

# AMERICAN <sup>cf</sup> COPYRIGHT LAW

WITH

ESPECIAL REFERENCE TO THE PRESENT UNITED  
STATES COPYRIGHT ACT

WITH APPENDICES CONTAINING FORMS FROM ADJUDI-  
CATED CASES, AND THE COPYRIGHT LAWS OF  
ENGLAND, CANADA, AUSTRALIA,  
GERMANY, AND FRANCE

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## PREFACE

As is shown in the succeeding chapters of this work, Copyright Law is largely concerned with a series of Statutes passed, from time to time, with reference to property in books, paintings, dramas, moving pictures, and other forms of literary and artistic works, and with the judicial interpretation of such Statutes.

The present United States Copyright Act was passed in 1909, and has since been materially amended. It effected great and sweeping changes in the previous law. Its provisions are frequently obscure, partly due to the language employed, partly due to the subject matter of the legislation, and partly due to the history of the subject. A proper recognition of the controlling effect of statutory development with reference to this subject, is essential to its proper understanding. There has been a great improvement in the way of unification of such Statutes of recent years. Still, the subject, from its very nature, is a difficult one, which, unless properly explained, can only lead to confusion.

No more potent evidence of this is possible than to observe how frequently Courts of high authority, composed of eminent judges, have rendered decisions, or made *dicta*, which are plainly erroneous or fecund with misunderstanding. The dearth of treatises on Copyright has increased both the judicial, and professional difficulties, which obtain with respect to this subject.

In 1879 Mr. Eaton S. Drone wrote his famous "Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States." No other American text book on the subject appeared until 1912, when Mr. R. R. Bowker's interesting work on "Copyright" was published.

The latter work, however, is not written from the lawyer's point of view. It is rather intended for the layman interested in copyrights, and both from its form and otherwise, is, hence, inadequate as a means of assisting the legal profession with respect to the legal questions involved in Copyright.

Various English text writers have discussed American Copyright Law, but only in a brief and fragmentary fashion. The result is, that since the publication of Mr. Drone's work, no comprehensive, technical treatise on United States Copyright Law has been published. This is in great contrast with the situation

in England, where there are many standard text books on Copyright Law, such as Mr. W. A. Copinger's, Mr. E. L. MacGillivray's, Mr. B. A. Cohen's, Mr. J. H. Slater's, and others.

Mr. Drone's work is of the utmost excellence, but unfortunately, and necessarily, only discussed the Statutory Law of Copyright up to and including the Act of 1874. A large portion of his work, also, was written to establish a definite thesis, that is to say, that certain controlling and fundamental copyright decisions, such as *Wheaton v. Peters*, and *Donaldson v. Becket*, which are discussed on subsequent pages of this work, were wrong.

No student of this subject should fail to read Mr. Augustine Birrell's short work on "The Law and History of Copyright in Books" in connection with the historical aspects of Copyright, underlying these cases, since Mr. Birrell's, and Mr. Drone's views are diametrically opposed on this subject.

Personal difficulty on the part of the author in investigation of points of Copyright Law, as well as statements heard by him from the Bench, with reference to the difficulties experienced by Judges in the same connection, led to the writing of the present volume. It represents a reading of all American and English cases, on the subject, which the author has been able to discover. All cases so found which still appear to have any value have been cited in the text.

In view, however, of the statutory nature of this subject in its more important aspects, the form of the volume has been built up around the pertinent Sections of the United States Statute now in force. Changes in Statutory Law have been noted where they occur. The history of the present Statute is referred to where it is deemed necessary to explain apparent obscurities in it. The leading English and American text books on the subject have been freely examined and have been of great value to the author in formulating his expression of, and conclusions concerning, the present state of the law on this subject, as has also been "*Le Droit d'Auteur*." Many important open questions under the Act, where there are no decisions in point, have also been discussed.

If this work will fill the difficulties experienced of recent years, prior to its publication, by persons interested in ascertaining the actual condition of the present law on the subject, the author will feel that the time and labor he has spent in the writing of this work have not been in vain.

With further reference to its form, the portions of the work in italics which precede or form part of the various chapters, in each instance represent, either the language of the pertinent Sections of the Constitution governing this matter, or of

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the present United States Copyright Act. The entire Act as well as the present English, Canadian, Australian, German and French Statutes, the Copyright Office Rules, and similar matters, will be found set forth in the Appendix. A number of forms for use in copyright litigation taken or adapted from adjudicated cases are also appended.

The translations of the German and French Acts which will be found in the Appendix, are not official, but were made by the Author. They are not available elsewhere, in their entirety, as far as he knows. He has attempted to be as literal as possible in translating them and hopes that the work done will prove of service to the profession in general.

His appreciative thanks are due to his friend and associate, Samuel F. Frank, Esq., for helpful suggestions in connection with the preparation of this work.

ARTHUR W. WEIL.

Dated, New York City, January, 1917.

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# **PART ONE**

**INTRODUCTORY, HISTORICAL AND  
CONSTITUTIONAL**

# Law of Copyright

## CHAPTER I

### INTRODUCTORY

No extended argument is necessary in this day and generation to prove that mental labor or thought as truly creates property as does physical labor. The craftsman, mechanic or technician, in creating physical property with his hands, whether directly or through the intermediary of tools or machinery, necessarily exercises thought, and that thought whether consciously or not, finds its answer in his product.<sup>1</sup> He has, however, no property in his potential abilities, whether of hand or head. It is not until he has created something tangible, that property can arise. It results from the act of creation,<sup>2</sup> but that result does not culminate until the effort and labor which are involved have found a permanent, tangible, expression.

§ 1  
Theoretical  
basis of prop-  
erty in matter  
subject to  
copyright.

Mental and physical labor are indistinguishable, legally. Therefore, there can be no property in the result of purely mental labor, until its product,—specific thoughts or ideas,—have had physical expression. Thoughts or ideas, before such expression, are of too fugitive a nature to be the subject of property,<sup>3</sup> but when so formulated they are

§ 2  
Physical  
expression  
essential.

1—Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055.

2—White-Smith Music Publishing Co. v. Apollo Co., 209 U. S. 1, 19, 52 L. ed. 655, 662.

3—Millar v. Taylor, 4 Burr. 2362 (this language, although in a dissenting opinion, has been quoted frequently and is deemed to represent the law); Keene v. Wheatley, 4 Phila. 157.

property by the practice and law of all civilized peoples.

§ 3  
General  
property  
characteristics  
of matter  
created by  
thought.

There are certain general rights inherent in property, and certain special rights which depend on the particular nature of given property. A distinguishing characteristic of property created by physical effort is the utility for physical purposes of the physical object created. A distinguishing characteristic of property created primarily by mental action is that the physical form in which the creator's thought is given permanent expression is, save in exceptional cases of secondary importance, it serving merely as a means to reduce such thought to expression, to preserve such thought and to communicate it, or similar thoughts, to the minds of third persons. The latter result can only be effected by making copies of such physical object or by its exhibition or representation by human or mechanical agencies.

§ 4  
Utilization of  
such property:  
copying.

In the earlier stages of modern thought, copying was the means chiefly employed for utilizing property primarily created by the mind. Since the property, after it arose, was in the thoughts created by their author, as expressed by him, such copies could only be made by him, or with his consent, or such property would have been a mere shadow and fiction. The right to make such copies was, accordingly, soon recognized as giving commercial value to such property, and this recognition has found permanent expression by calling the rights which exist in the product of mental labor, copyright. At first, this phrase was an accurate description of the chief manifestation of the property right involved.<sup>4</sup> In the course of time, however, the right to communicate the author's thoughts to third persons through their public performance, exhibition or representation became of

§ 5  
Public per-  
formance, etc.

<sup>4</sup>—*Millar v. Taylor*, 4 Burr. 2311, 2346.

great commercial importance. To call such rights "copyright" seemed a perversion of language and various text writers endeavored to substitute other terms such as "playright" or "stage right."<sup>5</sup> Neither of these latter expressions, however, have found judicial or legislative favor<sup>6</sup> and the term "copyright" is used generally to cover all the property rights which exist in intellectual property. By intellectual property is meant those property rights which result from the physical manifestation of original thought, either naturally or on compliance with statute.

§ 6  
Copyright and  
intellectual  
property  
defined.

All human institutions are a matter of growth and this is particularly true of such as are concerned with the human mind. The history of law shows a never ending accretion and transformation, and nowhere are the effects of development more marked than in copyright law. In the preface to his great work on *The Law of Property in Intellectual Productions*, written in 1879, Mr. Eaton S. Drone said that the law of copyright even then, was, as yet, in its infancy. But while this was true, and still is true, nevertheless, it is rooted in the past. It is unnecessary and unprofitable to trace the early beginnings of copyright in detail at the present day, but it is essential for a proper understanding of

§ 7  
Development  
of copyright.

5—Drone, 533.

6—The English statutes were a patchwork prior to the adoption of the present British Copyright Act. Various media were dealt with in different statutes. Thus statutory literary, dramatic and artistic copyrights were quite separate and distinct, arising under different statutes, and each was determined as to scope and incidents by the statute under which it arose. This was never the case in the United States. It is not unnatural then that in England, statutory play-right so called, was deemed something separate and apart from ordinary copyright, as it was created under a separate statute and not under the general Copyright Act which dealt with books. But this legislative conception has never found a footing in the United States, where rights of representation, where conferred by statute, have always been deemed a right which was covered by the general copyright and the latter conception has also now been adopted by the present British Act.

§ 8  
 Beginnings:  
 economic,  
 religious and  
 political  
 influences.

existing law, firmly to grasp certain fundamental developments with reference to this branch of law.

All early copyright dealt with books. The political and economic results which can be and are worked by the printed word were recognized by governmental and ecclesiastical authority from the very first.<sup>7</sup> It is a great mistake to deem that the multiplication of copies was coeval with the rise of printing. An enormous number of copyists or scribes were a feature not only of Roman but even more especially of late mediaeval life. Printing, however, spelled cheapness and the means of communicating to the masses what had been a luxury for the relatively few learned and lettered classes. The spread of the invention of printing, the Reformation and the Renaissance were, more or less, contemporaneous. They found absolutism, both political and mental, universal. Governmental censorship of all printed matter was rigorously enforced. The author under such conditions was a very different creature from his modern successor. As has been wittily said<sup>8</sup> in early days an author usually disappeared immediately after the publication of his work and if he reappeared at all, did so in the stocks or pillory. To talk about the natural rights of authors in Tudor or Stuart England,

7—Donaldson v. Becket, 17 Hans. Parl. History 991 (Lord Chief Justice De Grey). This great case is reported inadequately. The fullest account is contained in 17 Hans. Parl. Hist. 954. The synopses of the arguments of counsel and of the opinions of the judges and members of the House of Lords are fairly detailed, but only partly verbatim. It seems curious that Lord Mansfield, although present, neither spoke nor voted. The suggestion that he refrained from "motives of delicacy" appears met by the fact that Lord Chancellor Apsley, from whose decision this appeal lay, found no reason for not expressing his opinion (col. 1002) which, curiously enough, was that his own decision, made in deference to the ruling in *Millar v. Taylor* (*supra*), was quite wrong. The other judges who decided *Millar v. Taylor* both gave their opinions. The excerpts from Lord Camden's opinion given in Drone, p. 39, are from his peroration, and do not represent the balance of his opinion.

8—Birrell: *Law & History of Literary Property*.

would have been farcical.<sup>9</sup> The early history of copyright had nothing to do with the rights of the author. He was not allowed to publish his work save by governmental license.<sup>10</sup> He had not the financial ability nor the mechanical facilities for printing his works. The urban booksellers constituted guilds, monopolistic survivals of mediaevalism. In England, the London Stationers Company, partly utilized as a regulatory governmental agency,<sup>11</sup> was all powerful in the world of letters, prior to and well into the Eighteenth Century. The claims of its members to copyright rested not in the theory of creation but solely on that of purchase. Their theories were those of mediaeval merchants and their conception of the rights of authors was limited to that obtaining in the market place. It was not until relative political liberty, the breaking down of the guild system, the rise of the fashionable author and the great changes of the late Seventeenth Century in England came into being that we find the first beginning of the now accepted modern theories of literary property. These first arose out of the economic struggles of booksellers.<sup>12</sup> The resultant statutes, and the judicial opinions which are their reflex, have mirrored the changes in scientific, aesthetic and metaphysical thought which have marked the progress of modern civilization and form frequently unrecognized milestones in political development. Thus it is obvious that the views which now prevail as to the foundation of literary property are a relatively modern development. They date from a great opinion of Lord Mansfield more remarkable for its sense of natural justice

§ 9  
The Stationers  
Company.

9—See 1 Hallam Const. History, 258.

10—Donaldson v. Becket, 17 Hans. Parl. Hist. 993 (Lord Camden).

11—Maugham: Laws of Literary Property, 12; Cohen: Copyright, p. 2.

12—See on this period, Birrell: op. cit.

and eloquence than logical legal accuracy.<sup>13</sup> Since however, he reflected changed conceptions and times, with his usual consummate force and persuasiveness, it is not strange that his views have prevailed here, as elsewhere, save, and this has been largely the case, in so far as they conflicted with the stern necessities of civilization.

§ 10  
The struggle  
for perpetual  
copyright.

The theoretical basis for the claim that property exists in literary productions will have been noted. Property may be perpetual or for a limited time. Ordinarily where property does not arise by virtue of some statute or contract, it is perpetual. Governmental judgment has, however, always been opposed to the possibilities inherent in asserted perpetual property in thoughts. The remedies afforded for the vindication of such asserted rights at common law, were deemed inadequate by their possessors. Resultant legislation is found almost as soon as the rights were asserted in a court of justice. This legislation at first dealt only with published books.

§ 11  
The great  
controversy  
on perpetual  
copyright and  
common law  
copyright  
after publi-  
cation.

Whether or not an author at common law had rights which survived his publication of his work, whether these rights existed coterminously with statutory rights given an author after publication by the celebrated Statute of Anne (April 10, 1710)<sup>14</sup> or were taken away or suspended by this and similar statutes subsequently enacted both in England and the United States, were the subject of historic legal controversies.

§ 12  
The Star  
Chamber.

In England, governmental regulation of printed matter, aside from monopolistic patents to the so-called Kings Printers and patents to the University of Cambridge first resided in the Court of Star Chamber. It dealt with unlicensed printers and writers whose works were obnoxious to Church or

13—*Millar v. Taylor*, 4 Burr. 2408; Cf. *Tonson v. Collins*, 1 W. Bl. 300, 321 (where the opinions are interpolated in the arguments of counsel).

14—See § 248.

State in a drastic and summary fashion. No one appears to have been bold enough to assert a claim of common law copyright before it, judging from its reported proceedings. It issued decrees regulating the sale and printing of books from time to time and codified these in 1637 into a decree which formed the basis of the Licencing Act<sup>15</sup> passed by a Parliament of Charles II. It provides,—so far as material,—that no book might be published in England, the exclusive right of printing which belonged to the Stationer's Company, or to any other person, as a result of Letters Patent, Order, entrance in the Register Books of that Company or otherwise. The Licencing Act expired in 1679.

§ 13  
The Licencing Act.

The history of the Stationers Company and its Register Books have been rendered accessible, as pointed out by Mr. Birrell, through the zeal and learning of Mr. Edward Arber. From these it appears that from the very first,<sup>16</sup> entries were required to be made in the Registers of all new publications and reprints, at the date of publication, that such entries were, *by usage of the Company*, made *only* in the name of members of the Company, and that such members deemed themselves the owners, in perpetuity, of the exclusive right to publish the works, so entered, in their names. The works so entered were called the "copies" of the member entering them. In by-laws of the Company adopted in 1681 and 1694, they recited their usages as above, and stated that the members in whose name copies were entered, "ought to have the sole printing thereof."<sup>17</sup>

§ 14  
Beginning of need for registration.

§ 15  
Beginning claim property in exclusive right to publish.

After the expiration of the Licencing Acts, the members of the Stationers Company made repeated applications to Parliament for a new Licencing Act. Their efforts finally, in 1710, resulted in the famous

§ 16  
The Statute of Anne.

15—13, 14 Car. II, c. 33.

16—1556.

17—Birrell, 79, 81.



Statute of Anne,<sup>18</sup> discussed elsewhere in this work.<sup>19</sup> Its effects were not immediately apparent but ultimately precipitated the famous legal and literary battles of the booksellers for perpetual copyright.

§ 17  
The Battle of  
the Books.

The Statute of Anne dealt both with books which had been published and with new books and gave rights, limited in time, in connection with each. After the expiration of the term prescribed by the Statute, Scotch and country booksellers began to print copies of some of the old works in question. Early encounters in the Court of Chancery resulted in favor of the London booksellers, possibly, as Mr. Birrell suggests, because of the expense of defending actions under the early Chancery practice. But the results were not satisfactory and hence a collusive suit was brought, at law, in 1760, to restrain infringement of an alleged perpetual copyright in "The Spectator." This action, entitled *Tonson v. Collins*,<sup>20</sup> came on to be heard before Lord Mansfield. It was twice argued by leaders of the English bar, at great length, but the Court having heard the suit was collusive,<sup>21</sup> refused to decide it.

§ 18  
*Tonson v.*  
*Collins.*

§ 19  
*Millar v.*  
*Taylor.*

In 1766, a second action was brought, at law, *Millar v. Taylor*,<sup>22</sup> involving Thompson's "The Seasons." It was argued twice before Lord Mansfield, Willes, Aston and Yates, JJ. The Court, in most elaborate opinions, held that the copyright in a book belonged to an author at common law, was perpetual and not taken away by the Statute of Anne. Mr. Justice Yates dissented, it being the first time the Court had disagreed in Lord Mansfield's time. No appeal was prosecuted.

§ 20  
Perpetual  
copyright  
sustained.

18—8 Anne, c. 19.

19—See § 249.

20—1 W. Blackstone, 300, 321.

21—4 Burr. 2327.

22—4 Burr. 2303.

Thereafter, a contest over the same work precipitated the famous suit of *Donaldson v. Becket*.<sup>23</sup> The lower Court followed *Millar v. Taylor*<sup>22</sup> but, on appeal,<sup>23</sup> the House of Lords reversed the decision, holding that if there had been a perpetual common law copyright in a work after its publication, it was taken away by the Statute of Anne. This decision, discussed elsewhere,<sup>24</sup> forever ended perpetual copyright in published works in England. It was followed, and determined the fate of a similar claim, in the United States.<sup>25</sup>

§ 21  
*Donaldson v. Becket.*

§ 22  
Final and decisive defeat of perpetual copyright.

The countervailing influences that affected this question are indicated in the following passage:

“All arguments in support of the rights of learned men in their works must ever be heard with great favor by men of liberal minds to whom they are addressed. It was probably on that account that when the great question of literary property was discussed some judges of enlightened understanding went to the length of maintaining that the right of publication rested exclusively in the authors and those who claimed under them, for all time, but the other opinion finally prevailed.”<sup>27</sup>

All these questions, then, are now settled adversely to the author,<sup>26</sup> and their further extended discussion is unnecessary. But in the course of this controversy, which has engaged the attention of great judicial and legal minds, certain juridical concepts as to the fundamental nature of copyright were formed which have profoundly influenced not

§ 23  
Influence of the controversy on subsequent legislation and decisions.

<sup>23</sup>—17 *Hans. Parl. Hist.* 991; 4 *Burr.* 2408; 2 *Brown's Parl. Cas.* 129.

<sup>24</sup>—See § 249.

<sup>25</sup>—*Wheaton v. Peters*, 8 *Pet.* 591, 8 *L. ed.* 1055.

<sup>26</sup>—*Donaldson v. Becket*, 4 *Burr.* 2408; *Wheaton v. Peters*, 8 *Pet.* 591, 8 *L. ed.* 1055.

<sup>27</sup>—Lord Kenyon, Ch. J., writing in 1798, in *Beckford v. Hood*, 7 *Term. R.* 620.

merely the technical, legal, but also the legislative, point of view with respect to intellectual property. These legislative views have constantly differed in detail.

§ 24  
Subject  
matter of  
Statutory  
copyright:  
published  
works.

In the United States, and in England up to the passage of the present "Copyright Act 1911," all legislation, save with respect to dramatic and similar works, presented, however, one fundamental distinction, that is, it dealt only with the rights of the creator of intellectual property on and after his making copies of his work public, that is, publishing it. Prior to publication his rights were deemed to rest in the common law. A distinction was made between privacy and publicity. A shadowy line existed between even a qualified privacy on the one hand, as, for example the circulation of copies of a work amongst the author's friends, and a qualified publicity on the other hand, as, for example, a single sale of a copy to a single member of the public. The line of demarcation was not easy to draw on specific states of fact, but its existence and fundamental character was, and is, of primary importance.

§ 25  
Common law  
rights:  
unpublished  
works.

§ 26  
Publication:  
the dividing  
line.

Copyright in the United States is twofold and distinct. Copyright before publication, in so far as it exists, and is enforceable, is a right created by the common law.<sup>28</sup> Copyright after publication is purely a matter of statute.

§ 27  
Copyright in  
the United  
States: at  
common law.

§ 28  
Under  
statutes.

"In this country the right of an author to multiply copies of books, maps, etc., after publication is the creation of the Federal Statutes. These statutes did not provide for the continuation of the common law right, but under constitutional authority created a new right."<sup>29</sup>

28—Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055.

29—Globe Newspaper Co. v. Walker, 210 U. S. 362, 52 L. ed. 1099; see also Banks v. Manchester, 128 U. S. 245, 32 L. ed. 426.

While there are dicta<sup>30</sup> which deem that a right of circulating copies existed at common law after publication as well as before, but has now been superseded by statute, whether this is true or not, is of no practical importance since the Supreme Court holds that:

“Recent cases in this Court have affirmed the proposition that copyright property under the Federal Law is wholly statutory and depends upon the rights created under the acts of Congress passed pursuant to the authority conferred under Art. 1 of the Federal Constitution.”<sup>31</sup>

While the term “copyright” is loosely used to cover both species of property, that is, an author’s common law copyright or his statutory copyright, the word is a source of confusion unless so qualified as to show whether reference is being made to a common law or statutory copyright.<sup>32</sup> Since the chief value of any literary or artistic work is realized on and after publication, the law of statutory copyright (except in the case of certain dramatic compositions and paintings) far transcends that of common law copyright in importance. Since the statutes creating and defining copyright after publication have been frequently changed and added to, the term “copyright” means and has meant very different things under different statutes, and any definitions of the term except statutory ones should be distrusted.

It is a matter for some little astonishment to note how consistently this unquestionable fact is ignored by Courts and text writers. The slightest comparison between the nature of the right granted

§ 29  
Confusing  
terminology.

§ 30  
Preponderat-  
ing role of  
statutory  
copyright.

§ 31  
Different  
meanings of  
term due to  
its sources.

30—Holmes v. Hurst, 174 U. S. 82, 43 L. ed. 904; American Tobacco Co. v. Werckmeister, 207 U. S. 284-291, 52 L. ed. 208-214.

31—Bobbs-Merrill Co. v. Straus, 210 U. S. 346, 32 L. ed. 1097.

32—Baron Parke, in Jefferys v. Boosey, 4 H. L. C. 920.

§ 32  
Misleading  
quotations and  
definitions.

under the Eighteenth Century statutes and of the rights given by Twentieth Century legislation shows the confusing futility of quoting or adopting Eighteenth Century definitions of statutory copyright, yet such quotation is by no means unusual.

