 (1889); Logan, James C., *Legal Protection of Ideas*, 4 Missouri L. Rev. 239 (1939).

the language in which he has clothed them'.³¹ It is suggested, however, that this result could have been reached on the ground that "congressional life in Washington" is in the common realm and for that reason is not copyrightable.

It is not necessary to appropriate the whole to constitute piracy. It is only necessary to take enough to diminish the value of the original work. Jared Sparks published the works of George Washington in twelve volumes. The defendants published a *Life of Washington* consisting of 866 pages of which 353 were copied verbatim from the larger work. Justice Story properly held this an invasion of the copyright.³² The question does not hinge on quantity alone. The value and importance of the part pirated to the sale of the original are to be considered. It is necessary to look to the nature and objects of the selections made, their quantity and value, degree of prejudice to sale, diminished profits, and whether it supersedes the objects of the original. "Many mixed ingredients," said Justice Story, "enter into the discussion of such questions".³³ Nor shall the meritorious nature of the defendant's labors be considered.³⁴

It is generally held that there can be no actionable piracy of incident because incidents are not subject to copyright. Detection would be difficult. Nevertheless, one court calls attention to the fact that the unexpected climaxes of O. Henry were extensively copied, as well as Dickens' *Sketches by Boz*. This is likewise true of a great many other works. However, said the court, "It is doubtful whether incidents per se can become copyrightable literary property, but it does not take many of them, nor much causal connection thereof, to make what will pass for a plot, or scene, and constitute the action of a play; and that a scene has literary quality and can be copyrighted, and piracy

31. *Maxwell v. Goodwin*, 93 Fed. 665 C. C. (1899).

32. *Folsom v. Marsh*, 2 Story 100 (1841).

33. *Ibid.*

34. *Ibid.*

may consist in appropriating the action of a play without any of the words, is well settled."³⁵

An old plot is common property and copyright cannot prevent its use by anyone who chooses. For instance, Jack London alleged that the defendant had plagiarized his short story "Just Meat" by its moving picture "Love of Gold." The plot was the same in both. Each of two burglars, after securing a large amount of loot, unknown to the other placed poison in the other's drink. Both died. There was considerable variation in the details and embellishments. The court held that there was no infringement because copyright does not extend to an old plot per se, but merely to the embellishments.³⁶ It should be noted that this particular plot appears in Chaucer's Pardoner's Tale.³⁷ Kipling also used the story in his account of the King's Ankus in his second Jungle Book. In fact, the plot may be traced to the ancient literature of the Orient.

It has been suggested that a certain "technique," "attitude," or "approach" is necessary for the proper decision of plagiarism cases. Many courts have used a very technical approach whereas the matter should be treated in an artful fashion. "The character of the test of plagiarism is simple," said one court. "It is not to be determined by the fine analysis or by argument and dissection of an expert, but by ordinary observations."³⁸ An intelligent comparison of the works themselves in most cases is doubtlessly the greatest aid to a judge in deciding a question of piracy. One court expressed the thought in this manner, "There seems to be no good reason why . . . a reading and comparison of the books themselves should not dispose of the claim of infringement when there are no questions of access, origin-

35. *Frankel v. Irwin et al.*, D. C. 34 Fed. 2d 142 (1918).

36. *London v. Biograph Co.*, C. C. A. 231 Fed. 696 (1916).

37. *Chaucer, Works*, ed., Rev. Walter W. Skeats, 1894, vol. III, pp. 438-445

38. *Dymow v. Bolton et al.*, C. C. A. 11 Fed. 2d 690 (1926).

ality, or other facts requiring proof."³⁹ The meaning which the author may give his work is not the final test.⁴⁰

Ideas as such are not protected.⁴¹ Copyright merely protects the means of expressing the idea. "If the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result, and no infringement will exist."⁴² Neither is "theme" a word of art. Where the word has been used in decisions the cases show that a great deal more is meant than "the jealousy motif on which the fabric of Othello is hung, or, to go to the other extreme of composition, the theorem of a proposition by Euclid."⁴³ One court says the "safest guide is always to determine what the fundamental theme is, and to see whether it has been appropriated."⁴⁴ At least, it should first be decided whether anything at all has been appropriated, and if so, then it should be determined whether that which was appropriated was copyrightable and if the infringement is substantial.⁴⁵ In *Dymow v. Bolton* the plaintiff wrote a play in Russian entitled "Personality." The play was in Bolton's possession for some time, and he later wrote a play called "Polly Preferred" with the plot against the background of theatrical and movie life and speculative finance. Dymow's play dealt with Jewish society in New York engaged in the cloak and suit industry. The plays are similar only in that in both is found the gratification of the heroine's ambition and the requited affection of the hero. Thus, the "theme" of the two plays is similar, but the

39. *Wiren v. Shubert Theatre Corp. et al.*, D. C. 5 Fed. Supp. 258 (1933); See also *Nichols v. Universal Pictures Corp.*, C. C. A. 45 Fed. 2d 119; *Lowenfels v. Nathan*, D. C. 2 Fed. Supp. 73.

40. *Wiren v. Shubert Theatre Corp. et al.*, *supra*.

41. *Holmes v. Hurst*, 19 Sup. Ct. 606, 174 U. S. 82, 43 L. Ed. 904; *Kalem Co. v. Harper Bros.*, 32 S. Ct. 20, 222 U. S. 55, 56 L. Ed. 92.

42. *Dymow v. Bolton et al.*, 11 Fed. 2d 690 (1926).

43. *Ibid.*

44. *Underhill v. Belasco*, D. C. 254 Fed. 838.

45. *Dymow v. Bolton et al.*, *supra*.

flesh and blood is entirely different. Saying that "copying which is an infringement must be something 'which ordinary observation would cause to be recognized as having been taken from' the work of another," the court held there was no infringement.⁴⁶

It should not be said, however, that there can be no plagiarism for merely stealing a plot. The contrary has been distinctly held.⁴⁷ One court said, "We do not doubt that two plays may correspond in plot closely enough for infringement. How far that correspondence must go is another matter. Nor need we hold that the same may not be true as to the characters, quite independently of the 'plot' proper, though as far as we know, such a case has never arisen."⁴⁸

"Of Thee I sing," a musical satire was held not to infringe the copyrighted play "U. S. A. With Music," an operatic tragedy, on the ground that they were different in their very nature. Similar matters in both plays such as political conventions, six day bicycle races, etc., are common and are in the public domain.⁴⁹

The plaintiff's play "Under the Gas Light" had a "railroad scene" where a person lay helpless upon the track. As a train bore down upon him, another character dramatically rescued him by dragging him from the tracks. The defendant incorporated a similar scene in his play "After Dark," using the incidents in the same order and sequence, aiming at the same sensations and impressions. The court held the latter was an infringement of the former upon the ground that the action and the pantomime had been pirated. The excitement of the "rail-

46. *Dymow v. Bolton*, *supra*. See also *King Syndicate v. Fleischer*, C. C. A. 299 Fed. 533.

