

# **AN OUTLINE OF COPYRIGHT LAW**

# AN OUTLINE OF COPYRIGHT LAW

BY RICHARD C. DE WOLF, LL.B.

*Sometime Lecturer on the Law of Copyrights and Trade-Marks  
in the American University*

INTRODUCTION BY  
THORVALD SOLBERG  
*Register of Copyrights*

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## PREFACE

This book has grown out of a course of lectures given during several recent years in the School of Diplomacy, Jurisprudence and Citizenship of the American University. Some of the students who took the course were graduates in law, others had no legal education, and the endeavor was made to keep the substance of the lectures sufficiently complete and exact to meet the needs of the former class, while adapting the form of presentation to the latter. The work has been considerably expanded for the purpose of publication, especially in the parts relating to motion pictures, and chapters have been added on authors' contracts and on the errors of procedure most apt to occur in obtaining copyright.

The book is thus a combination of commentary, essay and manual. It is intended to be useful, first of all, to authors, particularly to inexperienced authors, next, to editors, publishers, entertainers and other persons engaged in the exploitation of intellectual property, and finally to the many practicing lawyers who do not specialize in copyright law, but have an occasional question on the subject. Those who desire a more extended treatment of any topic than that permitted

by the limits of this volume may consult the acute and comprehensive treatise of Mr. Arthur Weil, the excellent article in "Corpus Juris" by Mr. William B. Hale, or Mr. R. R. Bowker's "Copyright: Its History and Its Law," which, though written primarily from the book publisher's viewpoint, is well suited to the general reader and admirably equipped with indexes and reference tables. Mention should also be made of the classic treatise by Drone which, in spite of its age, is still worthy of study for its sound philosophical basis. All these works have been of much service in the preparation of this book, a service for which the author's best acknowledgments are tendered.

The series of bulletins and circulars issued by the Copyright Office has also furnished indispensable information. The material in the appendix is reprinted from these publications.

Thanks are due my friend and colleague in the Copyright Office, Mr. Herbert A. Howell, who has read much of the book in proof and has helped me with valuable suggestions.

It is now sixteen years since the present copyright statute, the Act of March 4, 1909, became law. These years, eventful in so many respects, have witnessed developments in the field of literary property which point to the desirability of very considerable changes in the law. The art of producing and exhibiting motion pictures has been greatly improved. Radio broadcasting has suddenly assumed large proportions. Periodi-

cal literature has increased in volume and variety. The World War has affected the international relations of the United States in the sphere of intellectual and artistic production, as it has in every other way. It is necessary that these new conditions should be met, by the amendment or revision of the copyright statutes.

The law should not, and probably will not, be changed without a good deal of preliminary discussion. Such discussion, lasting for several years, paved the way for the enactment of the present statute, as had also happened in the case of its predecessor, the "International Copyright Act" of 1891. The same various conflicting interests will be involved in the next revision and although new factors have been added to complicate the problem, the alignment of forces will remain much the same. On the one hand are the creators of intellectual property — authors, artists, composers, dramatists—and on the other those who exploit such property—publishers, producers and distributors of plays and motion pictures, phonograph manufacturers and radio broadcasters. Standing between the lines, with interests more or less divided between the two parties, are the general public. If a new law is to be enacted, it must be fair to all concerned. Those who advocate change, as well as those who oppose it, will do well to examine and understand the law as it now is and decide what provisions are good and should be retained, what are obsolete and should be discarded. It is the author's hope that this book may serve as a

convenient means to such examination and understanding.

The progress of copyright law does not take place by revolutions, but by successive stages. It resembles the growth of a city in which, as time goes on, some parts are torn down and others are devoted to new uses, while the plan remains the same and the great historic structures are preserved. When changes are made in the law they will continue the lines of development reaching back through two centuries to the Statute of Anne and marked by successive legislative enactments and leading judicial decisions into which the principles of copyright law have permanently crystallized. The author believes that the reader of this volume will get a fair notion of the process by which the law has grown and will find, when amendments take place in the future, that the law still corresponds in all fundamental points, with the "Outline" here presented.

The changes in the law which now appear most desirable and probable are six: (1) the separation of the various rights included in copyright, so that each can be dealt with singly; (2) the abolishment of the arbitrary distinction in the treatment of published and unpublished works; (3) the abrogation of "formalities"—notice, registration and deposit of copies—as conditions of copyright protection; (4) the substitution of a single, continuous term of protection, based on the life of the author, in place of the present system of first term and renewal term; (5) abrogation of com-

pulsory manufacture in the United States for books in the English language, and (6) the entry of the United States into the International Copyright Union. All these changes are in the direction of simplification of the law and tend toward the assimilation of literary property to other kinds of property.

Copyright was originally confined to books and even after it was extended to other kinds of works, the rights of printing and publication were long the most valuable rights which it included. But the time is now rapidly approaching, if it has not already arrived, when rights connected with publication must take a second place and other methods of bringing the creations of the mind before the public will become of paramount value. The motion picture daily presents to millions of people the literary and artistic expression of authors who could formerly reach their audience only through the medium of the printed page. Radio broadcasting plays an increasingly important part in the dissemination of speech and music, while the phonograph and other mechanical instruments compete, in their field, on equal terms with the output of the printing press. The rights of authors and composers which are exploited by the motion picture, by radio and by the phonograph are often of greater pecuniary value than the right to make and distribute "copies," strictly so called. It is therefore illogical and unjust that the right of publication should carry with it, as it does under the present law, the rights of reproduction and representation by other



methods. The author should not be obliged to sell all his rights together. He should be placed in a position to parcel them out and dispose of them separately.

The distinction between common law protection before publication and statutory copyright, which is obtainable for the more important kinds of literary works only after publication, is one which loses its meaning and value when such works can be transmitted to the public without ever being published at all, in the traditional sense of circulation in copies. There is no reason for arbitrarily dividing rights before publication from rights after publication, and this arbitrary division, which exists under the present law, is a constant cause of confusion in the interpretation and application of the law and of contracts for the disposal of literary property. Copyright should be a single body of rights, interpreted by the same rules and enforceable by the same methods from the time when its subject comes into existence until the expiration of the period of protection.

✓ No one can examine the decisions of the courts in copyright cases without being struck by the frequency with which the requirement of a specific form of notice on copies of the work leads to technical interpretations of the law and provides infringers with convenient loopholes of escape. It is not clear that the notice serves any useful purpose of protection. The United States is the only country where it is still obligatory and its retention in our law betrays a still imperfect sense of

literary property. The same objections are in great degree applicable to the requirement of compulsory registration. Something can be said in favor of optional registration, as furnishing a convenient record of the ownership of literary property, especially if the suggestion of divisible copyright should be adopted, and it might be desirable to encourage recording by providing certain summary remedies for infringement, available only when registration has taken place. But to make the very existence of copyright, or of any remedy whatever, depend on recording, results in losses which outweigh all the advantages. And when the double requirement of both notice and registration exists, as at present, the result is confusion worse confounded, because of the inevitable occurrence of inconsistencies between notice and record.

The objections to obligatory registration apply with peculiar force in the case of renewal copyrights, which are absolutely dependent on registration within a certain limited time, by specific classes of persons who are often difficult to locate and identify. The argument for a renewal term has been that it furnishes a means for the author to obtain a share in the increased value of his work after the lapse of years, and provides a sort of insurance for his family. There are, however, other methods by which these objects can be obtained, if it is desirable to make statutory provision for them. The present method too often results in the complete loss of copyright at the end of the first term. Nearly all other

countries have provided for a single, continuous term, and the United States should follow their example.

Compulsory manufacture in the United States, formerly required for all books, was confined by the Act of 1909 to books and periodicals in the English language. It is a measure supposed to benefit American printers and bookbinders. Its effect is to compel the double manufacture on either side of the water of books of English origin, if any considerable demand for such books exists in the United States. Thus an additional cost is added to such books, which is pure waste from the economic point of view, and which comes out of the pocket of the book-buying public. This is doubtless in accordance with the theory of protection to home industries, but if that theory is to be followed, it should be done by placing an additional duty on the English book, instead of by a restriction on the property rights of authors. The manufacturing provisions of our copyright law have already led to reprisals in the new Canadian copyright law and there is much room for doubt as to the reality of the benefits they confer even upon the class of workmen at whose behest they were placed in the law.

A further reason for doing away with the manufacturing provisions, as well as with compulsory formalities for obtaining copyright, is that such reforms are necessary in order to enable the United States to join the International Copyright Union. As to the desirability of our joining the Union there is no longer

much difference of opinion. There have always been strong reasons of justice for such action and to these have now been added cogent motives of self-interest. It might have been maintained a few years ago that the United States was the gainer by remaining outside of the Union, because our free, if honest, use of the literary property of European authors more than made up for what our own authors lost by failure to get protection in Europe, where there was not much demand for their works. But since the War the situation has been rapidly changing. American motion pictures dominate foreign markets. American popular music is played in theatres, dance halls and salons throughout the world. The political and economic power and prestige with which the United States emerged from the War is furnishing a new application of the adage that "Nothing succeeds like success," and American ideas, American methods, are rapidly gaining favor in Europe, as shown by the growing demand for the publications in which they are expressed and set forth. The literary property of American authors should be adequately protected in Europe through the automatic copyright provided by the International Copyright Convention. And it has always been demonstrable that adequate protection for the literary property of European authors in this country would amply compensate in cultural return for the losses which it might temporarily cause to certain industries which have been built up on the free use of foreign works.

Such is the practical side of the question. There is another side which will seem to many persons equally important. It is unworthy the dignity of a great nation to remain outside the republic of letters which is the International Copyright Union, and whatever promotes intellectual solidarity, mutual understanding and the free exchange of the products of the mind between nations also promotes peace and the sense of human fellowship on which all social welfare ultimately rests.

Washington, D. C.

April 10, 1925.

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## INTRODUCTION

It is believed that Mr. De Wolf's book will fill a need. The literature on copyright is very large, but so far as the United States is concerned, there is still lacking a convenient manual of this subject. The author explains in his preface that his book is intended to be useful, first, to authors, particularly inexperienced authors; second, to editors, publishers, and others engaged in the exploitation of literary property, and third, to practicing lawyers who have only an occasional copyright case to deal with.

The book accentuates the one particular advance in relation to copyright which it is generally admitted should now be proposed and urged, namely, the entry of the United States into the International Copyright Union. Our copyright legislation dates back to January, 1783, when the State of Connecticut enacted the first copyright law. The first federal copyright act dates from May, 1790. But it was one hundred and one years later before there was secured from Congress legislation to extend the protection of copyright in the United States to the works of foreign authors, namely the so-called international copyright law of March 3, 1891. Meantime the countries of Europe had evolved the International Copyright Convention of 1887, pro-

viding for the establishment of the International Copyright Union, which now includes twenty-eight countries of the world.

The United States has dragged behind these thirty-seven years, but the time seems now to have arrived when there is a general consensus of opinion that we should join this Union and secure for our authors, artists and composers the benefit of absolute and automatic copyright protection in all the countries now within this practical and up-to-date association of nations.

Our entry into the Copyright Union has been prevented by reason of the provisions in our existing copyright laws which are adverse to the articles of convention, which declare that copyright protection shall not be dependent upon compliance with any conditions or formalities. Our copyright statute requires not only American manufacture, but notice of copyright, deposit of copies, and the registration of a claim of copyright in the work. Chief among the changes in our laws necessary to enable the United States to enter the International Copyright Union is the abrogation of the much discussed typesetting clauses. That these must be abrogated to permit us to enter the Union is now well understood. That they should be eliminated in order also to bring our copyright laws to a parity with those of the other countries of the world the author concedes, and he points out that these manufacturing provisions are an excrescence upon the law, not in accordance with the

principles upon which copyright is based. They were included in our legislation at the instance of the printing trades upon the plea of the latter that they could justly claim the privilege of the manufacture of the work in the United States in exchange for the protection accorded the work in the United States. Whether this much contended for requirement has been of substantial benefit to our printing trades is not by any means clear. In 1901—ten years after the Act of 1891 put this burden on copyright—a report was made (in compliance with a resolution of the United States Senate of January 23, 1900), by Hon. Carroll D. Wright, then Commissioner of Labor, on the effect of the International Copyright Law in the United States. This report failed to reveal any consensus of opinion that ten years of operation under the typesetting clause of the Act of March 3, 1891, had effected any particular beneficial result. It would be interesting to set on foot another investigation at the present time along similar lines. If no more definite results could be demonstrated as the outcome of such an investigation than was the case in 1901, it would seem that the burden of proof should be placed upon the interests urging the retention of this requirement of American manufacture to show that it has resulted in any benefit commensurate with the burden it imposes upon the consumer.

As Mr. De Wolf says: "Its effect is to compel the double manufacture on either side of the water of books of English origin, if any considerable demand for such

books exists in the United States. Thus an additional cost is added to such books, which is pure waste from the economic point of view, and which comes out of the pocket of the book-buying public. This is doubtless in accordance with the theory of protection to home industries, but if that theory is to be followed, it should be done by placing an additional duty on the English book, instead of by a restriction on the property of authors."

Mr. De Wolf points out that the sixteen years which have passed since the Act of March 4, 1909, was put into effect, have witnessed developments in the field of literary property which point to the desirability of very considerable changes in our present copyright laws. Motion picture production and radio broadcasting have assumed large proportions, and in other directions our literary and artistic production has increased in volume and variety. The World War, too, has affected the international relations of the United States in the sphere of intellectual and artistic production. It is necessary that these new conditions should be met by proper amendment and revision of the copyright statutes.

Changes which now appear most desirable as indicated in Mr. De Wolf's book are: (1) the abrogation of such "formalities" as notice of copyright, deposit of copies and registration of claim of copyright; (2) abolishment of the arbitrary distinction in the treatment of published and unpublished works; (3) the separation of the various rights included in copyright, so that each

can be dealt with singly; (4) the substitution of a single, continuous term of copyright protection, based on the life of the author, in place of the present system of first term and a renewal term.

The first of these abrogations, that of the formalities of notice, deposit and registration, is also required by the terms of the International Copyright Convention. It is moreover dictated by a reasonable regard for the rights of the author of the work to be protected. As Mr. De Wolf pertinently says:

“No one can examine the decisions of the courts in copyright cases without being struck by the frequency with which the requirement of a specific form of notice on copies of the work leads to technical interpretations of the law and provides infringers with convenient loopholes of escape. It is not clear that notice serves any useful purpose of protection. The United States is the only country where it is still obligatory and its retention in our law betrays a still imperfect sense of literary property. The same objections are in great degree applicable to the requirement of compulsory registration. Something can be said in favor of optional registration, as furnishing a convenient record of the ownership of literary property, especially if the suggestion of divisible copyright should be adopted, and it might be desirable to encourage recording by providing certain summary remedies for infringement, available only when registration has taken place. But to make the very existence of copyright, or of any remedy whatever,

depend on recording, results in losses which outweigh all the advantages. And when the double requirement of both notice and registration exists, as at present, the result is confusion worse confounded, because of the inevitable occurrence of inconsistencies between notice and record.”

Mr. De Wolf's book is timely. In its pages will be found an intelligent presentation of the present-day copyright questions which have been considered in the drafting of the pending copyright bill (H. R. 11258). It affords an opportunity for comparison and the intelligent consideration of the proposals of that measure, and should prove an aid in determining many disputed questions.

THORVALD SOLBERG.

June, 1925.

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## CHAPTER I

### THE HISTORY OF COPYRIGHT

*The invention of printing — Early printers' monopolies — The Stationers' Company of London — The first copyright law, the Statute of 8 Anne — Donaldson v. Becket — The Constitution of the United States — Wheaton v. Peters — Copyright legislation in the United States down to the Act of March 4, 1909.*

Copyright law is the child of the printing press. Authors and artists have existed since the beginning of history, but for any general legal recognition of their right to the fruits of their labor, the creators of intellectual works had to wait until the invention of printing made possible the quantity production of books. In fact they had to wait two and a half centuries longer. Printing from movable types began in 1451 and the first copyright law, the Statute of 8 Anne, was not enacted until 1710. The law follows business, but often lags very far behind it.

The earliest copyrights were obtained by way of special grant, or privilege, to the publisher-printers of the fifteenth and sixteenth centuries. The Republic of

Venice, where the art of printing rose almost instantly to a flourishing condition, sharing in the beauty and distinction which the gifted Venetians imparted to everything they made, granted to John of Speyer, in 1469, the sole right of printing the letters of Cicero and of Pliny, for a period of five years. This is the earliest "copyright" of which we know. Other Italian States granted like privileges, as did the free cities of Germany. In England, where Caxton had set up the first printing press in 1474, we find no account of any special privilege of printing until 1518, when Richard Pynson brought out a book, the title-page of which stated that it was protected under a grant of privilege from the King, against reprinting within the kingdom or importation from without, for a period of two years.

Royal grants of monopoly to print certain works continued to be made in England for a century or more. Queen Elizabeth was particularly fond of thus enriching her favorites at no expense to herself. The books printed under these monopolies were, at first, not original works, but reprints of the classics, translations and the like. With the growing power of Parliament and the dislike of monopolies generally, such royal grants became less frequent until they finally came to be restricted to books of which the King claimed control, by virtue of his offices as head of the State and of the Church.

In all these grants of monopolies of printing we find no recognition of authorship as creating a property

right. Sometimes they were given as a reward of meritorious enterprise to the printer, but oftener as a cheap way of benefiting some courtier or dependent, who was neither printer nor author and who farmed out the grant to somebody else.

The first effect of printing, then, which led gradually up to copyright, was the possibility which the invention offered to princes and governments, of enriching favored individuals. A second effect, which operated even more strongly to the same end, was the necessity for regulation and control of the press in governmental interest. The rising tide of printed matter, accompanying the growth of free speculation and criticism, alarmed the absolutist princes and prelates of the sixteenth century and they sought to check it, in so far as it propagated doctrines contrary to what they conceived as essential to the existence of the State or the Church, of which they regarded themselves as the embodiments or exponents. Hence a series of laws to regulate the press, the first of which, in England, was included in the charter granted to the guild of printers called the Stationers' Company in 1556, by Queen Mary. This act recites the printing of seditious and heretical books and grants to the newly chartered Company the right to seize and burn all prohibited books, while at the same time it forbids any person not a member of the Company from printing any book at all. Thus the Stationers' Company was given a monopoly of all printing in England. The Court of Star Chamber, in 1566, forbade

any person to print anything against the force and meaning of any ordinance in any of the statutes or laws of the realm, and again, in 1637, the same body issued a decree, more stringent than any which had preceded it, for the suppression of libellous, seditious and mutinous books, and ordered that thereafter every book should be licensed and entered in the register of the Stationers' Company. After the abolition of the Court of Star Chamber in 1640, Parliament enacted laws substantially repeating the provisions of the Star Chamber decrees. The latest of these acts was that of 1662, entitled "An act for preventing the frequent abuses in printing seditious, treasonable and unlicensed books and pamphlets, and for regulation of printing and printing presses." The act, like most of its predecessors, provided that all books should be entered in the register of the Stationers' Company and that nobody should print any book so entered without the consent of the owner. This act, after several renewals, finally expired in 1694.

All these decrees, ordinances and acts were aimed primarily at the suppression of such works as the party in power, whether Catholic or Protestant, royalist or parliamentary, thought injurious to its interests. But incidentally they all recognized the custom of entry in the register of the Stationers' Company as an indication of the ownership of books and they all entrusted the Company with large powers of enforcement. There can be no doubt that members of the Stationers' Com-

pany had a considerable hand in the making of these laws and that they regarded them as made as much for the protection of their property as for the punishment of those who spread destructive opinions. Here again, however, there is no question of the author. He is never once mentioned as having an interest to be protected. Ownership of a "copy," as copyright was then called, was evidenced only by entry in the register at Stationers' Hall. Such entries could only be made by members of the Stationers' Company. The laws protected the Company and its members in their monopoly of printing and publishing in England. They did not protect the author himself.

At the time when the last of the royal printers' licensing acts went out of existence in 1694 the calling of authorship had begun to be respectable. The writing of books had ceased to be merely the accomplishment of aristocrats or the function of sycophants. Dryden, Swift, Prior, Gay, Pope, Addison and Steele did not depend entirely upon their writings for their livelihood, but they enjoyed a great reputation as authors and some of them received considerable pecuniary rewards. Authors became class conscious. They met in each other's homes, or at the famous coffee houses and discussed matters of common interest. Some of them were members of the government, where they had gained places by their literary talents. So it came about that when the Stationers' Company petitioned Parliament for a renewal of the licensing act, or for some other

measure which would protect them against the independent printers, who were "stealing" their "copies," the authors themselves took an interest in the matter. What the Stationers' Company wanted was, first, a definite statutory penalty against piracy, such as had been provided through the licensing acts by way of punishment, not so much for taking another's property as for not submitting to scrutiny by legal authority the books to be printed, and, second, the recognition of the ancient custom of registration in the Company's books and by its members. They had no particular idea of setting up a property right in authors. But the ultimate results of the law which they obtained were quite different from what they had expected.