Thus, in the latest edition of Bouvier's Law Dictionary (Vol. 1, p. 674), published in 1914, the article on copyright opens with the following definition:

“Copyright: The exclusive privilege secured according to certain legal forms, of printing or otherwise multiplying, publishing and vending copies of certain literary or artistic productions.”

The merest inspection of Section 1 of the present Act, or of the present British statutes, will show the total inadequacy of this definition to describe contemporaneous statutory copyright with its rights of translation, variation of form, performance, representation, etc., yet on the other hand the definition, although not purporting to be so, is a very fair generalization of the rights secured under early and now repealed statutes. It should also be noted in connection with this definition as is shown elsewhere, that copyright is not limited to literary or artistic products.

Mr. Drone says (p. 101): “Copyright is the exclusive right of the owner to multiply and dispose of copies of an intellectual product.”

This definition is also confusing, when taken by itself, because of its similarly patent inadequacy. Mr. Drone, however, adds, that “copyright is also used synonymously with literary property” (p. 101), which he defines elsewhere (p. 97) as “the exclusive right of the owner to possess, use and dispose of intellectual productions.” The latter definition is too indefinite to be a helpful description of present statutory copyright and is also inadequate

as it does not cover the right to vary the form of a work nor possibly its public exhibition, etc.

The English and American statutes have been and continue to be very different. Since copyright after publication is purely statutory, it is a self evident, but too frequently overlooked truth, that the opinions in cases involving such copyright must always be read in the light of the statutes existing, first, at the time when the copyright was obtained, and, secondly, when the decision was rendered.

This work deals primarily with copyright in the United States under the present United States Copyright Act (Act of March 4, 1909, as amended), that is to say, with statutory copyright. It follows from what has been said of the gradual development of this legislation that in order that the present Act may be properly understood, a short résumé of salient features of prior United States statutes, forms a necessary introduction to the subject, and since these statutes were passed under a clause of the Federal Constitution authorizing copyright legislation, a discussion of this clause is also an essential preliminary to a proper understanding of this branch of law.<sup>33</sup>

§ 33  
Nature and  
scope of pres-  
ent work.

33—It is a matter of some little astonishment that Mr. Drone's work contains practically no discussion of this clause, nor is it considered in detail in any other modern work.

## CHAPTER II

### THE HISTORY OF STATUTORY COPYRIGHT IN THE UNITED STATES

§ 34  
Early state  
copyright  
legislation.

Prior to the adoption of the Federal Constitution in 1787, all of the original thirteen States, other than Delaware, had passed laws<sup>34</sup> conferring the right to make and circulate copies publicly, upon the authors of books, pamphlets, maps and charts, for limited times after publication. These acts were passed in response to a resolution adopted by the Colonial Congress, in 1783, recommending State action. Some of the statutes never came into force, being conditional upon all the States adopting copyright laws; others have been expressly repealed and the remainder are superseded by Federal legislation adopted pursuant to the provisions of the Federal Constitution. They have, however, a distinct value as showing the contemporary view of the subjects of copyright, and suggest reasons for some of the apparently contradictory cases. Thus the early cases all insisted that a work must have literary merit in order that copyright might subsist therein,<sup>35</sup> which is not now the law.<sup>36</sup> In this connection it should be noted that all of these State statutes were passed, as generally expressed in their preambles, "for the encouragement of liter-

34—Conn. 1783, Jan. Sess.; Mass. 1783, Act March 17, Chap. 26, Laws 1783; Maryland, 1783, Act April 21; New Jersey, 1783, Act May 27; New Hampshire, 1783, Act Nov. 7; R. I. 1783, Dec. Sess.; Penn. 1784, Act March 15; S. C. 1784, Act March 26; Va. 1785, Act Oct. 17; N. C. 1785, Act. Nov. 19; Ga. 1786, Act Feb. 3; N. Y. 1786, April 29.

35—See § 104.

36—See § 115.

ature and genius," or to promote "literature" or secure "literary" property. These acts are interesting chiefly, at the present time, to the student of the history of copyright. A curious feature of many of the laws was that provision was made for ensuring an adequate supply of copyrighted works, either from the proprietor of the copyright or, after judicial proceedings, from responsible third persons.

The present United States Copyright Act<sup>37</sup> is entitled "An Act to Amend and Consolidate the Acts Respecting Copyright."

§ 35  
The present  
Federal Copy-  
right Act and  
its effect.

Its repealing clause<sup>38</sup> is so broad that except as to litigation pending or infringement which had occurred before the passage of the Act, all prior copyright legislation, save for possible minor exceptions considered elsewhere,<sup>39</sup> must be deemed repealed. In view of the passage of time since the enactment of the Act, the first, and major exception is now unimportant. This renders detailed discussion of such prior legislation unnecessary and the purpose of this chapter is merely to indicate the changes and gradual development of such legislation in the United States, in a very brief and summary form, so that the practitioner may have a ready reference to the statutes, understand their growth and development, and be warned by reference to them, if decisions rendered under their provisions are inapplicable under other statutes. The present Act is discussed in detail in this work and an effort has been made in citing decisions to indicate such as are not authorities under it because of statutory changes.

The first English Copyright Act became a law in 1710.<sup>40</sup> The first Federal Copyright Law was

§ 36  
The First

37—Act of March 4, 1909.

38—See § 1653.

39—See § 1660.

40—8 Anne, c. 19.



Federal Copy-  
right Act.

§ 37  
Its limited  
subject matter  
and duration.

§ 38  
Limited nature  
of right  
conferred.

§ 39  
Provisions as  
to penalties;

§ 40  
Assignments;

§ 41  
Deposits;

§ 42  
Renewals;

§ 43  
Exclusion of  
works pub-  
lished abroad,  
from United  
States  
copyright;

passed in 1790 (Act of May 31st). It was closely modeled upon the English statute. It provided "for the encouragement of learning" by securing to the authors or proprietors of printed or published maps, charts, and books, if citizens of the United States or resident therein, copyright for the term of fourteen years. The right given was merely the sole right and liberty of printing, reprinting, publishing and vending the same. No performing right or right of translation was conferred. Printing and publishing were apparently used largely as synonyms in it. The Act provided a penalty, half to the author or proprietor of the copyrighted work, half to the United States, as to all copies of the work printed, reprinted, published, imported, sold or exposed for sale, without the prior consent in writing of the author or proprietor signed in the presence of two witnesses. This, and the similar provision in the English statute, accounts for the early cases holding on *a fortiori* reasoning, that an assignment or copyright was invalid unless in writing.<sup>41</sup> Deposit of a printed copy of the title of the work was required to be made before publication, in the office of the clerk of the District Court in the district where the author or proprietor of the work resided. A copy of the record of the deposit was required to be published in a newspaper, and a copy of the work to be deposited in the office of the Secretary of State, within six months after publication. A renewal term of fourteen years was provided for the author, if living, and a citizen of the United States, or resident therein.

The Act further provided that nothing in that act should be construed to prohibit the importation, vending, reprinting or publishing within the United States, of any map, chart or book written, printed or published by any person not a citizen of the

41—See § 1513.

United States, in foreign parts or places without the jurisdiction of the United States.

Special provision was made for the protection of manuscripts, by an action for damages, on the case, founded upon the Act.

The changes and additions in and to this statute may now be briefly indicated.

By the Act of April 29, 1802, as a supplement to the first statute, its benefits were extended to the arts of designing, engraving, etching and working historical or other prints, personally, or through others, from the author's own designs. A notice of copyright was required to be printed in every copy of each book and to be engraved on each plate and printed on each print, or copy of a map or chart. The nature of the right was not enlarged, although the objects in connection with which it might be obtained were increased.

In the Revision of 1831 (Act of February 3, 1831) musical compositions were added to the list of copyrightable matter. The Act was, expressly, restricted to works which had not been "printed and published." The scope of the right was not increased but the term was enlarged from fourteen to twenty-eight years and a renewal right given to the author or his family to the exclusion of the proprietor. A copy of the work and not merely of its title (as before) was required to be deposited with the clerk. Manuscripts might be protected by injunction from printing or publication, the right to recover damages in connection therewith being preserved.

By the Act of June 30, 1834, transfers or assignments of copyright were required to be in writing and to be recorded to be valid as against subsequent bona fide purchasers and mortgages.

By the Act of August 10, 1846, the proprietor of the copyright in books, maps, charts, musical compositions, prints, cuts and engravings was re-

§ 44  
Manuscripts.

§ 45  
Subsequent  
legislation.

§ 46  
1802: Subject  
matter  
enlarged:  
Prints and  
engravings.

§ 47  
Notice of  
copyright  
prescribed.

§ 48  
1831: Musical  
compositions  
made copy-  
rightable.

§ 49  
Duration and  
renewal  
changed.

§ 50  
Place of de-  
posit altered.

§ 51  
Manuscripts  
protected  
further.

§ 52  
1834: Provi-  
sion for  
written  
assignments.

§ 53  
1846: Destin-  
ation deposits  
altered.

quired to deliver one copy within three months from publication to the Librarian of the Smithsonian Institution and one to the Librarian of Congress.

§ 54  
1856: Scope of copyright increased by addition of performing rights in dramatic compositions.

In August, 1856<sup>42</sup> an act was passed providing that any copyright thereafter granted in any "dramatic composition" should be deemed to confer along with "the sole right to print and publish" the same, "the sole right also to act, perform or represent the same," "on any stage or public place." Appropriate penalties for its violation were added. It was provided that nothing contained in the Act should impair any right to act, perform, or represent such dramatic composition, acquired previously to the securing of copyright or to restrict the author's rights to apply to equity for the further protection of his rights.

§ 55  
Effect of foregoing Act.

This legislation overruled the prior rule that since statutory copyright was limited to the right to circulate copies and performance was not a copy, anyone might perform a published dramatic work without its author's or proprietor's consent.<sup>43</sup>

§ 56  
1865: Photographs made copyrightable.

By the Act of March 3, 1865, photographs were added to the list of copyrightable matter "to the same extent and upon the same conditions" as in the case of prints and engravings.<sup>44</sup> The Act also provided for a demand by the Librarian of Congress, if the copy to be deposited with him was not deposited and for a forfeiture of the copyright on non-compliance with the demand. The Statute also defined "book" to mean, for the purpose of the Act, every volume and part of a volume, together with all maps, prints, or other engravings belonging thereto and second or subsequent editions of the book, if containing additions to the first edition.

§ 57  
"Book" defined by statute.

§ 58  
1870: Works

By the Act of July 8, 1870, a complete revision

42—Chap. 169, First Sess., 34th Congress.

43—See § 351.

44—This Act overruled the decision in *Wood v. Abbott*, 5 Blatch. 325.

and amendment of the Copyright Acts was undertaken. Negatives of photographs, paintings, drawings, chromos, statues, statuary and models or designs intended to be perfected as works of the fine arts, were added to the list of copyrightable works. Copyright under this Act consisted of the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the work and of public performance or representation, if it was a dramatic composition. Authors might reserve the right of dramatization and translation of their books. Titles of copyrighted works, or descriptions thereof as the case might be, were to be filed, before publication, with the Librarian of Congress, instead of with the Clerks of the respective District Courts, as before, and two copies of the work, unless a work of the fine arts, and in that case a photograph thereof, were to be mailed to such Librarian, within ten days from publication. The form of notice to be placed on copyright works was changed to read:

of the fine arts made copyrightable.

§ 59  
Scope of copyright under Act.

§ 60  
Formalities required by it.

“Entered according to act of Congress, in the year . . . ., by . . . ., in the office of the Librarian of Congress, at Washington.”

§ 61  
Form of notice of copyright altered.

Omission of this notice on any copy of any edition prevented the bringing of an action for infringement. The notice was to be on the title page or the one immediately following it on books, or on the face or front or face of its mount, in the case of other copyrighted works. Penalties for false notice of copyright were provided and protection for manuscripts continued, in so far as the right to recover damages was concerned.

§ 62  
Effect of its omission.

§ 63  
False notice of copyright.

The Revision of December 1, 1873,<sup>45</sup> made no change in the subjects of copyright, or the nature or scope of the right granted therein or in connection therewith.

45—R. S. Title 60, c. 3, §§ 4948-4971.

By the Act of June 18, 1874, the nature of the prescribed copyright notice was made permissively alternative, to be either as in the prior Act, or thus:

§ 64  
1874: Form  
of notice of  
copyright  
altered.

“Copyright 18           ,           by.....”  
    { Year           } (Name of party by whom taken  
    { entered       }           out.)

§ 65  
Labels and  
prints for  
utilitarian  
purposes to be  
registrable,  
but not copy-  
rightable.

The Act further provided that the terms “engravings, cuts and prints” should be construed to apply only to “pictorial illustrations or works connected with the fine arts” and “no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office.” The Commissioner of Patents was to enter and register the same in accordance with the regulations laid down by law with reference to copyright of prints, his fee to be \$6.00 for recording the title, except as to prints of trade marks.

§ 66  
Machinery for  
their registra-  
tion.

§ 67  
Effect of this  
Act and  
question as to  
its repeal.

The Copyright and Patent Offices, on the advice of the Attorney General of the United States, deem the last mentioned Act, in so far as it deals with prints and labels, to be used for other articles of manufacture, to be unrepealed and in full force and effect. The question whether this view is sound is discussed elsewhere in this work.<sup>46</sup>

§ 68  
1882: Copy-  
right notices  
on certain  
designs.

The Act of August 1, 1882, provided for placing notices of copyright in designated places on “designs for molded decorative articles, tiles, plaques or other articles of pottery or metal, subject to copyright.”

§ 69  
1891: The  
Chace Act;  
scope of copy-  
right enlarged.

By the Act of March 3, 1891, it was made unnecessary to reserve rights of translation or dramatization. Such rights were expressly conferred, whether reserved or not. It was further provided that the deposit of copies must be made not later than the day of publication in this or any foreign country; “that copies in the case of books, photographs,

§ 70  
Translation  
and dramati-  
zation.

chromos or lithographs must be printed from type set or plates made or from negatives or drawings on stone made in the United States” or from “transfers made therefrom.” The importation of copies thereof not made in the United States, with minor exceptions, or of plates or negatives, drawings or stone to be used for making them, not set or made in the United States, was prohibited. This Act made another great and important innovation. It repealed the provisions of the prior law which limited copyright to citizens of the United States, or residents therein and which provided for full freedom in publishing, importing or selling books, musical and dramatic compositions, prints, photographs, etc., if made by non-resident aliens. Citizens or subjects of nations or countries, giving American citizens copyright on the same basis as to its own citizens, or, which were parties to international conventions for reciprocity in copyright, to which the United States might, at its pleasure, become a party, were put on the same footing as American citizens with respect to obtaining the benefits of American copyright. The so-called manufacturing clause in the Act was intended as a protection to the printing interests in connection with this fundamental change in the classes of persons who might procure copyright.

The Acts of March 2, 1895, and January 6, 1897, dealt merely with changes in penalties and remedies.

The Act of March 3, 1897, was passed to overcome the force of decisions like *Rigney v. Raphael Tuck & Sons Co.*<sup>47</sup> and *Rigney v. Dutton*<sup>48</sup> which held affixing a false notice of copyright to a non-copyrightable article was not a violation of the law. As will be shown, the law is now back on the basis

§ 71  
Domestic  
manufacture  
prescribed for  
certain printed  
matter.

§ 72  
Extension  
of right to  
copyright to  
certain non-  
resident aliens.

§ 73  
1897: Law as  
to false  
notices of  
copyright  
altered.

47—77 F. 173.

48—77 F. 176.

upon which it was when these decisions were rendered.<sup>49</sup>

§ 74  
1904: Louisiana Purchase Exhibition legislation.

The Act of January 7, 1904, was a temporary act designed for the protection of exhibitors at the Louisiana Purchase Exposition. Its chief interest at the present time is because of a decision under it which bears on the question of whether a publication abroad, prior to copyright obtained in the United States would defeat such copyright. This decision and the Act are discussed elsewhere.<sup>50</sup>

§ 75  
1905: Ad interim copyright for works in foreign languages first published abroad.

The Act of March 3, 1905, was the first ad interim copyright law. It was designed to procure the proprietors of books in foreign languages, published abroad, to cause their publication in the United States, or in default thereof to facilitate their American translation. The Act provided that the author or proprietor of a book in a foreign language published in a foreign country, might, before publication in the United States, reserve copyright therein, for twelve months, by deposit of one complete copy, within thirty days after first publication of the work in that foreign country and by printing on the title page, or the one following, of that copy and all others sold or distributed in the United States of a notice reading:

§ 76  
Formalities.

“Published (*date of first foreign publication*) nineteen hundred and (*year*). Privilege of copyright in the United States reserved under the Act approved March 3, nineteen hundred and five by (*Proprietor's name*).”

If within that twelfth month from the date of such first foreign publication, the copyright proprietor filed the title of the book and two copies either in the original foreign language or translated into English, printed in either case from type set in the United States, or from plates made therefrom, con-

49—See § 1350.

50—See § 745.

taining the notice of copyright required by the copyright laws then in force, he obtained a permanent copyright for twenty-eight years from the date of recording the title, consisting of the sole liberty of printing, reprinting, publishing, vending, translating and dramatizing the said book. This Act applied only to citizens and subjects of nations permitting United States citizens to obtain the benefit of copyright on substantially the same basis as their own citizens. This Act as will be shown elsewhere<sup>51</sup> may still be in effect as far as such ad interim copyrights are concerned, although it probably is repealed.

The present Act being the Act of March 4, 1909 (in force July 1, 1909), has been slightly amended since enactment by the Acts of August 24, 1912, March 2, 1913, and March 28, 1914. The Act of 1909 was passed substantially without debate, largely upon the strength of Committee Reports. That of the Committee on Patents in the House of Representatives (House Report 2222, 60th Congress, 2nd Session) was also adopted, in extenso, by the Senate Committee on Patents which had the Bill in charge in the Senate (Senate Report 1108, 60th Congress, 2nd Session). The remainder of this volume is largely devoted to a detailed discussion of the present Act.

From the foregoing brief résumé of salient features of American copyright legislation it will be noted (and this is more forcibly apparent, if the first copyright law passed by Congress be compared to the present one): First, that the subjects of statutory copyright have not been the same at all times, but have shown a constant tendency to increase, and:

Secondly, that the term copyright originally used to denote a single right, that is, to print and publish,

§ 77  
1909: The statute now in force.

§ 78  
Legislative history.

§ 79  
Exemplification of increase of subject matter of statutory copyright.

§ 80  
Growth of rights comprising statutory copyright.

51—See § 535.



has meant very different things under different Acts, since new rights were from time to time added, until copyright became a term used largely for convenience of legal nomenclature, comprehending various, somewhat dissimilar rights, having only a generic relationship, either in their incidents or attributes.

§ 80a  
1913: The  
Panama Ex-  
position Act.

The Act passed in connection with the Panama-Pacific Exposition<sup>52</sup> requires notice. No decisions applying it have been found. It provides, that it shall be unlawful for any person, without authority of the proprietor thereof, to copy, imitate, reproduce or republish any pattern, model, design, trademark, copyright or manufactured article protected by the laws of any foreign country by registration, copyright, patent, or otherwise, which shall be imported, for exhibition at the Panama-Pacific International Exposition, and there exhibited.

The remedies provided are substantially those provided for by Section 25 of the Copyright Act, except that no provision appears to be made for fixed or stipulated damages. Sections 25 to 27 inclusive, and 34 to 40 inclusive, of the Copyright Act are made applicable to civil proceedings brought under the Act in question. Provision is also made for criminal proceedings in cases of wilful infringement for profit. The duration of the rights given was to end three years from the closing of the Exhibition and to begin on the date of the arrival of the protected works, in the Exposition grounds at San Francisco. Provision was made for a register of certificates of registration, which was to be deposited in the Copyright Office. The certificates were to be legal proof of ownership of the articles, etc., registered. There is no provision in the Act making registration compulsory nor for affixation of notice of copyright to copies.

52—Chap. 14, 63rd Congress, Sess. I, 1913; Act of Sept. 18, 1913.

### CHAPTER III

## THE CONSTITUTIONAL BASIS OF COPYRIGHT LEGISLATION IN THE UNITED STATES

*Federal Constitution—Article 1—Section 8:—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.*

As has been just shown,<sup>53</sup> Congress has exercised the power given it by the foregoing provision of the Constitution, continuously, since 1790. Under elementary rules of constitutional law, exercise by Congress of a power to legislate conferred upon it by Article 1 of the Constitution, will prevent State legislation upon the same subject. Hence, copyright, after publication, exists solely under, and is measured entirely by, the Federal statutes.<sup>54</sup>

Since these statutes have been passed pursuant to the provisions of an express constitutional power, they are necessarily limited by the boundaries of that power. Since Congress will not be presumed to have exceeded its constitutional powers, and since every Act passed pursuant to such a power will, if possible, be so interpreted that its provisions may be deemed in accordance with the power under which it was enacted, it would seem that any discussion of American copyright law should open with a discussion of this provision of the Constitu-

§ 81  
United States  
copyright,  
after publica-  
tion, solely  
creature of  
Federal  
statutes.

§ 82  
Construction  
of such stat-  
utes: as  
limited by  
their constitu-  
tional origin.

53—See §§ 36-78, *ante*; *Banks v. Manchester*, 128 U. S. 245, 32 L. ed. 426.

54—See *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055.

§ 83  
Limitations on  
Congressional  
power as to  
copyrights.

§ 84  
The effect of  
the general  
rule of broad  
construction  
of constitu-  
tional powers.

§ 85  
Importance of  
discussion of  
this neglected  
constitutional  
clause.

§ 86  
Federal  
copyright can  
only be in  
writings.

§ 87  
What are  
"writings."

tion and that all uncertain or ambiguous provisions in the Statutes should be construed in the light of, and with the aid of, this provision.

As a preliminary, it should be noted, that the power given is a limited, not a general one. It is confined to Acts passed for one specified purpose—promotion of the progress of science and the useful arts—and, in so far as it deals with copyright, it is confined to an "author's writings."

Nothing could be more futile, however, than to deem that the literal reading of this clause marks the limit of Congressional power, conceded or asserted, with respect to copyright legislation. There are relatively few cases which discuss this power but these show that the same amplification and extension of language by legislative and judicial construction has taken place with respect to this clause as has taken place with respect to other powers conferred by the Constitution, upon Congress. To a large extent, construction of the extent of the power, by scope of the legislation enacted, has prevailed. The dearth of judicial opinion on the subject is illustrated by the fact that there is no discussion of the clause in Drone or any subsequent text writer. The vast enlargement of the subject matter of copyright, and of the scope of copyrights when created, made by the present Act, as well as the considerations previously advanced, require a careful analysis of the power.

By express provision of the Constitution, copyright can only be conferred upon an "author" in his "writings."

The word "writings" in the Constitution has been interpreted, however, to mean something much more inclusive than the word implies when ordinarily used:

"By writings in that clause," said the

Supreme Court,<sup>55</sup> "is meant the literary production of those authors and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression."

§ 88  
Inclusive  
definition.

"An author . . . is 'he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.'—Worcester."

§ 89  
Photographs.

The question before the Court was whether a photograph could be deemed a "writing" within the Constitution.