47. See *Dam v. Kirk La Shelle Co.*, 175 Fed. 902; 20 Ann. Cas. 1173; *Stodart v. Mutual Film Co.*, 249 Fed. 513.

48. *Nichols v. Universal Pictures Corp.*, C. C. A. 45 Fed. 2d 119 (1930).

49. *Lowenfels v. Nathan et al.*, D. C. 2 Fed. Supp. 73 (1932).

road scene" was the essence of the plays. In deciding the case the court said, "The true test of whether there is piracy or not is to ascertain whether there is servile or evasive imitation of the plaintiff's work, or whether there is a bona fide original compilation, made up from common materials, and common sources, with resemblances which are merely accidental, or result from the nature of the subject."⁵⁰ In another suit in protection of the same play against another defendant the plaintiff also recovered on the ground that the introduction of the rescuer was novel and thus protected by copyright. The perilous situation alone was common property and thus not protected.⁵¹

It was alleged that Zane Grey in his "Thundering Herd" pirated a part of Maddux's "The Border and the Buffalo." Recovery was denied. The plaintiff's book was a narrative without plot describing western border life including buffalo hunting in the period just after the Civil War. On the other hand, Grey's book was essentially a love story. The similarities were only in historical facts which are in the public domain.⁵²

The merit of a copyrighted play entitled "The Woodsman" was supposed to consist in its atmosphere of the north woods of Maine. Its only originality was in the setting of the scenes. A simple guide wins the heart of a "society girl" who is at the time engaged to a typical villain. The villain employs a half-breed Indian to change the markers along a path which the guide and the girl usually follow so that they may be lost. The lady suspects that the guide has purposely caused them to be lost for the gratification of his own motives. The "tool," however, on his deathbed confesses the trick and the guide and the girl are brought together to live "happily ever after." The defendant's motion picture, "The Strength of Donald MacKenzie,"

50. *Daly v. Palmer*, U. S. C. C. 6 Blatch. 256 (1868).

51. *Daly v. Webster*, 56 Fed. 483 (1892).

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

uses exactly the same characters and the same trick of changing the signs on the trail. The defendant claimed the material was in the public domain and thus there could be no infringement of copyright. The court held infringement did exist on the ground that the defendant's motion picture resembled the plaintiff's copyright much more than it resembled anything that was in the public domain. In deciding the case, Justice L. Hand said, "A man may take an old story and work it over, and if another copies, not only what is old, but what the author has added to it when he worked it up, the copyright is infringed. It cannot be a good copyright, in the broader sense that all features of the plot or the bare outlines of the plot can be protected; but it is a good copyright in so far as the embellishments and additions to the plot are new and have been contributed by the copyright. That is this case."⁵³

Defendant's photo play was alleged to be a piracy of plaintiff's novel. They both dealt with circus life, but neither were original, and each treated its theme differently. There was sufficient differences to make it very doubtful that a piracy had occurred, and relief was denied.⁵⁴

It is common knowledge that writers make use of incidents that actually occur. The question turns upon how and in what manner they have used these incidents. Few things are "new." For instance, convent life is surely old and common. Likewise, the theme of a foundling is old. Normal human conduct is old and well known. The playwright or novelist attempts to weave these common things into a pattern around some central and controlling idea in such a manner as to be successful artistically and, quite frequently, financially. There is no plagiarism where two plays are common only in that they both deal with a foundling, and both are set in convent life with some similarities of

53. *Stodart v. Mutual Film Corp. et al.*, 249 Fed. 507 (1917).

54. *Bobbs-Merrill Co. v. Equitable Motion Pictures Corp.* 232 Fed. 791 (1916).

dialogue and terminology, if they are "essentially and fundamentally different."⁵⁵

Likewise, two plays, "In Hawaii" and "The Bird of Paradise," was held not to be a piracy of each other, because the basic themes and treatment were entirely dissimilar. The scene of both was Hawaii. Description of local color, customs, songs and dances, religious rites, and modes of living were replete. Anyone writing about Hawaii would probably use similar material in writing about these matters. But there was no infringement, because they were basically different in form and theme.⁵⁶

In another case the plaintiff owned the animated cartoon "Betty Boop." The defendant made a doll depicting the well known character. Though the hair was arranged a little differently, the copyright was infringed, because the doll "creates the same impression as the copyrighted sketch."⁵⁷ Even the "Mutt and Jeff" have not been without their imitators. The defendant placed two characters "Nutt" and "Giff" in a dramatic production, named "In Cartoonland." Some words and phrases were used directly from the comic strip. This was held to be infringement of the copyright because anyone who saw the production, and was familiar with the comic strip, would understand that "Nutt" and "Giff" were intended to represent "Mutt" and "Jeff."⁵⁸ Though a copyrighted work is subject to fair criticism, a parody may constitute piracy. One test is whether or not the parody reduces the demand for the original by partially satisfying that demand.⁵⁹

The standard of the ordinary observer should be applied in determining whether or not there has been a piracy. In the case

55. *Underhill v. Belasco*, 254 Fed. 838 (1918).

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

57. *Fleischer Studios, Inc., et al. v. Ralph A. Friendlic, Inc., et al.*, 5 Fed. Supp. 808 (1934).

58. *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359 (1914).

59. *Ibid.*

of the alleged piracy by a movie of plaintiff's novel, there is no infringement unless the public "is led to believe that the films are a picturization of plaintiff's literary work."⁶⁰ The rules by which piracy is determined are quite well established. The difficulty comes in applying the rules to a particular set of facts. Each decision must depend largely upon the specific facts dealt with. Other decided cases are of little aid, except as to furnish a background and demonstrate thought processes which have been used.⁶¹

Infringement may consist of copying from memory without conscious plagiarism. For instance, a defendant worked with and sold plaintiff's interest and discount time teller. He later made one of his own, unconsciously incorporating much of the plaintiff's production, which was held to be an infringement.⁶² A person took down in shorthand and published in shorthand characters a lecture which was delivered from memory by the plaintiff. This was held to be an infringement; although the audience would be allowed to take notes on the speech for personal purposes.⁶³

An author gave fragmentary and brief descriptions of famous operas in his book called "Opera Stories." Each scene was covered by a single paragraph. He took his descriptions from material other than the operas themselves, and the court held there was no infringement on the copyrighted librettos. The court suggested, in fact, that the publication should have a very beneficial effect upon the plaintiff's "market."⁶⁴ These brief

60. *Barbadills, et al. v. Goldwyn, et al.*, 42 F. 2d 881 (1930). See also *Roe-Lawton v. Hal E. Roach Studios et al.*, D. C. 18 Fed. 2d 126; *Frankel v. Irwin et al.*, D. C. 34 Fed. 2d 142; *Nichols v. Universal Pictures Corp. et al.*, D. C. 34 Fed. 2d 145; *King Features Syndicate v. Fleischer et al.*, C. C. A. 299 Fed. 533.