This law, the celebrated Statute of Anne (cited as 8 Anne, chapter 19) and entitled "An act for the encouragement of learning" was passed in 1710. It is said to have been originally drafted by Dean Swift. It recited that, whereas lately booksellers and others had made a practice of reprinting books without the consent of their authors or proprietors, therefore such authors, or their assigns, should have the sole liberty of printing such books for a limited time—twenty-one years in the case of books already in existence, and fourteen years with a possible renewal for a second fourteen years in the case of new books. The penalties for violation of the act were forfeiture of the unauthorized copies and a fine of a penny a sheet. Finally, no book was to be entitled to protection unless its title had been duly entered in the

register book of the Stationers' Company. It was not required, however, that the entry should be made in the name of a member of the Company, consequently entry in the name of the author became possible and was *prima facie* proof of ownership. Nine copies of the book had to be delivered to the Stationers' Company for various university and other libraries.

In the Statute of Anne we have the first law ever enacted for the protection of literary property. It is the parent of all copyright legislation and contains two out of three of the requirements for copyright protection which the law of the United States still includes—registration and the deposit of copies. The third requirement—that of a notice printed in the book itself—came later.

The next chapter in the history of copyright law deals with the efforts of the booksellers and printers to avoid the effect of the statute which they had themselves been so urgently anxious to obtain. Whether or not it occurred to them, soon after the enactment of the Statute of Anne, that the limitation of the term of protection had changed a permanent property right into a temporary one, the fact is that it was not for fifty years that any case came into court in which the statutory remedies were invoked. In the meantime, however, a number of applications were made to the High Court of Chancery for injunctions to restrain the unauthorized printing of "copies" alleged to belong to the applicants, and in all these cases the books had been published so

long before that the statutory term of protection had expired. The Court seems to have had little hesitation in granting the injunctions and this fact was largely responsible for the theory, which soon made its appearance, that there had always been, at common law, a right of perpetual copyright, and that the Statute of Anne had not taken that right away.

This question came up for decision in 1760, in the case of *Tonson v. Collins*, relating to the right of publication of the famous *Spectator*, but after learned argument on both sides the case was found to be a collusive one and was dismissed. It seems, however, that Lord Mansfield, before whom the arguments were heard, was in favor of the contention that a property in authorship had existed at common law. Blackstone, the author of the *Commentaries*, was counsel for the plaintiff, and argued in favor of this view, as he did in the later and more famous case of *Millar v. Taylor*, brought in 1766 and decided in 1769 by the Court of King's Bench. Millar was a member of the Stationers' Company and the publisher of Dr. Johnson's *Dictionary*. In 1729 he had become the owner of the "copy" of James Thomson's poem, "The Seasons," a long and laborious work in Spenserian metre, which was a best seller in the eighteenth century. Taylor, an outsider, reprinted the work and began to sell it in 1763. Millar of course could not base his claim on the Statute of Anne, because the statutory term of protection had expired, and he frankly claimed a perpetual and absolute ownership of



this literary property under the common law. The questions presented for the decision of the four judges were two: (1) Whether the copyright of a book belonged to an author by common law, and (2) whether such common law right, if any, was taken away by the Statute of Anne. Three out of the four judges, headed by Lord Mansfield, decided that there was an original common law right and that it had not been abrogated by the statute. Lord Mansfield's opinion, which will be found in full in volume 4 of Burrows' Reports, at page 2303, and is quoted from briefly in Augustine Birrell's agreeable little work, "Copyright in Books," while referring for support to the cases in Chancery in which injunctions had been granted, was based primarily upon that sense of the justness and fitness of things which was the stronghold of the believers in "natural law." The author's undoubted right to control his unpublished manuscript, Lord Mansfield thought, should be continued after publication. It was agreeable to natural principles and moral justness that authors should be allowed to reap the pecuniary profits of their own ingenuity and labor, which they could not do unless permitted to retain ownership of their works after they had been put in print. They could reap no pecuniary profit if at the next moment after their works came out, they might be pirated upon worse paper, in worse print, and in a cheaper volume. As to the Statute of Anne, under which protection had actually existed for a term of twenty-eight years, his lordship brushed it aside with

the remark that "We are considering the common law on principles before and independent of that Act."

Mansfield's arguments are as cogent today as they were when he made them and there are still many persons who agree with him as to the inherent right and justice of allowing authors the same perpetual property rights as belong to the producers of other kinds of property. But the growth of law is shaped by influences more powerful than those of abstract logic, and perpetual copyright, which may be said to have existed in England for a few years, as a result of the decision in *Millar v. Taylor*, was done away with, once for all, by the decision of the highest tribunal in England, the House of Lords, in the case of *Donaldson v. Becket*, in 1774.

The successful plaintiff in *Millar v. Taylor* sold his copyright in Thomson's "Seasons" to Becket, and it was again pirated by Donaldson, a Scotch bookseller. Becket immediately secured an injunction against Donaldson and the latter appealed to the House of Lords. It will be remembered that when the House of Lords sat as a court, it first listened to arguments by counsel on either side, then summoned the Judges of the Courts of Kings Bench and Exchequer and propounded questions to them as to the law governing the case. Upon the basis of their answers, the House of Lords rendered its decision in the case.

The total number of the judges who answered the questions in the case of *Donaldson v. Becket* was eleven

and the number of questions put to them was five, as follows:

*First*, Whether at common law the author of any book or literary composition had the sole right of first printing and publishing the same for sale and might bring an action against any person who printed, published and sold the same without his consent? Ayes, 10. Noes, 1.

*Second*, If the author had such right originally, did the law take it away on his printing and publishing such book or literary composition; and might any person afterwards reprint and sell for his own benefit such book or literary composition against the will of the author? Ayes, 4. Noes, 7.

*Third*, If such action would have lain at common law, is it taken away by the Statute of 8 Anne; and is an author by the said statute precluded from every remedy, except on the foundation of said statute, and on the terms and conditions prescribed thereby? Ayes, 6. Noes, 5.

*Fourth*, Whether the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity by the common law? Ayes, 7. Noes, 4.

*Fifth*, Whether this right is in any way impeached, restrained, or taken away by the Statute of 8 Anne? Ayes, 6. Noes, 5.

Stated more briefly, what the judges held was that an author had in perpetuity the right to control his

unpublished work, but that, as to published works, this right had been taken away by the Statute of Anne, after the enactment of which the protection of the statute, for a maximum of twenty-eight years, was all that could be had for a published work. The House of Lords accordingly decided in favor of Donaldson. The decision struck consternation into the Stationers' Company and the booksellers tried to get a new law passed, giving them perpetual copyright, but failed.

The decision in *Donaldson v. Becket* has ever since been followed in the courts of England and America. It established finally both the doctrine of full property in an unpublished work, and the destruction of that property by publication, except when copyright is secured by compliance with statutory requirements at or before the time when the work is published. Henceforth we find the law of copyright centering and growing around the question: What is publication? Has it, or has it not, taken place in the case under consideration? At the particular point of time when a work is published, it passes out of the protection of the common law into that of statutory copyright, enduring only for a limited time, or else it at once becomes public property.

When *Donaldson v. Becket* was decided, the American Colonies were about to begin their struggle for independent existence. Among their earliest legislative acts, after their independence was secured, were the copyright laws which were passed by all of the thirteen original colonies except Delaware. One who desires to

revel in the noblest sentiments, expressed in the loftiest language, should read the preambles of these acts, which are printed in Bulletin No. 3 of the Copyright Office at Washington. They all announce the double purpose, to promote the public welfare by encouraging the spread of knowledge, and to protect authors in their property, but the first named purpose seems to have been uppermost in the minds of the legislators. So it was also, one may believe, when the makers of the Constitution provided that the Congress should have 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." [*Article I, Section 8.*] It is by virtue of, and with the restrictions expressed in, this provision of the Constitution that the patent and copyright legislation of the United States exists, hence its phraseology ought always to be carefully borne in mind when any copyright statute is being studied or applied.

In the first place, one may observe the purpose of the constitutional provision—"To promote the progress of science and useful arts." If it can be demonstrated that any particular copyright statute does not, in fact, promote the progress of science or useful arts, such statute is invalid. Second, the rights in question are to be "secured" to authors and inventors. In the leading case of *Wheaton v. Peters*, it was argued that the force of this word "secure" was to imply a previously existing right, not the creation of a new

right. But the court overruled this contention. Next, the rights to be secured are "for limited times," which does away with the possibility of perpetual copyright in the United States unless the Constitution is amended. Finally, one notes that it is the "writings" of authors which are to be protected. When the Constitution was adopted books were almost the only objects deemed worthy of protection. Early legislation added maps and charts, but musical compositions and works of the fine arts were not for some time regarded as sufficiently important to be included as subject matter of copyright and of course photography was not yet dreamed of. Legal battles have been, and will continue to be, waged about the meaning of the word "writings" in the Constitution. In accordance with accepted principles of construction, the word has been interpreted very broadly. The Supreme Court of the United States has decided that it includes photographs, but has indicated a doubt as to whether its meaning can be extended so far as to make it include phonograph records and piano-player rolls, holding that these devices are, at least, not "copies" of the musical composition which they reproduce. [*White-Smith Music Publishing Co. v. Apollo Co.*, 209 U. S. Reports, 1.] Such sound records, however, have been brought within the scope of copyright control under the present law by an indirect method.

For the consideration of the curious another observation is presented which appears not to have had the attention of any court. If it should seem a bit metaphysical,

academic, pedantic, it may be remembered that important decisions sometimes turn on the meaning of a word, or the position of a comma, in the Constitution or a statute thereunder. Let us quote the passage again:

“The Congress shall have 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.”

This is an example of the balanced style of composition so much used in the days of the colonial worthies. We have as the objects of promotion, science and useful arts, as the classes of persons whose rights are to be secured, authors and inventors, and as the subjects of protection, their respective writings and discoveries. If we take this phraseology disjunctively, it resolves itself into two separate statements: (1) The progress of science is to be promoted by securing to authors the right to their writings; and, (2) the progress of useful arts is to be promoted by securing to inventors the right to their discoveries. Lawyers, textbook writers and even judges sometimes seem to have the impression that the proposition is the other way about—that science is to be promoted through patent protection and useful arts through copyright. But when the Constitution was adopted, the word science did not have the specific meaning which it has today—that of natural science. It meant learning in general. And on the other hand, the word art was not so closely associated as it now is

with the fine arts. One occasionally finds references to the useful arts as being within the scope of copyright protection on account of their having been mentioned in the Constitutional provision referred to. It is doubtful, however, whether the framers of the Constitution had any such idea.

The scope of copyright protection in the United States has gradually and steadily expanded, through successive statutes and decisions of the courts, from the date of the Constitution down to that of the present law, enacted in 1909 and amended in several important particulars since that time. The rights originally given to authors of books have come to be extended to composers of music, artists, engravers, dramatists, photographers, printers, and in fact to every one who, in however slight a measure, exercises creative intellectual or esthetic labor in the production of a concrete tangible form. Not only have the subjects of protection increased in number and variety, but the amount of protection extended to any particular subject has also increased, keeping step with new methods of reproducing and disseminating the results of the creative effort, the tendency being to give to the author (in the broad sense of the word—the creator of any kind of copyrightable matter) more and more complete control over his works. And finally we may note the increase in the time of protection, from a maximum of twenty-eight to a maximum of fifty-six years.

The first copyright law of the United States was



enacted in 1790 and included in the subject matter of protection books, maps and charts. The rights were granted only to citizens of the United States, a policy which continued until 1891. The period of protection was fourteen years. (It is interesting to note how the seven-year term of the old royal patents continues, in the form of multiples of seven, in the American law, as it did until lately in England.) Renewal for a second term of fourteen years could be made by the author if he was living at the end of the first term. Certain formalities were required in order to secure copyright: (1) the deposit of a printed title; (2) the deposit of a copy of the work with the Secretary of State; (3) the giving of a notice of the copyright by four successive advertisements in some newspaper.

In 1802 a new act extended the protection of the law to "historical prints," designed, engraved or etched, and required a notice of copyright to be printed on the copies of the work to be protected.

In 1819 the Circuit Courts of the United States were given original jurisdiction in copyright cases.

In 1831 the subject matter of copyright was further expanded to include musical compositions and the term "historical print" was enlarged to "any print or engraving." The newspaper notice of copyright was done away with, except as regarded renewals, and the term of protection was extended to twenty-eight years, with provision for a renewal of fourteen years, which privilege was granted not only to the author, but to his widow

or children, if he himself was no longer living at the expiry of the original term.

In 1834 the Supreme Court of the United States decided the case of *Wheaton v. Peters* [*8 Peters' Supreme Court Reports, 591*] and that decision holds a place in American law similar to that of *Donaldson v. Becket* in English law. The subject of the dispute was Wheaton's Supreme Court Reports. The copyright proprietor had failed to comply with the provision of the law then in force which required deposit of copies of the work with the Secretary of State. He contended that regardless of such non-compliance, he was entitled to copyright at common law. The Supreme Court declared that there was no common law of the United States, and if Mr. Wheaton's Reports were protected by any common law, it must be that of the State of Pennsylvania, where they were published. But if indeed there ever was such a thing as perpetual copyright at common law in England, which the court thought doubtful, it was not shown to have become part of the common law of Pennsylvania, and the decision in *Donaldson v. Becket*, in the absence of American precedents, was deemed authority of sufficient weight to justify a decision against any common law right of copyright after publication. This was a decision of four members of the Supreme Court against two dissenting, with one judge absent, and some of the most thorough students of copyright law have thought it wrong. From time to time some one has proposed that the question should be

tried again. In fact it was tried again in New York State, the theory being that the common law of New York differed from that of Pennsylvania. The New York court, however, followed the decision in *Wheaton v. Peters*. It does not seem probable that the question will ever be raised again. Any one who is interested in learning what can be said on principle in favor of perpetual copyright—and a great deal can be said in its favor—should consult the excellent work of Drone.

In 1856 the right of public performance was for the first time granted to authors or proprietors of dramatic compositions.

In 1865 photographs were added to the subject matter of copyright protection.

In 1870 a general revision of the law took place and the classes of works which could be protected were enumerated as “any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph or negative thereof . . . painting, drawing, chromo, statue, statuary, and . . . models or designs intended to be perfected as works of the fine arts.”

In 1873-4 the copyright law was included in the Revised Statutes of the United States, as Sections 4948-4971.

In 1891 the so-called “international copyright law” for the first time, and after prolonged agitation, extended the benefits of American copyright to aliens. At the same time there was inserted by way of restriction a provision that books to be protected by American

copyright must be manufactured in the United States.

In 1905 an entering wedge in the direction of dispensing with the American manufacture of books was inserted in the law, providing that books in foreign languages printed in a foreign country might obtain a preliminary, "ad interim" copyright of one year, during which the foreign proprietor might decide whether or not it would pay him to reprint the work, or a translation of it, in the United States and so go on to secure copyright in the usual way for the full term of protection.

In 1909 was enacted the copyright statute which, with some amendments, is now in force and which will form the basis of discussion in the further chapters of this book.

## CHAPTER II

### DEFINITIONS

*Copyright distinguished from patent, from rights in trade-marks and from the right of privacy — What is an “author”? — What is a “writing”? — Rights in unpublished works, without copyright — What is publication?*

Before proceeding with the discussion of the copyright law as it now is, it will be desirable to attempt to arrive at a rough general conception of what copyright is and this can be gotten at by considering in the first place what it is not. Certain other forms of protection given by the law against unauthorized reproduction or copying of words, pictures or other concrete expressions of thought, are apt to be confused with copyright, with which they sometimes overlap. A patent may be distinguished from a copyright by the fact that it is normally the protection of the *idea* of the inventor, as exhibited in a new and useful “art, machine, manufacture or composition of matter” or a “new and ornamental design for an article of manufacture.” Two men may have the same idea and invent the same machine; only the first can obtain a patent. But if it is possible for two men to write the same book or paint the same picture, independently, both can obtain

a copyright. Copyright protects against the copying of the thing protected. Patent not only does this, but prevents the duplication of the invention, even if it is not done by copying, but by a second act of original invention. Of course the subjects of patent are ordinarily quite different from those of copyright, but there is in the field of design patents a close approach and even at times a coincidence of the two domains of protection.

A trade-mark may consist of an artistic work which may also be the subject of a copyright. But the origin of the two rights is entirely different. Copyright originates in authorship — trade-mark rights originate in adoption and use. It is not necessary that the owner of a trade-mark shall have been the maker of it. Again, the copyright law gives the exclusive right to make copies of the article, or to reproduce it otherwise. The trade-mark law confirms the right to use the mark on goods of the owner, not the right to copy it generally.

The so-called "right of privacy" is, in our law, of rather a shadowy and indefinite nature, although clearly recognized in Roman law. It exists by statute in many states, but according to the best opinion, it does not exist apart from statutory enactment. It is the right to prevent the unauthorized publication of one's photograph, for example, or of details of one's private life. It is more closely related to the right to obtain redress for libel or slander, than to copyright, since it does not involve any question of property in the matter pub-

lished, or copied, but only injury to the feelings or reputation of the person whose privacy is invaded.

By way of a closer approach to the conception of copyright, one or two standard definitions may be quoted, always with the caution of the well worn maxim: *Omnis definitio in lege periculosa*.

Drone says: "Copyright is the exclusive right of the owner to multiply and dispose of copies of an intellectual product." This definition is hardly broad enough, as it does not include the rights of performance, so important in the case of dramatic and musical works, nor rights of modification of form, such as translation, dramatization, and arrangement of musical compositions.

Bouvier's Law Dictionary defines copyright as "The exclusive privilege, secured according to certain legal forms, of printing or otherwise multiplying, publishing and vending copies of certain literary or artistic productions," which definition restricts the meaning of the word to copyright secured under statutory provisions. This is a limitation which makes for clearness, but the definition is otherwise open to the same objection as that of Drone.

Mr. William B. Hale, author of the article on copyright in "13 Corpus Juris," calls it "the right granted by statute to the proprietor of an intellectual production to its exclusive use and enjoyment to the extent specified in the statute." This definition gets rid of the difficulty by referring to the statute and in spite of the

unsatisfactory vagueness which results, that is, as Mr. Weil, author of the latest comprehensive work on copyright, points out, the only safe guide.

One might simplify still more by going back to the Constitution and saying that copyright is a body of exclusive rights granted by statute thereunder to authors for the protection of their writings. This raises the questions: What is an author? and What is a writing?

The United States Supreme Court has quoted with approval the definition of author in Worcester's Dictionary: "He to whom anything owes its origin; originator, maker, one who completes a work of science or literature." [*Burrow-Giles Lithographic Co. v. Sarony*, 111 *U. S. Reports*. 53.] In cases where one person originates and another completes the work, there is an apparent difficulty in deciding which one is the author and the decision will depend on the facts of the particular case. Where the originator supervises the execution of the work, giving detailed instructions for carrying it out, which instructions are followed, quasi-mechanically, by him who completes the work, the first person will be the author. But where only the suggestion of a subject is given and its treatment is left entirely to the one who does the actual writing, painting, or composing, then this latter person is the author. Between these two extremes lie all degrees of collaboration, resulting in joint authorship, as in the case of a musical comedy in which one person writes dialogue, another lyrics and a third composes the music. All three are entitled to a share in



the copyright of the resulting work, considered as a single copyrightable whole. The case of moving pictures presents an even more elaborate combination of intellectual and artistic effort, scenario writer, title maker, photographer, director and general producer all coöperating to a single end. It might often be difficult to decide whose was the guiding mind—who was “the effective cause,” to use the definition of author given by an English court—in the finally resulting work. Practically, the case is usually one for the application of the convenient rule given in Section 62 of the Copyright Act, which includes in the definition of author, for purposes of interpretation and construction, “an employer in the case of works made for hire.” This provision finds application also in the case of composite works, such as encyclopedias. Each contributor would at first be the author of his particular contribution, and the one who planned and outlined the whole work would be the author of the whole, as distinguished from the parts. But the employer for hire would in any event stand in the shoes of the employee authors, so far as rights under the Copyright Act are concerned. And where a photograph is ordered and paid for by the sitter, he is entitled to the copyright as though he were the actual author. On the other hand, if the photographer solicits the sitting and makes the picture gratis, then the photographer is the author of the photograph, just as though he were photographing the scenery of nature, without the intermediation of any other person. [*Altman v.*

*New Haven Union Co., 254 Federal Reporter, 113.]*

The term "writings" has received a very broad construction by courts and by Congress, which, in making such things as sculpture and "drawings or plastic works of a scientific or technical character" subjects of copyright, has thus tacitly included them under the head of the writings mentioned by the Constitution. Some time after the inclusion of photographs in the statutory subject matter of copyright, an attempt was made to prove that they were not writings, but the United States Supreme Court held that they were, suggesting that anything in which the ideas of an author are given visible expression, is entitled to the name "writing." [*Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. Reports, 53.*] It is still a matter of doubt whether phonograph records and piano player rolls are writings within the meaning of the Constitution. The Supreme Court held that they are not copies of the music which they reproduce, pointing out that they could not be read, and it was strenuously contended by representatives of the mechanical music machine manufacturers, at the hearings before Congressional Committees when the present law was under discussion, that not being copies, they could not be writings. As will be seen, Congress has not made them direct subject matter of copyright, but only a manner of infringement of copyrighted music, if unauthorized. The provision of the Copyright Act which refers to them uses this language: "Any system of notation or any form of record in

which the thought of an author may be recorded and from which it may be read or reproduced." That is a very good definition of a "writing," and one which ought to be adopted as a basis for future copyright legislation. At present, it is a definition of one kind of right secured by copyright, but not a definition of that which is itself a subject of copyright—a writing.