The Court discussed the Acts passed by the first Congress of the United States, as a construction of the clause by the men contemporary with its adoption and deemed this construction, which bears out the above definition, of "very great weight" and rendered "almost conclusive" through not having been "disputed through a period of nearly a century."<sup>56</sup> As against the argument that the taking of a photograph was a purely mechanical and chemical operation, it was held that a photograph embodying an original intellectual conception of the subject was<sup>57</sup> a "writing" and the person who posed the subject and conceived the setting of the photograph was deemed its "author."

The Court refused to pass upon the question whether an ordinary photograph could be copyrighted. The elements of thought, arrangement and selection, which appealed to the Court in the Sarony case, are present, however, in the taking of all pho-

55—Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 58, 28 L. ed. 351.

56—Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 57, 28 L. ed. 351.

57—Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349. The lower courts had regarded this as a doubtful proposition. Schreiber v. Thornton, 17 F. 603; Sarony v. Burrow-Giles Lithographic Co., 17 F. 591.

tographs. Their manifestation is a matter of degree, but their presence, to some extent, no matter how small, is always demonstrable. The humblest taker of tin types has his subject sit at a favorable angle and arranges his accessories as best he may. The tourist who snapshots a landscape, tries to get the light "right," and to include the degree of foreground and perspective he deems artistic. Hence, it is not unnatural that in a later case, no difficulty was found by the Circuit Court of Appeals in holding a photograph of natural scenery, colored by hand, copyrightable.<sup>58</sup>

§ 90  
Writings  
must be  
"original"  
and expressed  
in physical  
form before  
copyright.

It should be noted that broad as the construction given the word writings be, it requires that ideas to be copyrightable must have been given visible expression, that is, that they must have been set forth in some reasonably permanent medium, and must be "original"<sup>59</sup> in a copyright sense.<sup>60</sup> An idea is too evanescent to be copyrighted until it has been crystallized in the form of a physical expression. This fact is, however, not the equivalent of saying that after an idea has been given visible expression and a copyright obtained in connection with this visible expression, that the incidents to the right so created may not be broad enough to prevent others from copying, not merely the concrete physical expression, of the idea, but in certain cases, any other possible expressions thereof. This is considered at another place,<sup>61</sup> as is the question whether writings must be such as are addressed to the eye<sup>62</sup> or whether they may be addressed to the other senses and still be copyrightable.

§ 91  
"Writings"  
and rights  
therein  
distinguished.

All writings are not copyrightable, however.

§ 92  
Writings  
which are not  
copyrightable.

58—*Cleland v. Thayer*, 121 F. 71.

59—*DuPuy v. Post Telegram Co.*, 210 F. 883.

60—See *Henderson v. Tompkins*, 60 F. 758 (cited with approval 188 U. S. 239, 47 L. ed. 460); *Bouccicault v. Fox*, 4 Blatch. 87.

61—See § 977.

62—See § 492.

Copyright acts must be passed for the promotion of the progress of science and the useful arts, for congressional power, in the premises is given for this purpose only. While Congress necessarily must determine very largely the nature and extent of copyright protection, its powers, in the last instance, are subject to the limitation that it could not enact a provision which plainly did not and could not tend to promote the progress of science and the useful arts. Thus, it may be argued, that an act which would permit copyright in a work in the public domain, accessible in this country, to its citizens, would be beyond the powers of Congress. Such a work would not be "original" with the applicant for copyright or with its predecessor in title. This question will be more fully discussed in the sections of this work dealing with the question as to whether there can be any American copyright in a work, where first publication has taken place without the United States.<sup>63</sup>

§ 93  
Works which cannot promote purposes of constitutional power.

It is for Congress, however, as stated, in the first instance, to determine what writings would tend to promote the progress of science and the useful arts. In prior statutes, various definite classes of writings were enumerated by Congress as the subject of copyright. The question with respect to the copyrightability of any individual work then, was, did it, or did it not, come within one of the enumerated classes. Under the present Act, however, all writings which Congress constitutionally could make copyrightable are made subject to copyright.<sup>64</sup> Hence the inquiry under the present Act in all such cases will go to the power of Congress to an extent not essential under prior acts.

§ 94  
Works in public domain.

§ 95  
Inclusive exercise of constitutional power, as to subject matter of copyright.

Just what the Courts in the past have deemed to promote the progress of science and the useful arts may now be considered. It may, in this connection,

63—See § 736.

64—Section 4.

§ 96  
Construction  
of copyright  
acts from  
constitutional  
point of view.

be laid down as a cardinal rule of construction that every copyright act passed by Congress should be so construed, if possible, that, as construed, it will promote the progress of science and the useful arts. By applying this rule of construction, various questions of constitutionality and non-constitutionality are avoided. Thus the statutes have never in terms declared immoral works not subject to copyright, but, by construing the Acts in the light of the constitutional provision, it seems that since an immoral work could not ordinarily promote the progress of science and the useful arts, the statutes should be so construed as not to include immoral works in their scope.<sup>65</sup>

§ 97  
What has  
been held to  
promote  
science and  
the useful  
arts.

The term "useful arts" as used in the Constitution, includes the fine arts<sup>66</sup> as a result of popular acquiescence in the legislative construction of this power in so including them. This is so well settled that, curiously enough, the Copyright Office in its Rules shows it does not regard works of the useful arts as subject to copyright, in many instances, a somewhat astonishing result in view of the language of the Constitution and of the present statute.<sup>67</sup> As a result of similar popular acquiescence, it may be deemed settled that music, the drama, literature of a non-scientific type and strictly utilitarian assemblages of printed facts "promote the progress of science and the useful arts." While it may safely be said that the inclusion of some of these works was undoubtedly the intention of the framers of the Constitution, as shown by the reasonable scope of the power, as read aside from its purpose, as expressed and while this is unquestionably the law, the result is far reaching. It may be questioned how a novel,

§ 98  
Effects of  
acquiescence  
in prior  
statutes.

65—Barnes v. Miner, 122 F. 480; Martinetti v. Maguire, 1 Abb. U. S. R. 356.

66—See Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 47 L. ed. 460.

67—See § 81.

for example, or a motion picture drama, can be said to promote the progress of science and the useful arts.

Any such promotion can only be in the sense that psychologically and physiologically, a worker's mind is said to need recreation and rest to enable future intellectual, creative effort. But it is obvious that reasoning such as this carries one far afield. It is even more difficult to see how ordinary directories or similar work can effect such promotion.<sup>68</sup> That such works are copyrightable, however, seems thoroughly established.<sup>69</sup> No one at the present time can question the constitutionality of the Acts which allow copyright in many works which cannot in any direct sense be deemed calculated to "promote the progress of science and the useful arts."<sup>68</sup>

§ 99  
Illogical and unexpected resultant condition of the law.

It should be recognized that copyright in such works is partly due to historical causes, partly through following English precedents without noting the constitutional differences obtained here and there, and partly because the narrow confines of the constitutional power were insufficient to enable a degree of protection deemed necessary by the community at large to be given to literary and artistic property. The latter condition led to legislation which transcended the language of the Constitutional provision but which was generally acquiesced in by the public. The primitive conditions existing in this country at the time of the adoption of the Constitution, were especially marked with reference to literary and artistic works. Although it is quite true that, as pointed out in the *Sarony* case (*supra*), the framers of the Constitution understood "the nature of copyright and the objects to which it was commonly applied," it cannot in view of the great difference of current and subsequent judicial opin-

§ 100  
Reasons underlying judicial approval of such popular acquiescence.

68—See remarks on this subject of Judge Platt in *Hartford Printing Co. v. Hartford Directory Co.*, 146 F. 332.

69—See § 112.



ion as to its scope and nature<sup>70</sup> be said, with any certainty, *what* they understood these to be, except as shown in the several statutes passed by Congress.

“The importance of the interests dependent on words, advances with the advance of civilization,” said Mr. Justice Earle, in *Jefferys v. Boosey*.<sup>71</sup> To which, it may be added that the conception of literary and artistic property at any given time is necessarily bounded by the limits of the material aspects of the civilization and prevailing intellectual views of that time. It should be recognized, accordingly, that whether or not a work promotes, or would tend to promote, the progress of science and the useful arts, in the ordinary sense in which such words are used, is not the true test as to whether it may, constitutionally, be made subject to copyright. Any work, which, directly or indirectly, would or could, tend to that result would be copyrightable as far as this proviso is concerned, but various works which it seems impossible to conceive to have any such tendency are, as shown, copyrightable also.

§ 101  
Commercial expediency, resting on popular acquiescence probably the true test of what “promotes” the progress of science and the useful arts.

§ 102  
“Public acquiescence” discussed.

It is useless to endeavor to work out this result logically. On the other hand, it is too firmly grounded in considerations of commercial expediency and necessity to be lightly overturned. Hence, it is not surprising that, at least in one case,<sup>72</sup> it was held that the power of Congress to grant copyrights, which comprised acting rights in connection with a novel, could not be questioned because of long continued public acquiescence (over 50 years) in such copyrights. This decision undoubtedly was a just one and reached a desirable result, but its reasoning presents difficulties. The Court did not discuss the period necessary to constitute a public acquiescence which would bar the individual from having

70—*Millar v. Taylor*, 4 Burr. 2408; *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055; *Jeffreys v. Boosey*, 4 H. L. C. 815.

71—4 H. L. C. 867.

72—*Harper Brothers v. Kalem Co.*, 169 F. 161.

his constitutional rights heard, on the merits. The present Act contains various provisions which show a marked legislative extension of what Congress apparently deems copyrightable. This Act was passed in 1909, and the public may be deemed to have "acquiesced" in its provisions, to the extent that many of these have not been questioned by counsel. It is deemed, however, that the doctrine of the principal case, if sustained by future decisions, should not preclude a proper examination of the questionable provisions of the Act on their merits, merely because causes have not yet, after the short interval of time since the passing of the Act, been heard, where these constitutional questions have not been discussed.

The ground adduced by the Circuit Court of Appeals, in the *Kalem* case, for sustaining the copyright there involved, when it was assailed on constitutional grounds, was quite unnecessary. The copyright was granted in the novel. When granted it comprised a right of dramatization and, potentially, of public performance of such dramatization. But the copyright was not in such dramatization nor performance, but in the novel. The right itself, or portions of the right, or resultants of its manifestation, thus appear, quite unnecessarily, to have been confounded with the work in which, or in connection with which, the rights arose and existed.<sup>73</sup> The economic developments underlying these questions, if recognized, facilitate their proper understanding.

In an extremely able opinion,<sup>74</sup> Judge Grosseup pointed out that at the time the Federal Constitution was adopted property rights in writings which were not strictly literary, had not yet been mooted, although such rights in strictly literary works were securely established. He points out that the fram-

§ 103  
Grosseup, J.,  
on the reasons  
underlying  
the enlarge-  
ment of  
constitutional  
power with  
respect to  
works, not

<sup>73</sup>—See *Kalem Co. v. Harper Bros.*, 222 U. S. 55, 56 L. ed. 92.

<sup>74</sup>—*National Telegraph News Co. v. Western Union Telegraph Co.*, 60 L. R. A. 805, 119 F. 296.

logically satisfying, the expressed purposes of the constitutional proviso.

ers of the Constitution in vesting Congress with the power under discussion, "unquestionably had literary authorship in mind," and continues:

"and were the intention of the framers of the Constitution to give boundary to the constitutional grant, many writings, to which copyright has since been extended, would have been excluded. But, here, as elsewhere, the Constitution, under judicial construction, has expanded to new conditions as they arose. Little by little copyright has been extended to the literature of commerce, so that it now includes books that the old guild of authors would have disdained; catalogues, mathematical tables, statistics, designs, guide-books, directories, and other works of similar character. Nothing it would seem, evincing, in its makeup, that there has been underneath it, in some substantial way, the mind of a creator or originator, is now excluded. A belief that in no other way can the labor of the brain, in these useful departments of life, be adequately protected, is doubtless responsible for this wide departure from what was unquestionably the original purpose of the Constitution."

§ 104  
Early views as to nature of subject matter of copyright: literary works.

The views enunciated in the language quoted are well illustrated by reference to the course of judicial decision.

The earlier decisions<sup>75</sup> all deem the Acts of Congress to be, in so far as they referred to books, limited to literary productions.

In *Baker v. Selden*,<sup>76</sup> language to the effect that the copyright law was not intended for the encouragement of mere industry, unconnected with learning, or the sciences, was quoted approvingly.

75—*Clayton v. Stone*, 2 Paine 382; *Wheaton v. Peters*, 8 Pet. 59, 8 L. ed. 1055; *Baker v. Selden*, 101 U. S. 99, 25 L. ed. 841; *Trade Mark Cases*, 100 U. S. 82, 25 L. ed. 550.

76—101 U. S. 99, 25 L. ed. 841.

In *Higgins v. Keuffel*,<sup>77</sup> the Court by Mr. Justice Field said, referring to the clause of the Constitution under discussion,

§ 105  
Intellectual  
works.

“This provision evidently has reference only to such writings and discoveries as are the result of intellectual labor. It was so held in *Trade Mark Cases*, 100 U. S. 82 where the Court said that ‘while the word writings may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are *original* and are founded in the creative powers of the mind.’ ”

The Court, accordingly, held a label, containing the words “Water proof drawing ink,” placed on a bottle, to designate the article contained therein, not to be subject to copyright since to be entitled to a copyright, it deemed the article must have, by itself, some value as a composition, apart from the article described, at least to the extent of serving some purpose other than as a mere advertisement, or designation, of the subject, to which it was attached.

§ 106  
Labels.

In *Burrow-Giles Lithographing Co. v. Sarony*<sup>78</sup> the Court held the Constitution to be broad enough to cover an Act authorizing copyright of photographs, in so far as they were representative of original, intellectual conceptions of the author.

§ 107  
Photographs.

It is to be noted that the expressions used in these opinions, viz.: “original” “intellectual” labor and “literary” labor, are by no means synonymous terms. The latter expression refers rather to the character of the product composed, or in course of composition, while the former refers to the mental process which is the essential of all creative effort. It may well be doubted whether judges writing in the days before the science of psychology had spread

§ 108  
Literary  
labor not now  
essential to  
copyright:  
but original,  
intellectual  
labor is.

<sup>77</sup>—140 U. S. 428, 431, 35 L. ed. 470, 471.

<sup>78</sup>—111 U. S. 53, 28 L. ed. 349.

unexpected illumination in dark places, intended to take quite such a distinction. The effect of the more recent decisions, however, is to draw just that distinction.

§ 109  
Mott v. Clow.

As late as 1902, Mr. E. J. Macgillivray in his work on Copyright<sup>79</sup> states that for a work to be copyrightable in the United States, "it must be an original literary or artistic work." In this opinion, he was undoubtedly largely influenced by an excellent opinion, rendered in *Mott v. Clow*,<sup>80</sup> from which he quotes largely in his work.<sup>81</sup>

That decision performed the valuable service of pointing out that the English decisions which have tended to hold that neither literary merit, intellectual labor, nor originality, either in thought or language, are necessary for a work to be copyrightable, rest upon the language of Acts passed by a Parliament, not acting under a limited constitutional power (a fact overlooked in the directory cases<sup>82</sup>) and holding that the Supreme Court meant what it said in *Baker v. Selden*.<sup>83</sup> The authority of *Mott v. Clow*<sup>80</sup> has, however, been seriously shaken, if not destroyed, from a practical point of view.

§ 110  
*Bleistein v. Donaldson.*

In *Bleistein v. Donaldson Lithographing etc. Co.*<sup>84</sup> the Supreme Court, in an elaborate opinion (Harlan, J., and McKenna, J., dissenting) reversed a decision, rendered by Lurton, Day and Severens, JJ., sitting in the Circuit Court of Appeals. The Supreme Court held it error for the lower Court to hold, as a matter of law, that ordinary circus posters, incapable of any use save advertisement, were not subject to copyright but that the question whether they were "original," "artistic" works subject to copyright was a question of fact which should, since

79—P. 236.

80—82 F. 316.

81—See pp. 238, 239 of his work.

82—See, for example, *Ladd v. Oxnard*, 75 F. 703 (a directory case).

83—101 U. S. 99, 25 L. ed. 841.

84—188 U. S. 239, 47 L. ed. 460.

the action was at law, have been submitted to the jury.<sup>85</sup> The Court, necessarily, held that a picture was none the less a picture and none the less a subject of copyright because it was intended solely to be used, as an advertisement, and that neither artistic or literary merit, even in a minor degree, were necessary to copyright. The Court said:

§ 111  
Literary or  
artistic merit  
not essential  
to copyright.

“We shall do no more than mention the suggestion that painting and engraving unless for a mechanical end are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs. *Burrows Lithographing Co. v. Sarony*, 111 U. S. 53, 28 L. ed. 349.”

This is the only direct reference in the majority opinion to the constitutional question involved. The minority dissented, on the opinion of the lower Court, on the ground that if a picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the Constitution, to protect its “author” in the exclusive use thereof. The majority opinion, indirectly, discusses the question, by its dissertation upon originality and artistic quality. The following excerpts from the opinion will serve as an illustration:

§ 112  
The minority  
view.

“It is obvious that the plaintiff’s case is not affected by the fact, if it be one, that the pictures represent actual groups—visible things—\* \* Others are free to copy the original. They are not free to copy the copy—\* \*. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwrit-

85—P. 250, 47 L. ed. 462.

ing and a very modest grade of art has in it something irreducible which is one man's alone. That something may be copyrighted unless there is a restriction in the words of the act. If there is a restriction, it is not found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories which may be copyrighted—\* \*. There is no reason to doubt that these prints in their ensemble and in all their details, in their design, or particular combinations of figures, lines and colors are the original work of the plaintiff's designer—\* \*. It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”

§ 113  
Effect of  
this decision.

The opinion did not discuss, and hence does not purport to overrule *Higgins v. Keuffel*<sup>86</sup> nor the *Trade-Mark Cases*.<sup>87</sup> Yet, while the precise points actually decided in these two cases may be deemed unaffected by the *Bleistein* case, their underlying conception that intellectual, literary or artistic merit was essential to copyright must be considered as overruled. It will be noted, from the language quoted, how largely psychological conceptions appear to have controlled the Court's views. Some of its remarks appear, with all deference, to be in the nature of assumption. Thus, the Supreme Court had not held directories copyrightable nor had the constitutional question as to whether they could be copyrighted in the United States, been discussed in the American, lower Court decisions, which followed English cases, decided where there could be no such constitutional question. To state that they are

§ 114  
Discussion of  
dicta in the  
opinion.

86—*Supra*, § 104.

87—*Supra*, § 105.

copyrightable without examining into this question, and to argue from such premise that circus posters are copyrightable is somewhat less impressive than is the usual reasoning in Supreme Court opinions. To deem the only restrictions on the question of what are copyrightable to be in the Act is to ignore the Constitution under which the Act was passed. Comparison of the prevailing opinion with that of the lower Court<sup>88</sup> will enable the professional reader to determine which, in his judgment, enunciates the sounder doctrine.

From the prevailing opinion, it would seem Mr. Justice Holmes deemed that neither literary or artistic merit, even of the lowest grade, was essential to copyright, as is probably the law, and further that the mere fact of composition, or manufacture, in itself manifests originality in such composition or manufacture. Just how the Court would be able to distinguish copying from memory, from any other "reaction upon nature" by a given individual, is not clear and how "science" and "the useful arts" can be promoted by circus posters also is not readily apparent. It is difficult to see under the Court's view as to what is, or is not, original, how anything is not original, that is not actually copied from a prior work, and this result seems necessarily involved in the decision.

The points not actually decided by the decision may be deemed open for further discussion, but it has been followed by the lower Courts, without apparently noting the somewhat narrow ground upon which it was actually decided, in holding catalogues of women's garments<sup>89</sup> and colored photographs<sup>90</sup> copyrightable.

From these opinions, it may be deduced:

(1) that neither literary or artistic merit, even

§ 115  
Result of  
the cases  
discussed.

88—104 F. 993.

89—National Cloak & Suit Co. v. Kaufman, 189 F. 215.

90—Cleland v. Thayer, 121 F. 71.



§ 116  
Literary  
merit not  
essential to  
copyright.

§ 117  
Intellectual  
labor beyond  
mere thought  
not necessary.

§ 118  
Originality  
necessary but  
this merely  
means absence  
of copying.

in a minor degree, is required to render a work copyrightable under the Constitution;

(2) that intellectual labor, if necessary for such purpose will be deemed to mean thought, in a physio-psychological sense;

(3) that originality is probably still necessary to make a work copyrightable but that this does not mean that the work must be unique either in whole or in part, but simply that it is not consciously copied or reproduced, literally, or colorably, in whole, or in part, from any other work or works;

(4) that the degree of such originality may be "very moderate;"<sup>91</sup> and finally

(5) that the Courts will deem nearly all writings, original in the sense just outlined, to be calculated to promote the progress of science and the useful arts, without even casual critical examination on the part of the Court.<sup>92</sup>

However, as stated by Judge Grosseup,<sup>93</sup> obviously there is a point where judicial expansion of the conception of what is copyrightable must cease.

§ 119  
Suggested  
limits upon  
what is copy-  
rightable, even  
if original.

"It would be both inequitable and impracticable to give copyright to every printed article. It would be difficult to define, comprehensively, what character of writing is copyrightable, and what is not. But, for the purposes of this case, we may fix the confines at the point where authorship properly ends and mere annals begin. Nor is this line easily drawn. Generally speaking, authorship implies that there has been put into the production something meritorious from the author's own mind; that the product embodies the thought of

91—Ladd v. Oxnard, 75 F. 703; National Cloak & Suit Co. v. Kaufman, 189 F. 215.

92—See Henderson v. Tompkins, 60 F. 758, and cases cited in text.

93—National Telegraph News Co. v. Western Union Telegraph Co., 60 L. R. A. 805, 119 F. 296.

the author, as well as the thought of others; and would not have found existence in the form presented, but for the distinctive individuality of mind from which it sprang. A mere annal, on the contrary, is the reduction to copy of an event that others, in a like situation, would have observed; and its statement in the substantial form that people generally would have adopted. A catalogue, or a table of statistics, or business publications generally, may thus belong to either one or the other of these classes. If, in their makeup, there is evinced some peculiar mental endowment—the grasp of mind, say in a table of statistics, that can gather in all that is needful, the discrimination that adjusts their proportions—there may be authorship within the meaning of the copyright grant as interpreted by the Courts. But if, on the contrary, such writings are a mere notation of the figures at which stocks or cereals have sold, or of the result of a horse race, or base-ball game, they cannot be said to bear the impress of individuality, and fail, therefore, to rise to the plane of authorship. In authorship, the product has some likeness to the mind underneath it; in a work of mere notation, the mind is guide only to the fingers that make the notation. One is the product of originality; the other the product of opportunity.”

These limits were further illustrated in an English case involving unusual facts. There the plaintiff, while drunk, wrote out such thoughts as occurred to him, and after he became sober again wrote out the same ideas for the purpose of proving, scientifically, that his language and handwriting, drunk or sober, were the same. He copyrighted both productions and when they were reproduced, sued for infringement. A jury to whom the question

§ 120  
The limit, in  
decision.

was left found the matter not to be a literary work. The Court called the work a drunken, unintelligible scrawl and refused to set aside the jury's verdict, although there was no dispute that the plaintiff had not copied the work from any other work.<sup>94</sup> This decision may be compared with Mr. Justice Holmes' remarks on the individuality of handwriting.<sup>95</sup>

The cases cited exhaust the list of opinions which discuss the constitutional questions involved. Since the statute now makes everything copyrightable which can constitutionally be made copyrightable, further discussion of the question as to what writings are copyrightable, will be deferred to that section of this work which deals with what is copyrightable.<sup>96</sup>

§ 121  
Copyrights  
must be exclu-  
sive and  
limited in  
time.