61. See *Ornstein v. Paramount Productions*, D. C. 9 Fed. Supp. 896 (1935).

62. *Edwards & Deutsch Lithographing Co. v. Boorman et al.*, 15 Fed. 2d 35.

63. *Nicols v. Pitman*, 26 Ch. Div. 374 (1884).

64. *G. Ricardo & Co. v. Mason et al.*, 201 Fed. 182, 184 (1911) and 210 Fed. 277 (1913).

descriptions were not "versions" as contemplated by Congress when the copyright statute was enacted. Reviews, criticisms and newspaper accounts of copyrighted material were not intended to be treated as infringement though perhaps a literal interpretation of the act would indicate such a result.⁶⁵

With this case, however, should be compared the case involving F. W. Taussig's "Principles of Economics." The defendant, a teacher, used the book as a text for his class in economics. Most of the students had copies. For each class period, the teacher gave each student a typewritten page on which he had prepared a brief summary of the materials to be used in class. The sheets were not sold but merely loaned to the students with the understanding that they were to be returned. Occasional phrases were quoted verbatim. Certain chapters were "somewhat roughly condensed . . . proof, modification, illustration, or application being disregarded." The court held that the teacher had infringed plaintiff's copyright. The outlines went further than just to give "enough information to put the reader upon inquiry." Strangely enough, the court suggested that the outlines might beguile the student into believing that he could "get by" without the book itself. Though there was no actual injury to the sale of the book, there was a possibility of injury if the process were permitted, and, therefore, an injunction was issued.⁶⁶ It was, of course, of no consequence that the material was being used for teaching purposes.⁶⁷

Typing or mimeographing is considered printing.⁶⁸ To have publication it is not necessary that the work "should have been offered in the market to whoever chose to buy . . . There may be a limited publication which will entitle the owner of the copyright to an injunction."⁶⁹

65. *Ibid.*

66. See *H. Holt & Co. v. Liggett & Meyers Co.*, 23 Fed. Supp. 302 (1938).

67. *Macmillan Co. v. King*, 223 Fed. 862 (1914).

68. *Ibid.*

69. *Ibid.* See also *Ladd v. Oxnard*, C. C. 75 Fed. 703, 730.

The loaning of a book of credit ratings to subscribers on the stipulation that they were merely loaned and not sold, and that if found in other hands, the rights of the subscriber would be annulled, was held to be a publication.⁷⁰

Literary excellence is not necessary to make a work subject to copyright. For instance, an introduction, skeleton, and chorus of a "topical song" which was part of dramatic composition is subject to infringement though it was designed only to amuse. It possessed little literary merit, but it was copyrightable because it was of value for the purposes for which it was designed.⁷¹ A great many books of very mediocre, in fact very poor skill rest safely under copyright.⁷² It is not the duty of the courts to assume the role of literary critics and weigh carefully the literary excellence of material coming before them in copyright litigation. They need not concern themselves with the training and skill involved in the production.⁷³ The courts will not interpose judicial knowledge so as to find on demurrer against the allegations of the bill relative to questions of originality.⁷⁴

A defendant published matter which had been copyrighted jointly for three publications. A reproduction of one of these publications had been made with the consent of the owner. The defendant copied the reproduction and was very properly held to have infringed the owner's copyright.⁷⁵ Many attempts have been made to evade, technically, the copyright law, but usually they are unsuccessful. Another defendant, for instance, made

70. *Ladd v. Oxnard*, 75 Fed. 703 (1896).

71. *Henderson v. Tompkins*, 60 Fed. 758 (1894).

72. Surely the play "Under the Gaslight" was no masterpiece yet it was the subject of famous litigation. See *Daly v. Palmer* and *Daly v. Webster*, notes 50 and 51.

73. *Henderson v. Tompkins*, *supra*.

74. *Ibid.*

75. *Cate v. Devon and Exeter Constitutional Newspaper Co.*, 40 Ch. Div. 500 (1889).

copies of copyrighted pictures, omitting the tint, title and plate mark, and sent them to London to have the tint, title and plate mark put on them, with the intent then to deliver the finished product. This was very properly held to be a violation of the copyright law.⁷⁶

Another class of cases involves compilations. A compiler of facts from common sources is required to examine for himself the original sources. He may not copy the results of a previous compiler's study, although the same results could have been reached by an independent study. Each compiler must make his own independent study. It was held piracy for the defendant to copy citations from copyrighted work. The fact that the citations appeared in the same order in the infringing work was evidence of the piracy.⁷⁷ However, the author of a law book may copy the citations of a prior author if he examines and verifies the cases cited. He may even use them in the same order with additions and subtractions. Failure to cite other cases or to note overrulings and reversals or to correct errors is evidence of copying.⁷⁸ Of course, some similarity of outline and subject matter in annotated statute books, for instance, is to be considered inevitable. But inexplicable similarities have a cumulative effect in determining whether or not the work infringes some prior work.⁷⁹

Judicial decisions themselves may not be copyrighted. They are the common property of all, and anyone may publish them.⁸⁰ Neither can a state give anyone the exclusive right to publish

76. *Fishel v. Lueckel*, 53 Fed. 499 (1892).

77. *Banks v. McDivitt*, 13 Blatch. 163 (1875).

78. *White v. Bender*, 185 Fed. 921 (1911).

79. *W. H. Anderson & Co. v. Baldwin Law Publishing Co.*, 27 Fed. 2d 32 (1928).

80. *Bank and Bros. v. West Publishing Co.*, 27 Fed. 50 (1866); *West Pub. Co. v. Lawyers Co-op. Pub. Co.*, 64 Fed. 360 (1894); *Banks v. Manchester*, 128 U. S. 244 (1888).

The defendant was held to have appropriated the plaintiff's telephone directory when he merely inverted the order of the information, leaving out some. Where the entry had appeared in the telephone directory as "Smith, John Joseph r 104 Chattanooga A T water 3570," the defendant in his directory under the A T water section had this item "3670 Smith J. J."⁸⁷

As to proof of infringement, in addition to the comparison as a whole by the court of the material involved, comparisons made by expert witnesses may be admitted into evidence. This evidence may be admitted only as an aid to the court, however, because it is the court's duty to make the comparison.⁸⁸ Common errors justify the inference of infringement and even though they are few, they justify the granting of a temporary injunction.⁸⁹ A large number of identical errors and peculiar spellings in the defendant's map makes out a *prima facie* case for the plaintiff. The defendant has the burden of going ahead with the evidence to explain the similarities. The testimony of a single discredited witness was clearly insufficient to overthrow the *prima facie* case.⁹⁰ Common errors in a hotel directory were held to constitute proof of infringement.⁹¹

Federal courts have no jurisdiction in a suit, which, even though it does charge infringement of copyright and asks an injunction, is really a suit to enforce an author-publisher contract. The case does not arise under the copyright law.⁹² A suit

87. *Leon et al. v. Pacific Telephone and Telegraph Co.*, 91 Fed. 2d 484 (1937).

88. *Encyclopedia Britannica Co. v. American Newspaper Association*, 130 Fed. 460 (1904).