At this point consideration may be given to the rights which an author has with reference to his unpublished work, without securing statutory copyright. These rights, existing at common law, are (1) the right to publish, (2) the right to dispose of the unpublished manuscript, drawing, musical composition or the like, and in the case of an unpublished play, the very important right to perform it publicly, or license others to do so, and (3) the right to secure statutory copyright for it. It may be observed that the possession of such rights implies the power of assigning them to others, in whole or in part. Mr. Weil very well says that an author's common law right in his unpublished works amounts substantially to the right to do as he chooses with them, so long as he does not publish them. He may pass copies about among his friends, he may read in public from them, he may do anything that he could do with any other kind of property, always provided he does nothing to indicate a relinquishment of his own private control and a dedication to the general public. These are exclusive rights. The author can prevent any other person from doing any of the things

with his unpublished work which he himself alone has the right to do, and can obtain suitable redress in the courts for such wrongs. The Copyright Act (Section 2) expressly affirms the common law rights of the author in the following language:

“Nothing in this Act shall be construed to annul or limit the right of an author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication or use of such unpublished work without his consent, and to obtain damages therefor.”

Publication being the one thing forbidden to the author who would keep his common law rights, is nevertheless the one thing which he wants and needs in order to reap the full value of his labor in reputation and money. And this is where the copyright statute steps in, continuing, and even enlarging, the author's control, on condition of the performance of certain formalities. Unless these formalities are fully performed, the author loses his property forever with the act of publication. To be sure, there are certain kinds of intellectual creations, such as plays, music and motion pictures, which may be to some extent exploited without being published. But it may be said broadly that every author contemplates publication of his work at some time. As this is the time when he either secures the protection of the statute for a limited time, or loses all rights in his work, it becomes important to determine, so far as possible, what acts constitute publication.

It may be said in general that publication of a work which is of a character to be distributed in copies means simply the placing of copies at the disposal of the public, whether by sale or gift. The number of copies so disposed of is immaterial. Publication may take place by the sale of a single copy, or even by the exhibition of copies meant for sale, or distribution, though none of them leaves the hands of the dealer. Expensive works are often issued in limited editions, but though an edition consists of but one hundred copies, it is published if it is possible for any member of the public to obtain a copy while they last. In copyright law, there is no such thing as a limited publication. There may be a limited distribution, confined to members of a certain organization and this is not such a publication as to destroy common law rights if the limitation is strictly maintained, as for example, in the case of the ritual of a secret society. Whether the leasing, or loaning, of copies, a method of distribution much in practice by makers of motion pictures and some books (commercial rating reports, market reports and courses of instruction) is publication is a matter of some doubt. It is probable that it is, where any one who chooses may obtain a copy by complying with the terms of the lease. But, as already stated, one may make copies of his work, even by a mechanical process, and give them to friends, without thereby publishing it. He gives or withholds each copy at his own discretion. He has not abandoned his exclusive control of the work. Send-

ing out sample copies of a work for the purpose of securing orders is not a publication, but in a case in which the proprietor at first refused to sell such a sample, but later accepted the amount fixed as the price, he was held to have published it. [*Gottesberger v. Aldine Book Publishing Co.*, 33 *Federal Reporter*, 381.]

Wherever a question of publication arises, one must consider the particular form of the work which is in controversy. Publication of a book in the French language is not publication of a translation of it. The translator has all common law rights, including the right of securing copyright, in his translation, just as though it were an original work. (This, of course, is assuming that the original work is not protected by copyright, or if it is so protected, that the translator is authorized by the copyright owner to translate it.) The like is true of other modifications of the form of a work which involve authorship—of dramatizations, for example, or new arrangements of music. They are regarded as original works, so far as the author's common law rights are concerned.

Publication has a usual, but not an essential, connection with printing. A work may be published even in copies written with pen or pencil. Or it may be printed for private distribution without being published. In the rules of the Copyright Office, the applicant for copyright registration is instructed to print *and* publish the work, with copyright notice, before filing his application. But

the privilege of copyright could not be denied to an author, merely because he did not make use of the printing press.

As to works reproduced in copies for sale or distribution, the Copyright Act contains a provision that the date of publication is to be understood as "the earliest date when copies of the first authorized edition were placed on sale, sold or publicly distributed." This, by implication, defines publication as the selling, placing on sale, or public distribution of copies. That definition is no doubt sufficient as regards publication of such works for the purpose of securing copyright. When we come to works which are not distributed in copies, but which may be placed before the public in other ways, the question of what is publication presents greater difficulty and there is less judicial opinion to guide us.

The public performance of a play has never been a publication which would divest the author's common law rights under United States law, but it was so under British law down to 1911, when the law was changed. It was contended before the Supreme Court that as the owner of a play which had been performed, although not circulated in copies, in Great Britain, had lost his common law rights under British law, he had also lost them here. But the Court decided that a statutory modification of common law in Great Britain could have no effect here and that the play was protected against unauthorized performance in this country, without copyright. [*Ferris v. Frohman*, 223 U. S. Reports, 424.]

What has been said regarding plays applies also to music. Public performance is not publication.

Works of art, if set up in a public place (not merely exhibited in a building to which the public is admitted only under certain conditions) must be regarded as dedicated to the public, at least to the extent of permitting photographs to be made of them. [*Carns v. Keeffe Bros.*, 242 *Federal Reporter*, 745.] Of course the makers of such photographs, or other permissible reproductions, may each secure copyright for their pictures, just as a translator may do for his work.

Since the author of a work has the exclusive right of publication, it follows that publication without his authority does not deprive him of any rights. Unauthorized publication is no publication in law.

There are two different purposes, or viewpoints, for the consideration of the question whether publication has taken place in any particular case. The first is, whether a sufficient publication has taken place to divest the author of his common law rights, the second, whether publication has been sufficient to give the author copyright, for the copyright law requires publication with the notice of copyright, in order to vest the right. Courts are much more careful in the consideration of the question, where the loss of rights is involved, than where their establishment has been attempted. It will be harder to prove a divestitive than an investitive publication.

Whether or not the publication with notice required



to obtain copyright under the present statute must take place in the United States—a question not yet authoritatively decided—it is believed that first publication without the copyright notice anywhere in the world will destroy the author's common law rights in America, including his right to obtain copyright, except in the case of books in the English language "seeking ad interim copyright" under section 21 of the statute. Something more will be said on this point when the provisions of the law for securing copyright come to be treated, in the next chapter.

The Copyright Act provides (Section 11) for the copyrighting of certain classes of works "of which copies are not reproduced for sale"—*i.e.*, lectures, sermons or addresses, prepared for oral delivery; dramatic, musical and dramatico-musical compositions, motion pictures, photographs, works of art, drawings or plastic works of a scientific or technical character. In view of the generally accepted theory, under decisions of the courts prior to the present Copyright Act, that copyright can only be had upon publication, the question has been raised when, if at all, the works mentioned in Section 11 of the Copyright Act are published. It is argued that there must be a publication at some time, especially as the period of protection is fixed by the date of publication, on which it begins to run (Section 23 of the Copyright Act). Hence, says Mr. Weil, the chief proponent of this argument, we must find a date of publication for the works mentioned in Section 11, if copyright

in them is to be upheld, and this date can be no other than the date of their deposit in the Copyright Office. He cites cases which hold that such deposit in a public office is tantamount to publication. This construction of the law seems a little technical, and such quasi-fictions are to be avoided. It is true that, when a copy of a work has been deposited in the Copyright Office, the public may have access to it, the Copyright Act expressly providing for this. But that hardly amounts to publication, in the general sense of giving the work to the public. A different view is taken by the Copyright Office itself, which regards works not reproduced in copies for sale as simply unpublished works. This is also the view of Mr. Hale, the writer on copyright in "Corpus Juris." As to the date when the copyright of such works begins to run, that is no doubt the date of the deposit of the copy, since the law provides that copyright is secured by the act of depositing the copy. If there is any inconsistency between this view and the provision of Section 23, that copyright begins on the date of publication, it is not a serious one. For it will be observed that, whichever view one takes, the result is the same so far as the beginning of the copyright protection is concerned.

Do common law rights still subsist in the works mentioned in Section 11, notwithstanding the fact that copyright has been obtained for them? That question has not yet come up for decision. It is often said that copyright terminates common law protection. That

statement seems to come from a course of reasoning something like this: Publication terminates common law protection, as was held in the cases of *Donaldson v. Becket* and *Wheaton v. Peters*. But copyright can only be obtained by publication, and prior to the present Act has always been so obtained. Therefore copyright terminates common law protection. In answer to this it may be said that the present law has changed the method of copyrighting works so far as to enable some classes of unpublished works to be copyrighted. There is no reason in the nature of things why the owner of a work should not have the option of claiming protection at common law for his unpublished work, even after he has registered a claim to copyright. And Section 2 of the Copyright Act, above quoted, seems to show that he can.

In case an author decides to sue for the protection of his rights in an unpublished work, the Court will probably require him to elect his remedy, whether under the copyright statute or under the common law. But the election should bind him only for the one case. He should still be held to retain both copyright and common law rights for future use.

## CHAPTER III

### HOW COPYRIGHT IS OBTAINED

*Publication with the copyright notice — Deposit of copies — Requirement of American manufacture — Works not reproduced for sale — Registration.*

An "author" has produced a "writing." It may be a literary work, a musical composition, a play, a picture, a map, a photograph, a piece of sculpture, a motion picture, or a set of architectural or engineering plans. It is his property. He can, at common law, prevent its appropriation and exploitation by any other person. But this is not enough. He wishes to give it to the public and to receive a return for it. He wishes to publish it and, in order to retain property in it after publication, he must secure copyright.

For this purpose the law lays down certain formalities to be complied with, the general purposes of which are to serve notice on the public that the control of the work has been retained by the author or proprietor, after publication, to make a permanent record of the copyright claim, and to enrich the collection of works in the national library—the Library of Congress at Washington.

The formalities may be considered under three heads: (1) the notice of copyright inscribed on copies

of the work; (2) the deposit of one or more copies of the work in the Copyright Office, in the Library of Congress; (3) the registration or recording of the copyright in the Copyright Office.

Section 9 of the Copyright Act provides:

“That any person entitled thereto by this Act may secure copyright for his work by publication with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking *ad interim* protection under section twenty-one of this Act.”

“Any person entitled thereto” means the author of the work, or some one who has obtained his rights from the author—the “proprietor”—with the restriction that the author must be either an American citizen, or a resident of the United States, or a citizen of a country with which the United States has established copyright relations. “Publication with the notice required by this Act” means in the normal case the sale or public distribution of copies bearing the notice. For some classes of works, particularly books and periodicals, publication is obligatory, but for the other classes the alternative method of securing copyright provided in Section 11 may be used. This method, which it will be convenient to treat as the exception, and publication with notice as the rule, has already been referred to, and will be taken up in detail a little later.

It has until recently been supposed that the publication required to secure copyright in the United States must be first or simultaneous publication in this country. The arguments in favor of this view are vigorously put by Mr. Weil. [*Weil, Copyright Law, pp. 273 et seq.*] Nevertheless the point is doubtful. The statute does not expressly require first publication in the United States and there is no decision of an American court which does so. On the other hand a recent decision upheld the validity of copyright in a work which had been published in a foreign country without the statutory American notice several years before its republication in the United States with the notice, where no intervening rights were involved and the foreign copyright proprietor had printed a notice on the work at the time of its publication abroad which, though not in the form provided by American law, was yet an assertion of reservation of rights for all countries. [*Italian Book Co. v. Cardilli, 273 Federal Reporter, 619.*] This decision may go too far, but it seems probable, at least, that publication in a foreign country with the statutory notice is sufficient to initiate copyright protection, even if it takes place in advance of publication in the United States.

To those unfamiliar with copyright, the idea of proceeding with publication and placing a notice of copyright upon the published copies of the work before registration seems peculiarly repugnant. They cannot readily believe that there is not some preliminary action

to be taken in the Copyright Office, to obtain a guarantee of protection in advance of publication. This idea is natural enough to the beginning author, who feels that he is sending his precious manuscript out naked and unprotected, unless previously clothed with a government certificate, and the notion that some preliminary protection is necessary has also been confirmed in the mind of the public by the long period during which the copyright law provided for the filing of the title of the work in the government office, in advance of publication. The law, however, now rests upon the theory that the author, who is the first owner of the work, has himself the right to give it to the public with a notice of his ownership, and then proceed with reasonable promptness to make the necessary deposit and registration of his rights. In practice, it is nearly always the publisher who takes care of these formalities, whether the copyright is held by the author, or sold to the publisher. But the author should see that the matter is properly attended to when he retains the copyright. Particular attention should be given to the proper printing of the copyright notice, as any omission or defect in the notice may prove fatal to the copyright and cause the author to lose his protection. Irregularities in the other formalities may be corrected, but it is too late for correction of the notice after the work has been published.

Section 18 of the Copyright Act prescribes the forms of the copyright notice. It provides:

“That the notice of copyright required by section nine of this act shall consist either of the word ‘Copyright’ or the abbreviation ‘Copr.,’ accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section five of this Act, the notice may consist of the letter C inclosed within a circle, thus: ©, accompanied by the initials, monogram, mark or symbol of the copyright proprietor: *Provided*, That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright is subsisting when this act shall go into effect, the notice of copyright may be either in one of the forms prescribed herein or in one of those prescribed by the Act of June eighteenth, eighteen hundred and seventy-four.”

It will be observed that two forms of notice are provided for works copyrighted under the present Act. The first, and longer, form may be used for any of the classes of subject matter of copyright. The second, briefer form can only be used for works of classes (f) to (k), that is, for maps and pictorial or other artistic works. Whichever form is used, the requirements of the statute regarding it must be substantially complied with.

In the longer form of the copyright notice we have three elements: the word “copyright,” in full or ab-



breviated to "copr.," the name of the copyright proprietor (the author, or one to whom he has sold or transferred the copyright), and the year date of publication, which, however, may be omitted on other than printed literary, musical, or dramatic works.

The full name of the copyright proprietor need not be given; provided his surname is given in full, initials for the other names are sufficient. A trade name is also valid. (But if the trade name is unlawful by statute in the State where the work originated, it is unlawful in the copyright notice. [*Haas v. Feist*, 234 *Federal Reporter*. 105].) The omission of the name, however, or the giving of a name other than that of the actual legal owner of the copyright, is fatal. An example of the last named fault is found in the history of Holmes' "Professor at the Breakfast Table," first published in instalments in the *Atlantic Monthly*, with only the general notice of copyright of that periodical in the name of the publishers, Ticknor and Fields, but later published in book form with a copyright notice in the author's name. The United States Supreme Court held that "a previous copyright having been obtained in the name of the publishers, Ticknor and Fields, the subsequent notice of copyright by Dr. Holmes in his book must be held insufficient." [*Mifflin v. White*, 190 *U. S. Reports*, 260.]

This situation, which is likely to arise where a work is first published serially in a periodical, the publisher having been given only a license to publish and the

author having retained the copyright, should be carefully guarded against. The author should see to it that the notice of copyright contains his name. In cases where he has given the publisher authority, either express or implied, to print the notice with the publisher's name, it seems likely that a court will avoid forfeiture of the copyright by holding that the publisher is a trustee and may be required to assign the copyright back to the author, who will be protected in the meantime against infringers generally. But the difficulty in such cases is that the author may not be protected against bona fide purchasers from the publisher, without notice of the trust. [*Brady v. Reliance Motion Picture Corporation*, 229 *Federal Reporter*, 137; 232 *Federal Reporter*, 259.] The only entirely safe course is to have the notice contain the name of the actual, legal owner of the copyright.

The third essential item in the notice, at least where the work is a printed literary, musical or dramatic composition, is the year in which publication takes place. Its omission from the notice on a periodical was held to defeat the copyright, although the date of issue of the periodical appeared just above a line below which the notice was printed. [*Record and Guide Co. v. Bromley*, 175 *Federal Reporter*, 156.] Even post-dating the notice by one year invalidated the copyright in a book, according to another decision, the theory given for so holding being that the copyright owner had claimed, as against the public, a year more

of protection than he was entitled to. [*Baker v. Taylor*, 2 *Blatchford's Reports*, 82. See also *Callaghan v. Myers*, 128 *U. S. Reports*, 617.] It is worth noting that publishers who bring out books very late in the year, say about Christmas, sometimes think it reasonable to put the subsequent year in the notice, apparently believing that a few days, more or less, may be disregarded. But the practice is a dangerous one.

The briefer form of notice provided for in Section 18 is an innovation in the law, intended to avoid the disfigurement said to result from printing the longer form of notice on works of art. The optional omission of the year date from this form of notice perhaps is based on the fact that most printed pictures are ephemeral, having been forgotten long before the expiration of the copyright period. Or it may be simply an example of the increasing liberalization of our law in the direction of abolishing the notice altogether, as has been done by British and other foreign copyright laws. If this form of notice is used, the full name of the copyright owner must appear somewhere on the article where it may be found, not covered up or otherwise concealed.

Section 19 of the Copyright Act, specifying the place where the notice must be printed, is as follows:

“That the notice of copyright shall be applied, in the case of a book or other printed publication, upon the title-page or the page immediately following, or if a periodical either upon the title-page or upon the first

page of text of each separate number or under the title heading, or if a musical work either upon its title-page or the first page of music: *Provided*, That one notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.”

There are three possible places for the notice in a periodical, two in a book, play or musical composition. Putting it on the editorial page of a periodical, instead of one of the places specified, was held to invalidate the copyright in a case decided under a former Copyright Act, which would no doubt be followed, in principle, under the present Act. [*Freeman v. The Trade Register*, 173 *Federal Reporter*, 419.] The copyright owner must take pains to guard his property by strict compliance with the requirements. Persons interested are not obliged to hunt all the way through the work to find a notice of copyright in some obscure place.

One notice must appear in each volume, or issue of a periodical, but one is enough. The meaning of this requirement will be clear if one considers the case of such works as law books, of which many revisions are issued, each new edition being copyrighted for the protection of the newly added matter. Formerly it was the practice to print a new notice for each new edition and a great part of the back of the title-page was sometimes so occupied. Now it is sufficient to print a single notice, but the various year dates of publication should probably all be given.

The notice must appear on each and every copy of

the work, as it reaches the public. In a case where a small picture was copyrighted and a large number of reproductions of it printed on a sheet, intended to be cut up into smaller portions and used to wrap candy boxes, only one notice was printed on the sheet, so that all the small portions did not show it. This was held to invalidate the copyright. The notice should have appeared on each and every copy. [*Louis De Jonge & Co. v. Breuker & Kessler Co.*, 235 U. S. Reports, 33.]

In the case of a work of art, the notice need not appear on the original as this is not a "copy." [*American Tobacco Co. v. Werckmeister*, 207 U. S. Reports, 284.]

Whether the notice is necessary on copies of the work deposited in the Copyright Office for registration is a matter of some doubt. Mr. Weil thinks it is, but this opinion results from his holding that the deposit of copies is publication, *per se*, as to which we have seen there is fair room for question. The Copyright Office makes a practice of calling attention to the omission of the notice from copies of a published work sent in for registration, but does not refuse to accept them.

The notice is not required on copies of a work which are not published or offered for sale in the United States by authority of the copyright proprietor, nor on copies of a work for which ad interim copyright is sought.

Should the notice be omitted from some copies of the work through mere inadvertence, the copyright is not invalidated, this contingency being covered by Section 20 of the Copyright Act, which declares

“That where the copyright proprietor 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 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.”

Section 29 of the Act imposes penalties for false or fraudulent notice or for removal of a notice, that is, for the printing of a copyright work without it. A penalty is also provided for the issue, sale or importation of a work bearing a copyright notice, which has not been copyrighted. Fraudulent intent and guilty knowledge have to be proved in such cases and that is usually a difficult matter.