Under the express language of the Constitution, the rights to be secured an author must be exclusive and can only be given for limited times. Thus perpetual copyright cannot be conferred upon any author nor can a non-exclusive title to the copyrighted work be given. This latter limitation on Congressional power will be discussed in connection with the provisions of the Act relating to mechanical music.<sup>97</sup>

§ 122  
Private Copy-  
right Acts.

There is no requirement in the Constitution that copyright laws shall be general laws, and Congress has in fact passed private copyright bills.<sup>98</sup>

§ 123  
Copyright  
confined to  
authors.

Copyright can only, under the Constitution, be given to authors.<sup>99</sup> But, as will be shown, this word, for copyright purposes, is not used in its usual or normal sense, but includes composer, artist, photographer, compiler, draughtsman, sculptor,

§ 124  
Enlarged  
meaning of  
term.

94—Fournet v. Pearson Ltd., 14 L. T. N. S. 82.

95—188 U. S. 239, 47 L. ed. 460.

96—See § 473.

97—See § 150.

98—See Copyright Office Bulletin No. 3 (1906), p. 73, *et seq.*

99—Yuengling v. Schile, 12 F. 97.

dramatist and practically means the creator of any tangible expression of thought addressed to the human mind, through the eye and, possibly, to the sense of touch, or to the ear.<sup>1</sup> By a further process of construction, the word "author" includes assigns or legal representatives of an author.<sup>2</sup> This has not been questioned since the passage of the first Federal Copyright Act. On the other hand, the Constitution would seem to exclude the granting of copyright to one who is not the author or does not claim under the author.

"The owner or proprietor of a work has not in that character alone any right of copyright. It is only to 'authors and inventors' or to persons representing the author or inventor that congress is authorized by the Constitution to grant a copyright. Const. Art. 1, Sec. 8. The right of any other person than the author must therefore be a purely secondary and derivative one and in enforcing any alleged copyright such person must show an exclusive right, lawfully derived, from the author or inventor."<sup>99</sup>

The rights to be given to authors are to "their" writings, not to someone else's. Thus it would seem there can be no copyright by discovery of another's work or by its appropriation against, or even, with the author's consent, unless he transfers his title thereto. So, if a work be published abroad, one who obtains a copy cannot copyright it here if he is not the author or the assignee or legal representative of the author, even though the work is as yet unknown in this country. The law of copyright in this respect necessarily differs from that of patents because of the difference in the constitutional language pertaining thereto, since the word "respective" as used in the constitutional provision

§ 125  
Consequences  
of limitation.

99—Yuengling v. Schile, 12 F. 97.

1—See § 406.

2—See § 680.

under discussion clearly draws a demarcation between the "writings" of "authors" and the "discoveries" of "inventors."

§ 126  
Federal  
legislation  
may deal with  
unpublished  
works.

There is nothing in the language of the constitutional proviso which limits the authority of Congress to published works and hence it may legislate in respect to unpublished works as well. It has done this under prior statutes with reference to manuscripts.<sup>3</sup> Whether it has done so in the present Act, is discussed in a subsequent portion of this work.<sup>4</sup>

§ 127  
General  
rules for  
construction  
of copyright  
acts.

In addition to the necessary rule of law with reference to construing Copyright Statutes in the light of the constitutional provision pursuant to which they were passed, various rules for their construction are to be found in the books, and may be conveniently summarized at this place.

§ 128  
Reasonable  
construction,  
the rule.

The copyright statutes are to be reasonably construed. They will not by judicial construction be either unduly extended to include privileges not intended to be conferred, nor so narrowed, as to exclude those benefits that Congress did intend to confer.<sup>5</sup>

§ 129  
Literal mean-  
ing may be  
disregarded  
for this  
purpose.

Copyright statutes being designed for the protection of the property which an author has in the right to publish his production for a limited term of years should be given a fair and reasonable construction, with a view to effecting that purpose,—which construction may disregard the literal reading of the statute to effect its object and purpose.<sup>6</sup>

§ 130  
Liberal or  
strict  
construction.

It has been said that copyright laws should be construed liberally.<sup>7</sup> On the other hand it has been said<sup>8</sup> since the law of copyright is entirely statutory,

3—See § 44.

4—See § 767.

5—Bobbs-Merrill Co. v Straus, 210 U. S. 339, 52 L. ed. 1086.

6—American Tobacco Co. v. Werekmeister, 207 U. S. 384, 52 L. ed. 257.

7—Myers v. Callaghan, 5 F. 726.

8—White-Smith Music Pub. Co. v. Apollo Co., 147 F. 226.

not declaratory of common law, but conferring distinct, limited rights, not existing at common law, it must be strictly construed and cannot be extended by equitable considerations or strained interpretation of its terms.

Finally, as said by Jessel, M. R., in *Maple v. Junior Army & Navy Stores*,<sup>9</sup> if a copyright law can be so construed as "to promote fair and honest dealing, such a construction is to be preferred."

The general rules of law providing for a strict construction of penal laws or laws imposing penalties, apply to portions of such Acts which impose penalties. Thus the same work when used in different portions of an Act may have entirely separate and distinct meanings. A book of music without words accordingly, while it might be a book within the meaning of the sections of the Act giving copyright to books<sup>10</sup> was held not to be a book within the meaning of the provisions of the same act requiring "books," under penalties prescribed therein, to be printed in this country.<sup>11</sup> The same result was reached with respect to dramatic compositions.<sup>12</sup>

It has been pointed out that the Copyright Acts are intended to protect authors, not publishers.<sup>13</sup>

"The constitution does not establish copyrights but provides that Congress shall have the power to grant such rights if it thinks best, not primarily for the benefit of the author, but primarily for the benefit of the public. Such rights are given, not that any particular class of citizens, however worthy, may benefit but because the policy is believed to be for the

§ 131

Penal provisions of copyright acts: strict construction.

§ 132

Different meaning same word in different sections of same Act.

§ 133

Purpose of copyright acts.

9—L. R. 21 Ch. D. 369.

10—See § 539.

11—*Oliver Ditson Co. v. Littleton*, 67 F. 905.

12—*Hervieu v. Ogilvie*, 169 F. 978.

13—*Bobbs-Merrill Co. v. Straus*, 15 L. R. A. (N. S.) 766, 147 F. 15; *Scribner v. Straus*, 147 F. 29.

benefit of the great body of the people in that it will stimulate writing and invention to give some bonus to authors and inventors. In enacting a copyright law, Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and Second, how much will the monopoly granted be detrimental to the public.”<sup>14</sup>

The present Act will now be considered in detail. Its provisions furnish a natural division of the law applicable to copyright into appropriate subdivisions and the decisions will accordingly be found grouped and discussed under the pertinent provisions of the Act.

14—House Rep. 2222, 60th Congress, 2nd Sess.

# PART TWO

THE GENERAL LAW OF COPYRIGHT IN THE  
UNITED STATES



**On the Following Pages of this Work (Up to  
585 Inclusive), the Matter Printed  
in Italics Consists of Pro-  
visions of the Pres-  
ent United States  
Copyright  
Act**

## CHAPTER IV

### NATURE AND EXTENT OF RIGHTS CONSTITUTING STATUTORY COPYRIGHT

AN ACT TO AMEND AND CONSOLIDATE THE ACTS  
RESPECTING COPYRIGHT.

*Section 1. 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;*

§ 134  
The rights  
comprehended  
in copyright  
under the  
present Act.

(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 sub-section (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, that the provisions of this Act so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after this Act goes into effect, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement or law, to citizens of the United States similar rights: and provided further, and as a condition of extending the copyright control to such mechanical reproductions, That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this sec-*

*tion shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: And provided further, That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.*

*In case of the failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount.*

*The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.*

The Act describes the general rights of the owner of a statutory copyright before making provision for what may be copyrighted or how copyright may be obtained.

The rights granted by the Act are co-extensive with the United States.<sup>15</sup> A copyright is an incorporeal right.<sup>16</sup> It is "a property in notion, without

§ 135  
Copyright:  
its general  
nature:

15—Stevens v. Gladding, 17 How. 447, 15 L. ed. 155.

16—Trustees v. Greenough, 105 U. S. 527, 530, 26 L. ed. 1157, 1159; Stephens v. Cady, 14 How. 529, 14 L. ed. 528.

§ 136  
Historically;

§ 137  
At present.

§ 138  
Distinction  
between copy-  
right and the  
physical  
property  
necessary for  
its accrual.

§ 139  
Theoretical  
basis for  
copyright and  
its bearing  
on this  
distinction.

corporeal tangible substance.”<sup>17</sup> It only arises, however, in legal contemplation, upon the “notion” or “idea” or ideas being placed in corporeal or written form. While these are the historic conceptions of copyright, it must be remembered that they dealt with a right under far less complex statutes than the present one and it may be suggested that instead of copyright at present being a single right, it is an aggregation of incorporeal rights,<sup>18</sup> depending in number and extent, on the form of the specific ideas involved, which aggregation for convenience is called copyright. The property in copyright is a different and independent right from the right in the corporeal or material property in connection with which it arises.<sup>19</sup>

“The foundation of all rights of this description is the natural dominion which everyone has over his own ideas, the enjoyment of which, although they are embodied in visible signs or characters, he may, if he chooses, confine to himself, or impart to others.”<sup>20</sup> “That is” adds Mr. Justice Day<sup>20</sup> “the law recognizes the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced.” And again p. 293, “The purpose

17—*Millar v. Taylor*, 4 Burr. 2303. Copyright was also defined by Lord Mansfield in *Millar v. Taylor* as “an incorporeal right to the sole printing and publishing of something intellectual communicated by letters.”

18—*Photo-Drama Motion Picture Co. v. Social Uplift Film Co.*, 222 F. 448.

19—See § 41 of Act. *Stephens v. Cady*, 14 How. 528, 14 L. ed. 528; *Stevens v. Gladding*, 17 How. 447, 15 L. ed. 155.

20—*Bouvier's Law Dictionary*, Rawle's Ed. 436, quoted in *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 291, 52 L. ed. 208, 214.

of the copyright law is not so much the protection of the possession and control of the visible thing as to secure a monopoly, having a limited time, of the right to publish the production which is the result of the inventor's thought."

The view that copyright arises from production or labor, which rests in equally respectable authority,<sup>21</sup> will be found set forth elsewhere.<sup>22</sup> The result is precisely the same, whatever theory as to the origin and basis of the property be adopted.

"Copyright, like patent right, is a monopoly, restraining the public from doing that which apart from the monopoly, it would be perfectly lawful for them to do. The monopoly is, in itself, right and just and is granted for the purpose of preventing persons from unfairly availing themselves of the work of others whether that work be scientific, literary or artistic. The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws. The acts are to be construed with reference to their purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression or extortion."<sup>23</sup>

§ 140  
Copyright is  
a limited  
monopoly.

Copyright was also defined by Lord Mansfield in *Millar v. Taylor*, as

"an incorporeal right to the sole printing and publishing of something intellectual communicated by letters."

§ 141  
Copyright  
defined, *temp.*  
Lord Mans-  
field.

It is not within the scope of this work to discuss

21—*Jefferys v. Boosey*, 4 H. L. C. 867 (Erle, J.).

22—*Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055.

23—Lindley, L. J., in *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109.

§ 142  
Copyright  
after  
publication  
is solely  
statutory.

the great question whether, or not, by the common law there was a copyright in literary works which survived publication, nor whether the decisions which hold that the copyright statutes have superseded any common law copyright that may have existed after publication, or have created a new right, are sound or not.<sup>24</sup> This subject is substantially exhausted in Drone and Birrell on Copyright and has a purely historical interest, at the present time. Whether theoretically correct or not, the law is now thoroughly settled that the common law or non-statutory protection of a literary or artistic work runs only to the time of publication and that all copyright after publication is purely statutory.<sup>25</sup>

§ 143  
The statutory  
nature of the  
right defines  
it and varies  
under statutes  
according  
to their  
provisions.

Since it is purely statutory, its scope at any given time must necessarily be, and is, measured solely by the statute under which it is claimed.<sup>26</sup> Hence, to speak merely of copyright is meaningless. Copyright under the Act of 1909, or 1912, or 1878 is not only the correct way of describing the right, but such phraseology, if used, will furnish a needed red flag at many times. The judicial and professional tendency in reading copyright cases is to seek for broad general rules of law, in entire forgetfulness, or obliviousness, that the statute in force at the time of any decision necessarily qualifies it, and must be examined and compared for the decision to have value as an authority. Thus in the first copyright law the only rights given were those set forth in the first subdivision of section 1 of the

§ 144  
Effects of its  
statutory  
origin.

24—See §§ 15-23.

25—Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; Banks v. Manchester, 128 U. S. 244, 32 L. ed. 425; Thompson v. Hubbard, 131 U. S. 123, 33 L. ed. 76; Am. Tobacco Co. v. Werekmeister, 207 U. S. 284, 52 L. ed. 208; West Publishing Co. v. Lawyers Cooperative Publishing Co., 25 L. R. A. 441, 64 F. 360. See Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096.

26—White-Smith Music Publishing Co. v. Apollo Co., 209 U. S. 1, 52 L. ed. 655.

present Act, and quite obviously therefore, a decision under the first Act would properly deny that a copyright obtained thereunder gave asserted rights which a decision in the case of a copyright under the present Act would find self-evident. The rights being given by statute, are measured solely by the statute, save that if the statute give no remedy whatever there might, it seems, be a common law remedy annexed to the statutory right.<sup>27</sup>

It will be noted that the rights conferred by the law are only given to "any person entitled thereto" (defined elsewhere in the Act)<sup>28</sup> "upon compliance with the provisions of this Act."<sup>29</sup> Such compliance is not limited to initial compliance only but refers to a general, and continued, compliance with the statute. When the compliance ends, so do the rights so conferred. This is declaratory of the prior law and means that each and every provision of the statute to be complied with by an applicant for copyright, or by a copyright proprietor, must be substantially complied with, as a condition precedent to the vesting of copyright,<sup>30</sup> or as the case may be, as a condition subsequent.<sup>31</sup> Failing to comply with these provisions will defeat the copyright. There is no hardship in this, as since the right claimed is in derogation of the common right, he who claims it should be required to comply with the conditions of its grant.

The Courts are not concerned with the wisdom or lack of wisdom of the statutory requirements in this connection, nor can they say that that is unimportant which Congress has prescribed.<sup>32</sup> A substantial

§ 145  
Initial and subsequent compliance with statutory requirements essential to copyright.

§ 146  
Effect of non-compliance.

§ 147  
Substantial compliance, in detail, essential.

27—Beckford v. Hood, 7 Term. R. 620.

28—See § 8.

29—Section 1.

30—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547; Miffin v. R. H. White Co., 190 U. S. 260, 47 L. ed. 1040.

31—Thompson v. Hubbard, 131 U. S. 123, 33 L. ed. 76.

32—Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055.



compliance, having due regard to the object, or apparent object, of the provisions of the statute, is all that is necessary.<sup>33</sup> Strict compliance is not requisite under the more modern decisions, although it was under the earlier ones.

Thus it will be observed that copyright is not an absolute right, but it is purely derivative from the statute, and defeasible, even after grant, to the extent it is so made defeasible by the statute under which it is obtained. The effect of the conditions which must be so complied with, will be discussed in connection with the sections of the statute in which they are found.

§ 148  
Copyrights  
are exclusive  
in their  
nature.

Each right conferred is an exclusive one. This is necessarily so under the express provisions of the Constitution. There have been few decisions defining or construing the words "exclusive right."<sup>34</sup> The prior Act used the words "sole liberty" in place of "exclusive right." This change in phraseology is not deemed important, as it is deemed under the Constitution, Congress having legislated, could give no more, and no less, than an exclusive right. The "exclusive right to writings" would seem necessarily to include an exclusive right to exercise in connection therewith, at least in the first instance, the ordinary rights incident to the ownership of property. An exclusive title stripped of the usual incidents of title would be a mere mess of pottage. The fair meaning of "exclusive right," would appear to be the right to exclude persons not claiming under the copyright proprietor, from, during the continuance of the copyright, exercising any of his express, or reasonably to be implied, rights, as proprietor of such copyright. By "reasonably to be implied rights," are meant such rights as are comprehended in the express ones, as, for example, the right to lease, implied, *a fortiori*, from the right to

§ 149  
Nature of such  
exclusiveness.

33—See § 874.

34—See § 81.

assign or grant.<sup>35</sup> Thus it has been held that copyright proprietors have the right to use the copyright laws for their own pecuniary advantage and to repel competition.<sup>36</sup>

In the present Statute, for the first time in Federal copyright legislation, there are provisions which, if held constitutional, would seem to be at least the entering wedge, for rendering all copyrights non-exclusive. These are the portions of sub-division (e) Section 1, which, "as a condition of extending the copyright control" to mechanical reproductions of musical compositions, provide for a compulsory license system of such music records. It seems that if a copyright proprietor can be required, under any circumstances whatever, as long as his copyright is valid, to permit anyone to use it, without his consent, his copyright can no longer be deemed exclusive.

In the debates in Congress, when the Act was passed, almost the entire discussion was concerned with this provision. In the detailed analysis of the Act prepared by the Committee of Patents of the House of Representatives, it was admitted that the constitutionality of this proposed clause had been seriously questioned. In the cause<sup>37</sup> which inspired these provisions by holding a mechanical record for use in a mechanical music producing instrument was not an infringement of a musical copyright, since it was not in any proper sense a copying, the constitutional questions possible in connection with such mechanical records, were not discussed. That decision involved the construction of the then statute, which differed widely in its scope, with reference to the right under discussion, from the present one. It followed from that case that the

§ 150  
The compulsory license provisions of the Act with reference to mechanical music.

§ 151  
History of these provisions.

35—See §§ 164, 167.

36—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618.

37—White-Smith Music Publishing Co. v. Apollo Co., 209 U. S. 1, 52 L. ed. 655.

scope of a musical copyright did not include a roll or record, which when inserted in an appropriate machine, reproduced the sounds of the musical composition. Great efforts were made by composers and music publishers, for protection along these lines. On the other hand, it was asserted, a vast Trust was in process of formation which would be stimulated and buttressed by, and if, copyright protection were given to cover such devices. The licensing feature of the Act represents the resultant compromise.

§ 152  
Constitution-  
ality of the  
provisions.

The argument advanced on behalf of the constitutionality of this provision, by the House Committee on Patents, is, that since Congress was not bound to extend copyright to mechanical music records, it, in doing so, might impose any condition it deemed wise, as a condition of such extension.<sup>38</sup> This, however, appears to be a non-sequitur. Congress is not bound to enact any copyright legislation but if it does legislate, it cannot exceed the power pursuant to, and under which it is acting. Within the limits of the power, it may impose conditions on the vesting, or divesting, of copyright. Thus, it may make registration a condition of the grant or compliance with such incident formalities, as it may deem wise or expedient. But this is not the equivalent of saying that if it determines to legislate, it may give more, or less, than the only thing it is empowered to give, viz: an exclusive right. Since it can determine the duration of copyright, enactment of conditions, which may prevent its coming into being, or cut it short (since they directly tend to measure its duration) are within its power. But there can be no suggestion that conditions which do not, in their last analysis, relate to time, can divide, or derogate, *in invitum*, from a copyright which has had a valid inception and continues to subsist after the alleged condition begins to operate. The constitutional power is the

<sup>38</sup>—House Rep. 2222, p. 9.

same with respect to all copyrightable matter. The Constitution is not self-executing.<sup>39</sup> Congress could repeal the Copyright Act tomorrow. Hence, if this provision be valid, Congress could, by repealing the present Act and passing a new one, make similar provision in the case of any book which might be printed, every lithograph or etching which might be sold, or any painting which might be duplicated. By then giving the right to reproduce on a royalty basis, fixed by Congress and with no safeguards as to the solvency, or financial responsibility, of the licensee, a speedy end might be worked to copyright protection in anything but mere form. The Constitution may be searched in vain for any suggestion that the right can be made non-exclusive, while subsisting.

It may, however, be suggested that the provisions in question do not relate to the copyright owner's rights, which, it may be conceded, must be exclusive, but merely to his remedies, in that, it may be said, since prior to the present law one who procured copyright in his music had no protection against infringement by mechanical reproductions, the effect of the present law is merely to give him a remedy against such reproductions and that such remedy may be conditioned on his permitting others to reproduce. This suggestion, however, will not bear analysis. Firstly, Congress has not seen fit to make such provision, as the legislation in question is found in the sections of the law enumerating the copyright proprietor's rights and their incidents, when created, and secondly, it is deemed Congress has no power to attempt to drive a bargain with anyone, by which, in consideration of furnishing a remedy, it requires the surrender of a portion of a right. Then, it may be suggested that the right to mechanical reproduction is a mere incident to a copyright proprietor's general copyright or a mere incident to his rights in his literary or artistic

39—*Banks v. Manchester*, 128 U. S. 244, 32 L. ed. 425.

property and that there is no requirement that rights in incidents to the property should be exclusive. Such suggestion overlooks the fact that there is no such thing as a main, or general, copyright or any copyright having incidental rights, appurtenant, or incidental, thereto.<sup>40</sup> Copyright, being a right created by statute and existing solely thereunder, is measured solely by the statute. The statute gives the copyright proprietor various rights. All of these stand on an equal footing and none are incident to the others.<sup>40</sup> Hence the title to each right must be exclusive, for the sum of all the rights so given by the statute is the copyright which must, under the Constitution, be exclusive. It may be further suggested that the only matter in which an exclusive title must exist, is the author's writings and that these mechanical records are not writings and hence the title to copyright therein need not be exclusive. But this suggestion is self destructive as, if they are not "writings," they cannot, under the Constitution, be copyrighted.

It may further be suggested that the compulsory license feature of the law only comes into operation if the copyright proprietor exercises the right given him to reproduce his work on mechanical music records; that he is not bound to exercise the right and that if he does exercise the right, since he is not bound to do so, it is right and proper that Congress may compel him to grant compulsory licenses. But this suggestion is not helpful. A copyright proprietor is not bound by the statute to exercise any right conferred upon him. But until terminated, the right once conferred, whether exercised or not, is a right, and, as shown, while existent, must be exclusive. It may further be argued that only the historical rights called copyright<sup>41</sup> need be exclusive

40—Photo-Drama Motion Picture Co. v. Social Uplift Film Co., 220 F. 448.

41—See §§ 135, 136.

under the Constitution and that this, as a new statutory right, need not be exclusive. But this is also a self-destructive argument, as it would lead to the conclusion that Congress had no power to grant the right, as *all* the rights it may grant are governed by the same constitutional language. Whether or not such mechanical musical records can be copyrighted, will be considered elsewhere. Any man would be bold indeed, who would venture to make a prediction as to the ultimate construction which will be placed upon the copyright clause in the Constitution, by the Courts, in view of its past judicial history. If however, there is any substantial limitation upon congressional power left in the clause, it would seem that the subdivision of the statute under discussion should be held unconstitutional, in so far as it attempts to grant an involuntary automatic license.

§ 153  
The compulsory license clause deemed unconstitutional.