89. *George T. Bisel v. Welsh et al.*, 131 Fed. 564 (1904); *Frank Shepard Co. v. Zachary P. Taylor Pub. Co.*, 185 Fed. 941 (1911).

90. *General Drafting Co., Inc. v. Andrews et al.*, 37 Fed. 2d 54 (1930).

91. *American Travel & Hotel Directory Co., Inc. v. Gehring Publishing Co., Inc.*, 4 Fed. 2d 415 (1925); *Investment Service Co. v. Fitch Publishing Co.*, 291 Fed. 1010 (1923).

92. *Silver v. Holt*, 84 Fed. 809 (1895); *Danks v. Gordon et al.*, 272 Fed. 821 (1921).

involving title to a copyright, where no question of infringement is involved, depending on rules of common law, is not removable from state to Federal courts on the basis of the copyright law.⁹³

The plaintiff and the defendant contracted to cooperate in gathering information and setting type for a city directory to be published by each. The plaintiff was to print his first and deliver the type to the defendant who was to print from the same type with certain restrictions. The defendant violated the contract, but the plaintiff had copyrighted his work prior to the violation. The breach of contract here furnishes no ground for a suit on the infringement of copyright.⁹⁴

VI

INTENTIONAL OR INNOCENT INFRINGEMENT

It cannot be categorically stated that the matter of intent or other mental attitude is absolutely immaterial in plagiarism suits, though the statements of some courts might lead to that conclusion.⁹⁵ Actual intent to infringe is not usually considered necessary in order to allow the plaintiff to recover.⁹⁶ However, where the defendant was charged with infringement through the maintenance of a radio receiving set, it was held that lack of an intent to infringe prevented a violation of the Copyright Act.⁹⁷ Though there may be a definite and conscious intent to

93. *Hoyt v. Bates et al.*, 81 Fed. 614 (1897).

94. *Maloney v. Foote et al.*, 101 Fed. 264 (1900).

95. See *Sheldon v. Metro Goldwyn Pictures Corp.*, 81 Fed. 2d 49 (1936); *Seltzer v. Sunbrook*, 22 Fed. Supp. 621 (1938).

96. *Pathe Exchange v. Local No. 306*, 3 Fed. Supp. 63 (1933); *Fishel v. Lueckel (C. C.)* 53 Fed. 499; *Stern v. Jerome H. Remick & Co. (C. G.)* 175 Fed. 282; *Witmark & Sons v. Calloway*, 22 Fed. 2d 412 (1927).

97. *Buck v. Duncan*, 32 Fed. 2d 366 (1929); *Buck v. Jewell-LaSalle Realty Co.*, 51 Fed. 2d 726, 730.

avoid infringement, unconscious copying as a result of subconscious memory developed from knowledge of a story may constitute infringement.⁹⁸

Intent is considered important in weighing circumstantial evidence of copying.⁹⁹ Efforts to avoid infringement may be considered in deciding whether equitable relief should be granted because of profit and use gained from materials inserted despite defendant's efforts to the contrary.¹⁰⁰ Some courts have presumed the intent to plagiarize from the fact of unlawful copying.¹⁰¹

One court has said, "Regarding the intent . . . it is obvious that the use of a certain amount of an author's production may be perfectly fair and legitimate in one case, while the use of a similar amount in another case might be unlawful . . . (a reviewer may make considerable use) . . . On the other hand, if the selections are made *animo furandi*, with intent to make use of them for the same purpose for which the original author used them, to convey in a different publication the information which he imparted, or to supplant him in his own territory, a small quantity will suffice to render the defendant liable to a charge of piracy."¹⁰² The failure to give source may indicate *animus furandi*.¹⁰³

Though intent may be immaterial where there has been a great deal of actual copying, if there is considerable doubt as to whether or not there has been copying, the intent not to pilfer, either colorably or otherwise, is given weight in deciding. Therefore, where it was clear that the main intent was to make

98. *Harold Lloyd Corp. v. Witwer*, 65 Fed. 2d 1, C. C. A. (1933).

99. *Ibid.*

100. *West Publishing Co. v. Edward Thompson Co.*, 169 Fed. 833 (1909), 176 Fed. 833.

101. *Journal Pub. Co. v. Drake*, 199 Fed. 572 (1912).

102. *Farmer v. Elstner*, 33 Fed. 494 (1888).

103. *Ibid.*

a cheaper work with original poetry rather than republish the plaintiff's work, the prayer for an injunction was refused.¹⁰⁴ Intent may be considered in determining whether there has been an actual infringement.¹⁰⁵ In another case the plaintiff owned the copyright to a song which an actress used in a performance where she stepped into one of the boxes and sang it to an individual, accompanying her song with gestures, postures and artistic effects. Another actress had an act in which she imitated the first actress. She announced that it was to be but an imitation. She used plaintiff's song. The court held that the representations were merely of the "peculiar actions, gestures, and tones" of the original actress. These the plaintiff could not copyright. The use of the chorus was not an infringement, because it was merely a vehicle for carrying the imitation along. "No doubt," said the court, "the good faith of such mimicry is an essential element; and if it appears that the imitation was a mere attempt to evade the owner's copyright, the singer would properly be prohibited from doing in a roundabout way what could not be done directly."¹⁰⁶ If the mimicry is the substantial and primary part of the performance and the song is merely incidental, there is no infringement. Liability is not affected by the lack of intent to infringe, but is determined entirely by the results of the performance.¹⁰⁷

An interesting variation is suggested in a case involving the copyright of advertising. In response to an allegation that advertising material for pianos was protected by copyright, the court held that the particular material was not protected because it misrepresented the wares, falsely stated the number that had been sold, and extravagantly puffed the quality and merits of the pianos. What is usually understood as puffing

104. *Webb v. Powers*, 29 Fed. Cas. 511 (1847).

105. *Meccano, Ltd. v. Wagner*, 234 Fed. 912 (1916).

106. *Bloom Hamlin v. Nixon et al.*, 125 Fed. 977 (1903).

107. *M. Witmark & Sons v. Calloway et al.*, 22 Fed. 2d 412 (1912).

would not alone cause a refusal of relief. "If their tendency be misleading and deceptive," said the court, "they will find the doors of a court of equity barred against their admission." The plaintiff must come into equity with clean hands.¹⁰⁸ The same thought is expressed by another court in these words: "Consistency requires that the defendant should not be punished for doing that which the complainant does with perfect impunity." This court held that an author who has pirated a large part of his own work from other copyrighted works is not entitled to have his copyright protected.¹⁰⁹

The purpose of the work is absolutely immaterial. Because the plaintiff wrote for a presidential campaign and the defendant wrote for the instruction and guidance of young persons is no justification whatsoever for infringement.¹¹⁰ It is well established that the defendant is not relieved from liability because he acknowledges the source of his material and gives credit to the original.¹¹¹

The Copyright Act of 1909, has made provision for the protection of an innocent infringer where the copyright owner has attempted to obtain copyright, but who for some reason has failed to give proper notice. "Where the copyright owner has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by

108. *Stone & McCarrick, Inc. v. Dugan Piano Co et al.*, 220 Fed. 837 (1915).