Section 30 prohibits the importation of works bearing a false notice.

The provisions of the copyright law requiring the

deposit of copies in the Copyright Office, at the Library of Congress in Washington, are to be found in Sections 12, 13 and 14 of the Act. Such deposit has always been a requirement of American copyright law. Formerly it was a condition precedent to the securing of copyright, along with the filing of a title of the work. No copyright was secured unless copies were deposited within a definite period after publication or, under the law in force immediately before the enactment of the present statute, not later than the day of publication. But under the present law deposit, in the case of published works, is one of the acts to be performed after copyright has been secured by publication with the copyright notice. A mere delay in the deposit of copies will not invalidate the copyright, although a contumacious delay, after copies have been demanded by the Register of Copyrights, will do so. And in no case can suit for infringement of copyright be brought until the deposit has taken place.

Section 12 provides

“That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published

in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section eleven of this Act, such copies or copy, print, photograph or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

No special time is set for deposit of copies, but it must take place "promptly" after publication, if the work is a published one. "Promptly" has been held by courts to mean "without unnecessary delay" and it is prudent for copyright claimants to attend to this matter at the earliest moment possible. Deposit in the mail, if properly addressed, is sufficient, even if the copies never reach the Copyright Office, the theory being, apparently, that the United States Post Office should assume the responsibility for delivery. [*Proof of deposit in the mail may be preserved by the postmaster's receipt provided for in Section 14 of the Copyright Act.*] The number of copies of published works required is two, except for foreign works, where, by a recent amend-



ment of the law, it has been reduced to one. The reason for this reduction is that the deposit requirement is regarded as an undue burden by foreign publishers, whose domestic laws do not usually require it as a condition of copyright. The intention was, on the one hand, to stimulate the flow of foreign works to the Library of Congress, and on the other, to relieve the foreign claimant of any unnecessary burden, as one copy of a foreign book is usually all the Library of Congress desires.

The deposit required in the case of a contribution to a newspaper or periodical is a complete copy of the issue containing it. It is not enough to clip the contribution and send it alone. The whole number of the periodical containing it should be sent.

The deposit called for by Section 11 will be taken up in connection with the discussion of that section.

The copies must be complete and of the best edition published at the time. Attempts have sometimes been made to secure copyright registration by depositing incomplete copies, proof sheets, preliminary prints, or copies of books without the illustrations or maps which they are supposed to contain. Such deposits are not in compliance with the law and the Attorney-General of the United States has so ruled. [*28 Opinions of the Attorney General, 176.*]

An example of the practical working of the provision that no action or proceeding shall be maintained until the deposit has been made is found in a case in which one New York newspaper sued another for

unauthorized publication of the story of Captain Amundsen's discovery of the South Pole. A temporary injunction was hastily obtained about midnight of March 8, but the required copies of the newspaper containing the copyrighted story were not mailed until early in the morning of March 9. Although the difference was only one of a few hours, it was held that the action had been brought before it was permissible and the injunction was held void. [*New York Times Co. v. Star Co.*, 195 *Federal Reporter*, 110; *Same v. Sun Printing and Publishing Association*, 204 *Federal Reporter*, 586.]

Section 13 is intended to insure the deposit of copies by careless claimants, or those who are reluctant to part with very expensive works. It reads as follows:

“That should the copies called for by section twelve of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.”

Incidentally the length of time given for deposit after formal demand (three months within the United States, and six months elsewhere) may be thought to suggest what might be regarded as lack of "promptness" in the ordinary case.

The much discussed "manufacturing provisions" of the Act, relating to books in the English language are found in Section 15, *viz*:

"That of the printed book or periodical specified in section five, subsections (a) and (b) of this act, except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this act, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo-engraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photo-engraving process, and also to separate lithographs or photo-engravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art; but they shall not apply to works in raised characters for the use of the blind, or to books of foreign origin in a language

or languages other than English, or to books published abroad in the English language seeking ad interim protection under this act.”

This section, with its adjunct, Section 16, requiring an affidavit of American manufacture for the works in question, owes its place in the law to the American printing and allied trades. It appeared in simpler form in the Copyright Act of 1891, along with the first removal of the copyright disabilities of aliens.

The courts construed the similar provisions in the Act of 1891 with strictness, holding that the requirement of American manufacture applied only to the classes of works expressly named therein, that is, books, photographs, chromos or lithographs, and consequently that dramatic compositions and music, though printed in book form, were not included in the requirement of American manufacture. [*Hervieu v. J. S. Ogilvie Co.*, 169 *Federal Reporter*, 978.] It seems probable that a similar strictness of construction would be applied under the present Act to the question of what are lithographs and photo-engravings and that pictures made in foreign countries by other processes of reproduction, although somewhat similar in their nature to lithography or photo-engraving, would be exempt from the manufacturing provisions. Lithographs and photo-engravings made abroad are themselves so exempt if they are reproductions of bona fide works of art located in a foreign country, or if they reproduce other objects so located and illustrate a scientific work.

The manufacture must take place "within the limits of the United States." This includes the Hawaiian Islands and Porto Rico, which now have a territorial status, but was held some years ago, in an opinion of the Attorney-General, not to include the Philippines. [*25 Opinions of the Attorney General, 25.*]

Instructions for making the affidavit of American manufacture, which must be filed with applications for copyright registration of books in the English language, will be found in the Rules for Registration issued by the Copyright Office. [*See Appendix B, p. 273.*]

Sections 59 and 60 of the Act provide for the disposal of articles deposited in the Copyright Office.

"SEC. 59. That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein.

"SEC. 60. That of any articles undisposed of as above provided, together with all titles and correspondence relating thereto, the Librarian of Congress and the register of copyrights jointly shall, at suitable intervals, determine what of these received during any period of years it is desirable or useful to preserve in the permanent files of the copyright office, and, after

due notice as hereinafter provided, may within their discretion cause the remaining articles and other things to be destroyed: Provided, That there shall be printed in the Catalogue of Copyright Entries from February to November, inclusive, a statement of the years of receipt of such articles and a notice to permit any author, copyright proprietor, or other lawful claimant to claim and remove before the expiration of the month of December of that year anything found which relates to any of his productions deposited or registered for copyright within the period of years stated, not reserved or disposed of as provided in this Act: And provided further, That no manuscript of an unpublished work shall be destroyed during its term of copyright without specific notice to the copyright proprietor of record, permitting him to claim and remove it."

Thus it will be seen that the deposits which go to the Copyright Office may afterward be disposed of in a variety of ways. First, they may go into the permanent collections of the Library of Congress; second, they may go to the reserve collections of the Library, and thence be sold or exchanged; third, they may be transferred to other government libraries in the District of Columbia; fourth, they may be preserved in the Copyright Office; fifth, they may, after due notice to the copyright proprietor of record, be destroyed.

What has been said hitherto in this chapter has been applicable to what may be called the normal method of securing copyright—that of publication with notice. Section 11 of the Act provides a different method, not applicable to all classes of works, but

primarily to works which are not intended for publication in the usual way (by dissemination of copies). It reads as follows:

“That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title or description, with one print taken from each scene or act, if the work be a motion-picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this Act, where the work is later reproduced in copies for sale.”

The classes of works for which copyright may be obtained by deposit of a copy, or identifying material, under this section are lectures, dramatic, musical and dramatico-musical works, motion pictures, photographs, works of art, plastic works and drawings, but not books, periodicals, maps, reproductions of a work of art or prints and pictorial illustrations.

Section 11 of the Copyright Act has been the subject of much discussion and of some criticism by writers

and courts. In the only decision of a court in which the section was considered generally, at some length, the judge seemed to be much puzzled by it. [*Universal Film Manufacturing Co. v. Copperman*, 212 *Federal Reporter*, 301.] It is the subject of a careful analysis by Mr. Weil, [*Weil, Copyright Law*, pp. 289 *et seq.*] whose conclusion is, as has been already stated, that the works referred to as "not reproduced in copies for sale" must nevertheless be published in order to secure copyright, but that the deposit of the required copy for the purpose of securing registration is a sufficient publication. He finds a difficulty in fitting this theory to the case of motion pictures, of which not a complete copy, but only a title, description and some prints are to be deposited. Hence he concludes that this class of works should be independently published before registration under Section 11 is made. Others have expressed the opinion that the section simply provides for registration to add the statutory remedies for infringement to those enjoyed under the common law. The difficulty with this view is that Congress cannot legislate to secure copyright except for a limited time, because of the restriction to that effect in the Constitution. Unless the period of protection is to be limited, Congress cannot touch the subject of author's rights. On the whole, it seems simpler to take the obvious view that a work not reproduced in copies for sale (or for other general distribution) is a work not published. There seems to be no



greater obstacle to this view than to the somewhat forced and technical construction which insists that publication is necessary for copyright—a view, it may be said, which proceeds very largely from the conservatism of lawyers and courts, who do not like to lose the benefit of the long line of decisions regarding publication, the accumulation of the century or more during which publication was a *sine quâ non* for copyright protection.

The “claim of copyright” referred to in Section 11 is simply an application for registration, similar to that required for published works. The description required for a motion picture is a brief synopsis, enough to identify it, and the entire scenario need not be deposited. Copies of oral works filed as deposits may be written or typewritten, but should be complete, neat and legible.

If the work is published in the usual manner after registration under Section 11 has been made, the law requires that the same formalities shall be complied with as if the work had never been registered before. Not only must there be a deposit of copies, but there must also be a new registration, although there cannot be a new copyright, and the period of protection must be regarded as already having begun to run from the time of the registration of the unpublished work. Applicants whose works have not been published, but who will probably obtain publication in the near future should weigh the advantages of copyright registration of the unpublished work against the undoubted unde-

sirability of two registrations, in which discrepancies of dates or other material statements are apt to occur and confuse the record. It may be just as well to rely on common law protection until publication with the copyright notice can be had.

Section 10 of the Act provides for copyright registration, in the following language:

“SEC. 10. That such person [the person entitled to copyright] may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act.”

Registration furnishes permanent evidence, in the records of the Copyright Office and in the certificate issued to the copyright proprietor, that the requirements of the law for securing copyright have been complied with. The copyright, however, does not depend upon the registration, except in the case of renewal or extension, to be mentioned later.

No misconception regarding copyright is more prevalent than that which takes the piece of paper—the printed and written certificate of the Copyright Office—for the copyright itself. The difference between the copyright and the certificate of copyright registration is like that between a piece of land and the deed which testifies to its ownership, except that the land is visible and the copyright is not.

Section 53 of the statute authorizes the Register of Copyrights to make rules for registration, subject to the approval of the Librarian of Congress. Such rules have been issued and the printed pamphlet containing them (Copyright Office Bulletin No. 15), may be obtained on application to the Copyright Office. The rules will also be found in Appendix B of this volume, at pp. 263-278.

A question has been raised, but never conclusively answered, whether the Register of Copyrights is, in legal parlance, merely a "ministerial officer," required to perform, quasi-mechanically, the functions with which he is clothed by the statute; or whether he has discretion to decide that the law has or has not been complied with in the case of any work presented for registration, and to grant or withhold registration accordingly. A compromise between the two extremes is probably the correct view. The nature of the Register's office demands the exercise of some discretion, within the spirit of the law, and it is to the advantage of copyright claimants and the general public that registrations should not be made in a haphazard and mechanical manner, thus diminishing the value of the certificate and the record as evidence of valid copyright. Such exercise of discretion by the Copyright Office is the more necessary because there is no provision in the copyright law, as there is in the patent law, for scrutiny of applications or copies, to deter-

mine questions of originality or authorship. For such matters the word of the applicant has to suffice.

Section 54 of the statute provides for the keeping of record books in the Copyright Office in which all works deposited under the provisions of the Act are to be entered. Section 55 states what the certificate of registration is to contain. Among those items one of the most important is the title of the work. Mention should be made of a practice not uncommon among persons who copyright unpublished works—that of changing the title of the work after registration. This may cause trouble by breaking the link of identity between the work as registered, and as later circulated, sold or produced under a different title. The change of title should be avoided, but if it is necessary, then manuscripts with the new title should also refer to the old one.

Sections 56 and 57 give further details as to the method of recording and indexing copyright registrations, and provide for the issuance of a printed catalogue of copyright entries. This catalogue, apart from its legal aspect as evidence of the facts it contains, has marked value as a bibliographical record and will be found useful to persons interested in the current output of literature, music and art.

By Section 58 the record books and indexes of the Copyright Office, as well as the copies deposited for registration, are open to public inspection. Express provision is made for taking copies of entries from the

record books, but no provision for copies of deposits, which therefore the Copyright Office only permits on written authorization from the copyright proprietor, or on the order of a court. It is obvious that any other copying of a copyright deposit would be infringement.

The fee for copyright registration is \$1.00.

Mention may here be made of the elaborate series of forms for applying for registration which are furnished by the Copyright Office. The variety of these forms is such that every class of work is specifically provided for. The Copyright Office is always ready to aid applicants, orally or by correspondence, in the proper presentation of their applications and in the general understanding of the law. In furtherance of this purpose a number of valuable and interesting bulletins and circulars have been published. The bulletins containing the Copyright Act, the Rules for Registration and the English Copyright Act, are distributed gratis, as are the circulars. Other bulletins can be had at nominal prices through the Government Printing Office at Washington. The most recent publication of the Copyright Office is the Drama List, containing the titles of all dramatic compositions copyrighted in the United States from 1870 to 1916. This work is invaluable for students of the drama, as well as for persons desiring to know whether any contemplated title has already been used.

The Copyright Office cannot adjudicate the validity of any copyright or give advice in cases of litigation, as these are matters outside its province and authority.

## CHAPTER IV

### RENEWAL AND TRANSFER OF COPYRIGHT

*How renewals are obtained — Renewal term a new grant — Assignments — Bankruptcy — Licenses — Divisibility of copyright by means of licenses.*

When copyright has been secured it lasts for a period of twenty-eight years, which is computed, in the case of a work copyrighted by publication with notice, from the date of publication, and in the case of an unpublished work, copyrighted by the deposit of a copy or identifying matter under Section 11, from the date of the deposit. At the end of the period a renewal of the copyright may be obtained for a second term of twenty-eight years. The sections of the Copyright Act relating to the duration and renewal of copyright, (Sections 23 and 24) read as follows:

“SEC. 23. That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author’s true name or is published anonymously or under an assumed name: Provided, That in the case of any posthumous work or of any periodical, cyclopaedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual

author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopaedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication."

"SEC. 24. That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then

by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: Provided, however, That if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: Provided, That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term."

Section 23 deals with the renewal of copyrights secured under the present Act. The earliest possible renewal to take effect under this section will therefore not begin until twenty-eight years after the date when the present Act went into effect, that is, not until July 1, 1937, and the earliest registration of such renewals will not be possible until a year sooner, July 1, 1936. Nevertheless the provisions of the section relating to renewals of posthumous, or periodical, cyclopædic or other composite works, and of works copyrighted by corporate bodies or employers for whom such works were made for hire, have a sort of anticipatory effect, in their bearing upon the form in which registrations may at present be made. For unless the original term of copyright is secured in the name of the proprietor (the person or corporation deriving its rights from the author) then the renewal term cannot be obtained by such proprietor, but must be taken by one of the regular beneficiaries



(author, widow, etc.) mentioned elsewhere in the section. This fact may influence the terms of contracts made with authors, in which provision is made for the renewal term. The author, as we shall see in discussing the following section, cannot directly grant the renewal term, which may never be his, but if he is employed under contract, for hire, to create the work, or if the copyright is obtained by a corporation, otherwise than by direct assignment or license from the author, then no question of the renewal rights of other beneficiaries than the proprietor can be raised.

Section 24 relates to the renewal and extension of copyrights which were already subsisting when the present Act went into effect. The acts under which such copyrights were obtained provided for a renewal of fourteen years and Section 24 provides that a further renewal may be obtained, so that the total period of protection will be the same as that obtainable for works copyrighted under the new Act, that is, fifty-six years. Where the subsisting copyright had been renewed, therefore, prior to the date when the new Act took effect (July 1, 1909), an extension of fourteen years could be secured. Where the original term of twenty-eight years had not expired on July 1, 1909, the renewal term is twenty-eight years.

The renewal term is an entirely new grant of protection, not merely a continuation of the old grant. Consequently the author or proprietor who has taken the original copyright cannot assign, *in futuro*, the rights to

be secured under the renewal. The renewal can only be obtained by the beneficiaries expressly named in the law, and by them in the order named, *i.e.*, the person having the first right is the author, if living at the end of the original term; if he is not living, then the widow or widower, is entitled to renew; if there is no widow or widower, the children come in; in their absence, the executor of the author's will; and finally in the absence of all other beneficiaries and the intestacy of the author, the author's next of kin are entitled to the renewal.

It will be seen that, although the renewal copyright is a new copyright, and not merely the continuation of the original copyright, yet the policy of the law is that it shall go to the author or to his relatives. It cannot in any case go to an administrator, for the general benefit of the author's estate, or for the payment of his debts. Much less can it go to an assignee of the author. [*White-Smith Publishing Co. v. Goff*, 187 *Federal Reporter*, 247.] Contracts between authors and publishers were formerly often made, by which the author undertook to grant not only the right to obtain the original copyright, but also the right to renew. It may be that if the author is living when the time for renewal arrives, he can be compelled to carry out the terms of his contract by taking out the renewal in his own name and then assigning it without further compensation to the publisher. But if he dies before the time for renewal registration arrives, *i.e.*, before the beginning of the last year of the original

twenty-eight year term, his obligations die with him, so far as the copyright law is concerned. His widow, or children, are not bound by his agreement and they receive the renewal copyright free of all incumbrance.

If there are several children who are entitled to take the renewal copyright, it seems that they take it as tenants in common, that is, each is entitled to deal with the copyright as he sees fit, without the consent of the others.

The renewal of copyright is absolutely dependent upon the filing of an application and registration of the renewal claim in the Copyright Office within the last year of the original term. If the application arrives one day too late, the renewal copyright is lost. But if an application is filed in time, it would seem that it can be subsequently corrected, if it fails to state the renewal claimant's name and capacity correctly. It is good policy, therefore, for any person who is interested in the preservation of the renewal rights to file an application in the name of the person whom he believes to be the proper beneficiary under the law, even if he has been unable to learn to a certainty of the existence of such person. No harm can be done by this procedure, and it may save the copyright from falling into the public domain.

When does the renewal right become vested? Is it when an application has been filed and the renewal has been registered in the name of a beneficiary entitled to renew? Or is it, as the language of the statute

implies, only on the expiration of the first term? Some nice questions arise on this point and they have not yet been conclusively answered. Suppose the author is living at the beginning of the last year of the first term of copyright. Then he can file an application for renewal which will be registered. But then, suppose he dies immediately afterward, before the first term of copyright runs out, and his widow also files an application. To whom does the renewal copyright go—to the author's estate, or to the widow absolutely?

Another question concerning the right of renewal has recently been decided by the United States Supreme Court, which held that the executor of the author can renew the copyright, even if the last year of the original term has not arrived at the time of the author's death. [*Fox Film Corporation v. Knowles*, 261 U. S. Reports, 326.] This decision reversed those of the courts below, which had held that the executor could only exercise the right of renewal when that right was vested in the author at the time of his death, *i.e.*, when the last year of the first term had arrived. The decision of the Supreme Court is consistent with the intention of Congress, as expressed in the report of the Committee which framed and presented the Act. They meant "to permit the author who has no wife or children to bequeath by will the right to apply for the renewal." But it rather upsets the conventional theory that the executor stands in the shoes of his testator.

So far as the Copyright Office is concerned, the

renewal will be registered in the name of any beneficiary named in the law. In the event of conflicting applications, no doubt both registrations would be made, leaving the parties to settle their rights in court.

Makers of anthologies or other compilations sometimes wish to know whether a given work is free for their use. A simple computation will tell them that, as fifty-six years is the utmost that any copyright can last, any work actually published that long before the date of the intended use must necessarily be out of copyright. If published within fifty-six years, the work may, or may not, be protected, depending on whether all required registrations and other formalities have been made. As to that, inquiry should be made at the Copyright Office.

The sections of the Copyright Act relating to assignments are as follows:

“SEC. 41. That the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

“SEC. 42. That copyright secured under this or previous Acts of the United States may be assigned, granted, or mortgaged by an instrument in writing

signed by the proprietor of the copyright or may be bequeathed by will.

“SEC. 43. That every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts. The certificate of such acknowledgment under the hand or official seal of such consular officer or secretary of legation shall be prima facie evidence of the execution of the instrument.