Returning now to a discussion of the section in general, it should be noted that there is a very definite and distinct limitation upon the exclusiveness of the rights given, which, while largely theoretical, is partly practical.

§ 154  
Non-exclusive features of the copyright monopoly, due to its subject matter and scope.

“The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas. Or as Lord Mansfield describes it ‘an incorporeal right to print a set of intellectual ideas, or modes of thinking, communicated in a set of words or sentences, and modes of expression’ . . . 4 Burrowes 2396. The nature of this property is perhaps

best defined by Mr. Justice Erle, in *Jeffreys v. Boosey*, 4 H. L. C. 815, 867, 'The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation.' " 42

"The Statute," said Mr. Justice Day speaking of the Act of 1907, "has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be," 43 or apart from the defined forms of tangible reproduction of intellectual concepts referred to in the Act. 43

While the decision last cited, 43 purports to be overruled by the present statute, in so far as the point actually decided is concerned, and while the present statute unquestionably purports to enlarge the number of "tangible forms of intellectual concepts" which are protected, there is nothing in the present Act, as compared with previous legislation, which gives to authors, monopolies in their ideas, as ideas. 44 An author's "writing" may, of course, be viewed in a double sense. The historical meaning of the word as used in copyright law undoubtedly means original ideas, expressed in tangible form, addressed to the brain through the medium of the eye or ear. The popular meaning of the word includes a conception of the ideas so formulated, as ideas. There is nothing, except the historical use of the word, to prevent the word "writings" from being construed to mean the ideas so expressed, as distinguished from their tangible existence. The

§ 155  
The copyright  
monopoly is  
not in ideas.

42—*Holmes v. Hurst*, 174 U. S. 83, 43 L. ed. 904.

43—*White Music Pub. Co. v. Apollo Co.*, 209 U. S. 1, 52 L. ed. 655.

44—*Kalem Co. v. Harper Bros.*, 222 U. S. 55, 56 L. ed. 92.

same clause of the Constitution gives Congress its powers in connection with patents and copyrights. The actual distinction between the two is partly artificial. Its power therefore in each instance in so far as the matter under discussion is concerned, is the same, unless the courts on historical grounds, or by applying its historic meaning to the word "writings," determine otherwise, as the words, an "author's writings," and an "inventor's discoveries," may, in each instance, refer either to concrete ideas, or their concrete expression in tangible form.

At present, a basic distinction between the patent and copyright laws is that the former, gives an actual, absolute, monopoly in the idea patented, largely through giving the patentee the right to the exclusive use of the patented article, while no such absolute monopoly is given, or attempted to be given, a copyright proprietor.<sup>45</sup> The United States Copyright Acts do not attempt to give a monopoly in ideas,<sup>44</sup> but only in particular cognate forms, or media for reproducing or communicating them.<sup>43</sup> If any other author by original intellectual effort produce the same, or a similar, writing to that for which another has procured a copyright, he may have copyright therein, in spite of the other copyright.<sup>46</sup> Naturally in the case of such similarity, a high degree of proof is required to induce Courts to believe such identity, or similarity, is the result of coincidence or chance and not the result of copying.<sup>47</sup> In some classes of copyrightable works, such identity, or similarity, may be honest and natural. Thus two translations of an uncopyrighted foreign work may well be substantially identical and yet produced independently and each would be

§ 156  
The fundamental difference between patent and copyright monopolies.

§ 157  
Original independent reproduction of the substance of a copyrighted work, not an infringement of the monopoly.

45—Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086; Bauer et Cie v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041, 50 L. R. A. (N. S.) 1185.

46—See §§ 488, 998.

47—See §§ 998, 1207.



§ 158  
The essential  
nature of  
copyright  
monopoly.

copyrightable.<sup>48</sup> So of directories, maps, portraits, photographs, dramatizations and numerous other works. Thus the monopoly given a copyright proprietor in such, and indeed all cases, is, as will be shown under the discussion with reference to infringement,<sup>49</sup> the exclusive right to prevent others, without his consent, from unfairly using his ideas, as expressed in tangible form, by him, and is not such an exclusive right as will prevent others from using these very same ideas, if they are their ideas, not copied from or induced by his ideas but solely by their independent creative effort. Having in view the present trend of copyright legislation, it may well be that the great question will be raised sooner or later whether, to use the language of Mr. Justice Holmes, the protection given under the copyright laws could be "coextensive, not only with the invention which, though free to all, only one had the ability to achieve, but with the possibility of reproducing the result which gives to the invention its meaning and worth"<sup>50</sup> or, in other words, complete protection for the idea rather than for the form, of its expression. The difficulty with this is that, as will be shown, there are numerous classes of works which are copyrightable only because of their form, where the ideas embraced therein would not be copyrightable.<sup>51</sup> This is the inevitable result of the combination of utilitarian and purely intellectual, literary and artistic works, as a subject of uniform copyright legislation. The very judicial expansion of the word "writings" in the Constitution, which has made this possible, may well, if historically and comprehensively presented, lead to the view that exclusive property cannot be given

48—See § 992.

49—See § 998.

50—White-Smith Music Pub. Co. v. Apollo Co., 209 U. S. 1, 19, 52 L. ed. 655, 662.

51—See § 537.

by Congress in ideas, as distinguished from their individual "written" form of expression. On the other hand, with that splendid disregard for the ordinary meaning of words, and of the historical development of copyright doctrines which has been somewhat characteristic of the decision of copyright causes, coupled with a comparison between Congressional powers in connection with patents and with copyrights, the great step may be taken and ideas held protectable according to their essence and not according to their copyability. This is not deemed to be the result of the present Act however, as it, no less than its predecessors, confers specific, and hence limited, rights in connection with copyrighted works and no general right in, or to, such works, or to their exclusive use.

The first of the exclusive rights, given by the first Section of the Act, to a copyright proprietor, is

§ 159  
The rights  
constituting  
copyright.

*"To Print, Reprint, Publish, Copy and Vend the Copyrighted Work."*

This right is the historical copyright, and the language used is a phrase coming down unchanged from the prior statutes.

Thus it has been said a copyright involves the right of publication and reproduction of works of art and of literature. Indeed, it may be doubted whether a copyright can be conceived to exist which does not involve these rights.<sup>52</sup> This must, however, be due to the statutory history of the subject.<sup>53</sup>

§ 160  
The right to  
reproduce in  
copies.

The right to print requires no great discussion as it is comprehended in the right to copy. The right to reprint refers to the right to issue editions of the copyrighted work, subsequent to the first printing. The right to copy, includes the right to

§ 161  
The right to  
print and  
reprint.

52—Landeker & Brown v. Louis Wolff & Co., 52 Sol. J. 45.

53—Day, J., in American Tobacco Co. v. Werekmeister, 207 U. S. 484, 52 L. ed. 257, quoting from Bouvier's Law Dict., Rawle's Ed., Vol. 1, p. 436.

§ 162  
The right to  
make copies.

§ 163  
What is a  
copy, in  
general.

§ 164  
The right to  
sell copies.

§ 165  
Exhaustion of  
right by first  
sale as to copy  
sold: restric-  
tions on resale  
or use.

make copies by means, not only of printing, but by writing, typewriting, shorthand, photography, electro and stereotyping, lithographing and, generally, reproducing the work by any other mechanical process.<sup>54</sup> The sole right to make copies is often given as the definition of copyright and "may be said to have been the main purpose of the copyright statutes."<sup>55</sup> A copy need not be an exact reproduction to be a copy.<sup>56</sup> This is necessarily so, as, owing to the fallibility of human means of reproduction, it is difficult to make absolute fac-similies. While copying is a phrase which bulks large in the law of infringement, and may there best be discussed,<sup>57</sup> it may be defined, at this time, as the reproduction, substantially, in the same, or any other media, either in whole, or in material part, of the copyrighted work.

The right to vend, "means the exclusive right to transfer the title for a consideration to others."<sup>58</sup> Without this right the other rights given would be of but little value. It may be freely exercised in the first instance. After, however, the copyright proprietor parts with title to a copyrighted object, it is quite impossible, under the decisions, to restrict its re-sale price,<sup>59</sup> territorial use,<sup>60</sup> or, it would follow, to place any other restriction upon the use of a copyrighted article once it is sold, that is, once title thereto has been parted with. The test is, has there been an actual sale. Merely calling the transaction by some other name, say, license or lease,<sup>58</sup> will not suffice to prevent the operation of the rule stated, when, what the parties really intended was a sale.

54—*McMillan v. King*, 223 F. 862.

55—*Bobbs-Merrill Co. v. Straus*, 210 U. S. 347, 52 L. ed. 1092.

56—See §§ 1031, 1040.

57—See § 1023.

58—*Bauer et Cie v. O'Donnell*, 229 U. S. 1, 13, 57 L. ed. 1041, 1045, 50 L. R. A. (N. S.) 1185.

59—*Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. ed. 1086; *Bauer et Cie v. O'Donnell*, 229 U. S. 1, 57 L. ed. 1041, 50 L. R. A. (N. S.) 1185; *Universal Feature Film Co. v. Copperman*, 218 F. 578.

The limit of the right to vend, then, is the first sale, or the first parting of title, to the copyrighted article. As far as the material objects so sold is concerned, and the use to which it may be put other than for reproduction, it may safely be said, after initial sale, to be governed by general rules of law and no longer by the law of copyright. In passing upon the question whether, or not, the transaction is, or is not, a sale, the nature of the copyrighted article may well be considered by the court and a "lease," for example, for a gross price, paid in advance, of a moving picture film, for a period of time manifestly beyond the probable, or even possible, life of the film, although usual in the moving picture business, may well be deemed a sale, and special restrictions therein may not be saved by force of any provision of the Copyright Law.

The right to lease copyrightable objects is comprehended in the right to vend, as are the lesser rights of qualified disposal, inherent and incidental to all classes of property.

The right to publish means the right, not only to communicate a work to the public or any part thereof,<sup>60</sup> but also the right to determine when, where, and how, and on what terms and conditions, such publication shall be made.<sup>61</sup> Since however, the right of first publication is a common law right,<sup>62</sup> the rights given by this section, which refer to statutory copyright, can arise only after first publication. Hence the right so given by the statute instead of being the right first to publish is, in reality, the right to continue, or not, to publish after the initial publication, or to publish new editions.<sup>63</sup> What constitutes a publication can best be taken up

§ 166  
The right to lease copies, etc.

§ 167  
The right to publish: its incidents and meaning.

60—See *Universal Feature Film Co. v. Copperman*, 212 F. 301; § 393.

61—See § 271.

62—See § 271.

63—As to what is a new edition, see § 617.

§ 168  
The right not  
to publish.

§ 169  
The foregoing  
rights, appli-  
cable to all  
copyrighted  
works.

in connection with the sections of the law dealing with first publication.<sup>60</sup> This exclusive right to publish after the initial publication, includes the right not to publish, since there is no provision in the statute to the contrary.

The most important question arising under this subdivision of the section<sup>64</sup> is as to what works are included in its scope. It refers generally, in terms, to copyrighted "works." Section 5 details some classes of "works" it was intended to make subject to copyright. Many of these works are not embodied in such media that they may be printed. Subdivision (a) gives the right to print the works to which it refers. The grammatical structure is such that, literally, the rights given are collective and not separate and distinct. It may, hence, be argued that in view of the literal reading of the subdivision, unless the work is such that all the rights given by it may be used, it was not intended to apply to such work. The question whether the subdivision is limited to works capable of being printed, should, it is deemed, be answered in the negative. The external evidence of Congressional Committee reports does not show that such limitation was intended. A liberal construction should be given the statute.<sup>65</sup> In analysis, the only difficulty in holding the subdivision to cover all copyrighted works is the use of the word "and," which, however, may be read as "or." So read, the various rights given by the subdivision are separate and distinct, applying, or not applying, to different classes of copyright works, in accordance with their media. While the point has not yet been adjudicated, it is deemed that the broad and inclusive construction which may be given this section should prevail.

The second subdivision of the section confers the exclusive right:

64—Section 1, (a).

65—See § 130.

*“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.”*

The exclusive right to translate the copyrighted work into other languages or dialects, is given all copyright proprietors. There is no longer any necessity for an author, in the United States, to reserve such rights or rights of dramatization. Translate, really means, to change from one language into another. Works consisting of words, need not be written in English to be copyrightable and if such works are copyrighted while written in a foreign tongue, this section ensures the right to turn them into English.

A translation, to be such, need not be literal.<sup>66</sup> The flavor and style of a work would otherwise be frequently lost. It may have changes, omissions and alterations,<sup>66</sup> provided that it afford the opportunity of knowing a work in a foreign tongue, to English speaking readers, as accurately as it is possible to know such foreign work, by the medium of a version in English.<sup>67</sup> An English distinction,<sup>67</sup> made between adaptations and translations, is of no substantial importance under the present Act, as the right to adapt is also given by it. It may be doubted, however, whether the case last cited would be followed, on its facts, in this country, in the distinction it draws between translation and adaptation.

The right to make any other version of a literary work ensures to the proprietor the right to change

§ 170  
The right to translate.

§ 171  
Non-English works copyrightable.

§ 172  
What is a translation.

§ 173  
The right to make other versions.

66—Lauri v. Renard (1892), L. R. 3 Ch. 402.

67—Wood v. Chart, L. R. 10 Eq. 193.

§ 174  
The right to  
abridge.

its literary form at will, and to prevent others from doing so against his consent. It does not, however, give him such right as will, if he be the author of the scenario of operas, prevent another from making brief sketches thereof, "entirely fragmentary and superficial," being the barest summary of the story thereof and not abridgment presenting their essence.<sup>68</sup> The subdivision appears to reserve the exclusive right of abridgment to the copyright proprietor, thus terminating difficult controversies of fact, under the prior law, where fair abridgments were,<sup>69</sup> with difficulty, solely on authority<sup>69</sup> held permissible. As the cases so holding have properly been deemed open to criticism,<sup>70</sup> this change in the law appears welcome.

§ 175  
The right to  
make other  
versions  
applies to  
literary  
works only.

The right to make other versions is confined to "literary works." It may be questioned whether the limitation to literary works also applies to rights of translation. Having in view the rule of liberal construction applicable to these statutes, and the grammatical structure of the sentence in which the words are found, it is deemed the limitation does not apply to rights of translation, but that these exist in connection with works not of a strictly literary character.

§ 176  
What is a  
literary work.

The words "literary work" may be construed to mean "works of creative or imaginative literature, as distinguished from works in the nature of compilations, produced by merely clerical methods, from statements and facts found elsewhere."<sup>71</sup>

An interesting question may arise under this section, whether a moving picture drama film may be deemed a literary work. If this be held not to be a literary work, since the rights of dramatization

68—*G. Riccordi Co. v. Mason*, 201 F. 184.

69—*Story v. Holcombe*, 4 McLean 306; *Dodsley v. Kinnersley*, Amb. 403; *Newberry's Case*, Lofft 775; *Giles v. Wilcox*, 2 Atk. 142; *D'Almaine v. Boosey*, 1 Y. & C. Ex. 288.

70—See *Drone: Copyright*.

71—Cf. *Colliery Engineer Sales Co. v. Ewald*, 126 F. 843.

are limited to non-dramatic works, the right to make other versions would not enure to its proprietor and he would hence, while able to turn it into a novel, not have the right to turn it into a play to be spoken by human actors. Because of the broad construction given the word "writings" and by applying the same reasoning, it is deemed it may be held "literary works" embraces those embodied in the media of motion picture films, but this is entirely a question for future decision.

A broad right of dramatization is expressly given, but only as to non-dramatic works. The word "it" in the sentence conferring this right, would seem to refer to "copyrighted work" in the opening clause of the paragraph, rather than to "literary work," in the clause immediately succeeding. "Copyrighted work" is a broader phrase than "literary work." Thus a series of cartoons or drawings may furnish the basis for a drama in its copyright sense<sup>72</sup> and the books contain at least one instance, where dramatic rights in a song were attempted to be reserved by its composer.<sup>73</sup>

§ 177  
The right to dramatize.

Dramatization means to turn into a drama.

The words drama, or dramatic work, for copyright purposes, have a far larger meaning than that in which they are usually used.

§ 178  
What is a dramatization.

"A dramatic composition is 'a written or literary work invented and set in order' in which the narrative is not related but is represented by dialogue and action. . . . A pantomime is a species of dramatic work consisting wholly of directions set in order for conveying the ideas of the author on a stage or public place by means of characters who represent the narrative wholly by action and is as much a dramatic

§ 179  
Dramatic composition defined.

72—Hill v. Whalen & Martell, Inc., 220 F. 359; Cf. Empire City Amusement Co. v. Wilton, 134 F. 132 (where the Court refused to examine the question on demurrer).

73—Green v. Minzesheimer, 177 F. 286.



composition as if language or dialogue were used in it to convey some of the ideas."<sup>74</sup>

§ 180  
Examples of  
dramatic  
works.

Thus it will be observed that under this definition comedies, farces, musical comedies, operas, pantomimes, spectacular productions, melodramas, and plays of all types, are "dramas," or dramatic productions.

§ 181  
All stage  
productions  
not copyright-  
able. "The  
Black Crook."

On the other hand, as said in *Barnes v. Miner*,<sup>75</sup> everything put on the stage is not copyrightable. A mere spectacle, "The Black Crook," was deemed not subject to copyright, both because of its supposedly immoral tendency and as being devoid of the necessary literary merit.<sup>76</sup>

§ 182  
Spectacular  
productions.

This decision,<sup>76</sup> save, possibly on its facts, although not overruled in terms, is doubtful law, in view of changed standards of public morality, and the broad interpretation now placed on the Constitution. Nevertheless, merely spectacular productions, or rather their scenarios, may be deemed on the extreme border-line of copyrightability. Whether, or not, such works may be copyrighted would seem to be a question of fact, in each instance. So also, the fact that motion pictures represented an actress in the act of changing her dress, was deemed to militate against their being a drama,<sup>75</sup> but this decision, if sound, is sustainable on grounds of public policy rather than on any other point.

§ 183  
Immoral  
stage works.

§ 184  
Action:  
words, panto-  
mimes, motion  
pictures.

A drama necessarily implies the idea of action. Words, as we have seen, are unnecessary.<sup>77</sup> So are human actors.<sup>78</sup> Thus a pantomime<sup>79</sup> or a motion picture film may be a drama.<sup>80</sup> So it would seem may a ballet, if it tells a story. On the other hand,

74—Blatchford, J., in *Daly v. Palmer*, 6 Blatch. 256.

75—122 F. 480.

76—*Martinetti v. Maguire*, 1 Abb. U. S. R. 356.

77—*Daly v. Webster*, 56 F. 483.

78—*Kalem Co. v. Harper Bros.*, 222 U. S. 55, 56 L. ed. 92.

79—*Lec v. Simpson*, 3 C. B. 871, 881.

80—*Kalem Co. v. Harper Bros.*, 222 U. S. 55, 56 L. ed. 92.

mere action is not drama, as for example, a series of postures and movements constituting a dance.<sup>81</sup> § 185 Dances.

“It is essential to ‘a dramatic composition,’ ” said Lacombe, J., in the Fuller case,<sup>81</sup> “that it should tell some story. The plot may be simple. It may be but the narration or representation of a single transaction, but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary. When it does, it is the ideas thus expressed, which become the subject of copyright. . . . The merely mechanical movements by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition.”

§ 186  
Stage effects.

On the other hand, a combination or series of dramatic events, apart from the dialogue, may be protected by copyright.<sup>82</sup> Thus a so-called railroad scene was protected,<sup>83</sup> consisting of the following: an individual was fastened to a railroad track. There was an approaching train and a rescue by a third person, who, surmounting obstacles, released him at the last moment. The language of the scene was not copied but the scene itself was. In such cases the scenic effects or action are said to be copyrightable and will be protected, provided the play, in which they are contained, has literary quality.<sup>84</sup> *Daly v. Webster*<sup>82</sup> contains a *dictum* that the mere exhibition of mechanical appliances to represent incidents would not be protected but that there must be a series of events dramatically presented by actors, in a certain sequence or order, for the doctrine to apply. This decision was rendered before the days of moving picture films and is not law, in

§ 187  
Dramatic  
arrangement  
copyrightable.

§ 188  
Stage effects,  
as incidents  
of a drama.

81—Fuller v. Bemis, 50 F. 926.

82—Daly v. Webster, 56 F. 483.

83—Daly v. Palmer, 6 Blatch. 256.

84—Chappell & Co. v. Fields, 210 F. 864.

that it does not apply to such motion picture "writings," or plays. On the other hand, except as to motion pictures, the *dictum* still probably represents the law.

It should be noted that while the cases<sup>85</sup> cited, purport to establish the doctrine that a combination, or series, of events may be copyrighted, apart from the dialogue in which they occur, and that this is probably true, in a sense, care must be taken not to confuse the copyright in the language in which such events are described, or reflected, with the protection against the copying of the events so described or reflected, which protection results from the copyright. This is a topic which is, however, best treated in connection with the law of infringement.<sup>86</sup>

To constitute a dramatic composition, a work must tell a connected story or series of events.<sup>87</sup>

In *Kalem v. Harper Brothers*,<sup>88</sup> it was held that an exhibition of moving pictures, depicting the principal scenes of a copyrighted novel, was a dramatization of the novel. The Court approved *Daly v. Palmer* (*supra*) and established a doctrine that action depicted by mechanical means, in a proper case, may be deemed drama.

A monologue would be a dramatic composition, if it otherwise satisfied the requirements of the definition of such compositions and since it can make no difference whether in acting it, it be spoken or sung, a song, which, if, as ordinarily, sung by only one person, may be called a musical monologue, may, if its nature and capacity for dramatic representation permits, be deemed a dramatic composition.

The English cases are interesting. In *Russell v.*

85—*Daly v. Palmer*, 6 Blatch. 256; *Daly v. Webster*, 56 F. 483.

86—See § 981.

87—*O'Neill v. General Film Co.*, *New York Law Journal*, April 9, 1915 (*New York Supreme Court*, Shearn, J.); affirmed (see *Law Journal*, April 4, 1916).

88—222 U. S. 55, 56 L. ed. 92.

§ 189  
Sequence  
essential to  
drama.

§ 190  
The drama  
of action:  
moving  
pictures.

§ 191  
Songs, as  
dramas.

Smith,<sup>89</sup> a song, "The Ship on Fire," depicting a storm at sea, the burning of a ship, an escape from it and a subsequent safe return to land, was held a dramatic piece. Lord Denman, C. J., said:

"The nature of the production places it rather in the representative, than in the narrative class of poetry, according to Lord Bacon's division of dramatic from epic and the evidence" (the opinion of "a witness of great experience in publishing music") "states it to be known as dramatic among those who are conversant with such things." He said, "It moves terror and pity and sympathy by presenting danger and despair and joy and maternal and conjugal affection."

He concluded that any piece, including a song, was dramatic,

"which on being presented by any performer to an audience would produce the emotions which constitute the entertainment of the audience."

It appears that neither scenery or costume was used in performing the song. In *Clark v. Bishop*,<sup>90</sup> "Come to Peckham Rye," a music hall song, sung in costume, was held a dramatic piece. Kelly, C. B., said:

"The plaintiff by his powers of singing, acting, and characterization had made this song a thing of value, not as a song merely, but as acted by him in character and so as a dramatic piece."

The same result was reached in a decision of but little value, because of the manner in which it was reported, with reference to the music hall song, "Oh Jenny Dear."<sup>91</sup>

89—12 Q. B. 217.