109. *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 922 (1903).

110. *Gilmore v. Anderson*, 38 Fed. 846 (1889).

111. *H. Holt & Co. v. Liggett & Meyers Tobacco Co.*, 23 Fed. Supp. 302 (1938); *Pike v. Nicholas*, 5 Ch. App. 251; *Walter v. Steinkopff*, 3 Ch. 481 (1892).

the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion shall so direct."¹¹² This was not true before the Act of 1909. Anyone who copied copyrighted material on which the notice had been inadvertently omitted did so at his peril though he had no actual knowledge of the copyright.¹¹³

In a case where the author copyrighted her play under one title and later changed the title, under which it was produced, the copyright was not forfeited as to a plagiarist who knew all the facts. There is dictum in the case that indicates the court would have reached an opposite result if the infringer had been misled by the action of the plaintiff in changing the title.¹¹⁴

VII.

FAIR USE

Since every author must intend that some use of his production be made, the doctrine of "fair use" has grown up and is recognized by the courts. "Fair use" may be said to be just another term for "legally permissive" use of copyrighted material. A certain use is legally permissive "either because the scope of the copyright, the nature of a work, or by reason of the application of known commercial, social or professional usages, having the effect of custom, insofar as these do not expressly run contrary to the plain language of copyright legislation."¹¹⁵ Lord Eldon said that whether a use was a fair use depended upon whether what the user did involved the "fair exercise of a

112. Act of 1909, sec. 20.

113. *American Press Association v. Daily Story Pub. Co.*, 120 Fed. 766 (1902)

114. *Collier v. Imp. Films Co.*, 214 Fed. 272 (1913).

115. Weil, A. W., *American Copyright Law*, pp. 429, 430.

mental operation deserving the character of an original work."¹¹⁶ This was early qualified by the statement that the action should not be merely "colorable."

From a very early time book reviews have been considered a fair use. Authors are desirous of having their books reviewed in hopes of favorable publicity.¹¹⁷ In a book review enough may be taken to give a correct view of the whole, but the review must not be allowed to become a substitute for the book reviewed.¹¹⁸ A reviewer whose object is to show the merit or demerit of a book may quote to reasonable extent.¹¹⁹ The extent of fair quotation is a question of degree and must be decided on the facts of each case. Justice Story summarized the rule as follows: "We must in deciding questions of this sort look to the nature and objects of the selection made, the quantity and value of the material used and the degree to which the use may prejudice or diminish the profits or supersede the objects of the original work."¹²⁰ A very large amount may be reproduced if it is clearly intended to be for purposes of criticism. In one case nearly one-fourth was reproduced and the court held it fair use.¹²¹ Parody, if within the limits of fair use, is an accepted form of review.¹²²

Fair use may turn also upon the purpose of the copyrighted material. There are, for instance, such utilitarian works as directories, digests and manuals of instruction. Some books may be designed to have portions of their contents copied, such as

116. *Wilkins v. Aiken*, 17 Ves. 422.

117. *Vramwell v. Halcomb*, 3 My. & Cr. 737.

118. *Chatterton v. Cave*, L. R. 3 A. C. 492.

119. *Lawrence v. Dana*, 4 Cliff. 1 (1869), Fed. Cas. No. 8, 136.

120. *Story's Executors v. Holcombe et al.*, 4 McClean U. S. C. C. 306 (1847).

121. *Folsom v. Marsh*, 2 Story 100 at 116, approved in *Scott v. Stanford*, L. R. 3 Eq. 718.

122. *Bell v. Whitehead*, 8 L. J. Ch. 141.

123. *Bloom & Hamlin v. Nixon*, 125 Fed. 977.

legal form books.¹²⁴ Justice Lacombe stated, "It would seem that all books which are not purely literary, that is are not works of creative or imaginative literature, but merely compilations of statements found elsewhere, should be treated alike in applying the principles of the law of copyright. Legal digests, algebras, arithmetics, etc., statistical yearbooks, directories, gazetteers, business or social registers, are all produced by the same methods and by the use of skill which is merely clerical."¹²⁵ A compiler may make such use as he pleases of all common sources. He may also check his work by former compilations. However, he may not simply colorably adopt the work of another as has already been pointed out.¹²⁶ A subsequent writer may note authorities cited and then examine them and quote the same portions to illustrate the same thought.¹²⁷ But he may not copy the excerpts directly from the copyrighted work.¹²⁸ Thus, it is apparent that quite extensive use may be made of copyrighted material in addition to those purely private uses for which literary productions are primarily designed.

VIII

MEASURE OF RECOVERY

How well does the plaintiff in an infringement of copyright suit fare if he wins? An examination of the cases forces the conclusion that he fares much better than winning plaintiffs in any other field of law on an equally well established case. It seems that the plaintiff's likelihood of recovering a substantial judgment is greater here than in any other field of the law.¹²⁹

124. *Stover v. Lathrop*, 33 F. 348.

125. *Colliery Engineer Co. v. Ewald*, 126 Fed. 843.

126. *Jarrold v. Houlston*, 3 Kay & J. 708.

127. *Pike v. Nicholas*, L. R. 5 Ch. App. 251.

128. *Moffat & Paige v. George Gill & Sons, Ltd.*, 86 L. T. N. S. 465.

129. See Caplan, Julian, *The Measure of Recovery in Actions for the Infringement of Copyright*, 37 MICH. LAW REV. 564 (1939).

Statutes now govern the matter. In England for some time after the first copyright statute was passed,¹³⁰ Chancery continued to hold that "by the common law and independently of legislation there was a property of unlimited duration in printed books." This pronouncement was affirmed as late as 1769, in a case where the author's right to a monopoly of "Thompson's Seasons" was sustained.¹³¹ A few years later, the House of Lords by an equal division of the judges, held that the common law right had been taken away by the Statute of Queen Anne and that the rights of authors were limited by the act.¹³² This remains the law of England today. In the United States after Congress enacted a copyright statute in 1790, the Supreme Court of the United States followed the English rule.¹³³ "It seems now to be the settled law of this country and England that the right of the author to monopoly of his publications is measured and determined by the copyright act—in other words, that while a right did exist by common law, it has been superseded by statute."¹³⁴ The statute smiles generously upon the expectant plaintiff.

Among other things, the present copyright statute¹³⁵ provides for an injunction restraining the infringement.¹³⁶ The proprietor of the copyright may also recover such damages as he has suffered as a result of the infringement, together with the profits the infringer himself may have made. If no actual damages or profits are proved then the court shall allow damages according to its discretion. The court, however, must exercise its discretion, within certain specified limits set out in

130. 8 Ann. C. 19.

131. *Miller v. Taylor*, 4 Burrows 2303.

132. *Donaldsons v. Becket*, 4 Burrows 2408.

133. *Wheaton v. Peters*, 8 Pet. 591.