“SEC. 44. That every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

“SEC. 45. That the register of copyrights shall, upon payment of the prescribed fee, record such assignment, and shall return it to the sender with a certificate of record attached under seal of the copyright office, and upon the payment of the fee prescribed by this Act he shall furnish to any person requesting the same a certified copy thereof under the said seal.

“SEC. 46. That when an assignment of the copyright in a specified book or other work has been recorded, the assignee may substitute his name for that of the assignor in the statutory notice of copyright prescribed by this Act.”

The provision that the copyright is distinct from the property in the object copyrighted recites what was the law under decisions of the courts prior to the enact-

ment of the present Act. Situations calling for its application arise most frequently in cases of works of art, which have themselves a large intrinsic value, in addition to the value of the right of reproduction. The painting or statue may go to one, the right to reproduce copies to another, although it would seem that where an artist has sold a painting, the purchaser might through merely refusing access to the reproducer nullify the value of the copyright. It is to be observed that, while the sale or conveyance of the object does not "of itself" constitute transfer of the copyright, yet in cases where the object is evidently intended only for reproduction, and where the author must be aware that his transfer of it was accepted for that purpose, the sale of the copyright would be implied from the sale of the object. Although this section does not apply to common law rights before copyright, there cannot be much doubt that the rule in regard to such rights (that the sale of a manuscript book, for example, without express restriction, carries the right of publication and copyright) would be applied in its interpretation. An implied conveyance of the copyright was held to be included in the conveyance of a painting, placed upon the walls of the Library of Congress, the court taking notice in its opinion of "the nature of governments and the habits of government officers," which were held to negative any idea that it was the intention to allow the artist to retain copyright in such a work so placed. [*Dielman v. White*, 102 *Federal Reporter*, 892.] The practical

lesson to be drawn from a consideration of this section of the Act and the decisions leading up to its enactment, is that a contract of sale of an original work for which copyright has been or is to be obtained should clearly state the disposition of the copyright, as well as that of the work itself.

The latter part of Section 41 has reference to the class of cases in which copyright proprietors have endeavored to tie a string to the copies of the work when selling them, by fixing the price at which, or the classes of purchasers to whom, the copies might be resold. Such restrictions are matters of private contract between seller and buyer, but the copyright law does not support them in any way and a violation of their terms cannot be prosecuted as an infringement of copyright. [*Bobbs-Merrill Co. v. Straus*, 210 U. S. Reports, 339.]

If the owner of the copyright becomes bankrupt, or makes an assignment for the benefit of creditors, the copyright passes to the trustee or receiver in bankruptcy, like any other property, and in such cases the order of the court declaring the copyright owner bankrupt, or insolvent, should be recorded in the Copyright Office, like any other assignment. But where a publisher becomes bankrupt, or insolvent, and copyrights in works which he is publishing are owned by the authors of such works, or other persons, the question whether the trustee or receiver gets any control over the copyrights depends upon the terms of the contract of publi-



cation. It has been held that a contract of publication is of a personal nature and that the rights granted to a publisher thereunder cannot be transferred by him without the author's consent. Therefore, if the contract was not in express terms made assignable, it does not pass to the trustee or receiver, and may doubtless be cancelled or rescinded by the author. Copies of the work in the publisher's hands at the time of bankruptcy cannot be sold without the author's consent. The author cannot, *in invito*, be divested of his statutory exclusive right to vend. And if such copies are held by a printer or binder, under a lien for materials or labor, the lienor cannot sell them, unless it be as waste paper. He can only continue to hold them until his lien is satisfied.

In this connection the question may be raised of the right of disposal of copies in the possession of an assignor after the date of his assignment, or of copies lawfully in the possession of the owner of the first term of copyright after renewal has been obtained by another. Drone (p. 339) argues that the assignor must stop selling copies from the date of the assignment, but it has been suggested that this rule may have been modified by the language of the Act of 1909 already referred to:

“but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.”

It seems probable that the opinion of Drone is still correct, the language quoted being intended to cover only cases where the right of vending has once been exercised, and where an attempt is made to restrict resales of the same copies.

Section 42 tells how assignments may be made. No special form is required, other than a writing signed by the proprietor of the copyright. Any words are sufficient which indicate the intention to transfer the copyright. The Copyright Office therefore does not furnish any forms for assignments, as the circumstances of each case dictate the language to be used. Whether a mere oral assignment of copyright is valid the law does not state, but as the recording of assignments is provided for and has important legal results, an oral assignment is at least undesirable, although possibly it might be held valid as between the parties. Regarding the passing of copyright by bequest or descent, no special comment is necessary. The rules governing personal property in general are applicable to copyrights upon the death of the owner.

Section 43 requires assignments of copyright executed in foreign countries to be acknowledged before a consular officer or secretary of legation. It has been suggested that this requirement is obligatory and that the assignment would be invalid if not so acknowledged, but it seems more probable that it was the intention of the law to provide merely for prima facie evidence of execution of the assignment, as stated in the

latter part of the section and that even in default of the certificate of acknowledgment mentioned, the execution of the assignment could be proved by other sufficient evidence.

The provisions of Section 44 requiring the recording of assignments in the Copyright Office are not mandatory. It is not necessary to the validity of an assignment as between the parties that it shall be recorded. But failure to record an assignment within the statutory period allowed—three months after the date of its execution, if within the United States, and six months if it is executed in a foreign country—“cuts off the equities” of the original assignee, if it is subsequently assigned to a third party who takes it in good faith, not knowing of the prior assignment. It is therefore to the interest of the assignee to have his assignment recorded promptly. Nevertheless many assignments of copyright are probably not recorded, for the reason that the parties do not wish to disclose the terms of their bargain.

It not infrequently happens that assignments are sent to the Copyright Office to be recorded more than three months after execution. Such delayed assignments will be recorded by the Copyright Office, but the effect of the delay has sometimes been debated. The situation may be explained as follows. The first assignee is protected against the claim of a subsequent assignee for a clear three months, whether he records his assignment or not; while after three months he is

protected only if he records, and then only against a purchaser whose assignment is subsequent to such recording. On the other hand, the subsequent purchaser must himself record within three months in order to prevail against the first, or other, purchaser who has not recorded. It is obviously prudent to record assignments promptly.

Section 45 speaks for itself. The fees mentioned are specified in Section 61 of the Act, which will be found in the Appendix.

Section 46 allows the substitution of the assignee's name for that of the assignor, in the notice of copyright on the copies of the work, after the recording of the assignment. This is a further advantage in recording assignments, from the assignee's point of view. For a nominal additional fee the Copyright Office also indexes the change in proprietorship of the copyrighted work.

A great deal of the business of commercial exploitation of copyrights is carried out by means of licenses. A license is distinguishable from an assignment by the fact that the assignment changes the legal ownership of the copyright, while the license merely makes the doing of certain things by the licensee lawful. The copyright owner excuses the licensee from the penalties of infringement. This is a matter of contract. A license is not transferable. The ordinary rule of law is that a licensee cannot sue, in his own name, for violation by another of the rights which he has been permitted to exercise. This rule was successfully invoked in a case

in which a magazine publisher had been given mere rights of publication by the copyright owner of a story which was infringed by publication in a newspaper. The magazine publisher, being merely a licensee, not an assignee, was not allowed to maintain the action. [*New Fiction Publishing Co. v. Star Co.*, 220 *Federal Reporter*, 994.]

In an earlier case under the present statute, a licensee of dramatic rights in copyrighted cartoons was allowed not merely an injunction, as being a "party aggrieved," in the language of section 36 of the Act, but damages as well. [*Hill v. Whalen & Martell, Inc.*, 220 *Federal Reporter*, 359.] But this decision must now be regarded as overruled by a later one, holding that an "assignee" of motion picture rights in a novel, being a grantee of less than the whole copyright, hence really only a licensee, could not sue in its own name even for an injunction, and that "any party aggrieved" in section 36 means a party having a legal cause of action under section 25, which a mere licensee cannot have. [*Goldwyn Pictures Corporation v. Howell Sales Company*, 282 *Federal Reporter*, 9.]

Through a series of licenses the various rights included in a single copyright may be parcelled out among a number of different licensees, and this is a means of realizing the fullest value of a copyrighted work. In the case of a book, for example, the following series of rights may be the subject of separate disposition by license: Rights of first, and of second, serial

publication; book publication; translation; dramatization, and the making of moving pictures. The copyright owner keeps the legal title to the parent copyright all the time, but he sells the right to use it in the various ways mentioned. There may also be a division of territory by license. A may be given the right to perform a play in New York and B on the road. This of course is a different thing from the assignment of foreign copyrights, *e.g.*, for Canada, for Great Britain, etc.

The Copyright Act does not expressly provide for the recording of licenses, but the Copyright Office will record them, as it will any instrument affecting the ownership of rights under a copyright, and such recording by the licensee would seem to be a prudent act.

## CHAPTER V

### THE SUBJECT MATTER OF COPYRIGHT

*Works barred from copyright: (a) by statutory prohibition; works in the public domain, government publications; (b) by judicial decision; seditious or immoral works — Titles not protected by copyright, but in other ways — Statutory classification of copyrightable works.*

What has been said in preceding chapters has been of general application to all copyrights, whatever their subject matter, except in so far as two different methods of securing copyright have been described as provided for published and for unpublished works. In this chapter and the following one consideration will be given to two correlative questions: first, what classes of works can be protected under the copyright law; second, what kinds of exclusive rights does the law grant to the copyright owner in dealing with these works. In the discussion of these two questions it will also be necessary to touch from time to time upon a third — that of infringement — since the definition of subjects of copyright and of the character of the protection given nearly always grows out of the question whether infringement has taken place. A more specific treat-

ment of infringement, however, will be given in a separate chapter.

Although the law gives protection in general to all the writings of authors, yet under certain circumstances copyright is denied to works normally coming under this head, either by reason of express statutory prohibition, or by decisions of the courts based on motives of public policy.

Copyright is expressly prohibited in certain works under Section 7 of the statute, which is as follows:

**“SEC. 7.** That no copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to the going into effect of this Act and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof: Provided, however, That the publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.”

This is a statutory enactment of a view which would seem fairly obvious in any case, and which was already law by virtue of judicial decision, that when a work has once become open to the use of all, by publication without copyright it cannot be restored to the status of private property. And publication in a foreign coun-



try, even though copyright was obtained under the laws of that country, prior to March 4, 1909, when the present Act went into effect, likewise bars the work from copyright, unless obtained at the time of publication. Works originally published by the United States Government, or reprints of such works, are not subject to copyright, but are free to be made use of by the public, unless copyright had already been obtained for them before the United States Government published them. It would seem that even the omission of the copyright notice in the government edition of a copyrighted work would not deprive the copyright owner of his rights. Persons using government publications, therefore, should be careful to ascertain whether copyright for them was in existence before they were issued by the Government.

On similar principles it seems that there can be no copyright in the text of the opinions of State courts, although the editorial work of the reporter may be copyrighted. [*Banks v. Manchester*, 128 U. S. Reports, 244.]

It is a recognized rule of copyright law, laid down in a number of decisions of the courts, that protection will not be accorded to works of a seditious or immoral character. It is contrary to public policy to uphold property rights in such works. Notice may be taken, however, of the fact that standards of both private and public morals change from time to time and that in such matters courts usually reflect the public opinion

of the day, tinged with some legal conservatism. At present this opinion is a little broader in matters of personal morality, while a little more strict as to civic morality, than it was at the time when the last copyright decisions on these questions were made.

How strongly ethical considerations may influence courts is shown by a later case in which the court denied copyright to the writer of a story, a mere fiction, who published it as a true account of facts. It was held that as copyright cannot be claimed in an account of facts the author, who had deceived the public, including the infringer, was bound by the legal implications of such deception, and could not copyright his work. It would seem more correct in theory to hold that copyright was actually secured, though perhaps the author might be estopped from asserting it against any person actually deceived, who reproduced the matter in good faith. [*Davies v. Bowes*, 209 *Federal Reporter*, 53. *The decision was affirmed by the Circuit Court of Appeals on other grounds* (219 *Federal Reporter*, 178).]

This is perhaps as good a place as any to say that titles of works are not protected by copyright, but that they are protected under rules of common law or equity, relating to unfair competition, and also in some instances by statutes of the States. The titles of periodicals (but not the titles of books or plays) may be valid trade-marks, in which case they can be registered in the Patent Office, under the federal trade-mark law. But

the copyright law is applicable only to the substance of the work copyrighted, and not to its name.

The principle under which courts will grant injunctions to prevent the use of a title, at the suit of one who has already used it, is that the title so publicly used has come to have a "secondary meaning." It means not only what it says, but it means the particular play, moving picture, or other work, which the public has come to know under that title. The owner of the work has thus acquired a species of "good will" which it would be unfair for another person to appropriate by using the same title. The two works for which the same, or a similar, title is used must be within competing classes. A moving picture competes with a play, and vice versa. It has been held that a moving picture does not compete with a book, but it seems likely, from the tenor of recent decisions, that this decision would not now be followed, as the copyright owner of a book may intend at some time to have a motion picture made from it, and the right to use the title of the book for the "movie" would be reserved to him. The right of protecting a title does not rest on absolute priority in the use of the title. If the work for which it was first used was obscure and if a subsequent use has made it famous, the subsequent user ordinarily has a superior right. [*Of the many decisions dealing with protection for titles, two recent ones may be cited in illustration of the principles stated: National Picture Theatres v. Foundation Film Corporation, 266 Federal Reporter, 208, where protection for*

*the title was allowed, and International Film Service v. Associated Producers, 273 Federal Reporter, 585, where it was denied.]*

The question of the right to the use of a title is of great importance in relation to dramatic compositions and moving pictures, on account of the advertising value of the title. Authors of such works who wish to avoid the use of a title already used would do well to consult the list of copyrighted dramatic compositions published by the Copyright Office, which contains sixty thousand titles of dramas copyrighted between 1870 and 1916, and which may be found in the public libraries of the larger cities, or purchased from the Government Printing Office at Washington. If a search through this work, supplemented by an examination of the catalogue of copyright entries since 1916, fails to show the contemplated title, it will be fairly certain that it has not been publicly used in this country. On the other hand, if it is found to have been used a number of times, some of them a long time ago, it will be unlikely that it is the subject of an exclusive right in any user, hence it can be safely used again.

Two sections of the Copyright Act set forth what may be copyrighted:

“SEC. 4. That the works for which copyright may be secured under this Act shall include all the writings of an author.”

“SEC. 5. That 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 cyclopaedic 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;
- (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:

Provided, nevertheless, That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act.”

Without broadening this classification, but rather by way of further particularizing, we have

“SEC. 6. That compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this

Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.”

It is to be noted that Section 4 defines the subject matter of copyright as broadly as the language of the Constitution will permit, by making it include “all the writings of an author,” and that the classification in Section 5 is not to be regarded as limiting copyrightable works to those which come under these classes. The classification is in fact primarily a matter of convenience in recording and indexing copyright registrations. Nevertheless it includes nearly everything which one can think of as coming by its nature within the sphere of copyright protection, and if an article is clearly outside any of the classes named, it may fairly be presumed that it is outside the copyright law. The burden of proving the contrary will at least rest with the applicant for copyright registration.

Let us glance briefly at the classes of articles enumerated in Section 5, and see what is embraced by each.

(a) *Books*. This is a very broad class, including practically any article consisting of words which has the requisite originality to be copyrightable, and is not otherwise classifiable. The size or form of the work is immaterial. A single page, paragraph, or even a single

sentence may be a "book." Each of Rochefoucauld's maxims, for example, if new today, would be so designated. But a mere statement of fact, such as anybody might make: Yesterday was the anniversary of the battle of Lexington; Dempsey knocked out Carpentier in four rounds; is not a book, because it lacks the element of authorship.

Books may also consist of figures, or arbitrary symbols, such as tables of mathematical computations, a stock example being a collection of logarithms. It may be said that it is the kind of authorship, the nature of the faculties employed in the creative act, which determines the classification of the work, at least as much as the character of the work itself. Thus a compilation of musical compositions, or of engravings, is classifiable as a book under the copyright law, where the basis of the claim of copyright is not the music or pictures, but their collection in a certain order.

"Articles designed rather for physical than intellectual use or enjoyment," in the language of Mr. W. B. Hale [*13 Corpus Juris, 1022*] are outside the sphere of copyright protection, hence outside the definition of the term "book," although they may have some of the characteristics of a book. Thus railroad tickets, index cards, dress patterns and blank books of account are not so classifiable, nor are they subjects of copyright at all. Such articles may sometimes include a quantity of explanatory text which is entitled to be called a book, and in case application is made for registration of copy-

right for such matter, care should be taken to distinguish the informative text matter from the article itself.

(b) *Periodicals.* The distinction between a periodical and a book rests in the serial nature of the former and perhaps to some extent in its composite character. In respect of the rights given by copyright, periodicals are like books. Their separate classification under Section 5 is only of importance in connection with their registration. All the contents of any issue of a periodical are protected under a single notice and a single registration. Reference has already been made to the provision for separate registration of contributions to periodicals, where the copyright has not been assigned to the proprietor of the periodical. In such cases a special notice should be printed in juxtaposition to the title of the contribution, and should contain the name of the actual owner of the copyright. Periodicals in the English language, like books, must be manufactured in the United States, under Section 15 of the Act, but an affidavit of such manufacture is not required.

(c) *Lectures, sermons and addresses, prepared for oral delivery.* Here again, the subject matter is like that of books, and if such works are published, they become books under the copyright law. And if they are prepared, not for oral delivery, but for publication, they may not be copyrighted as unpublished works under Section 11, but only by publication with the copyright notice, like other books.

(d) *Dramatic or dramatico-musical compositions.*



The term "dramatic composition" has been the subject of much discussion in litigation and is still rather vaguely defined. The dividing line between a dramatic composition and a book is hard to draw. The ordinary play, prepared for presentation on the stage and containing both speeches and directions for action, is a clear enough case, but there may be dramatic compositions without words to be spoken, *i.e.*, pantomimes; and there are many works in dramatic form which are intended only for reproduction in copies and are unsuited to actual performance, *e.g.*, Shelley's "Prometheus Unbound," although it is hard to say, in this day of ingenious stage craft, that any work is incapable of stage production. Not everything which may be presented on the stage is entitled to be called a dramatic composition under the copyright law. An acrobatic performance, for instance, would not be so classifiable, and under a former statute a dance, although containing elements of picturesqueness and color, was denied the protection of copyright. [*Fuller v. Bemis*, 50 *Federal Reporter*, 926.] On the other hand, a railroad accident scene, with practically no words spoken, was held to fulfill the conditions of protectable drama. [*Daly v. Palmer*, 6 *Blatchford's Reports*, 256.] A dramatic composition, in copyright law, must be intended for, or suited to, representation as distinguished from mere narration, it must tell a story, and its essence must be action. For the rest, one may notice an increasing tendency to liberal construction of the

law in recent decisions regarding the protection of performing rights. [*Green v. Luby*, 177 *Federal Reporter*, 287.]

A dramatico-musical composition is a dramatic composition with accompanying music, such as an opera, a musical comedy, or perhaps an oratoric or cantata. The classification makes it possible to secure a single copyright covering all the component parts of the work, literary, musical and dramatic.

(e) *Musical compositions*. It is important to observe that the rights granted by the law to musical compositions differ in some respects from those given to dramatico-musical compositions. This should be borne in mind when copyright is registered for individual numbers from a dramatico-musical composition. For in spite of the provision of Section 5, that errors in classification shall not invalidate or impair the protection secured, there is some possibility that the copyright claimant may be held to be bound by the classification he has selected and so restricted to the rights given by the law to works of that class. Further discussion of this matter will be found in connection with the treatment of the kinds of rights granted in different classes of works.

A musical composition may consist of music alone, or of music accompanied by words, and in the latter case both words and music are covered by a single copyright. But a "song" consisting of words only is classifiable as a book, not as a musical composition. This

very obvious fact would not be mentioned, were it not that the experience of the Copyright Office shows a widespread impression that "songs" without music are specifically entitled to copyright under that designation.

(f) *Maps.* The term includes what were formerly separately mentioned by the law as charts. A map is any cartographic work, representing a portion of the earth's surface, or perhaps even a portion of space with objects therein. There is a point, however, at which this class shades imperceptibly into that of drawings of a scientific or technical character and the distinction is of some practical importance, inasmuch as the latter class (i) may be copyrighted without publication, while this privilege is not granted to maps proper.

(g) *Works of art; models or designs for works of art.* Herein are included works of the fine arts, such as paintings, sculpture and drawings, but not works of the useful arts, which are within the sphere of patent protection. It would be desirable that the copyright law should contain special provisions for works of art applied to industry, and such legislation has been recommended, but so far not adopted. The design patent act, however, provides protection for "new, original and ornamental designs for articles of manufacture." [*U. S. Revised Statutes, sec. 4929.*]

Models or designs for works of art may also be protected pending their execution and completion.