90—25 L. T. 908.

91—*Roberts v. Bignell*, 11 Q. B. D. 102.

§ 192  
Costume not  
essential to  
drama.

In *Fuller v. Blackpool Winter Gardens*,<sup>92</sup> the song, "Daisy Bell," a music hall ditty, sung in costume, was held not a dramatic piece. Lord Esher, M. R., said:

"The fact that it is sung in costume does not make it a dramatic piece."

This appears entirely sound. He said further:

"The same may be said of the manner in which the singer treats the song. The question must be what was the character of the composition when it was first written and published. I can quite understand that it is possible that a thing to be performed by one person only may be a dramatic piece. But whether the composition is to be sung by one or more persons, if a song is sung, and only a song, there is no performance of a dramatic piece."

A. L. Smith, L. J., said, after discussing the earlier cases, cited *supra*:

"It is not necessary to determine whether each of these cases was rightly decided or whether the reasons given in each for holding the song to be a dramatic piece are satisfactory. Every case must depend upon its own attendant circumstances. In each case it is a question of fact."

§ 193  
Acting, and  
possibly  
scenery,  
deemed essen-  
tial to make  
song, drama.

This appears entirely sound, but he then goes on to say:

"I think that to constitute a song a dramatic piece, it must be such a song that for its proper presentation, acting and possibly scenery, formed a necessary ingredient and that if neither of these be a requisite to the efficient representation of the song it is not a dramatic piece."

If costume of the singer could not affect the character of a song, it is not clear how scenery could. A drama is a dramatic composition, none the less because acted without scenery, as Shakespeare's plays were, and sometimes still are, performed. Scenery only aids the audience to apprehend and neither affects the form, nor character, of a work. Acting is a relative term. All it can mean legally is public presentation. Courts that refuse to determine whether, or not, a work has literary, or artistic merit will scarcely assume to determine what is, or is not, acting, as distinguished from mere presentation. As has been shown, a work need not be acted, if it can be represented. Mr. MacGillivray<sup>93</sup> deems the latter decision to establish that for a work to be dramatic:

§ 194  
The foregoing view questioned.

“there must be more than dramatic flavor, there must be dramatic form, that is to say, the work must be so constructed as to be obviously intended for reproduction by means of acting, with scenic effect.”

The latter portion of this quotation appears quite erroneous, for the reasons previously outlined, and the first portion is not helpful, as it leads to the inquiry, what is dramatic form in copyright law? Dialogue is not essential, as no one would question that the great soliloquies so characteristic of classic drama are dramatic. If such soliloquies were set to music, the answer to the question whether they would lose their character as drama because they might be sung, instead of spoken, would undoubtedly be in the negative. That a given composition can be sung, then, or, hence is a song, in no way affects the question whether it is a dramatic composition. Whether it is, or is not, must be determined by submitting it to the same tests as if there were

§ 195  
Is dramatic form essential to make a work a drama?

<sup>93</sup>—MacGillivray: Copyright 125.

§ 196  
Suggested  
test as to  
whether work  
is a dramatic  
composition.

§ 197  
The right to  
novelize, etc.

§ 198  
Purely musi-  
cal works  
defined.

no accompanying music. This question may be of some importance as different rights are given copyright proprietors, under the present Act, in connection with dramatic and non-dramatic works and in connection with dramatic and musical works. So, for example, if a song is not held dramatic, there could be no exclusive performing right and anyone might sing it in public with different music and not infringe the copyright proprietor's rights. Capacity for public performance or presentation appears the best test available in determining whether a work is a dramatic composition.

On the other hand the mere fact that a work, obviously incapable of performance in its published form, is of a dramatic character, or intended for dramatization, would not make it a dramatic work.<sup>94</sup>

The right is given a copyright proprietor by the statute to convert dramatic works into novels or non-dramatic works. This is an innovation corresponding to changed conditions in the world of letters. This right corresponds, in the case of a musical composition, to the right to make any other version thereof if it be a literary work.

A musical composition has been defined as:

“a rational collocation of sounds, apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with, or without, continuous human intervention” (Holmes, J.).<sup>95</sup>

It will thus be observed that the word, in this instance, is used in its strict scientific sense and that it excludes words as part of a musical composition. Since the rights given to copyright proprietors of literary and musical compositions are deemed identical, in the respects under discussion, there is not

94—Toole v. Young, L. R., 9 Q. B. 523.

95—White-Smith Music Pub. Co. v. Apollo Co., 209 U. S. 1, 19, 52 L. ed. 655, 662.

deemed to be any importance in this exclusion, as far as copying, adaptation or publication are concerned, but if the words of a song are held non-dramatic, there would be no performing rights in them since they themselves are not musical.

§ 199  
Effect of holding songs non-dramatic.

A further aspect of the question is illustrated in a very recent decision.<sup>96</sup> In that case, a so-called comic opera was copyrighted. Thereafter, an attempt was made to copyright one of the songs in it separately. Copies of the song, sold, did not bear notice of the first copyright. The defendant had the song sung in his restaurant, no admission fee being charged. The question whether or not the song was a dramatic composition was not discussed. The Court assumed it was not. It was held, accordingly, that performance of the song not for profit, was no infringement.

§ 200  
Gratuitous public performance of songs.

The final right given under Section 1 (b) is "to complete, execute and finish models or designs for a work of art." It is not deemed the change of language in this subdivision from that used in R. S. Section 4952, as amended, (latest prior amendment, Act March 3, 1905) consisting of the excision of the words, "intended to be perfected as," and the insertion of the word, "for," in place thereof, and the change of the words, "fine arts," into, "art," works a narrowing in the scope of the section. A design for a work of art may be deemed by fair implication, intended for it and a "work of art," having regard to modern phraseology, comprehends "fine art." It should be noted that this section is limited to designs or models, that is to say, inchoate works of art. While it may be doubted if a work of architecture may be copyrighted, after completion, under the United States Act,<sup>97</sup> no good reason seems to exist, under this section, why adequate protection

§ 201  
The right to execute models or designs for works of art.

§ 202  
Works of architecture.

<sup>96</sup>—Herbert v. Shanley Co., 225 F. 340, reversed, — U. S. — (N. Y. Law Journal, Feb. 2, 1917).

<sup>97</sup>—Such works are copyrightable under the British Act, § 35 (1).



may not be obtained by architects, if they copyright their models or designs. This right—completing, executing, and finishing—is supplementary, or correlated as an antecedent right, to the general rights given by Section (a) of Section 1.

§ 203  
Scope of  
copyright in  
works of art.

§ 204  
Design  
patents.

§ 205  
Patents may  
supplement  
copyrights

It should be noted that the only rights given the owners of copyright in completed works of art, in Section 1, are those given by subdivision (a). In view of the existence of the statutes covering design patents, it is probable that under the copyright law, copyrightable designs or models are limited to those for works falling within the fine arts, although cases can be readily conceived where a work might be one of fine art, because of its form and execution, and a work of useful art because of its intended use. In such an event both a copyright and a patent should be procured for perfect protection. While in doubtful cases the Courts will hold that, presumptively, the fact that a given work is patentable is ground for holding it is not copyrightable, and *vice versa*, it seems that there is no rule of law nor is there any consideration of public policy which will prevent the issuance of both a copyright and a patent to cover the same work, in its different aspects, in a proper case (1). It is an innate sign of culture to desire useful articles to be artistic in form. The present and future appears to tend steadily to the unlimited utilization of mechanics and physical forces in every branch of life. As civilization becomes more and more complex, the facts to which statute must be applied, become more and more complex. A future development of "talking machines" may well lead to books that may either be read or heard. The literary contents of such books would require copyright protection, the mechanical features patent protection. A novel household utensil may be modeled by a great sculptor. Its form may be artistic in the highest degree; its machinery may show the qualities neces-

sary to patentability; its use may be purely utilitarian and it may be so constructed as to be one inseparable unit. In such event it should be both copyrightable and patentable.<sup>98</sup>

Subdivision (c) of Article 1 is new, but merely declaratory of the prior law, save in so far as it gives the author the right to authorize others to deliver his sermons, lectures, etc., orally, in public, and does not require works covered thereby to be printed. That subdivision reads as follows:

§ 206  
The right to authorize the public delivery of lectures, etc.

*“To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production.”*

It should be noted that this subdivision applies only to works, not dramatic or musical, in nature, intended, primarily for oral communication to auditors. It does not appear to apply to printed or other mechanically reproduced matter, intended primarily to be apperceived through the eye and not through the ear.

Whether poems, which, while addressed to the eye, though their verbal music may also be intended for the ear, have the rights conferred by this section is, in view of the inclusive rules of construction applicable, an open question. There appear to be no provisions of the Act which would prevent the public reading of novels, poems (unless dramatic works) or other works, not covered by this subdivision, or the following one. It should be noted the subdivision does not protect against gratuitous deliveries of lectures, etc., but only against unauthorized public deliveries for profit. The English cases which will be commented on in connection with subdivision (c) of this section should be read on the question of what “for profit” means in such connection.

§ 207  
Poems.

§ 208  
Limitations on right: private or gratuitous deliveries not prohibited.

98—See *Louis De Jonge & Co. v. Breuker & Kessler Co.*, 182 F. 150.

§ 209  
Mechanical  
deliveries.

The right to authorize the delivery of the work is not limited to reproduction by human agencies.

This subdivision, as well as the following and preceding ones, apply only to copyrighted works, that is, to works which have been published. What constitutes publication of lectures, dramas, etc., will be discussed in a subsequent portion of this work as well as the rights existing therein at common law, before publication.

The exclusive right is further given a copyright proprietor:

*“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.”*

§ 210  
The exclusive  
right of  
public  
performance  
of dramas and  
to sell manu-  
script copies  
or records  
thereof.

Subdivision (d) refers to the performing right in dramatic works, and to the sale of manuscript copies of such works.<sup>99</sup> The exclusive right to vend, that is, sell any manuscript or record of such work is given, if it is “not reproduced in copies for sale.” The phrase quoted appears at various places in the Act. It can most conveniently be discussed in connection with Sections 11 and 12,<sup>1</sup> as it should, it appears, be given the same construction throughout the Act. It will be shown in connection with

99—Prior to the passage of the present Act there could be no statutory copyright in the United States in manuscript plays. See § 358.

1—See §§ 767, 788.

the discussion of the phrase elsewhere,<sup>2</sup> that it would appear that the word "sale" is not used in it with strictly technical nicety, but rather in a sense of including distribution of a work to the public, or any indiscriminate part thereof, with, or without, the payment of a consideration and with, or without, the passing of the technical legal title therein.

Manuscript, as used in this Section would probably include unbound, printed copies, as well as those typewritten, or written by hand, by reasoning along the lines used in construing the word "writings" in the Constitution.

The right to vend any record of dramatic compositions, if not reproduced in copies for sale, is evidently a very limited right, as if any considerable number of such records were sold, or available for sale, it would be difficult to avoid the result that the work was reproduced in copies for sale. By "record" would appear to be meant, any expression of the dramatic work in tangible form from which it could be read or reproduced. It would appear to cover a motion picture film, phonographic disk or roll or other mechanical appliance to be used on a machine. It would be aptly descriptive of photographic positive motion picture films which are rarely reproduced in copies, the prints taken therefrom being negatives, and of master-records for phonographic reproduction. Such a motion picture positive at the present day corresponds as far as its use is concerned, largely to the manuscript of a written or printed play. It will be noted, the right here conferred is that of sale, but, judging from the general drift of copyright decisions, this would, on *a fortiori* reasoning, be held, probably, to include lesser rights of limited disposal such, for example, as leases, etc., not amounting, in their essence, to sales.

The exclusive right of public performance and representation of copyrighted dramas is given to

§ 211  
What are such manuscripts.

§ 212  
What are such records.

§ 213  
The right to lease, etc., such copies.

<sup>2</sup>—See § 781.

§ 214  
Meaning of  
exclusive  
right of  
performance.

the proprietor of the copyright therein. "Exclusive" means the right to exclude any third person from performing such dramatic work, or any similar work, copied in whole, or material part, from his work, in public, without his consent. It would not prevent public performance of a substantially identical play, independently produced, in ignorance of the copyrighted work.<sup>3</sup> The word "drama" as used in this subdivision is deemed to be the equivalent of "dramatic work." Performance would appear to mean rendition by human, or living, actors: representation, by mechanical agencies.

§ 215  
What is such  
performance.

What is a public performance is a question of fact.

§ 216  
Need not be  
for profit.

As the exclusive right of performance, or representation, is not limited to performances, or representations, for profit, gratuitous public performance is an infringement of the right. As novelty is the chief attraction in the average dramatic production, and, in the absence of other inducing factors, persons rarely desire to see the performance, or the representation, of the same dramatic work more than once, the potential audiences of the copyright proprietor are diminished by every performance, whether public or private. Hence, since his protection is the chief purpose of the statute, and the author alone by his creative powers furnished the only means by which his particular dramatic ideas may become cognizable to others, it is only just that a very inclusive construction be given the words "public performance." It is not necessary for a performance to be public that it be open to everyone who chooses to come. It would seem sufficient if one or more persons, connected with its performance, may invite anyone they choose, without limit, or within broadly extended limits, either as to number or class. On the one hand, a

§ 217  
When a  
performance  
is public.

3—See § 998. See also *Bachman v. Belasco*, 224 F. 817.

performance, the audience hearing which consisted of the families, or a necessarily very limited class of associates, might not be deemed a public performance, while one consisting of the friends of numerous performers might. The matter would seem one of degree, and the extent of the audience as well as its relationship to those responsible for, or participating in the performance. In doubtful cases, the doubt should be resolved in favor of the copyright proprietor. This, however, is not always done. There are very few reported cases that discuss the question as to what is, and what is not, a public performance. In one instance,<sup>4</sup> a gratuitous performance of a play took place in a hospital for the entertainment of the nurses and attendants of the hospital. The hospital staff and some of their friends were present. A reporter was present by invitation. The Court, by a two to one vote, with an express limitation of the case to its facts, held the performance was not a public representation. While the case is a doubtful one, on its facts, the law as announced in the case appears entirely sound. The general test laid down is that a performance is public when there is present a sufficient number of the public who would, presumptively, also go to a performance licensed by the author, as a commercial transaction, so that it may be said that, theoretically, at least, the author has sustained a monetary loss.

§ 218  
Test as to  
when a  
performance  
is public.

The present statute does not draw any distinction as to the place of performance, as was done under the former English Act,<sup>5</sup> which limited infringement to performances at places of dramatic entertainment. Under the present Act, a performance, if public, is a violation of the copyright no matter where performed. The character of the place of performance, at most, is only of slight evidentiary

§ 219  
Place of  
performance  
unimportant.

<sup>4</sup>—*Duck v. Bates*, 13 Q. B. D. 843.

<sup>5</sup>—<sup>2</sup> & 4 Will. IV, c. 15, § 1.

§ 220  
Absence of  
scenery, etc.,  
unimportant.

§ 221  
The right to  
reproduce  
dramatic  
works,  
mechanically.

§ 222  
Limit of the  
right.

§ 223  
Mechanical  
adjuncts for  
visualizing  
writings.

importance as bearing upon the question whether, or not, the performance was public. Neither scenery nor costumes are necessary to make a performance public.<sup>6</sup>

The balance of subdivision 1 (d) is intended to confer, in as inclusive fashion as possible, the exclusive right, upon proprietors of copyrighted dramatic works, to reproduce such works mechanically, in whole or in part, in any manner, and, exclusively, to present such reproductions. It is to be noted this right of representation or mechanical reproductions of dramatic works is not, in terms, limited to public representations. Whether it would be deemed so limited, by construing the subdivision as an entirety, must be deemed an open question. This right is conferred in language broad enough to cover reproductions in media, or by processes, not now known or discovered. There appears to be only one limit, that the records, or transcriptions, must, under the Constitution, be in the form of "writings."

No case has yet passed upon the question as to whether Congress may constitutionally attempt to grant copyright in objects which may not in some form be read or apperceived by the eye. Having in view the history of copyright, this question can only arise when and if some dramatist shall attempt to record his drama by means of some mechanical device which will result in a writing which cannot be read by the eye but only through the intermediary of some other mechanical device. In this connection it may be further suggested that mechanical adjuncts to vision, however complicated, cannot, in the last analysis, it would seem, be differentiated logically from the simple eye-glass, through which, and by means of which, one reads and that as long as a writing may be read by the eye through, or by

6—Russell v. Smith, 12 Q. B. 217, 236.

means of, a machine it would seem to be a writing, no matter how or where reflected or how communicated to the eye.

It should be carefully noted that the case of *White Smith Music Publishing Company v. Apollo Co.*<sup>7</sup> does not hold that it is not within the constitutional power of Congress to grant copyright in "writings" which cannot be "read" except through mechanical agencies. The contrary is established by the cases holding motion pictures subject to copyright, as these can only be "read," satisfactorily, by being thrown on screens, by mechanical agencies.

The rights conferred by Section 1 (d) appear to include the right to their exercise in person, or by agents or licensees. Such derivative rights have been exercised, and acquiesced in, for many years past. The fact that one of the subdivisions of this section (c) contains apt words for the derivative exercise of the right and the others do not, is deemed simply a historically needed amplification of doubtful rights in respect to the particular class of works mentioned in that subdivision, rather than a denial of such rights in respect to the classes of works not mentioned. This view is strengthened by comparison of the present Act with its predecessors, which shows an evident legislative desire, at all points, to enlarge rather than restrict, the scope of copyright and its incidents.

The right is also conferred upon a copyright proprietor:

*"(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*

§ 224  
The right  
may be  
exercised  
through  
agents or  
licensees.



*thought of an author may be recorded and from which it may be read or reproduced. . . ."*

§ 225  
The right  
publicly to  
perform  
musical  
works, for  
profit.

The final subdivision of this section<sup>8</sup> gives the proprietor of a musical composition the exclusive right to its public performance, for profit, and to its mechanical reproduction. The subdivision is entirely new. The meaning of the phrase "public performance" has been discussed in connection with the similar phrase used with reference to dramatic compositions.<sup>9</sup>

§ 226  
What is  
"profit."

What is "profit," as used in this clause, may now be considered. A similar phrase was construed in an English case,<sup>10</sup> where it was held the proprietor of a hotel, who caused music to be played to attract custom, no admission fee being charged, gave a public performance for profit. The profit in this case was indirect, arising from his sale of food and drink, which were increased, or likely to be increased, by his drawing customers by the performance of music. The Circuit Court of Appeals for the Second Circuit refused to follow this decision and held,<sup>11</sup> that a performance of a musical composition by a hotel orchestra, where no admission fee was charged, was not a performance for profit, within this subdivision of the section. These decisions appeared to take cognizance of existing, and long continued, custom, but the Supreme Court, on appeal, adopted the English view.<sup>11a</sup>

Copyright in a musical composition has been held<sup>12</sup> not to include necessary incidental verbal directions for its proper rendition, when disconnected from it. Thus the right of public

8—Section 1 (e).

9—See § 217.

10—*Sarpy v. Holland*, (1908) 2 Ch. 198.

11—*John Church Co. v. Hilliard Hotel Co.*, 221 F. 229; *Herbert v. Shanley Co.*, 229 F. 340.

11a— — U. S. — (N. Y. Law Journal, Feb. 2, 1917).

12—*White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1, 52 L. ed. 655.

performance does not include the words of a song, unless it be of such a nature that it may properly be deemed a dramatic composition. The words of an operatic libretto, including those sung, are, patently, dramatic and, since length is not the test of dramatic quality, the words of a song may be a dramatic monologue. The Act does not in terms refer to songs, but it does, in terms, elsewhere, refer to dramatico-musical compositions. Other things being equal, whether a person sings, or speaks, words constituting a dramatic composition is immaterial. In the latter event, its public performance, even gratuitously, would be interdicted by the subdivision dealing with dramatic compositions. In the case of non-dramatic songs, it would seem there is nothing to prevent their public performance, if the words be set to uncopyrighted music.

§ 227  
Public  
performance  
of songs.

It should also be noted that musical compositions may be performed gratuitously, in public. It may also be observed that while the subdivision gives exclusive rights of performance, it does not give exclusive rights of representation, in so many words.

§ 228  
Gratuitous  
performance.

The semi-colon which appears after the word "profit," in the third line of the subdivision, should, it appears, have been inserted after the word "composition" in the second line. That the latter was the Congressional intention may be gathered both from the general language of the subdivision and from its last paragraph which would be unmeaning and unnecessary, if the punctuation in question, in its present form, were not inadvertent. Correctly punctuated, the subdivision, then, confers the exclusive right of making mechanical reproductions of musical compositions for sale

§ 229  
The exclusive  
right to  
reproduce  
music  
mechanically.

"in any form of record, in which the thought of an author may be recorded and from which it may be read or reproduced."

§ 230  
 "Writings"  
 not addressed  
 to the eye.

§ 231  
 Such writings  
 may be  
 copyrighted  
 constitu-  
 tionally.

§ 232  
 Effect, if any,  
 of possible  
 unconstitu-  
 tionality of  
 compulsory  
 license system  
 on right.

Such records, normally, as is common knowledge, cannot be read with the eye, even by the intervention of mechanical agencies. Here, then, is the only subdivision of the section which necessarily deals with forms of expression, not addressed directly, or indirectly, to the eye. These records are addressed only to the ear. But although this be so and although they are not readable by the eye, nevertheless, they are writings within the Constitutional sense, as truly as it etched plate, chiseled marble or painted canvas, since they too are the physical embodiment of creative thought. Although not readable by the eye, they may be read by machinery and are so read in practice. Since there is no requirement apparently in the Constitution, either expressly, or by necessary implication, that "writings" shall be communicated to the brain, solely through the eye, rather than through any other sensory organ, it would seem that in conferring this right, as is, indeed, foreshadowed by *White Smith Publishing Co. v. Apollo Publishing Co.*,<sup>13</sup> Congress was acting within its constitutional power. As has been shown, however, the condition of compulsory licenses annexed to the right is deemed probably to be unconstitutional,<sup>14</sup> but this does not necessarily render the right itself invalid.

The right is to make records. The attempted condition becomes effective if such records, after being made are, with the knowledge or consent of the copyright proprietor, actually "used on parts of instruments," mechanically reproducing the copyrighted work. The introduction to the license clause says it is enacted as "a condition of (sic) extending the copyright control to such mechanical reproductions." The language used in the Act at this point is singularly inapt and confused. This section of the subdivision being in derogation of the author's

13—209 U. S. 1, 52 L. ed. 655.

14—See § 152.

rights, if constitutional, is to be strictly construed. The last quoted phrase may conceivably be taken to mean the right to represent musical compositions through machines in which so-called records or rolls are inserted and played. It will thus be noted that the right to make such records does not necessarily appear to be conditional but merely the right to their public use, if made. This construction is borne out by the succeeding language of the license clause. The attempted condition appears a condition subsequent.

§ 233  
The compulsory licensing clause discussed.