134. *Holmes v. Hurst*, 174 U. S. 82 (1899).

135. 17 U. S. C. (1925), sec. 25.

136. Sec. 25 (a).

the act.¹³⁷ The defendant may be required to deliver to the court all infringing articles subject to the terms of the court.¹³⁸ All such articles may be destroyed.¹³⁹ Strict and generous provisions are also made for violation of musical copyright.¹⁴⁰

A. RECOVERY OF DAMAGES AND PROFITS

The plaintiff may show the sales that he has lost because of infringement and his consequent loss in terms of profits that he would have made.¹⁴¹ On the other hand, the plaintiff may show his loss by proving what the sale value of his copyright would have been had it not been infringed. "The amount cannot be determined with any assurance that it is truly accurate," said one court, "but must be measured by the reasonable probabilities, considering all of the evidence presented on both sides of the question."¹⁴²

Any other costs which have been occasioned by the infringement may also be recovered. For instance, the Atlantic Monthly owned the copyright to a letter from Al Smith regarding the religious issue in his presidential campaign. The Boston Post surreptitiously procured a copy of it and published it. As a result, the Atlantic Monthly was required to change its forthcoming issue. The court held that the plaintiff could recover, in addition to any profit made by the defendant, any expense resulting from the change of plans necessitated by the infringement plus any loss of subscriptions.¹⁴³

137. Sec. 25 (b).

138. Sec. 25 (c).

139. Sec. 25 (d).

140. Sec. 25 (e).

141. *Gross v. VanDyk Gravure Co.*, 230 Fed. 412 (1916); *Chils v. Gronlund*, 41 Fed. 145 (1890).

142. *Paramore v. Mack Sennett, Inc.*, 9 Fed. 2d 66 (1925).

143. *Atlantic Monthly v. Post Pub. Co.*, 27 Fed. 2d 556 (1928).

The damage for the unlawful performance of a play may be measured by the value of a license to "produce the play at the time and place of its performance."¹⁴⁴ In a suit on the infringement of a copyrighted advertisement the court held that the plaintiff could not show with any degree of certainty the sales that he could have made.¹⁴⁵

In addition to recovering the actual damage, the plaintiff may also recover the profits which have accrued to the defendant. To show the profits he has gained, the defendant may be compelled to produce all his records concerning the sales he has made.¹⁴⁶ The plaintiff may prove that he could have made the sales the defendant made and thus recover the profit made by the defendant in addition to what the plaintiff actually lost because of the infringement.¹⁴⁷ Positive proof that the plaintiff could have made the sales being almost impossible, there is a rebuttable presumption that he would have done so. However, where the defendant gave away a certain number of his infringing copies of a map, there was no presumption that the plaintiff was deprived of the same number of sales.¹⁴⁸

The defendant is not allowed to show that the plaintiff would not have made so much profit on the given number of sales.¹⁴⁹ If the plaintiff can show that he could have made more sales and more profits than did the defendant, he may recover for this also.¹⁵⁰ Where the infringements are intermingled through the whole work so that they cannot be separated, or at least the defendant makes no effort to separate them, he must account for all the profits on all the sales of the whole

144. *Keane v. Wheatley*, 4 Phila. 57.

145. *Sebring Pottery Co. v. Steubenville Pottery Co. et al.*, 9 Fed. Supp. 384.

146. *Ginn & Co. v. Oppollo Pub. Co.*, 228 Fed. 214.

147. *Gross et al v. Van Dyk Gravure Co.*, 230 Fed. 412.

148. *Woodman v. Lydiard Peterson Co.*, 192 Fed. 67.

149. *Scribner v. Clark et al.*, 50 Fed. 473.

150. *Dam v. Kirk La Shelle Co.*, 175 Fed. 902.

thing.¹⁵¹ But where more of the infringing copies were printed than sold, he may deduct from the gross receipts "all such items of cost as would have been the same, had no more copies been printed than were sold, such as providing the copy and composition."¹⁵²

The statute is very favorable to the plaintiff on this matter of profits. In order to establish his case all the plaintiff need prove is the sales. "In proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims."¹⁵³ Expenses that the defendant may deduct include manufacturing costs, salaries,¹⁵⁴ and selling expenses.¹⁵⁵

There is some question as to whether it was the intention of Congress to have the damages as well as profits awarded or whether they were to be awarded in the alternative.¹⁵⁶ The apparent meaning of the words is that the award should be cumulative. It has generally been interpreted this way.¹⁵⁷

Under the Act of 1909, does equity have jurisdiction to award damages if an injunction is denied? Two opposite answers have been given. In both decided cases the infringements had occurred in the past and there was no reason for an injunction. Both courts denied the injunction but awarded damages. On appeal one court held that equity had no jurisdiction but that the damages should have been awarded at law. This decision

151. *Hartford Printing Co. v. Hartford Directory and Pub. Co.*, 146 Fed. 332 (1906).

152. *Hartford Printing Co. v. Hartford Directory and Pub. Co.*, 148 Fed. 470.

153. 17 U. S. C. (1935), sec. 25 (b).

154. *Dam v. Kirk La Shelle Co.*, 175 Fed. 902, 189 Fed. 842.

155. *Meyers v. Callaghan*, 128 U. S. 617 (1888).

156. See Caplan, Julian, *The Measure of Recovery in actions for the Infringement of Copyright*, 37 MICH. LAW REV. 564 at 571, 572 (1939).

157. *Atlantic Monthly Co. v. Post Publishing Co.*, 27 Fed. 2d 556; *Sebring Pottery Co. v. Steubenville Pottery Co.*, 9 Fed. Supp. 384.

was put upon the ground that there must have been a right to equitable relief at the time the suit was brought before equity can retain the case and assess the damages. This case follows the patent cases on this point.¹⁵⁸ The second case on appeal held that equity did have jurisdiction to assess the damages on the ground that the Act of 1909, makes the remedies of injunction and the award of damages and an accounting for profits cumulative. Granting of injunctive relief is not a condition precedent to an award of damages in an equity court when equity jurisdiction was invoked in good faith by suitable allegations.¹⁵⁹ This latter view should be followed. Neither injunctive relief nor an award of damages is made a condition precedent to the other in Section 25 of the Act of 1909, and Section 27 permits them to be joined in one action. Thus if equity jurisdiction is invoked in good faith, the equity court should be permitted to reach a final determination of all the issues. This is a practical as well as legally sound solution of the problem.¹⁶⁰

B. APPORTIONMENT

A difficult question of fact arises when an attempt is made to mete out justice where the profits made by the infringer are the result of both the material pilfered and the contribution that has been made by the infringer. A striking example of this problem is found in the *Sheldon* case where the defendant's motion picture "Letty Lynton" was held to have infringed Sheldon's play, "Dishonored Lady."¹⁶¹

In this case an accounting for profits in the amount of

158. *Hutchinson Amusement Co. v. Vitaphone Corp.*, 93 Fed. 2d 176 (1937).