(h) *Reproductions of works of art.* This class was intended to cover such works as engravings, lithographs,

etchings, and other reproductions in which the reproducer has embodied an element of original artistic labor, upon which the copyright in each separate reproduction is based. Such reproductions, in order to secure copyright, must be made with the consent of the copyright proprietor of the work reproduced, unless such work is in the public domain.

(i) *Drawings or plastic works of a scientific or technical character.* These are architects' or engineers' drawings or plans, relief maps or technical models, not within the sphere of the fine arts. Under this provision a claim for copyright has been sustained for a prismatic glass lamp shade, as a "plastic work of a scientific or technical character" [*Brock v. National Electrical Supply Co., Supreme Court of the District of Columbia, February 24, 1911 (not reported)*], but the decision seems to go to the very border line between the domain of copyright and that of patent, if not across it.

(j) *Photographs.* This class includes all pictures made by actual photographic processes, but not those made by derivative processes, e.g., half-tone cuts, which are classifiable as prints.

(k) *Prints and pictorial illustrations.* In Class (k) are included all pictures made by any kind of printing process. They may be, and usually are, reproductions of works of art, or of photographs. In fact, Class (k) often overlaps Classes (g) or (h), but by far the greater number of pictures copyrighted are normally registrable in Class (k). Herein are included

lithographs and photo-engravings which, as mentioned in a previous chapter, must be manufactured in the United States, unless they are illustrations of a scientific work, or reproductions of works of art, and the objects represented are located in a foreign country.

(l) and (m) *Motion pictures*, additions to the subject matter of copyright, included by amendment in 1912. The distinction between Class (l), motion picture photoplays, and Class (m), motion pictures other than photoplays is that the former are of a dramatic character while the latter are merely pictorial.

## CHAPTER VI

### THE KINDS OF RIGHTS GRANTED BY THE COPYRIGHT ACT

*(a) Rights of copying and disseminating: printing, reprinting, publishing, copying and vending — (b) Rights of transformation or modification: translation, dramatization, arrangement, making of mechanical music records—(c) Rights of performance or representation — Performance for profit — Radio broadcasting.*

The different kinds of exclusive rights granted by the law to proprietors of copyright in the various classes of works which have been enumerated may be conveniently grouped under three heads:

- (1) Rights of copying and dissemination of copies.
- (2) Rights of modification, or transformation.
- (3) Rights of performance, or representation.

Not all of these rights are accorded, or are indeed applicable, to all classes of copyrighted works. To ascertain what kinds of rights are given by the law for any particular work, both the nature and classification of the work and the language of the statute have to be considered. The grant of rights is set forth in the Copyright Act in its first section:

“That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

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

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a non-dramatic work; to convert it into a novel or other non-dramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: Provided . . .

(Here follow the provisions of the Act relating to the mechanical reproduction of music, which, on account

of their prolixity and technicality, are not quoted here, but will be found in Appendix A, at page 234.)

The rights of copying and disseminating copies are contained in subsection (a), and only there, except for the provision as to vending any manuscript or record of a dramatic composition, contained in subsection (d). Subsection (a) contains the classical grant of rights under copyright, and its language is practically the same as that of the first copyright act of the United States, passed in 1790. The right to "print, reprint, publish, copy and vend" is not restricted to any special classes of works, but is applicable to all of them, so far as the nature of the work permits; (one could not, of course print a statue). Printing means not only printing from type, or plates, but also typewriting, mimeographing and kindred duplicating processes. Copying has an even broader significance, including the making of manuscript copies. The exclusive right of copying is not limited to the making of exact copies. A colorable alteration, as where a single figure is changed in a picture, and the balance of the picture copied, will not excuse an infringer. Nor is it necessary that the entire work be copied in order to violate the copyright owner's exclusive right to copy. If a substantial part of the work, or even a small, but very important part, is copied, that is infringement. [*Boosey v. Empire Music Co.*, 224 *Federal Reporter*, 646.] The right to copy includes the right to make alterations in size, or to change the medium of reproduction. A work



of art is copied, in the sense of the law, when it is photographed. If the plot of a dramatic composition is copied in detail, although the names of the characters and even some of the speeches, are changed, that is a copying of the drama. [*Dam v. Kirke La Shelle Co.*, 166 *Federal Reporter*, 589.] One who made and published a copy of a picture, based on the original sketch from which the copyrighted picture had been developed, was held to have copied the picture. [*Beifeld v. Dodge Publishing Co.*, 198 *Federal Reporter*, 658.] Conversely, whoever copies a copy, copies the original.

The strict application of the law as to copying, however, is modified by what is known as the doctrine of fair use, which is, briefly, that any one may make such use of the work, if he has lawfully obtained a copy of it, as must have been reasonably expected by the copyright owner. One may quote extracts from a book, by way of illustration or criticism. One may consult a work in the preparation of other works of similar character, as in various cases which have come before the courts regarding the employment of directories in checking up lists of names. Reading aloud from a published book, even in public and for profit, is not yet one of the exclusive rights of the author. Whether reading an entire play in public might not in some circumstances be forbidden is a question, since that might be held an infringement of the performing right. It is well settled that a parody is not an infringement

of the right to copy. A test applied to determine whether a given amount of copying exceeds the limits of "fair use" is whether the demand for the original has been reduced. [*For a good discussion of the doctrine of fair use, see Drone on Copyright, pp. 386 et seq.*]

The right to vend, or sell, copies of the work is restricted, as to any particular copy, to a single act of sale. In other words, conditions as to the resale of the work cannot be imposed. The copyright owner has exercised his right, and exhausted it, when he has once sold the copy. [*Bobbs-Merrill Co. v. Straus, 210 U. S. Reports, 339.*]

The meaning of the word "publish" has already been discussed.

The second class of rights which has been mentioned—rights of modification or transformation of the copyrighted work—is covered by subsection (b) above quoted, by the portion of subsection (d) which relates to the making of transcriptions or records of a dramatic composition, from which it may be reproduced, and by the portion of subsection (e) which deals with the making of arrangements or settings of musical compositions, in which is included the making of "parts of instruments serving to reproduce mechanically the musical work," that is, phonograph records and rolls for piano players. These rights are restricted to the classes of works expressly mentioned as enjoying them. The making of translations, or "other versions,"

## AN OUTLINE OF COPYRIGHT LAW

YALE  
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is a right extended to any literary work, and this means any work in words, including not only books, but dramatic compositions and lectures, sermons or addresses. The "other versions" include abridgments, which could under former statutes be made without infringement of the copyright. The right to dramatize a non-dramatic work extends not merely to books, but also to a series of pictures, as has been held in regard to the "comic strips" of a famous cartoonist. This right also covers the making of moving pictures from non-dramatic works and the decision of the United States Supreme Court to that effect has added incalculably to the value of copyrighted works. [*Kalem Co. v. Harper Bros.*, 222 *U. S. Reports*, 55.]

The right of dramatization was granted, if specially reserved by the author, in the Copyright Act of 1870, and without qualification in the Act of 1891. Hence all works copyrighted since 1891, and probably most of those copyrighted earlier, if the period of protection has not run out, are privileged to the exclusive right of dramatization, which includes the right to make motion pictures based on such works. [*See Chapter VII, post, pp. 112-113.*]

The right of arrangement of music calls for brief special comment. An "arrangement" in the language of musicians is a re-composition of music for a different instrument from that for which it was first composed. A mere transposition of key, involving only the mechanical, as distinguished from the creative, exercise of the musical mind, is not a new arrangement. The

Copyright Office, in practice, has recognized this fact by making a single registration to protect a musical composition in two or more keys, on deposit of a copy in each key.

The right to make arrangements of music "in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced" includes the right to make (or permit others to make) phonograph records or rolls for mechanical piano players, or other "parts of instruments serving to reproduce mechanically the musical work." This right, which is a new feature of copyright law, not given prior to the present Act, was added only after a prolonged struggle between the manufacturers of mechanical instrument records and the composers and publishers of music. The composers and publishers wanted a complete and absolute right; the manufacturers did not want any, and the provisions in question are therefore the result of a compromise. As the law stands, there are a number of restrictions on the grant. It applies only to compositions published and copyrighted after the law went into effect (July 1, 1909). It applies to the works of foreign composers, only when the country of which the composer is a citizen grants similar rights to citizens of the United States. It is exclusive only so long as not exercised: in other words, the copyright owner may refrain from making, or allowing others to make, "parts of musical instruments

serving to reproduce mechanically the musical work," but if he once makes, or permits another to make, such parts, he is compelled to allow any one else to do the same, on payment of a royalty fixed by the Act at two cents for each such part. The copyright proprietor is required to file in the Copyright Office a notice of his use of the musical work for the manufacture of such parts, or of his permission to another to use it. On the other hand, when such use has once taken place and another manufacturer desires to make records or rolls, he must file in the Copyright Office notice of his intention to do so and mail a copy to the copyright proprietor.

It has been suggested that this so-called "compulsory license" provision of the law is unconstitutional, because the right granted is not exclusive, and the Constitution provides that Congress may grant only exclusive rights. In answer it has been said that the right is exclusive when granted and only ceases to be so when it is exercised. [*Weil, pp. 61 et seq.*]

Not much litigation has arisen regarding the mechanical music provisions of the Copyright Act, and the question of their constitutionality has not so far been brought before the courts. It has been held that, while the mechanical reproducing parts (records or rolls) are not themselves subject of copyright protection, but only of copyright control, yet one who has a license to manufacture records from copyrighted music can enjoin the unauthorized reproduction of such

records—a decision a little difficult to understand. [*Aeolian Co. v. Royal Music Roll Co.*, 196 *Federal Reporter*, 926.] It has also been held that a license to use copyrighted music in the manufacture of a piano player roll does not carry with it the right to print the words on the roll. It seems that this restriction, based on the exclusive right of copying the words which belongs to the copyright proprietor, does not apply to the licensee who manufactures a phonograph record, since such a record is not a copy. [*Standard Music Roll Co. v. Mills*, 241 *Federal Reporter*, 361.]

In an interesting series of decisions concluded not long ago, it was held that where an alien not entitled to the privilege of making, or licensing others to make, phonograph records of his copyrighted music, had the coöperation of an American citizen who wrote the words to his music in a popular song, the resulting musical composition was protected against unauthorized manufacture of records because the American could not be deprived of his rights through the mere fact of coöperation with the alien, the words and music constituting a single work. The force of the decision is lessened by the fact that the alien was later held to have been domiciled in the United States at the time of the composition of the music. It was also held that records for which all the steps in manufacture except the final one were taken in the United States were not released from the obligation to pay a royalty to the copyright proprietor merely through the fact that

the final step in manufacture was taken in a foreign country. [*G. Ricordi & Co. v. Columbia Graphophone Co.*, 256 *Federal Reporter*, 699; 258 *Federal Reporter*, 72; 263 *Federal Reporter*, 354.]

It is to be noted generally regarding the second group of rights which we have considered—rights of modification and transformation—that their exercise usually results in the creation of a new work, which can in turn be copyrighted, for the protection of the intellectual labor of the person who has transformed, or modified the work. Thus a translation may be copyrighted for the protection of the work of the particular translator, although that copyright does not of itself prohibit the making of other translations, much less does it extend back to the original work. Such secondary, or derivative copyrights, are the subject of the provisions of Section 6 of the Act, which has already been quoted.

The third class of rights granted by the statute affords an example of the broadening scope of copyright to which reference has already been made. The right of performance of dramatic compositions was added to the copyright law in 1856 and the right of performance of music in 1897. The present law considerably enlarges these rights and adds a new class of works to those for which the right of public rendition is given—lectures, sermons, or addresses, prepared for oral delivery. It adds to the subject matter of copyright motion pictures, works partaking

of both pictorial and dramatic qualities. Performing rights are of special importance, involving perhaps more than half the litigation on copyright which comes currently before the courts, as well as much litigation regarding the interpretation of contracts dealing with copyright matter, though not directly raising points of copyright law. A great many of the questions which arise with respect to performing rights, and to motion pictures, have not so far been decided by the courts and must therefore be discussed on a general basis of reason and analogy drawn from judicial decisions on other subjects.

The rights under consideration are granted by subsections (c), (d) and (e) of Section 1 of the Copyright Act, already quoted. Subsection (c) gives to the copyright proprietor of a lecture, sermon, address or similar production the exclusive right to deliver it, or authorize its delivery, in public, for profit. It should be observed that this privilege does not extend to published books, but only to those unpublished works which are especially designed for oral delivery. Since, on publication, such works become books, within the meaning of the law, it would appear that the exclusive right of oral delivery is lost when they are published. The provision in question, however, has not yet been judicially construed.

Subsection (d) of Section 1 of the Act gives to the copyright proprietor the exclusive right "to perform or represent the copyrighted work publicly if it be a



drama," "and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever." Subsection (e) gives the right "to perform the copyrighted work publicly for profit if it be a musical composition." The right of public performance of a dramatic composition is absolute; the right of public performance of a musical composition is limited to performances which are given for profit. Dramatico-musical compositions, which combine the characters of drama and music, are entitled to the broad protection given to dramatic compositions.

The question, what is a performance for profit, and the distinction in this matter between the rights granted for musical and those for dramatico-musical compositions, were involved in two cases which reached final decision together in the United States Supreme Court in 1917. In both these cases copyrighted music had been performed without the consent of the copyright proprietor in a public restaurant for the entertainment of guests during meal times. The Supreme Court decided that such performances are "for profit." "If music did not pay," said Justice Holmes, in his opinion, "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." [*Herbert v. Shanley: Church v. Hilliard, 242 U. S. Reports, 591.*]

In each of these cases, the music performed was a single number from a dramatico-musical composition,

which had been copyrighted as a whole, the number in question having also been separately copyrighted under the classification musical composition, and sold in separate form. The Circuit Court of Appeals raised two questions regarding the situation so presented, as to one of the compositions (and it would seem the same questions might have been raised as to the other). First, whether a copyright for a single musical number from a previously copyrighted dramatico-musical composition was valid; second, whether, supposing it to be valid, the copyright proprietor had not abandoned his absolute right of public performance for the dramatico-musical composition, in favor of a right limited to performance for profit, emphasis being placed on the fact that the separately published number bore no statement of the fact that it was a part of a previously copyrighted work. The Supreme Court, in its opinion, did not pass upon these questions, and they remain undecided. But it is obviously a matter for careful consideration whether separate copyrights should be registered for the songs from a dramatico-musical composition, and whether the proprietor should not rather publish such songs with a notice of copyright corresponding to the notice on the complete work, and refrain from a new registration under another, and different, classification, by reference to which he might be held to have lost a portion of the rights originally acquired.

Performance for profit, therefore, is any perform-

ance out of which the person ordering it expects to make a profit, directly or indirectly. Public performance is performance in any place to which the public is admitted without restriction, whether admission is charged or not. Reference may be made here to the practice among amateur dramatic companies of performing any play of which copies can be obtained, on the easy assumption that no harm is done if no charge is made, or if the profits of the performance go to some charitable purpose. Both the idea and the practice are wrong and such performances are none the less infringements that it may not be worth the copyright proprietor's trouble to stop them, or obtain damages for them.

Public performance of certain classes of musical works, or dramatico-musical works, for charitable or educational purposes is, however, expressly permitted by Section 28 of the Copyright Act, to which further reference will be made when the subject of infringement is specially discussed.

The latest application of the right of public performance is that which has begun to take place in the new field of radio broadcasting. Owners of copyright in musical compositions have asserted their claim to control the performance of such works for transmission by radio, urging that the decision of the United States Supreme Court in the case of *Herbert v. Shanley* [242 *U. S. Reports*, 591] is broad enough to cover this method of exploitation. That case, as already pointed out,

held that the performance of music in a public restaurant, where a charge was made only for the food and not, ostensibly, for the music, was a public performance for profit, because the purpose of giving it was to attract custom and so incidentally to add to the profits of the restaurant. This reasoning is applicable to any public performance of music if the person causing the performance to be given either actually makes a profit from it, or intends to make one, whether such profit be direct or indirect.

It will be seen that there are two questions to be answered in applying the reasoning of *Herbert v. Shanley* to a radio performance of music (or a performance or rendition of any other class of work for which the law grants the right of performance, including dramatic and dramatico-musical compositions, and lectures, sermons and addresses prepared for oral delivery, but not including, up to the present time, works classifiable as "books"). These questions are: first, is such a performance public? second, is it for profit? Both questions must be answered in the affirmative, if the copyright proprietor is to be permitted to control the radio performance. At the time of this writing, the federal courts have passed upon these questions in two cases, with diametrically opposite results.

In *Witmark v. Bamberger* [291 *Federal Reporter*, 776], the District Court for New Jersey held the broadcasting an infringement. The defendant was in the business of selling radio equipment and at the beginning of

the performance announced its name and address. Hence the court held the purpose of the broadcasting was to advertise defendant's business, hence profit. The question whether this was a public performance was lightly passed over. In *Remick v. American Automobile Accessories Co.* [298 *Federal Reporter*, 628], decided somewhat later on similar facts, the District Court for the Southern District of Ohio passed over the question whether the performance was for profit and held that it was not public, within the meaning of the Copyright Act, as Congress did not have radio in mind when the Act was passed, and as a performance which took place on private premises, and not in a public place of assembly, could not be regarded as public.

The *Remick* case was appealed and on April 9, 1925, the Circuit Court of Appeals for the Sixth Circuit reversed the decision of the lower court, holding that the Act of 1909 is broad enough to apply to radio broadcasting, even though this method of dissemination was not developed when the Act was passed. "A performance, in our judgment," said Judge Mack, in rendering the opinion, "is no less public because the listeners are unable to communicate with one another or are not assembled within an inclosure or gathered together in some open stadium or park or other public place. . . . Radio broadcasting is intended to and in fact does reach a very much larger number of the public at the moment of the 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.”

The question whether any particular performance by radio is for profit, on the other hand, is one the answer to which depends on the circumstances of the performance. Radio broadcasting might be done by a charitable organization for a philanthropic purpose, by a learned institution for scientific experimentation, by an enthusiastic amateur for love of the game, or by a dealer in radio apparatus for the advertisement of his wares. In only the last named case would there be the purpose of making a pecuniary profit for the benefit of the person causing the performance. The other cases would probably be outside the intention of the statute and the reasoning of *Herbert v. Shanley*.

As the matter stands today, the great bulk of radio broadcasting is being done by companies which are directly interested in promoting the sale of receiving apparatus which they manufacture, and it is safe to say that their chief purpose in furnishing this service free to the public is to increase such sales and thus to enlarge their profits. “If it did not pay, it would be given up.”

Another line of reasoning which may play a part in fixing the ultimate status of radio broadcasting under the copyright law is found in the opinion in the recent interlocutory decision of the District Court for the Southern District of New York, in the case of *Remick*

*v. General Electric Co.*, final decision in which has not been reached when this book goes to press. The Court there suggested that all which is actually done by broadcasting is to increase the audience. The broadcasting itself is not a performance at all; it is only the transmission of a performance, just as telephoning would be. Hence the legal liability of the broadcaster may depend on the status of the performance which he broadcasts. If he procures a performance, without authorization, for the purpose of broadcasting, he is directly liable as an infringer (assuming that the performance is thus made public). If he broadcasts a performance which he did not procure, but which has not been authorized, he is liable only for contributory infringement, while if he merely broadcasts a performance which has been duly authorized, he may not be liable at all. The above observations are *obiter dicta*, thrown out during the course of an opinion denying a motion to dismiss the complaint, but they should be weighed with some care as an indication of the distinctions which may come to be made in dealing with broadcast performances.

While music has hitherto occupied the chief place on the programs of the radio broadcaster, an increasing quantity of other copyright material is being sent through the air, consisting of matter classifiable under the copyright law as books, lectures, etc., and dramatic compositions. The copyright law does not give the exclusive right of public reading to works classifiable as books, hence copyright owners cannot restrict the

broadcasting of such works. Copyrighted lectures, sermons or addresses, prepared for oral delivery, however, cannot be delivered in public (and therefore cannot be broadcasted, on the view that broadcasting is public performance) whether for profit or not, without the copyright owner's consent. This is probably also true of readings from copyrighted dramatic compositions, and the authors of plays should consider, in making their contracts, whether they wish to grant, or to retain, the right to exploit their works in this way. At present this is mainly a question of advertising policy, but the development of radio may make such performances a source of direct profit to the author in the near future.

The right to make motion pictures from a non-dramatic work is included in the right of dramatization, as has been stated, but the questions which have arisen in this connection, as well as those relating to representation of dramatic works by means of motion pictures, are of such novelty and importance as to call for treatment in a separate chapter.