It is to be observed that compulsory licensing is only to become effective if the copyright proprietor permits the "use" of "the copyrighted work," "upon the parts of instruments serving to reproduce mechanically the musical work." This phrase presents possible difficult questions for construction, if the subdivision is constitutional. Is there a distinction between instruments and machines which reproduce music? Is the former word broad enough to include the latter, *if strictly construed*? If not, the condition does not express its intended purpose<sup>15</sup> and would be inapplicable in most instances. What is meant by the "use" of the copyrighted work on parts of such instruments? Does this mean its notation on the record? If so, why is not the appropriate language used as in the earlier portion of the subdivision? Or is performance of the record meant? If so, use of the record on the machine and not on its parts, would seem to be the more natural method of expressing such intention. What is meant by a "part" of such an instrument? The ordinary record used in mechanical music machines is entirely separate from it and can be used on numerous machines of different types, made by different manufacturers. Can such a record properly be said to be a part of any given instrument. This appears to

have been intended<sup>15</sup> as interchangeable "parts" are mentioned.<sup>16</sup> Finally, what is meant by the phrase "mechanical reproduction" of the musical work? This cannot mean actual reproductions, as it refers to the copyrighted work, which is not the sounds composing the work but their expression, in some tangible form, in which form the work has been copyrighted. While the copyrighted form may be varied, it seems, since there can no more be property in sounds than in ideas, that the only effect of the variation would be to bring the resultant form within the copyright, or make it copyrightable as the case may be. Hence, reproducing the work would appear to mean copying it. On the other hand, the latter meaning was undoubtedly not intended. These questions which arise at the very outset in determining the existence of the very facts essential to the application of the license clause are suggested, rather than discussed, as until the question whether the portion of the division in question is constitutional, or not, is determined, it is deemed unnecessary to discuss its effect and application in great detail.

§ 234  
Limitations  
on compulsory  
licenses.

It should be noted the compulsory licensing system is limited to cases where the "use" in question of the copyrighted work has been made by its owner or with his knowledge or express consent. As long as he does not chose himself to reproduce his property mechanically, and represent it publicly, no one else can. But as soon as he attempts to utilize the right in a manner to give it value, the section purports to apply.

§ 235  
Nature of  
such licenses.

The license rights given, if valid, are broad. Not only the same but any use "similar" to that made by the copyright owner may be made.

§ 236  
The royalty  
system.

The royalty to be paid is to be paid only by the manufacturer. If he or it (if a corporation) are

15—See § 25, e.

16—Cf. also *Mabe v. Connor*, (1909) 1 K. B. 515.

irresponsible, the copyright proprietor is without apparent remedy, save that he can enjoin future manufacture of such records. The State statutes covering compulsory licensing, enacted prior to the formation of the United States, with their provision for the giving of security if such licenses were granted, might well have given suggestions to Congress in this respect.

The royalty provided, two cents, is the same, whatever the merit, or popularity, of the musical composition. Monthly reports are provided for but no penalty for failing to make the reports. Payments are to be "due" on the 20th of the month succeeding the month of manufacture. On the royalties being paid, "the articles or devices" in question, are to be free "from further contribution to the copyright except in case of public performance for profit." If this is to be deemed to render the proprietors of such articles liable for infringement in the case of public performance of mechanical music for profit, it would seem to impose a rather onerous examination of the manufacturer's business dealings upon their owners, before they can safely render such performances, or even purchase them.

Provision is made for the filing of notice by copyright proprietors if they use, or license, the musical composition "for the manufacture" of such parts, and a failure to file such notice is to be a complete defense to suit for any "infringement of the copyright." No time is provided for filing the notice, so that, apparently, it may be filed at any time before suit. While the language used with reference to this defense is broad, it is deemed it will be construed to apply only to infringements of musical copyright by mechanical reproduction, both because of its situation in the Act and its evident purpose. The application of this clause was considered in a recent decision where it was held<sup>17</sup> that a license

§ 237  
Reports.

§ 238  
Time of  
payment.

§ 239  
Notice of  
mechanical  
use to be filed  
by copyright  
proprietors.

§ 240  
Effect of  
failure to file  
notice.

17—F. A. Mills v. Standard Music Roll Co., 227 F. 849.

to use copyrighted musical compositions, in the manufacture of mechanical records, in any form whatsoever, would not permit the separate printing of the words of the songs upon paper, and their subsequent distribution. It was further held that such a license would not bar suit for infringement of copyright by such unauthorized copying, merely because no notice of such license was filed, as provided by this subdivision of the Act, as the filing, or non-filing, of such notice was only important in connection with infringement by reproduction of the work in mechanical record form.

The penalties for failure to pay royalties can be best considered in connection with that later portion of the Act which deals with remedies.<sup>18</sup>

§ 241  
Mechanical  
slot  
machines.

The reproduction or rendition of a musical composition by or upon slot machines is not, by express provision of the Act, a public performance for profit, unless a fee is charged for admission to the place where the machines are.

§ 242  
Works in  
connection  
with which  
rights of  
mechanical  
reproduction  
exist, limited.

It is to be further observed that this right of reproduction for representation by mechanical agencies is conferred only upon compositions published and copyrighted after July 1, 1909, and does not include the works of any foreign author or composer, whether resident in the United States or not, unless the country of which he is a citizen or subject grants similar rights to American citizens. While the right given the President<sup>19</sup> under Section 8 (b) to determine by proclamation the existence of the reciprocal conditions under which foreigners may become entitled to copyright strictly speaking applies only to Section 9, it has been assumed to apply to Section 1 also, and as this establishes a convenient form of procedure, the Courts, if the matter comes before them, will probably construe the two sections together in this respect.

§ 243  
Presidential  
proclamations.

18—See § 1310.

19—See § 678.

The various express rights conferred by the section have now been enumerated. The sum total of these rights applicable to a given work constitutes copyright under the present Statute. Thus it is to be noted

§ 244  
Summary:  
Nature of  
copyright  
under the  
present Act—  
multiple but  
variable.

(a) that copyright under the present Act is an aggregation of rights but

(b) that such aggregation of rights is not constant but is variable, depending on the various subjects of copyright involved in a given case.

The scope of such rights is further elaborated in the discussion of infringement and of what is copyrightable.<sup>20</sup> Other rights dealing with the title to copyrights are covered by other sections.<sup>21</sup> Questions illustrative of the scope of copyright in a work, partly original, partly not, or copyrightable solely because of its form, are also discussed elsewhere.<sup>22</sup>

§ 245  
Effect of  
passage of Act  
as enlarging  
rights of prior  
copyrights.

It will have been noted that the present Act purports to amend and consolidate the prior copyright statutes. It will also have been noted that "any person entitled thereto," is to have all the rights enumerated in Section 1, upon compliance with the provisions of the Act, except only that the provisions of the Act, "so far as they secure copyright controlling the parts of instruments serving to reproduce, mechanically" musical works, are only to apply to compositions, "published and copyrighted after this Act goes into effect." It would appear to follow that the rights of the proprietors of all copyrights existing under statutes prior to the present one, were enlarged and made to conform to those enumerated in Section 1, on the passage of the Act, with the single exception noted. A copyright act may enlarge the rights of the proprietors of existing copyrights.<sup>23</sup> Such enlarged rights will

20—See §§ 504, 971.

21—See §§ 1476, 1507.

22—See §§ 453, 611.

23—Cumberland v. Planché, 1 Ad. & El. 580.



arise in the proprietors of the copyrights, not in the authors of the works involved,<sup>23</sup> save where the statute expressly provides the contrary, as the present Act does with respect to renewals of copyright.<sup>24</sup> Reference may be made to Sections 7, 18 and 24 of the Act, as indicating the soundness of the view advanced as to its intended application to existing copyrights. Reference is made, however, to the decision in *M. Witmark & Sons v. Standard Music Roll Co.*,<sup>25</sup> which while apparently recognizing this doctrine, reaches a result opposed to it, by application of the provisions of Section 63 of the Act to the facts involved in its decision. That case is discussed at length in connection with Section 63, and attention is there directed to the apparent fallacies in its reasoning.<sup>26</sup>

23—*Cumberland v. Planché*, 1 Ad. & El. 580.

24—See § 946.

25—221 F. 376.

26—See § 1655.

## CHAPTER V

### COMMON LAW COPYRIGHT, PUBLICATION AND AUTHORSHIP

*Section 2. That nothing in this Act shall be construed to annul or limit the right of the 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.*

§ 246  
Common Law  
Copyright.

The earliest copyright legislation dealt solely with books, after publication. It had no application to works before they were published.<sup>27</sup> Its scope is shown by the following excerpt from the Statute of Anne:

§ 247  
Nature of  
early statu-  
tory copyright.

“From and after the tenth day of April, 1710, the author of any book or books already printed who hath not transferred to any other the copy or copies of such book or books, share or shares thereof or the bookseller or booksellers, printer or printers, or any other person or persons, who hath or have purchased or acquired the copy or copies of any book or books in order to print or reprint the same, shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from the said 10th day of April and no longer and that the author of any book or books already composed and not printed and published, or that shall hereafter be composed and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term

§ 248  
The Statute  
of Anne:  
text.

27—Jefferys v. Boosey, 4 H. L. C. 815.

of 14 years, to commence from the day of the first publishing the same and no longer.”<sup>28</sup>

§ 249  
The first  
United States  
Act.

The first American Copyright Act<sup>29</sup> was modeled on the Statute of Anne and also dealt only with published works.

§ 250  
The contro-  
versy as to the  
effect of the  
statutes on  
common law  
copyright.

Reference has been made elsewhere<sup>30</sup> to the historic controversy as to whether or not an author's rights in his works, his so-called common law rights or common law copyright, survived publication, independently of statute. As a result of the enactment of the Statute of Anne and of the original United States Copyright Act, this question when it came up for determination, was inseparably connected with the question as to whether or not, if such rights existed prior to the passage of the Statutes, they were “taken away” by the statutes. In *Millar v. Taylor*,<sup>31</sup> it was held such rights existed and were not taken away by the Statute. In *Donaldson v. Becket*,<sup>32</sup> the House of Lords, before deciding the question, put the four following questions to the judges, who answered yes, or no, as indicated after each question:

§ 251  
*Millar v.*  
*Taylor.*

§ 252  
*Donaldson v.*  
*Becket.*

(1) Whether, at common law, an 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? Yes, 10. No, 1.

(2) If the author had such right originally, did the law take it away upon 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? No, 8. Yes, 3.

28—8 Anne cap. 19.

29—First Congress, 2nd Session, Ch. 15.

30—See § 17.

31—4 Burr. 2311.

32—17 Hans. Parl. Hist. 954 (4 Burr. 2408).

(3) If such action would have lain at common law is it taken away by the Statute of 8th Anne? And is an author, by the said statute, precluded from every remedy except on the foundation of the said statute and on the terms and conditions prescribed thereby? Yes, 6. No, 5.

(4) 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? Yes, 7. No, 4.

(5) Whether this right is in any way impeached, restrained or taken away by the Statute 8th Anne? Yes, 6. No, 5.

The House of Lords, by a large majority, held<sup>33</sup> that since the work involved in the litigation was a published work, its proprietor's rights, were, after publication, solely under, and in accordance with, the Statute. It will thus be noted that the opinions of the judges on the question whether or not, a common law right in literary property existed in the absence of statute, after publication, were entirely in the nature of advisory *dicta*.<sup>34</sup>

In *Wheaton v. Peters*,<sup>35</sup> the same result was reached, by a divided court, with reference to the United States statute then in force. The majority of the Court deemed, however, that there was no copyright, after publication by virtue of any rule of the common law.<sup>36</sup> This view, which appears contrary to that of the English judges,<sup>33</sup> with reference to the question under discussion, receives much countenance, as far as the United States is con-

§ 253  
Judicial end  
of the  
controversy  
in England.

§ 254  
Judicial end  
in the United  
States.

33—4 Burr. 2408.

34—In *Jefferys v. Boosey*, 4 H. L. C. 815, only one judge stated he believed there was a common law right after publication, all the other six judges and law lords who expressed an opinion were unanimously against the right. See also *Routledge v. Low*, L. R. 3 H. L. 100; *Holmes v. Hurst*, 174 U. S. 83, 43 L. ed. 904; and see § 28.

35—8 Peters 591, 8 L. ed. 1055.

36—See also *Stephens v. Gladding*, 17 How. 447, 15 L. ed. 155.

§ 255  
No common law copyright exists in published works.

§ 256  
Common law copyright exists in unpublished works.

§ 257  
Comments on the admissions upon which the foregoing rule rests.

§ 258  
Illogical resultant condition of the law.

cerned, from the pertinent provision of the Federal Constitution. Since the decision of these cases, there have been various judicial *dicta*<sup>34</sup> on the question as to whether an author had a common law copyright in connection with his work, after publication, but the subject should be concededly academic, as the point actually decided by *Donaldson v. Becket*<sup>33</sup> and *Wheaton v. Peters*<sup>35</sup> is undoubted law.

In the opinions, in all of these cases,<sup>37</sup> it is stated that it was conceded that the author of a book had rights in his work, at common law, prior to publication, and this is undoubtedly the law with respect to all literary and artistic works. The exact extent of such rights will be considered in subsequent paragraphs of this work.

Yet, despite this concession, curiously enough, it is deemed doubtful to what extent, save in the case of books,<sup>38</sup> an author, composer, painter or sculptor, can be shown, historically, to have had any such rights at common law and what the precise scope of such rights was, at common law, with respect to books.<sup>39</sup> It appears from *Donaldson v. Becket*<sup>33</sup> that the common law copyright, *before publication*, which the judges then had in mind, was the sole right of first printing and publishing a work for sale and nothing more. If it be once granted that authors had a property in their work, as distinguished from and in addition to their property in their manuscripts, and that this included the right to publish, or sell a copy of it for the first time, it is difficult, logically, to see why similar rights should not have enured in their favor, at common law, after publication, as has been pointed out with great

37—See, for example, *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055, where the property is described as being in his manuscript and the right to be against anyone who deprives him of it or by improperly obtaining a copy endeavors to realize its publication.

38—See *Millar v. Taylor*, 4 Burr. 2411.

39—See *Birrell: Law & History of Copyright*.

eloquence and learning by text book writers, such as Mr. Drone.<sup>40</sup>

It has been suggested that an examination of such of the early cases as do not simply assume the existence of common law copyright, will show that the protection given an author, before publication, and the scope of his rights, as recognized, were personal, rather than property rights, resting in the so-called law of privacy<sup>41</sup> or in general doctrines of equity, with reference to abuse of confidence,<sup>42</sup> etc. If this were a correct view, much of the logical difficulty experienced at this point might be obviated. But such theory has not been adopted generally.<sup>43</sup> It is opposed to the theoretical view that property in a given work arises on creation and hence, and perhaps not unnaturally, an author's rights before publication are usually, and without too much critical examination, treated as full fledged property rights.

It is natural for the legal mind, after a superficial reading of the decisions, to ask why the common law should give copyright before publication and not after publication. The answer to this suggestion is that common law copyright before publication and copyright after publication are so different that the two rights, or groups of rights, are alike only in the legal term loosely applied to both. Further, such questioning overlooks the existence of the statutes which are the reason for the so-called illogical condition of the law, as well as the apparent impossibility of distinguishing between patents and copyrights, as unaffected by statute, in this regard.<sup>44</sup>

40—Drone, p. 8. Mr. Birrell should be read for the other view on this question. Mr. Drone does not meet the argument that a patentee at common law concededly had no such rights after publication.

41—4 Harvard Law Rev. 193, 198, 205; Morrison v. Moat, 9 Hare at p. 257; Corliss v. Walker Co., 31 L. R. A. 283, 64 F. 280, 283; Prince Albert v. Strange, 2 De G. & S. 652, p. 695.

42—Prince Albert v. Strange, *supra*, and cases cited.

43—See Woolsey v. Judd, 4 Duer 379.

44—8 Peters 591, 8 L. ed. 1055.

#### § 259

The view that common law copyright was a personal, not a property right.

#### § 260

The foregoing view, not law.

§ 261  
The distinction between copyright before and after publication, if illogical, is settled law.

It is perhaps not unnatural that where a statute is enacted in a field where this, or that, is deemed to be a rule of the common law as well, that the two may, or may not, make a consistent, or logical, whole. If they do not, the illogical resultant situation should be accepted, as it is, until changed by legislation, without attempts, which can only cause confusion, to find a theoretical justification for such situation. In view of existing statutes the question as to whether, or not, there were rights in a work, after publication, before the enactment of the statutes, is entirely academic. The points decided in *Donaldson v. Becket*<sup>45</sup> and *Wheaton v. Peters*<sup>44</sup> are also no longer open to discussion. The only reason for present reference to the matter is that the reason for the great and decisive part that the doctrine of publication has played in copyright law may be fully understood, and that the force of these decisions, in their possible bearing on certain obscure aspects of the present United States Act, may be fully appreciated.

§ 262  
Publication, the boundary between common law and statutory copyright: its possible double effects.

With reference to the doctrine of publication, it should again be repeated that the Statute of Anne and the original United States Act, only referred to published books.<sup>46</sup> Therefore, unless a work were published, no statutory rights, could be obtained, under this legislation. If it was published, since its owner could have obtained statutory rights, if he did not obtain such rights, he was deemed, by force of the statute, to have lost his rights at common law, whatever they were, and if he did obtain such statutory rights, the common law rights which they superseded, were not revived by the expiration of the statutory rights.<sup>44</sup> Publication, therefore, became the line between so-called common law copyright and statutory copyright, not because of any theoretical basis of distinction but solely because

§ 263  
Reason for the boundary line.

44—*Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055.

45—4 Burr. 2408.

46—The latter also referred to published maps and charts.

the statutes provided for statutory copyright, on and after publication, and not before. Publication, then, had a double importance, solely, however, as a result of the terminology of the statutes: (a) it was requisite to initiate copyright under the statutes (which only dealt with published works) if the requirements of such statutes were observed. If such requirements were not observed (b), the publication, while unsuccessful as far as concerned the initiation of statutory copyright, ended all common law rights in connection with the work so published.<sup>47</sup>

§ 264  
Publication essential to initiate statutory copyright.

As a result of these statutes, and similar subsequent legislation, the fundamental conception that publication is the boundary line between the two rights, the certain end of the one and possible beginning of the other, appears too firmly established to be overturned by any considerations of logic, or abstract justice, or indeed by anything less than unequivocal, statutory language.

§ 265  
Publication, without statutory copyright, ends all common law rights.

As has been shown elsewhere,<sup>48</sup> copyright after publication, in the United States vests solely by virtue of statute. One of the effects of this rule was illustrated in *Dixon v. Corinne Runkel Stock Co.*,<sup>49</sup> where it was held no attachment could issue in a copyright suit, where the state statute regulating attachments limited them to common law suits, since the copyright involved was unknown to the common law.

§ 266  
Attachments not permissible in actions respecting statutory copyright.

Since the early statutes dealt only with copyright after publication, it was natural that considerations of justice, as well as of the wise policy of increasing human efficiency, by disseminating knowledge and culture, predisposed the judicial mind to admit the claim of the author or creator of an intellectual

§ 267  
Reasons for rise and extension of doctrine of common law copyright.

47—*Wheaton v. Peters*, 8 Peters 591, 8 L. ed. 1055; *Bamforth v. Douglas Post Card & Machine Co.*, 158 F. 355; *Holmes v. Hurst*, 174 U. S. 83, 43 L. ed. 904.

48—See § 28.

49—214 F. 418.



work to property, before publication, in that which he and he alone had made. In the absence of statute, such right could only exist by virtue of the common law.

The hard fact also faced the Courts that with the statutory protection limited, as it was at first, to books, and only gradually extended both in subject matter and scope, no adequate statutory machinery existed for preventing any painter, sculptor, musician, playwright, or artist, from being entirely remediless against anyone who might surreptitiously obtain a copy of his work and desire to turn it into moneys, nor could he be protected, unless it was on the theory that a common law right existed which would furnish ground for judicial intervention or, where the facts warranted it, some general principle of the law of equity could be applied.

Such considerations, in turn, gradually gave rise to the now firmly established doctrine that the author, composer, painter, creator or proprietor of a book, dramatic or musical composition, painting, etching, or other artistic or literary productions, has more or less well defined rights therein, before publication, independently of statute. This doctrine rests upon cases that merely assert, or assume, the existence of the right, but the evident justice of the doctrine tends to render their result desirable.

This property does not exist in strictly literary and artistic property<sup>50</sup> only. No good reason exists, why there should not be the same growth in the nature of property, or media of expression, in which it may be held copyright may exist before publication, as has taken place in the case of such property as is deemed copyrightable after publication. It is quite true that there is not the same latitude for judicial construction of words as has existed in con-

50—Woolsey v. Judd, 4 Duer 379; Taft v. Smith, Gray & Co., 134 N. Y. Supp. 1011.

§ 268  
In what works  
common law  
copyright  
exists.

nection with statutes referring to subjects of copyright after publication but the reasoning which has led to such construction is equally applicable to the subject matter of copyright, before publication. It need only be reversed, so as to lead from the concrete to the abstract, instead of *vice versa*, to achieve this result. It is deemed, then, that if the question be raised at any time, protection before publication will be given, on common law principles, to any work capable of copyright after publication.<sup>51</sup> The two rights should thus be regarded as complementary the one to the other. The scope and incidents of the two rights, however, as distinguished from their nature, differ widely.

Common law copyright is perpetual,<sup>52</sup> unless terminated by the act of its proprietor: statutory copyright is always limited as to duration.

The common law copyright equally with the statutory copyright is an incorporeal right.<sup>53</sup> In the case last cited,<sup>53</sup> Mr. Justice Day, writing for a unanimous Court, said:

“It is well to remember that the property of the author or painter in his intellectual creation is absolute until he voluntarily parts with the same. One or more persons may be permitted an examination under circumstances which show no intention to part with the property right and it will remain unimpaired.”

Or, as said by Townsend, J., in *Bobbs-Merrill Co. v. Straus*,<sup>54</sup>

“The owner of the common law copyright has a perpetual right of property and the exclusive right of first general publication and may prior thereto enjoy the benefit of a restricted publica-

§ 269  
Common law and statutory copyrights complementary.

§ 270  
Common law copyright perpetual.

§ 271  
Nature and scope of common law copyright: decisions and dicta quoted.

51—*Mayell v. Highbey*, 1 H. & C. 148 (photographs).

52—See answers of Judges, 4 Burr. 2408.

53—*American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 52 L. ed. 208.

54—15 L. R. A. (N. S.) 766, 147 F. 15.

tion without forfeiture of the right of general publication. Thus he may communicate the contents of his work under restrictions without forfeiture of the right. This communication of contents under restriction known as a restricted or limited publication is illustrated by lectures to classes of students, dramatic performances before a select audience, exhibitions of paintings in private galleries, private circulation of copies of manuscripts, etc.”<sup>55</sup>

“The copies which were given to members of the committee on ceremonies and to a so-called ‘Literary Committee’ were delivered to them solely to enable them to decide whether the poem was one suitable and worthy of their acceptance as the ode to be delivered at the opening exercises. Such delivery of copies of a literary production is not a publication and could not prejudice the owner’s common law rights.”<sup>56</sup>

“The common law rights of authors as now recognized existed before the passage of copyright laws and have not been taken away or impaired by those laws. \* \* \* The author of a literary work or composition has by law, a right to the first publication of it. He has a right to determine whether it shall be published at all and if published when, where and by whom and in what form. This exclusive right is confined to the first publication.

When once published it is dedicated to the public, and the author has not, at common law, any exclusive right to multiply copies of it or to control the subsequent issue of copies by others. The right of an author or proprietor of a literary work to multiply copies of it to the

55—*Werckmeister v. American Lithographic Co.*, 68 L. R. A. 591, 134 F. 321.