159. *Sheldon v. Moredall Realty Co.*, 95 Fed. 2d 48 (1938).

160. See 24 VA. LAW REV. 923 (1938).

161. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 7 Fed. Supp. 837 (1934); 81 Fed. 2d 49 (1936); 106 Fed. 2d 45 (1939).

\$587,604.37 was ordered. The evidence clearly showed that a large part of this profit was a result of the drawing power of the defendant's stars, including Joan Crawford and Robert Montgomery, defendant's reputation as a producer, advertising and various other elements that cause a successful motion picture production. A long line of authority held that there could be no apportionment of the profits in relation to the respective factors that contributed to it.¹⁶² This holding was based on the common law doctrine of the confusion of goods. The courts felt that it was impossible to apportion the profits accurately and that any such determination would be based entirely on speculation. Because of this difficulty the courts gave the entire profits to the plaintiff regardless of how small his contribution had been compared with the contribution of the infringer. To prevent any possibility of the wrongdoer profiting by his wrongdoing, and to avoid a matter involving difficult calculations the courts allowed the admitted injustice caused by giving all to the plaintiff.

In a very admirable opinion in the *Sheldon case*, Justice L. Hand frankly admits that no accurate division can be made, but to make no apportionment is so palpably unjust that he insists upon making an attempt. The court held that the writer of the play should receive one fifth of the total profits made by the infringing motion picture and that the balance should be retained by the defendant.¹⁶³ Clearly this courageous holding, opposed by a long line of authority, is just. To admit that perhaps the plaintiff should not get all and yet refuse to give defendant a part because of the difficulty involved in de-

162. *Mauman v. Tegg*, 2 Russell 385 (1826); *Callaghn v. Myers*, 128 U. S. 617 at 665, 6; *Belford v. Scribner*, 144 U. S. 488 at 508; *Dam v. Kirk La Shelle Co.*, 175 Fed. 902; See also Copinger, *Law of Copyright* (7th ed., 1936), 159; Amdur, *Copyright Law and Practice*, 1127 et seq. (1936).

163. *Sheldon v. Metro-Goldwyn Picture Corp.*, 106 Fed. 2d 45 (C. C. A. (1939)).

termining the proportionate amounts that should be awarded does not speak well for any court purporting to mete out justice. Similar difficulties in measuring damages occur in innumerable other instances, yet the courts have found it necessary to face the issue and have made the best estimate they could.

Apportionment is difficult. In addition to merits of the writers product, the actors, the work of the producer and director, the story, the scenery, costumes, publicity given to the picture, the reputation of the stars and the company, many other factors contribute to the success of any motion picture. If there is to be apportionment it is the burden of the defendant to disentangle the various contributing factors.¹⁶⁴ This is so difficult that frequently the infringers have made no attempt to apportion but have rather vigorously litigated the question of the amount of the net profits, trying to drive them as low as possible. Some of the cases denying apportionment have not held that the infringer must always pay over all the profits regardless of what evidence bearing on apportionment he introduces. They hold that he must pay all over the profits if he makes no attempt to apportion them.¹⁶⁵ Some cases have held positively that there should be no apportionment regardless of the evidence on the subject introduced by the defendant.¹⁶⁶

What evidence bearing on the matter of apportionment should be admitted? Drawing upon an analogy to patent law the court held that expert or opinion testimony should be admitted. Producers and exhibitors were allowed to answer the question: "What proportion of the gross receipts were properly apportionable to the play?" In this case the answers ranged

164. *Ibid.*

165. See *Callaghan v. Myers*, 128 U. S. 617; *Belford v. Scribner*, 144 U. S. 488.

166. See *Dam v. Kirk La Shelle Co.*, 175 Fed. 902.

from 5 percent to 12 percent. The popularity of the stars, Crawford and Montgomery, were said to be the chief contributing factor to the large profits. Of course, these estimates were based upon the assumption that there had been infringement of the whole play. The play's plot of a girl killing her lover to free herself for a better match is an old one indeed, and of itself in all likelihood is not protected by copyright. This plot doubtlessly contributed also. On the other hand the producers were not allowed to count their reputation, which was an important element in the success of the motion pictures, because they were wrongdoers.

The brilliant pronouncement of Justice Hand should be quoted at some length:

"We are aware," he said, "that out of all this no real standard emerges, and that it would be absurd to treat the estimates of the experts as being more than expressions of very decided opinions that the play shall count for very little. But we are resolved to avoid the one certainly unjust course of giving the plaintiff everything, because the defendants cannot with certainty compute their own share. In cases where the plaintiffs fail to prove their damages exactly, we often make the best estimate we can, even though it is really no more than a guess, and under the guise of resolving all doubts against the defendants we will not deny the one fact that stands undoubted. . . .

"However, though we do not press the burden of proof so far, the defendants must be content to accept much of the embarrassment resulting from mingling the plaintiff's property with their own. We will not accept the expert's testimony of its face value; we must make an award which by no possibility shall be too small. It is not our best guess that must prevail, but a figure which will favor the plaintiffs in every reasonable chance of error. With this in mind we fix their share of the net profits at one-fifth."¹⁶⁷

167. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 Fed. 2d 45 (1939).

It is suggested that though this result is not exactly accurate, and from the very nature of the problem could not be mathematically accurate, it is at least an approximation that achieves substantial justice. It is far better to meet the difficulty in this manner than in the proverbial manner of an ostrich.¹⁶⁸

C. STATUTORY STANDARDS OF LIABILITY

It is frequently difficult for the plaintiff to prove actual loss, but he need have no worries on this score. All he need show is the infringement. The statute takes care of him from that point. The Act provides that the plaintiff shall recover "in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated."¹⁶⁹ Any question as to the interpretation of this phrasing was dispelled by the Supreme Court of the United States in 1918. The court said: "The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they be more than \$5000 nor less than \$250, except that for a newspaper reproduction of a copyrighted photograph they shall not be more than \$200 nor less than \$50. In other words, the courts conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assignment must be within the prescribed limitations, that is to say, neither more than the maximum nor less

168. See 52 HARV. L. REV. 688 (1939); 8 FORDHAM LAW REV. 263 (1939); 48 YALE LAW JOUR. 1279-1284 (1939); 39 COL. LAW REV. 869-74 (1939).

169. 17 U. S. C. (1935), sec. 25 (b).

than the minimum."¹⁷⁰ The damages under this provision may not be assessed at a smaller amount than provided by statute regardless of actuality.¹⁷¹

The minimum damage rule applies to performing rights as well as to reproduction rights.¹⁷²

Within the prescribed limits the trial court is given very wide discretion. The ordinary rules of discretion do not apply. "The employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion. This construction is required by the language and the purpose of the statute."¹⁷³

In a case where a calendar was held to infringe a book, the court without logical reasoning held: "Notwithstanding, then, that the amount of copying is comparatively small, and that the plaintiff has made no proof of actual damages, I am of the opinion that a proper award under the circumstances would be statutory damages of \$1000, together with all costs, and \$1000 as attorney's fees."¹⁷⁴

However, in the "in lieu" damages cases there is a definite tendency to confine the award to the minimum of \$250 if there is no actual damage¹⁷⁵ nor profits shown,¹⁷⁶ or if the infringement is unintentional,¹⁷⁷ The awards are increased by a large number of infringing copies,¹⁷⁸ or by profits or damages in

170. *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100 (1918).