## CHAPTER VII

### MOTION PICTURES

*Making motion picture photoplays from a non-dramatic work is dramatization (Kalem Co. v. Harper Bros.) — The right of dramatization as granted by former statutes — Interpretation of contracts involving the right to make or produce motion pictures — Manners v. Morosco — Measure of protection for motion pictures and scenarios.*

The rapidly increasing importance of motion picture rights in copyright law is an example, something like that of mechanical reproduction of music, of the way in which the progress of invention acts to enlarge the scope of copyright protection. The art of making and exhibiting motion pictures had been known for some years before it was finally settled, by the decision of the United States Supreme Court, in the case of *Kalem Co. v. Harper Bros.*, in 1911, that the making of such a picture, based on a copyrighted work, was a dramatization of such work, and consequently, if not authorized, an infringement of the copyright. The right of dramatization had first been given in the copyright law by the Act of 1870, which permitted authors to reserve such right. How the reservation was to be made was not stated, but presumably it could be made either by a

notice in the copyrighted work ("All rights reserved." or the like), or, where the copyright was sold, by an express reservation in the contract of sale. If no such reservation was made, however, any one was free to dramatize the work. In 1891 the right of dramatization was enlarged by the provision that

"authors or their assigns shall have exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States."

It seems clear from this language that it was the intention of Congress not merely to grant the right of dramatization to all works copyrighted subsequent to the date when the Act of 1891 went into effect (July 1, 1891), but to enlarge retroactively the grant of rights obtained under previous copyrights. In other words, the effect of the Act of 1891 was to give an unqualified right of dramatization to all works in which copyright was then subsisting, or might thereafter be obtained. Such retroactive rights, however, could not, it is conceived, operate to destroy the property of persons who had, in good faith, made dramatizations of works for which the right of dramatization had never been granted (those copyrighted prior to 1870) or for which it had not been "reserved" during the period between 1870 and 1891. Such persons could not retroactively be made infringers, *ex post facto*, if they were not so under the law in effect at the time their dramatizations were made.

No copyright can now subsist in a work published prior to 1869. [*See Chapter IV, p. 69.*] In works published before 1869, therefore, there is now neither right of dramatization, nor any other right under the copyright law. Such works can be used freely by the public, in the making of motion pictures, as in all other ways.

As to works copyrighted between 1870 and 1891, the right of dramatization may have been reserved by the author, as permitted by the Act of 1870. If so, such reservation would include the right to make motion pictures. If no reservation was made, it is still probable that in the majority of cases the right of dramatization was retroactively obtained under the provisions of the Act of 1891. And even where the author failed to reserve the right, and some member of the public made a dramatization, it seems probable that after 1891 the author could prevent any further dramatizing of his work, although he could not interfere with the continued production of the stage version already in existence, or of motion pictures made from that version.

So much for works copyrighted before 1891. As to works copyrighted since that time, there can be no question since the decision of the Supreme Court in *Kalem v. Harper*. The right to make motion pictures is an inherent part of the copyright.

If the author himself has taken and retained the copyright in his work, the right of dramatization, including the right to make motion pictures, of course

belongs to him, and can be granted under a contract. In cases where a grant of the right of dramatization has been made, however, there frequently arises the question whether such grant includes the right to make motion pictures. In the determination of this question, nice distinctions have been made by the courts. As in all other cases involving the construction of contracts, the intent of the parties governs. The difficulty is that where contracts were made before the development of the art of motion pictures, neither party had them in mind. In the earlier litigation following the decision in *Kalem v. Harper*, courts showed some tendency, at least in dicta, to assume that a contract giving the exclusive right of dramatization included the right to make a version for motion picture production, but the more recent development of the law has been away from this theory and in the direction of the view that any language in a contract giving the right of dramatization which indicates that the parties had in contemplation only the spoken drama will be construed as saving the motion picture rights to the grantor.

The *Kalem-Harper* case was that of a book, Lew Wallace's "Ben Hur," and the right under construction was that of dramatization. But there has also been a good deal of litigation in cases where the work was a play and the right of production had been granted. In such cases the question for decision has been whether the intention of the parties, as exhibited in the language of their contract, was to transfer the right to produce

the play on the screen as well as on the stage. The law as laid down by courts has, in this class of cases, even more markedly than in cases involving the right of dramatization, proceeded towards the view that the owner of the copyright retains the right to produce the play by means of motion pictures, wherever the language of the contract indicated that the parties had the spoken, and not the silent, form of dramatic production in mind.

A curious development of the law on this point has been the theory that, while the owner of the play may retain his "movie" rights, yet he is bound by an implied covenant not to exercise them in such a way as to injure the owner of the right of stage production. In such cases both the grantor and grantee are mutually restrained from producing motion pictures, so long as the agreement granting the right of "production" is in force. This theory was first acted upon in a case in which the contract for production had been made in the infancy of the motion picture art, when neither party had the possibility of that form of production in mind. [*Harper v. Klaw*, 232 *Federal Reporter*, 609.] But it has also been applied in a case in which the contract was made after the art of motion picture production had become well developed and when, it is to be supposed, the parties to the agreement might have taken into account this form of exploitation of the drama. [*Manners v. Morosco*: 254 *Federal Reporter*, 737; 258 *Federal Reporter*, 557; 252 *U. S. Reports*, 317.]

The course of litigation in the last mentioned case is worth detailed mention, because it epitomizes the changing tendency of the law above mentioned, from the view that motion picture rights are presumed to pass, to the contrary view.

In 1912 Hartley Manners, author of the play, "Peg o' My Heart," made a contract with Oliver Morosco for its production. The contract gave Morosco the right to "produce, perform and represent" the play, but made no mention of motion pictures, and contained provisions as to manner of performance, payment of royalties on gross receipts per week, the right of the author to control alterations of the text, and other matters, indicating that production on the stage was what the parties had in mind. A dispute having arisen as to who controlled the "movie" rights, the United States Court for the Southern District of New York decided that they belonged to Morosco, because of the broad force of the words of the grant—"produce, perform and represent"—and because it was not reasonable to suppose that Morosco would have consented to Manners' retaining the power of destructive competition with the play which the production of a motion picture might imply. Manners appealed from this decision and although it was affirmed by a majority of the judges in the Circuit Court of Appeals, one of the three judges dissented on the ground that, while the language used was broad enough to convey the screen rights, yet it must be construed with regard to what the parties

were actually contracting about, as indicated from other portions of the agreement. The case was then taken to the United States Supreme Court and there the decision of the lower court was reversed, Justice Holmes, who rendered the opinion, following the reasoning of the dissenting judge, Ward, in the Circuit Court of Appeals, but adding to his decree restraining Morosco from producing pictures, the condition that Manners be likewise restrained during the period of the agreement, on the theory of implied negative covenant above referred to.

The decision of the United States Supreme Court in the case of *Manners v. Morosco* represents the law in cases of this kind today, which may be stated as follows: Where the owner of copyright in a play has given by contract the right to produce, perform or represent it, such contract will not operate to divest him of the right to produce the work in motion pictures, when the language of the contract in general indicates that the parties had in mind stage production and not production on the screen. But the owner of the play will in such cases be restrained from producing motion pictures in competition with the stage production of the play, there being an implied negative covenant on his part not to do anything which will interfere with the profitable enjoyment of the rights which he has conveyed.

From a study of the decisions relating to contracts giving a right of dramatization of books or stories a

similar result may be deduced. Where the words "dramatization for the stage" are used, or where provision is made for payment by royalties based on weekly receipts, or for regulation of changes in the text, such language will be held to indicate, in the absence of anything to the contrary, that the parties contracted with the stage in mind, not the screen. [*Klein v. Beach*, 239 Federal Reporter, 108.] The screen rights being in many cases more valuable than the rights for spoken drama, it is not to be presumed that conveyance of the thing of less value will carry the thing of greater value without a clear expression of intention to that effect.

A question suggested by several cases, but not so far decided by the courts is this: The author of a book grants the right of dramatization, under which a play is made. By the provision of Section 6 of the Copyright Act, this play is to be considered as a new work and the dramatist may copyright it as such. Under the copyright he obtains the exclusive right of production in any manner. He can restrain not only the unauthorized production of his play on the stage, but also its unauthorized reproduction by means of motion pictures. But can he himself exercise the usual derivative right of a copyright proprietor and make a motion picture from his play and produce it without the consent of the author, or copyright proprietor, of the book from which the play was made? The answer, it is submitted, must be in the negative. The new copyright must be held



subject to the terms of the contract by which the dramatic rights were conveyed. The copyright owner of the play may protect himself against infringement of his rights, but he cannot turn about and infringe the rights of his grantor. And this view is borne out by the language of the latter part of Section 6 of the Copyright Act:

“but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.”

Having thus considered the question of the right to make and produce motion pictures based on other copyrighted works, we may now take up the pictures themselves, and see what kind of protection the law provides for them.

The scenario for a motion picture does not fall strictly within any of the classes of subject matter of copyright mentioned in the law. The class “book” is broad enough to include scenarios, but in order to protect a book, publication with the copyright notice must take place, and this is ordinarily inconvenient for a scenario. In the view of the Copyright Office, a scenario cannot properly be regarded as a dramatic composition, since it is only a preliminary step in the creation of a drama, and not, in itself, a complete work. In some cases, however, where scenarios have been elabo-

rately worked out, with details of action, registrations have been permitted for them as dramatic compositions not reproduced for sale. The circumstances of each case must determine whether a scenario is classifiable as a dramatic composition or not. Certainly a mere brief synopsis of plot and action is not entitled to such a classification.

In any event, a scenario is entitled to protection at common law against unauthorized use. The difficulty encountered in acting under the common law, without copyright, is to prove authorship and date of composition of the work. Authors should keep careful records of their compositions and should be prepared to prove by the testimony of others the identity of their productions, the time when they were completed and submitted and other pertinent facts of which the copyright certificate, in the case of copyrighted works, furnishes *prima facie* evidence. In the course of time it is to be expected that some way of including scenarios under copyright protection will be provided. The amount of skill and labor involved in their production is certainly as great as that required for most plays, and the technique of the motion picture scenario is by now sufficiently developed so that it should be possible to distinguish between the mere synopsis, or jotting down of ideas, and a complete scenario.

Reference has elsewhere been made to the fact that a completed motion picture embodies the work of many authors. In theory such persons are entitled to a joint

copyright, or would be if they coöperated on an equal footing. In practice they are almost always the employees of a producer who, whether an individual or a corporation, is entitled to copyright the complete picture as the "author," being, in the language of Section 61 of the Copyright Act, an "employer for hire." In rare cases, in which copyright is held jointly by several authors, it is important to remember that each such author is free to dispose of the copyrighted work by means of license without consent of the other authors, probably without even the necessity to account to them for the proceeds. From this point of view a joint copyright is undesirable, unless there is a careful agreement among the parties as to what shall be their respective dealings with the property, and their liabilities to each other.

A motion picture may be copyrighted either under the general provisions of the law governing published works—if in fact it is published—or under the provisions of Section 11 relating to works not reproduced in copies for sale. The leasing system under which most motion pictures are put in circulation permits of construction as publication, on the authority of decisions relating to books so circulated, but it may equally well be regarded as a dissemination of "copies not reproduced for sale." The Copyright Act, in which the amendatory provisions of August 24, 1912, first expressly mentioned motion pictures, seems to contemplate their classification as works not reproduced for

sale, inasmuch as the requirements for deposit were inserted in Section 11, dealing with such works. So many questions have arisen regarding the construction of that section, however, that it is suggested copyright proprietors of motion pictures will be safer to follow the procedure required for published works and deposit the two complete copies required in case of publication. The Copyright Office usually permits withdrawal of such deposits after the copyright registration has been made.

What rights are given to the copyright proprietor of a motion picture, in addition to the general grant of subsection (a) of Section 1 of the Act, "to print, reprint, publish, copy and vend" the work? Where the motion picture is a photoplay (Class L) it seems likely that it will be entitled to the exclusive right of performance and production, as granted in subsection (d) of Section 1 for "dramatic works," but the question must remain in doubt until passed upon by the courts. For motion pictures other than photoplays (Class M), including pictures of scenery, current events and animated cartoons, the scope of protection is presumably limited to that of cognate productions not intended for the screen, *i.e.*, photographs and works of art.

Whatever may be the rights secured by copyright, it has been held that the sale of a single copy of an uncopyrighted motion picture carries with it the right of representation on the screen, since that is a necessary incident of ownership in such a copy. [*Universal Film Manufacturing Co. v. Copperman*, 218 Federal Reporter, 577.]

## CHAPTER VIII

### MOTION PICTURES (*continued*)

*The sale of motion picture rights — Analysis and criticism of some provisions found in the current form of motion picture producer's contract.*

The usual contract between a motion picture producer and an author, or copyright proprietor, who sells motion picture rights, is, like the average landlord and tenant lease, rather a one-sided affair. But while in the landlord and tenant lease it is the seller—the landlord—who dictates the terms of the contract and on the whole gets the better of the bargain, in the motion picture contract the reverse is true. The buyer makes the contract and looks out for his own interests very carefully, while the seller, often not well informed as to his rights, takes the terms he can get.

Probably the ideal contract from the author's standpoint would provide for a license to produce a single picture, with a liberal cash payment when the contract was signed and further payments on a royalty basis, figured on gross receipts from the exploitation of the film. The time has not come when motion picture producers are willing to make such a contract, except in the case of very valuable works, such as successful

plays with a long Broadway run behind them, and even in such cases the producers prefer an outright purchase of all rights. As time goes on, authors will get better terms, but the changing conditions of the motion picture business make it almost impossible today to standardize a form of contract fair to both sides. Such standardization is pretty nearly an accomplished fact in the matter of book publication and that of stage production. In these two methods of exploitation of the author's work conditions have undergone no great change for a number of years past, while with the pictures all is in a state of flux and will remain so for some time to come. But although it is yet hardly possible to present a complete form of contract for the sale of motion picture rights, the provisions of which will be fair to both parties in all cases, we can at least lay down some general principles which should govern the negotiations and offer some criticism of provisions which at present are being incorporated in many contracts prepared by producers and offered to authors for their signatures. Circumstances will govern the feasibility in any particular instance of the suggestions here made. The author should be able to secure most of the advantages indicated in his behalf, if he presents his case intelligently.

The question of motion picture rights will not ordinarily arise for the beginning author until after his book or story has been published, or his play accepted for production. The value of the rights will depend

to a great extent upon the popular success of the book or play. This is one reason among many why the author should secure copyright before making any bargain for the picture rights in his work. In cases of increasing frequency, however, the picture rights are in contemplation when the work is written and the producers themselves are at present using a form of contract which, while broad enough to cover rights obtained under copyright, is also phrased in such a way as to cover rights at common law, before publication.

The producer's contract usually begins with a recital that the author named has written a certain named literary composition and that the producer desires to acquire the right of making motion pictures based on the said composition. If the composition has been published and copyrighted, the contract will so state, giving the circumstances of publication and the date and number of the copyright registration. Then follows a recital of the consideration (often not given in full) and a broad, general grant to the producer of all "motion picture rights" throughout the world, the right to make pictures, to sell them and to exhibit them or cause them to be exhibited being specifically named.

The contract is as a rule so worded as to divest the author of *all* motion picture rights, in *all* countries and for *all* time. This absolute relinquishment of his rights by the author should be avoided. Instead of granting the right to make pictures generally, the author will do well to grant the right to make one picture. The tech-

nique of motion picture production has changed so rapidly that pictures made five years ago are out of date, while the works on which they are based may be as fresh as ever. Hence "remake rights" are of much value and the author should keep control of them.

A limitation of time is also very desirable. The complete exploitation of a picture takes only a year or two, and if the author's work has acquired some reputation prior to the making of the contract, it will pay him to restrict the time of his grant to, say five years, which should be ample for the making of the picture and for the full realization of its value through exhibition, both at home and abroad. It should be provided that at the end of five years, more or less, depending on circumstances, the contract and all rights granted thereunder shall cease and determine and that no further distribution of the picture made shall take place. A new contract can then be made if desired, in which the proved value of the picture can be taken into consideration. Should such a limitation be impracticable, the contract should at least reserve to the author the right to "remake" after a reasonable time.

If the work in question has been copyrighted, the rights granted can in no case outlive the first term of copyright. The author may contract to renew the copyright and to make a new grant of rights under the renewal and if he is living when the time comes for renewal he may doubtless be compelled to carry out this contract. But if he should die before the time for



renewal arrives, the grantee has no recourse because the widow or other beneficiary will hold the copyright entirely free from encumbrances and can make a new and independent grant of rights. It is conceived that such renewal beneficiary could even proceed against the original grantee as an infringer, if distribution and exhibition of the picture were continued after renewal, and this notwithstanding the original grant had been made before copyright was secured. [See *Weil*, pp. 541-42, and cases involving renewals, particularly *White-Smith Music Publishing Company v. Goff*, 187 *Federal Reporter*, 247. But see also as to common law rights granted "forever," *Paige v. Banks*, 13 *Wallace*, 608.]

The grant of rights for all the countries in the world is objectionable in principle from the author's standpoint, but is probably unavoidable under present conditions of the motion picture business. If in the future it should become practicable to license or assign motion picture rights for each country or group of countries separately, as is now done with rights of book publication, dramatic production and public performance of music, it will probably be found to the author's interest to divide his grant in that way.

It will be prudent for the author to insert in the contract, at the conclusion of the general grant of rights, a statement to the following effect:

All rights not expressly granted herein are reserved to the author, including any rights not now in existence

which may hereafter accrue to the copyright by reason of changes in the law or new inventions by means of which the copyrighted work may be made a source of profit.

Such a clause, if included in contracts for dramatization of literary works, made before the invention of motion pictures, might have saved screen rights to the author in some cases where they have been lost.

Following the general grant of rights, a subsidiary grant is usually called for by the producer, of the right to obtain copyright in all countries for the motion pictures made pursuant to the contract. Such a provision is a necessary corollary of the grant of world rights. It has now been definitely established that the grantee of motion picture rights is a mere licensee until the picture has been copyrighted, and cannot bring suit in his own name. [*Goldwyn Pictures Corporation v. Howell Sales Co.*, 282 *Federal Reporter*, 9.] Of course if copyright has already been secured by the author in various countries, that fact should be recited, as the producer will then hold his motion picture copyrights subject to the parent copyright of the literary composition.

In the stock form of contract under consideration there is likely to be a paragraph authorizing the producer "to adapt, arrange, change, transpose, add to and subtract from the composition and its title, as it may deem expedient in order to cause it to conform to the demands of motion pictures." This language is much

too broad. The garbling and mangling of an author's work in a picture version often does more harm than actual infringement, with which, indeed, it is not unlikely to be coupled. In this connection several recent decisions of the courts are instructive.

*Curwood v. Affiliated Distributors, Inc.* [283 *Federal Reporter*, 219] was a case in which the author, James Oliver Curwood, who had acquired a reputation for stories of the frozen north, relinquished to the defendant screen rights in a story written some years before the litigation arose, called "The Poetic Justice of Uko San." In granting the picture rights, Curwood gave permission "to elaborate on said story, with addition of characters, etc., however needed." The defendant produced a motion picture entitled, "I Am the Law," which it advertised as based on the story by Curwood. The author, however, alleged that not only was the picture not based on the story the screen rights of which he had sold, but that it was an infringement of other stories of his, already adapted to the screen. The defendant asserted that what it had bought and intended to buy was the right to use Curwood's name, and the name of the story, in its advertising, and that the changes from the story were covered by the right to "elaborate" granted in the contract. The court, however, declined to take this view of the matter and enjoined the defendant from using either Curwood's name, or the name of his story, in connection with the picture, "I Am the Law," saying, "The elaboration of a story means some-

thing other than that the same should be discarded and its title and authorship applied to a wholly dissimilar tale.”

In *International Film Service, Inc. v. Affiliated Distributors* [283 *Federal Reporter*, 229], the plaintiff corporation was the owner of motion picture rights in Curwood's story "The Valley of Silent Men," and obtained an injunction against infringement by the same defendant, and the same picture, "I Am the Law."

The Appellate Division of the New York Supreme Court has recently upheld the suit of Frank L. Packard against the Fox Film Company, for damages for making important and unauthorized changes in a story for which he had granted film rights, and for changing the title of the story, "The Iron Rider," to "Smiles are Trumps."

The cases cited support the author's right to have his story presented in a picture version substantially as he wrote it, and with its original title.

A certain amount of change is of course necessary for the process of transferring a story to the screen, or, as the producer's contract often phrases it, "in order to cause it to conform to the demands of motion pictures." Some notion of how a court would be likely to interpret such a provision may be obtained from the case of *Manners v. Famous-Players-Lasky Corporation* [262 *Federal Reporter*, 811], relating to the motion picture version of the play "Peg o' My Heart," which was the subject of other litigation mentioned in an

earlier chapter. The contract for the screen production of the play contained a stipulation reading:

“No alterations, eliminations, or additions to be made in the play without the approval of the author.”