171. *M. Witmark & Sons v. Calloway et al.*, 22 Fed. 2d 412 (1927).

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

173. *Douglas et al. v. Cunningham et al.*, 294 U. S. 207 (1935).

174. *Warren v. White & Wyckoff Mfg. Co.*, 39 Fed. 2d 922 (1930).

175. *Russell & Stoll Co. v. Oceanic Electrical Supply Co.*, 80 Fed. 2d 864 (1936); *Fred Fisher, Inc. v. Dillingham*, 298 Fed. 145 (1924).

176. *Buck v. Jewell-LaSalle Realty Co.*, 51 Fed. 2d 730, *aff'd* in 283 U. S. 202 (1931).

177. *Buck v. Bilkie*, 63 Fed. 2d 447 (1933).

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

excess of the minimum.¹⁷⁹

Though the theory is that the awards are compensatory in nature, a willful violation seems to increase the cost to the defendant.¹⁸⁰ Because of the reluctance on the part of the Federal Government to prosecute criminally for infringement, this gradual judicial amendment with respect to willfull infringement is probably justified.¹⁸¹ If a manuscript is published with willful disregard of the rights of the author, the jury may award punitive damages, even though no actual pecuniary damages were proved.^{181a}

D. COSTS AND FEES

The Act also provides that in "all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed."¹⁸² This provision has not always been strictly followed; where the suit was brought in good faith and the plaintiff lost, the court did not allow costs against him.¹⁸³ Where the plaintiff won in part and failed in part the costs were divided.¹⁸⁴

The statute also provides that "the court may award to the prevailing party a reasonable attorney's fee as part of the costs."¹⁸⁵ A fee as high as \$17,500 has been allowed.¹⁸⁶ The

179. *General Drafting Co. v. Andrews*, 37 Fed. 2d 54 (1930); *Gross v. Van Dyke Gravure Co.*, 230 Fed. 412 (1916); *Hendricks v. Thomas Pub. Co.*, 242 Fed. 37 (1917).

180. *Fleischer Studios v. Ralph A. Freundlich, Inc.*, 14 Fed. Supp. 401 (1936); *Warren v. White & Wyckoff Mfg. Co.*, 39 Fed. 2d 922 (1930).

181. See 37 *Col. Law Rev.* 487 (1937).

181a. *Press Pub. Co. v. Monroe*, 73 Fed. 196.

182. 17 U. S. C. (1935), sec. 40.

183. *Vernon v. Sam S. & Lee Shubert, Inc.*, 220 Fed. 694 (1915).

184. *Record and Guide Co. v. Bromley*, 175 Fed. 156 (1909).

185. 17 U. S. C. (1935), sec. 40.

186. *Lewys v. O'Neill*, 49 Fed. 2d 603 (1931).

amount of the fee is to be determined by the court within its discretion. The amounts allowed vary widely.¹⁸⁷ Often if the courts feel that the minimum damage is too high they allow small fees or no fees at all.¹⁸⁸ The court should use the same considerations in setting the amount of the attorney's fees as the attorney would be likely to use.¹⁸⁹

IX

CRIMINAL PROSECUTION FOR LITERARY PIRACY

It is not strange that the larceny of literary property should be made a crime. The copyright act provides that "any person who willfully and for profit shall infringe any copyright secured by this Act, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the court."¹⁹⁰

Since the Copyright Act of 1909 came into effect to the present time, the writer has been able to find but two cases involving the use of this section reported in the casebooks.¹⁹¹

The *Schmidt* case came up on a motion to set aside an indictment on the ground of duplicity. The motion was denied. Though the indictment charged the offense on diverse days, it was not bad for duplicity.¹⁹² In this case Santangelo was the principal offender and Schmidt was accused of aiding and

187. *Hendricks Co. v. Thomas Pub. Co.*, 242 Fed. 37 (1917).

188. *Cravens v. Retail Credit Assoc.*, 26 Fed. 2d 833 (1924). *Contra*, *Witmark & Sons v. Calloway*, 22 Fed. 2d 412 (1927).

189. *Witmark & Sons v. Calloway*, 22 Fed. 2d 412 (1927).

190. 17 U. S. C. (1935), sec. 28.

191. *United States v. Schmidt and Santangelo*, 15 Fed. Supp. 804 (1936); *Marx v. United States*, 95 Fed. 2d 204 (1938).

192. *Supra*.

abetting him. The docket entries in the case disclose that both defendants entered pleas of *nolo contendere*. Santangelo was fined \$100 on each count, a total of \$400 and Schmidt was fined \$10 on each count, a total of \$40, and an order for destruction was made which was executed by the United States Marshal.¹⁹³

In the *Marx* case¹⁹⁴ "Groucho" and "Chico" Marx were convicted of infringing and aiding and abetting infringement of a copyrighted dramatic composition. The court held that the question of whether or not the infringement was willful was for the jury to decide.

It is difficult to assign a reason why the criminal proceedings are not used more often.¹⁹⁵ It is doubtlessly true, however, that the usual victim of a copyright infringement is much more interested in recovering compensation for the injury and having it discontinued than he is in seeing the government punish the offender. Thus the victim evidences no aggressiveness in having the criminal statute invoked. The government prosecutors have manifested little interest in prosecutions for copyright infringement.

No doubt there are occasional criminal prosecutions under this act throughout the country. Where the defendant enters a plea of guilty or *nolo contendere*, or where there is a jury trial, the disposition of such cases would seldom appear in published reports. But the fact that there appears to be only two reported decisions indicates that this part of the act has been made use of quite seldom.

There is as much reason for the criminal prosecution of the intentional and willfull piracy of literary property as there is for the larceny of a chattel.

193. Personal correspondence with Hon. Albert W. Johnson, District Judge in the Middle District of Pennsylvania, Lewisburg, Pa., and Mr. Robert McK. Glass, Chief Deputy Clerk, U. S. District Court, Lewisburg, Pa.

194. *Supra*.

195. 37 COL. LAW REV. 487 (1937).

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CONCLUSION

Thus the law governing the infringement of copyright has developed. In spite of extensive efforts that have constantly been made to make changes for the better in the copyright law of the United States, unquestionably much room for improvement remains. But aside from the matter of improving the substantive law, it has been shown that much benefit may be derived from a more thorough understanding of the existing law. The law should be applied to particular facts in the light of centuries of development in literature and literary criticism.

Technical considerations have no place in making a decision as to whether or not there has been actionable plagiarism. The light of learning in the ways of authors of all time should be permitted to shine on the technical definitions of literary piracy and guide the steps of any court confronted with the task of deciding whether permitted boundaries in using the literary productions of another have been crossed.

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