In commenting upon this clause, the court discussed very instructively the kinds of changes which might be necessary in turning a play into a picture, with the following conclusion:

“. . . there cannot be a substantial deviation from the locus of the play or the order and sequence of development of the plot. If these substantial features are retained, then such pictures as may be necessary to explain the action of the play, and as may be necessary in substitution for dialogue, may be entirely proper.”

The point to be brought out is that the author, not the producer, should be the final judge of the necessity or desirability of the changes made in adapting his work to the screen. The provision regarding such changes should be phrased in the negative and read somewhat as follows:

No alterations, eliminations or additions are to be made in the work, or in its title, beyond what may be necessary for adaptation to the motion picture form. Such alterations, eliminations or additions as are made shall be approved by the author before the picture is released for exhibition.

It may be said that authors do not usually know enough

about the technique of motion picture making to be qualified to pass upon such matters. Then let the author secure the services of some one sufficiently skilled to advise him, not leave his work entirely in the hands of the producer.

For like reasons the author should stipulate that the cast of the picture shall be acceptable to him.

The contract will usually contain a provision empowering the producer to institute and prosecute suits for the infringement of the rights granted and to use the author's name in such suits. Such a provision is entirely proper so long as the motion picture has not been made, for, as was held in *Goldwyn Pictures Corporation v. Howell Sales Co.*, cited above, the producer cannot sue in his own name until he has made and copyrighted the picture, being until then only a licensee under the copyright, or the common law right, of the author. But when the picture has been copyrighted the producer is able to sue in its own name for infringement of that picture, and no longer needs to join the author. A clause should therefore be added to the grant of rights to use the author's name in suing, to run somewhat as follows:

But these rights shall cease and determine as soon as the producer shall have secured copyright for the picture made hereunder, which the producer agrees to do immediately upon the completion of the picture.

The author is required, in many producers' contracts, to make certain warranties, *viz.:*

1. That he is the sole owner of the rights which he is granting as well as of the work itself and that he has not previously sold, mortgaged or otherwise encumbered such rights.

2. That he has the right to obtain copyright for the work throughout the world and that this right is not defective in any way.

3. That the title of the work is free for use in motion pictures.

4. That the composition is original in all respects and that no incident which it contains is based on any other composition.

The first three of these warranties should be qualified by the insertion of some such phrase as "to the best of my knowledge and belief." Inasmuch as a warranty is likely to be held an essential feature of the contract, a violation of which would invalidate it, the author should not guarantee the existence of conditions about which he probably knows nothing. His right to obtain copyright in foreign countries, for example, depends upon the legislation of those countries. At the time this book is written, the author could not obtain copyright in Russia, for the simple reason that the Soviet Government has abolished copyright.

The warranty of originality should not be made at all. It involves questions so difficult of decision and so likely to lead to dispute that it is better to leave it alone. Originality is a matter of treatment, rather than of theme. None of Shakespeare's plays could pass

muster under a condition so exacting as that of absolute originality in every detail, and it is probable that most works of importance, and many of the very greatest, contain some incident or episode which has been consciously, or unconsciously, borrowed. The number of dramatic situations is limited and the same "motifs" have been and will be repeated again and again. The decisions of the courts contain much discussion of theme, plot, incident, atmosphere, narrative, embellishments and so on, but so confused that the law can hardly be succinctly stated. Let the author, if he chooses, warrant that he has not infringed the copyright of another. Beyond that it is unsafe to go.

A customary clause in the contract requires the author to agree not to make any other contract or agreement in conflict with the terms of the one in question, nor to encumber the rights which he is granting. No objection can be offered to such a clause.

The author further is required to indemnify and save harmless the producer from any damages, claims, liabilities, expenses and loss which the producer may incur through the exercise of the rights granted, or through its dealings with the pictures made. Such an agreement, if made, should be so worded as not to go beyond the author's reasonable responsibility for the contents of his work, such as would be incurred if the author himself should publish and copyright it. If there is anything libellous in it, the author will share liability with the producer, but he should not assume



liabilities which might come from changes made by the producer and even from undertakings bearing no relation to the work itself.

There is another side to the question of indemnification. The author's reputation may be damaged in case his work is unduly changed. That may be taken care of by the provision above suggested, that the changes made are to be subject to the author's approval. But it would also be well to add a clause to the effect that the producer shall indemnify the author for any damages which may result, through no fault or negligence on the author's part, from the making, distributing and exhibiting of the picture. In this connection, the author's right of publication, which is not a part of the grant, should be carefully guarded. The length of extracts, synopses, or scenarios permitted to be published should be regulated, particularly where the author has granted publication rights to some one else, or expects to do so.

The producer will usually require that it shall be authorized to use the author's name in its publicity and on the film "for exposure long enough to be read." If the word "authorize" is used in this connection, the producer is left with the option to use the author's name, or not, as it sees fit. This is not enough. If the author has taken care that the contract includes a certain amount of supervision of the use of his work and is satisfied that the screen version will enhance his reputation, he should require the producer to agree abso-

lutely to use his name, and to display it in publicity and on the film with sufficient prominence to give his work its due share of importance, and not subordinate it to the work of the director, the scenario writer or other members of the producing staff.

We have been dealing with the case of screen rights only. If the question of stage rights is also involved in the contract the question is somewhat less simple. In accordance with the general rule already stated, the author should always seek to subdivide the rights included in his copyright and grant them separately, for in this way he stands to realize the fullest possible returns for his work. But we have seen that under the decision of the United States Supreme Court in *Manners v. Morosco*, an author cannot sell rights to a "screen" version of his work to be produced in competition with the stage version, rights for which he has already granted, unless the grantee of the stage rights consents to such an arrangement. The grantee of stage rights will usually want some control over the disposition of the screen rights. A solution of the difficulty may be sought in some such arrangement as the following.

Where the contract is primarily one for the sale of stage rights in a play, or for dramatization and stage production of a book or story, and the grantee of the stage rights is not willing to have the author retain screen rights unrestricted, let the contract provide for a reservation of the screen rights to the author,

not to be released by him for production during the term of the contract. Then let a clause be added providing that if the number of performances of the play in a given season shall fall below so many, or if the gross royalties payable to the author in any season shall fall below a specified sum, the author's agreement not to release the screen rights shall become void and he may sell them for production.

## CHAPTER IX

### INFRINGEMENT

*Infringement generally — To what extent is the Copyright Act retroactive? — “Fair use” — Infringement of specific rights in particular classes of works — Remedies and procedure — Damages.*

The Copyright Act nowhere defines infringement and the courts have been reluctant to do so, except under the limitations of the particular facts of the case they were deciding. Certain general principles, however, may be laid down, which are applicable alike to infringement of common law rights in literary property, and to rights secured under copyright statutes. At the outset the question is presented: Has the work of an author been used, without his consent, to the author's injury, or to the profit of some other person? If the answer is yes, a second question arises: Is the use which has been made of the work within the limits of “fair use”? If not we have a *prima facie* case of infringement.

If we are dealing with copyright claimed under a statute, however, our case must be cut down to fit the provisions of the statute. Unless the kind of use which has been made of the author's work is one to which the statute exclusively entitles him, he has no redress under

the statute. The text of the statute must be consulted, therefore, to see whether some one or more of the rights which it grants exclusively to the author has been violated. If the copyright in question was secured under some statute prior to the one in force when the question of infringement comes up, such prior statute must also be consulted, for it is possible that the author's rights may be measured by the laws in force at the time when he secured the copyright, and not by those in force when the infringement is committed.

There is no general rule regarding retroactivity in copyright statutes. All acts in conflict with the one now in force are repealed, but where there is no conflict they remain in force. From the language of the statute it appears that remedies are retroactive, while rights are not. Section 25 imposes certain liabilities upon infringers of copyright "in any work protected under *the copyright laws of the United States*," while the grant of rights in Section 1 is to persons "complying with *the provisions of this Act*," which provisions, especially as to the manner of securing copyright, are quite different from those of former acts. As copyright may now last as long as fifty-six years, it is possible, generally speaking, that any statute of the last fifty-six years may be pertinent to the consideration of the question of infringement.

It has been argued that the title of the Copyright Act of 1909, "An Act to Amend and Consolidate the Acts Respecting Copyright," as well as the express

negation of retroactivity with regard to the new rights of mechanical reproduction of music, is evidence of the intention of Congress to make other rights, as well as remedies, retroactive. [*Weil*, pp. 579 et seq.] Several decisions of the Courts, however, as well as the language of the Act above quoted, seem opposed to this view. [*Fitch v. Young*, 230 *Federal Reporter*, 743; *Witmark v. Standard Music Roll Co.*, 221 *Federal Reporter*, 376.]

An express exception to the retroactivity of the remedial portions of the statute is found in the provision that causes of action for infringement committed before the statute went into effect are to be prosecuted in accordance with the mode of procedure previously provided. This provision is no longer very important and as time goes on will become less so.

Returning now to the question of "fair use," briefly mentioned in Chapter V. We have seen that the term means such use as the author must be supposed to have reasonably contemplated at the time when he created his work, notwithstanding the monopoly which the law allows him. The quotation of considerable extracts from a work under review, the use of directories in the compilation of selected mailing lists, the copying of legal forms from works giving examples of such forms, are all instances of fair use. A peculiar application of the doctrine is also found in the law relating to parodies, which often approach actual copying, but have always been held legitimate.

A test sometimes used to determine whether what has been done with the copyrighted work exceeds the limits of fair use is to inquire whether the demand for the original work has been diminished to a substantial extent through competition from the alleged infringement. In one case a compilation of "Opera Stories" was published, giving brief synopses of the plots of the copyrighted works. These were held not to infringe. They were only such accounts as a critic might give in reviewing a performance. [*G. Ricordi & Co. v. Mason*, 201 *Federal Reporter*, 182; *Ib.* 184.] In another case, topical headings and the method of development of the subject, with a phrase quoted here and there, were used in the preparation of a quiz course in economics, the result being to enable students to dispense with the work on which the course was based. This was held to be infringement. [*Macmillan Co. v. King*, 223 *Federal Reporter*, 862.]

It is convenient to distinguish between permissible use of a copyrighted work, which is any use the law does not forbid, and "fair use" strictly speaking, which is a use technically forbidden by the law, but allowed as reasonable and customary, on the theory that the author must have foreseen it and tacitly consented to it.

Innocence of intention to infringe does not excuse an infringer, but it may mitigate his liabilities. If he has been misled through the absence of the notice of copyright from the copy of the work he has used, he is not liable for damages, but he must give up his profits

and he will be enjoined from continuing the infringement, although, as a condition of such injunction, if the court sees fit, he may recover from the copyright proprietor "his reasonable outlay, innocently incurred." There is also a limitation of the amount of damages for infringement by means of motion pictures, when the infringer shows that he was not aware he was infringing and could not have reasonably foreseen it. The above limitations and conditions cease to apply and the infringer becomes fully liable after he has been notified to desist.

Intention is also a material element in criminal infringement, which is a misdemeanor, punishable by fine and imprisonment. And where intention to infringe can be shown, it is a material fact as evidence that infringement has actually taken place. [*Meccano Limited v. Wagner*, 234 *Federal Reporter*, 912.]

A license, as we have seen, in copyright as in patent law, may be described as an act of the copyright proprietor making that lawful, under certain conditions, which would otherwise be infringement. If the licensee violates the conditions, the copyright proprietor may sue him for breach of contract, or he may revoke the license and sue for infringement of copyright, just as though no license had been granted. The producer of a play contracted with the author that no alterations should be made without the author's consent. The producer permitted a motion picture production of the play in which considerable alterations were made and this



was held to be infringement. [*Manners v. Famous Players-Lasky Corporation*, 262 *Federal Reporter*. 811.] In another case the copyright proprietor had licensed the production of copyrighted plays by means of motion pictures. The licensee defaulted in his payments and the copyright proprietor sued in the state court, obtaining the annulment of the license and an accounting for the proceeds received from the production of the pictures. [*De Mille Co. v. Casey*, 189 *New York Supplement*, 275.]

Of the exclusive rights granted by the statute to the copyright proprietor the one most frequently involved in suits for infringement is that of copying. If the whole, or a substantial part, of the copyrighted work has been copied, infringement has taken place, and is only to be excused by proof of the copyright owner's consent, express or implied. Where the entire work has been taken bodily, the situation is a simple one, but where only a part has been taken, or where the copying deviates more or less from exactitude, the questions may arise, whether what has been copied is a substantial part of the work and whether the alleged infringer has done more than amounts to "fair use," perhaps in building upon the suggestions of the copyrighted work a new work of his own. Reference has already been made to the case of *Macmillan v. King*, where the portions of the copyrighted work actually copied were few and of slight extent, but where none the less infringement was held to have taken place. In

another case the statements of the copyrighted work, a manual of instructions for using a mechanical toy, were not literally copied, [*Meccano Limited v. Wagner*, 234 *Federal Reporter*, 912.] but paraphrased, so as to repeat the same instructions in different words, and here too, infringement was held to have taken place. On the other hand, a writer on the history of the great war was held not to have infringed the copyright of his earlier work on the subject, which was the property of its publisher, when he used similar language in writing a subsequent work dealing with the same subject. [*Kennerley v. Simonds*, 247 *Federal Reporter*, 822.] The court was of opinion that the similarity could not have been avoided unless the writer was to be denied the privilege of ever writing again on the events in question. The logic of the decision seems clear, but its result worked some hardship upon the publisher of the earlier work, who saw the value of his copyright destroyed through competition from the later work.

The appropriation of the plot of a copyrighted dramatic composition is an infringing copying, provided the plot is original, and this is true even where the characters, incidents and speeches in the infringing work are all different from those in the work infringed. And the whole plot need not be taken. The appropriation of the central situation constitutes infringement, as being the copying of a substantial part of the work. [*Dam v. Kirke La Shelle Co.*, 166 *Federal Reporter*, 589; 175 *Federal Reporter*, 902.] Where the plot is

old, however, it may be used by any one, even if he has taken it from a copyrighted work. Such at least seems to be the result of the reasoning in a case decided some time ago. [*London v. Biograph Co.*, 231 *Federal Reporter*, 696.] It might be more satisfactory from the standpoint of the legal theorist, to say that the use of a plot similar to that in a copyrighted play is not in itself evidence of infringement, when it can be shown that the plot might have been found elsewhere.

Distinction must be made between the plot of a play, which is the order of the occurrences set forth, and the general subject, atmosphere, or background of the work. Courts have taken notice, upon occasion, of the practice of playwrights to follow the fashion set by a successful play. At one time there is an epidemic of crook plays, at another of plays dealing with theories of telepathy, hypnotism, or other current hypotheses of psychology. Similarities necessarily exist among such works, and do not afford a basis for holding that infringement has taken place, for "an author cannot obtain control of a field of thought on a particular subject." [*Bobbs-Merrill Co. v. Equitable Motion Pictures Corporation*, 232 *Federal Reporter*, 791.] Copyright protection does not go that far. The safest guide in deciding whether infringement exists, in the absence of direct evidence, is to determine what is the fundamental theme of the play and see if it has been appropriated. [*Underhill v. Belasco*, 254 *Federal Reporter*, 838.]

It has happened that there have been in existence several versions of a play, of which only one was copyrighted. The appropriation of incidents found only in that particular version was infringement, although the use of matter found in other versions was not. The infringer, therefore, was allowed to continue the production of his version, after removing the infringing episodes. [*Stevenson v. Fox*, 226 *Federal Reporter*, 990.]

The above instance was an application of the general rule that when it is possible to separate the infringing portions of a work from those which do not infringe, the infringer will not be restrained from the production, or dissemination, of the whole work, but will be permitted to go on with its exploitation after eliminating the parts which infringe, although of course liable for damages for infringement up to the time when the matter is thus settled. If, however, such separation is not practicable, the entire work must be abandoned. Conversely, where a copyright proprietor has inextricably mingled copyright matter with matter which is free of copyright, he cannot obtain redress against one who copies the whole work, since by his own act he has made it impossible to distinguish the copyright from the non-copyright matter. These are applications of the rule in the law of personal property regarding "confusion of goods," that he who mingles his goods with those of another so that they cannot be separated must lose his part.

The foregoing statements regarding infringement by means of copying the copyrighted work have been illustrated by instances of literary or dramatic works, but the same principles apply to other kinds of works, with such modification as the class of work requires. Thus the rule that an author cannot monopolize the treatment of a certain subject merely because he has been the first to write upon it, finds its analogy in the rule regarding pictorial works, that one cannot obtain the exclusive right to represent an object, or to manufacture it, simply by copyrighting a picture of it.

It was formerly held that there could be no copyright in a rudimentary picture, such as a simple cut of an object, used in advertising. The present rule, more logical, is that copyright subsists in such trifles, to the extent of their originality. [*National Cloak & Suit Co. v. Kaufman*, 189 *Federal Reporter*, 215.] There is a point, however, in the progress toward simplicity, where copyright becomes practically worthless through the ease with which any one, without needing to copy, can produce a practically identical thing. This was true of copyrights claimed, not in pictures, but in cards used by "Christmas Savings Clubs," containing elementary computations of sums to be paid into a bank account at regular intervals, and their totals on specified dates. The plan of saving and the method of advertising by banks using the plan were not subjects of copyright protection, and once the idea had been spread abroad, it was a very simple matter for any one to duplicate the

copyrighted article, without actually copying it. [*Landis Christmas Savings Club v. Merchants' National Bank*, 100 *Southeastern Reporter*, 607.]

The ordinary photograph of a building or of a landscape is another illustration of the possibility of substantial duplication without copying, and hence without infringement. Two photographers, placing their cameras in the same position, at the same time of day, and under similar atmospheric conditions, will obtain photographs which are much alike, yet one will not infringe the other, unless there was a deliberate intention to copy, and in cases of this kind intention is an element of some importance. A photographer made a picture of a model in nearly the same pose and lighting as those shown in an earlier photograph of the same subject, the copyright of which he had sold. The court thought there was an obvious intention to produce a close imitation of the first work, and consequently held the second an infringement. [*Gross v. Seligman*, 212 *Federal Reporter*, 930.]

From the above example it will be seen that the infringing copy of a pictorial work need not be made directly from the copyrighted work. It may be made from a copy of that work, for to copy a copy is to copy the original. Per contra, copying the original is copying the copy, as in a case where a painting was copyrighted, but not a preliminary study from which it had been made, and which the artist gave away. Reproductions of this study were held to be infringements of the

copyrighted painting. [*Beifeld v. Dodge Publishing Co., 198 Federal Reporter, 658.*]

A case which seems to conflict with the above at first glance is one in which a clothing dealer gave an artist directions for making a color drawing for the cover design of an advertising booklet, and the artist registered copyright. The design did not satisfy the dealer who employed a second artist to express the same conception. When the picture was published, the first artist brought suit for infringement, but was unsuccessful, the court holding that the similarities were the necessary result of the fact that the same conception had been embodied independently in the two pictures. Perhaps the basis for the decision is to be found in the fact that the employer was the actual "author" of the work, hence the copyright in both pictures belonged in equity to him. [*McCarthy v. L. Adler Bros. & Co., 227 Federal Reporter, 630.*]

Any work may be copied by means of photography. A photograph of sculpture is a copy, hence an infringement, if the sculpture is copyrighted.

Of musical compositions it is especially true that a relatively small part may yet be a substantial part, and the appropriation of a single striking phrase has been held sufficient to infringe. [*Boosey v. Empire Music Co., 224 Federal Reporter, 646.*] Copying the words of a song of which both words and music were copyrighted together as a musical composition, under former law, was held not to be infringement because it was said

the words should have been copyrighted separately, as a book, in order to obtain separate protection. [*Witmark v. Standard Music Roll Co.*, 213 *Federal Reporter*, 532; 221 *Federal Reporter*, 376.] The decision, although allowed to stand on appeal, seems wrong in principle. Words set to music form a single work and copying the words is certainly copying a substantial part of the composition. The court seems to have been misled by the fact that Section 3 of the Copyright Act, which provides for the protection of all the "copyrightable component parts of the work copyrighted" was not in existence at the time when the song was copyrighted. But this section, whether retroactive or not, merely enacted an already recognized rule of judicial decision—that the copying of any substantial part of a copyrighted work is infringement.

The right to vend the copyrighted work is a right which is exhausted as to any particular copy when it has once been sold. In other words, no restrictions can be attached to a sale of copies, under the copyright law, which will follow the copies into the hands of subsequent purchasers. Hence it is not infringement for a dealer who has purchased worn, second-hand copies of books to renovate and rebind them and sell them again, although he cannot reprint portions that are missing, for the sake of making complete copies. [*Ginn & Co. v. Apollo Co.*, 215 *Federal Reporter*, 772.] If such renovated copies are sold as new, there is a misrepresentation which may be actionable as unfair competition, but