56—*Press Publishing Co. v. Monroe*, 51 L. R. A. 353, 73 F. 196.

exclusion of others is the creature of statute.

\* \* \* This property in a manuscript is not distinguishable from any other personal property. It is governed by the same rules of transfer and succession and is protected by the same process, and has the benefit of all the remedies accorded to other property so far as applicable. It is personal, as other movable property, personal in legal contemplation, following the person of the owner and is governed by the law of his domicile."<sup>57</sup>

"It is certain that every man has a right to keep his own sentiments to himself if he pleases. He certainly has a right to judge whether he will make them public or commit them only to the sight of his friends. In that state the manuscript is, in every sense his peculiar property and no man can take it from him or make any use of it which he has not authorized, without being guilty of a violation of his property, and as every author or proprietor of a manuscript has a right to determine whether he will publish or not, he has a right to the first publication and whoever deprives him of that priority is guilty of a manifest wrong."<sup>58</sup>

"The only question is what is the extent and nature of an author's right at common law in his own work before publication apart from any title to the corporeal paper or canvas on which it is written or delineated. I am of opinion that it is an incorporeal right of property giving to the author the fullest rights not only of exclusive but also of actual enjoyment, so far as they are compatible with non-publication."<sup>59</sup>

"It is not denied and it cannot in the present

57—Palmer v. De Witt, 47 N. Y. 532, 538.

58—Yates, J., in Millar v. Taylor, 4 Burr. 2379.

59—Cozens-Hardy, M. R., in Mansell v. Valley Printing Co., (1908) 2 Ch. 441.

state of the law be denied that an author has a proprietary right in his unpublished literary productions. It is further incapable of denial, that that proprietary right, may still continue notwithstanding some kind of communication to others.”<sup>60</sup>

“The author of a lecture on moral philosophy or any other original composition, retains a right of property in his work which entitles him to prevent its publication by others until it has with his consent been communicated to the public.”<sup>61</sup>

“At common law the exclusive right to copy existed in the author until he permitted a general publication. \* \* \* At common law, an author had a property in his manuscript and might have an action against anyone who undertook to publish it without authority.”<sup>62</sup>

“The right of the author before publication we may take to be unquestioned, and we may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript; he may withhold or he may communicate it; and, in communicating, he may limit the number of persons to whom it is imparted, and impose such conditions as he pleases upon the use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation.”<sup>63</sup>

This right is presumed to be the law “of all civilized countries so far as not derogated from by the municipal law of any particular country.”<sup>64</sup>

60—Lord Halsbury in *Caird v. Sime*, 12 A. C. 326, 337.

61—Lord Watson in *Caird v. Sime*, 12 A. C. 326, 343.

62—Day, J., in *Caliga v. Inter Ocean Newspaper Co.*, 215 U. S. 182, 54 L. ed. 150.

63—Lord Brougham in *Jefferys v. Boosey*, 4 H. L. C. at p. 962.

64—Mr. Justice Maule in *Jefferys v. Boosey*, 4 H. L. C. at p. 893.

In *Harper Bros. v. M. A. Donohue & Co.*,<sup>65</sup> Sanborn, J., in elaborate dicta, enumerated an author's rights before publication, as follows:

“The sole, exclusive interest, use and control. The right to its name, to control, or prevent publication. The right of private exhibition, for criticism or otherwise, reading, representation, and restricted circulation; to copy and to permit others to copy and to give away a copy; to translate or dramatize the work; to print without publication, to make qualified distribution. The right to make the first publication. The right to sell and assign her interest, either absolutely or conditionally, with or without qualification, limitation or restriction, territorial or otherwise, by oral or written transfer.”

He added:<sup>66</sup>

“Such literary property is not subject either to execution or taxation, because this might include a forced sale, the very thing the owner has the right to prevent.”

This assertion, plainly resting in the early conceptions of the law of privacy, marks the high water mark of the extraordinary claims sometimes asserted in connection with this subject. Property beyond governmental reach or regulation, would indeed be an astonishing phenomenon. No decisions sustain this *dictum* with respect to the taxing power and while such intangible property cannot, of course, be reached on execution, if it be a property right, as the cases treat it, and not merely a personal right, no good reason can be shown why it cannot be reached by a creditor's bill in equity, just as a statutory copyright may be made subject to legal process.<sup>67</sup>

§ 272  
Criticism of certain dicta as to common law copyright.

§ 273  
View advanced that it may be reached to satisfy owner's debts.

65—144 F. 491, 492.

66—*Idem*, p. 492.

67—The decision in *Dart v. Woodhouse*, 40 Minn. 399, that manu-

§ 274  
Common law  
copyright by  
adverse  
possession.

Curiously enough, in a recent decision, the New York Supreme Court has swung to the other extremity, by holding that title to a common law copyright may be obtained by adverse possession.<sup>68</sup> This opinion, which is entirely unsupported by authority, appears erroneous, as the adverse possession would be against the author, but only the author, or one claiming under him, would be entitled to the right and the claim, if successful, would appear to involve the very publication which the claimant would be desirous of avoiding. The English cases<sup>69</sup> where the Courts have drawn an inference of assignment by the author, on facts essentially similar to those involved in the O'Neill case, appear to rest upon a firmer foundation, and this is practically the view which has just been taken in the latter case, on appeal.<sup>70</sup>

§ 275  
The actual  
scope of  
common law  
copyright.

Nothing can be more sweeping than the *dicta* with respect to an author's rights before publication,<sup>71</sup> but these rights, as established by actual decision, may be summed up, shortly, as follows. Subject to the provisions of law affecting all classes of property, an author may, without losing the protection of the common law, deal with his work in any manner he chooses, so long as he does not publish it, or dedicate it to the public, or voluntarily permit it to be published or dedicated.

scripts could not be seized on execution, appears to confuse the material object with the use of which may be made of it (see *Stephens v. Cady*, 14 How. 529, 14 L. ed. 528); and also to involve conceptions of the law of privacy rather than of property rights.

68—*O'Neill v. General Film Co.*, N. Y. Law Journal, April 9, 1915.

69—*Dennison v. Ashdown*, 13 L. T. 226; *Morris v. Kelly*, 1 Jac. & W. 460.

70—See New York Law Journal, April 4, 1916.

71—See *Prince Albert v. Strange*, 2 De G & Sm. 652; *Thompson v. Stanhope*, Amb. 737; *Duke of Queensbury v. Shebbeare*, 2 Eden 329; *Southey v. Sherwood*, 2 Meri. 235; *Bartlett v. Crittenden*, 4 McLean 300, s. c. 5 McLean 41; *Jefferys v. Boosey*, 4 H. L. C. 867 (Erle, J.); *Parton v. Prang*, 3 Cliff. 548, and quotations cited in § 271 of this work.

The law applicable to this question has been well stated, in a decision erroneous in other respects,<sup>72</sup> but apparently sound on this point.

“The established rule defining the rights of the owner of such property,” is, said Van Fleet, V. C. in *Aronson v. Baker*<sup>73</sup> that “every new and innocent product of mental labor, which has been embodied in writing, or some other material form, while it remains unpublished, is the exclusive property of its author, entitled to the same protection which the law throws around the enjoyment and possession of other kinds of property.”

The true measure of an author's common law rights, accordingly, is the doing of any act or acts which do not, in law, constitute publication or dedication,<sup>74</sup> including, however, the right first to make such a publication or dedication.

That is, for example, he may circulate copies of his work privately, among his friends or acquaintance.<sup>75</sup> He has, probably, the right to prevent even a “fair use” of the work by others, against his consent.<sup>76</sup> Hence he has the right to prevent others from making copies of his unpublished work, or any portions thereof,<sup>77</sup> and he may assign his rights to third persons and even, according to the authorities, give exclusive territorial licenses for the use of such works.<sup>78</sup> Such licenses however exclusive, may, nevertheless, be defeated, as to third persons, by a publication of the work made by the author, even

§ 276  
Examples of  
legitimate  
exercise of the  
right: posi-  
tive and  
negative.

72—See § 1089.

73—43 N. J. Eq. 365, 367.

74—*Mansell v. Valley Printing Co.*, (1908) 2 Ch. 441.

75—*Prince Albert v. Strange*, 2 De G. & Sm. 652; *Duke of Queensbury v. Shebbeare*, 2 Eden 329.

76—*Prince Albert v. Strange*, 2 De G. & Mac. 693.

77—*Press Publishing Co. v. Monroe*, 51 L. R. A. 353, 73 F. 196.

78—*Palmer v. DeWitt*, 47 N. Y. 532.



abroad, as was held in the case of Suderman's, "Die Ehre."<sup>79</sup>

§ 277  
Who is  
entitled to  
common law  
copyright.

Having considered what this right is, the question will now be discussed as to who may assert it.

§ 278  
Authors and  
persons in  
privity of  
title with  
them.

Only the author<sup>80</sup> of a work, or one claiming under him by assignment or license, is entitled to common law copyright.<sup>81</sup> Mere consent will not take the place of an assignment by the author, of his right to copyright<sup>82</sup> nor will the conferring of contractual rights falling short of such assignment. Thus in *Fraser v. Mack*,<sup>83</sup> it appeared Barrie had contracted to give the sole and exclusive right to publish his novel, "The Little Minister," in the United States, from the advance sheets, these to be delivered two months prior to the completion of the British publication, which was proceeding serially. Barrie was to get £20 on the American publication. This contract was held to confer a mere right to use the advance sheets and no property in the novel, especially as, at this time, neither aliens, nor their assigns, could obtain copyright in the United States. Such assignment, or license, may be oral,<sup>84</sup> whatever the rule in the case of statutory copyright,<sup>85</sup> and need not be accompanied by a transfer of any material object,<sup>86</sup> although, prima facie, a transfer of the manuscript or work of art will be deemed to be intended to carry the common law copyright with it,<sup>87</sup> unless a contrary intention be manifested.<sup>88</sup>

§ 279  
Oral transfers  
and licenses.

§ 280  
Implied  
assignments.

79—*Daly v. Walrath*, 40 A. D. 220 (N. Y.).

80—See §§ 406-425 for discussion as to who is an author in a copyright sense.

81—*Turner v. Robinson*, 10 Ir. Ch. 121.

82—*Clementi v. Walker*, 2 Barn. & Cr. 861.

83—116 F. 285.

84—*Power v. Walker*, 3 Maule & S. 7; *Parton v. Prang*, 3 Cliff. 548.

85—See § 1508.

86—*American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 52 L. ed. 208.

87—Mr. Justice Maule in *Jefferys v. Boosey*, 4 H. L. C. 893; *Parton v. Prang*, 3 Cliff. 548.

88—*Lucas v. Cook*, L. R. 13 Ch. D. 872.

In *Parton v. Prang*,<sup>89</sup> it was said that the ordinary rules of law applicable to personal property generally, apply to the sale of common law copyrights and this must follow if the right is a property, as distinguished from a personal, right. This was subsequently held in a decision<sup>90</sup> which laid down the rule that the acquisition and succession of common law copyright is regulated by the same legal rules as other classes of property.

It has been shown that an author obtains common law copyright by production. The manner in which he may lose it will now be considered.

In addition to facilitating the rise of the doctrine of common law copyrights, the early restriction of the scope of statutory copyright and the slow but certain increase in the variety of copyrightable works, bore another far reaching result. The fundamental doctrine around which the great copyright controversies had raged was publication.<sup>91</sup> The reason for this lay in the Statute of Anne. This term was borrowed by the law from the vocabulary of the printers and booksellers. It accurately described the final stage in the commercial process by which books, or other printed matter, were put into the hands of the public. The early legal definitions which were made of the term, naturally had books in mind, as the then existing statutes only referred to books. As the subject matter of copyright increased, it at first did so in the direction of works expressed in media, which were reproduced in copies, in order to obtain commercial results. Publication, hence, held its fundamental place in the copyright scheme. But, gradually, copyright was allowed in works which were not of value chiefly because they could be copied and which could not, accordingly, ordinarily, by any stretch of language,

§ 281  
General rules of law regulate the transfer of common law copyright.

§ 282  
The doctrine of publication discussed.

§ 283  
Historical development of doctrine and meaning of term.

§ 284  
Statutory development as to matter copyrightable, but continuing use of early technical terminology.

89—3 Cliff. at 550.

90—*Aronson v. Baker*, 43 N. J. Eq. 365.

91—See Birrell: *Law and History of Copyright*.

be said to be published, in the mercantile or non-technical sense of the word. But by this time the doctrine of publication was too essential a feature of copyright law to be ignored. The term was still used in the statutes. It had, hence, to be considered and fitted to the various media in which there might, or might not, be copyright. Here, however, important practical considerations intervened, viz:— firstly, the features of such works which give them pecuniary value and, secondly, where the author of a book published his work, he could obtain statutory copyright in place of the common law right, but, where the author, expressing himself in other forms of media, published, he could not, under the earlier statutes, obtain statutory copyright as these did not cover such media, or if he could obtain it, the rights obtained were so limited as to destroy his protection, from a practical point of view. These considerations led to two important results. Such media were, if not covered or adequately protected, by statute, whether consciously or not, protected according to their essence, by the simple device of holding the exercise of acts utilizing such an essence were not a publication, a conclusion which was undoubtedly facilitated by the other result, a judicial disinclination to hold any debatable act, a publication in the case of any works, where the result of a contrary ruling would be so finally and definitely fatal to their creator. It was during this period of incomplete statutory protection that the leading cases on what was not the publication of dramatic compositions and works of art were decided.

Time passed, and the statutes which gave rise to this condition were supplemented, broadened and liberalized. When in 1833, Parliament provided for dramatic copyright, the Act contained a provision<sup>92</sup> that for the purposes of the Act, public performance of a play was to be deemed a publication. By virtue

92—3 & 4 Will. 4, c. 15.

§ 285  
Inadequacy  
of rights  
constituting  
early statutory  
copyrights  
to protect  
performing  
rights, etc.

§ 286  
Results of  
foregoing  
conditions.

§ 287  
Leading cases  
decided during  
the foregoing  
period.

§ 288  
Subsequent  
statutory  
increase of  
scope of  
copyright:  
diversity of  
statutes in  
England.

of similar statutory definition, public performance of a musical work was a publication, under the prior English statute.<sup>93</sup> It should be noted that the statutes to which reference has just been made did not cover, or refer to, copyright in dramatic or musical compositions, as books. Such copyright was covered by the general statute governing copyright in books. These statutes have all been repealed.

The present British Copyright Act, 1911,<sup>94</sup> provides<sup>95</sup> that neither performance, representation or exhibition is to be deemed a publication under the Act. The reason for this change is apparent, when the respective statutes are considered. The earlier Acts conferred copyright for a definite limited term of years. It was necessary in order to fix the duration of this to have a starting point and the time when the work was first made public, furnished a convenient, and practical, place of beginning. The present British Act, however, makes the life of the author and fifty years beyond, the term of copyright and permits this to exist in unpublished, as well as published, works. Hence, publication has ceased to have its former importance in English law, but,—and this should be carefully noted,—solely as a result of the changes in the British statutory scheme.

In the United States, no separate statute creating separate and distinct forms of dramatic, musical or artistic copyright was ever enacted. There was only a general Copyright Act and not an aggregation of Acts. The Act of 1856 which created a statutory performing right, simply extended this to published dramatic compositions, copyrighted as printed books, under the general copyright Act, then in force. While manuscript plays could be copyrighted, in order to secure dramatic copyright, under

## § 289

The present English law as to what is not a publication.

## § 290

Reasons for its statutory rule.

## § 291

Doctrine of publication no longer important in England.

## § 292

Statutory history of copyrights in the United States with reference to doctrine of publication.

93—45 & 46 Vict. c. 40.

94—2 George V, c. 46.

95—Cf. § 1, subd. (d).

§ 293  
Publication  
still of  
fundamental  
importance in  
United States.

§ 294  
Absence of  
statutory  
definition in  
United States.

§ 295  
Differences in  
statutes and  
their bearing  
on case-law.

§ 296  
The question  
considered  
whether  
publication  
and dedication  
are equivalent  
terms.

the 3 & 4 Will, 4 c. 15, manuscript plays could not be copyrighted, for any purpose, in the United States, before the passage of the present Act.<sup>96</sup> The present United States, Copyright Law, no less than its predecessors, fixes publication as the beginning of the term of copyright for which it provides.<sup>97</sup> It will thus be noted that publication, since it marks the inception of the stipulated copyright term, retains its fundamental importance in United States copyright law. It should also be noted that there is no statutory definition in the present Act as to what is, or what is not, a publication in the case of manuscript dramas, etc. That is to say, that the present Statute, while it follows the 3 & 4 Will. 4 c. 15, to which reference has been made, in permitting the copyright of manuscript dramas, does not follow it in the express enactment of pertinent statutory definitions. In the midst of this growth and change of statutory provisions, it is not perhaps strange that many of the cases decided under the earlier statutes have furnished precedents which are constantly acted upon, without consideration of the reasons underlying such decisions, or the statutory changes which have been made.<sup>98</sup>

As has been pointed out,<sup>99</sup> the effect of publication, under the prior British law was, and under the present United States statute is, both to terminate common law copyright,<sup>1</sup> and to initiate statutory copyright, if the proper formalities connected with the latter be fulfilled. This result followed from the

96—Cf. *Ferris v. Frohman*, 223 U. S. 424, 56 L. ed. 492.

97—Section 23.

98—The copy of the volume of the reports containing *Chappell v. Boosey*, 21 Ch. D. 232, in the New York Law Institute, bears silent testimony to the point under discussion. That case involved a highly technical construction of English statutes. No parallel or similar legislation exists in the United States. The copy of the report is penciled for quotation in briefs so that all mention of the statutes discussed is elided in the excerpts indicated.

99—See § 262.

1—*Bamforth v. Douglas Post Card & Machine Co.*, 158 F. 355.

precise points decided in *Donaldson v. Becket*<sup>2</sup> and *Wheaton v. Peters*.<sup>3</sup> The plain ground on which these cases rest is, either that there was no common law copyright in any work after publication, or that, even if there had been, the assertion of the existence present or future, of such a right was so necessarily inconsistent with the copyright permitted and created by the statutes, that the enactment of such statutes negatived the existence of rights comprehended by the statutes, save and under the statutes. The latter view, taken by the majority of the judges in *Donaldson v. Becket*,<sup>2</sup> was all that was necessary to dispose of the question.<sup>4</sup>

Some confusion has been caused by efforts to suggest that since the publication of a work without copyright, in effect, is a dedication of the work to the public<sup>5</sup> that publication and dedication are practically synonymous terms. This is entirely inaccurate. While the term "dedication" may frequently be used to advantage to indicate the result of publication without copyright, it can only be used to describe this effect and cannot be used in any way to describe the publication necessary to initiate copyright under the statute. There would seem to be no good reason why acts not amounting to publication may not be deemed to terminate a common law copyright, but this is not the equivalent for holding that such acts would be deemed the publication necessary for statutory copyright. The intolerable effect of perpetual property rights in the expression of ideas has been considered to be the unexpressed reason for statutory copyright, and for the decisions holding that this, with its limited duration, superseded common law copyright after publication, if this existed. Just as public

§ 297  
Publication,  
without  
copyright, is a  
dedication.

§ 298  
But publica-  
tion to procure  
copyright  
is not.

§ 299  
Acts not  
amounting to  
publication  
may be a  
dedication.

2—See § 252.

3—See § 254.

4—*Holmes v. Hurst*, 174 U. S. 83, 85, 43 L. ed. 904, 905.

5—*Carte v. Ford*, 15 F. 439; *Keene v. Clark*, 5 Robert (N. Y.) 38

policy in earlier times showed its direct action upon literary works through the censorship, in restricting the dissemination of knowledge, it, at the present day, having swung to the other end of the circle, shows its effects by endeavoring to make ideas common property, as quickly, and as widely, and with as little restriction, as may be just to the author. It permits the latter to keep his work to himself, forever, or it permits him to make it public. If he chooses the latter course, it in turn permits him certain rights in connection with his work,<sup>6</sup> if he complies with certain simple conditions, largely designed for the protection of the public. If he does not comply with these, the result, it would appear, should be the same whether he be deemed to have "published" his work, or dedicated it to the public, or be considered to have abandoned, or waived, his right to copyright. Since the term "copyright" is a mis-description of the rights it includes, because of its extension,<sup>7</sup> beneficiaries should not complain if the doctrine of publication be similarly extended, even to their detriment. Thus leaving a manuscript for many years in the hands of a publisher to whom it had been given for reading, with a view to possible purchase, was deemed to be an abandonment of the common law right which terminated it.<sup>8</sup> Permitting numerous members of the public to perform a play without the owners' consent and without objection, may also be treated as an abandonment of rights in the play.<sup>9</sup> On the other hand, mere acquiescence cannot, it seems, be deemed to terminate common law copyrights, since the owner is not bound to assert his rights, unless he chooses to do so.<sup>10</sup> This question,

### § 300

#### Abandonment.

6—Cf. Cairns, L. J., in *Maxwell v. Hogg*, L. R. 2 Ch. App. 307.

7—See § 1.

8—*Southey v. Sherwood*, 2 Mer. 435; Cf. *Rundell v. Murray*, Jac. 311.

9—*Bouccicault v. Wood*, 2 Biss. 34.

10—Cf. *Black v. Allen*, 56 F. 764; *Lawrence v. Dana*, 4 Cliff. 83;

probably, is largely a matter of degree, coupled with the surrounding circumstances.

It will have been noted that publication may have a two-fold effect. It has been suggested that there may be more than one kind of publication and that only one kind of the two suggested types will have either of the effects attributed to publication in this branch of law.

The term "publication," has been said to be unfortunate and confusing, in that it has been said to include what have been called "limited" and "general" publications.<sup>11</sup>

"A limited publication," said Judge Townsend in the case last cited,<sup>11</sup> "is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public."

The cases cited for this proposition are all cases of common law copyrights, involving dramatic compositions, paintings and lectures. This definition is only deemed accurate and applicable to an exercise of his rights by the holder of a common law copyright. The definition can only give rise to confusion if not so limited, and, if so limited, as will be shown, it is unnecessary.

Publication is primarily of importance in forming a boundary between common law copyright and possible statutory copyright. It terminates the former and initiates, or prevents, the latter, depending on whether, or not, the statutory formalities are complied with, on publication. "Publication" on its face involves the conception of making public, in contradistinction from keeping private. A "limited" publication which does not involve mak-

§ 301  
Limited  
publication  
and general  
publication.

§ 302  
What is called  
a "limited"  
publication.

§ 303  
Definition of  
the term  
analyzed and  
its use  
criticized.

§ 304  
Essential  
nature of  
publication.

Heine v. Appleton, 4 Blatch. 125; Menendez v. Holt, 128 J. S. 514, 32 L. ed. 526.

<sup>11</sup>—Werkmeister v. American Lithographic Co., 68 L. R. A. 591, 134 F. 321 at p. 324.



§ 305  
Application of  
the doctrine  
of implied  
contracts.

§ 306  
The "public"  
may be only  
one individual.

§ 307  
Publication  
not measured  
by size of  
public  
involved.

§ 308  
Quasi-contract  
as underlying  
the doctrine  
of limited  
publication.

ing the work public is, accordingly, a contradiction of terms and it is difficult to conceive of any concrete case which would fall within the definition given of limited publication where the communication is not expressly, or impliedly, deemed a private one, resting in express, or implied, contract.<sup>12</sup> The "public" may consist of one person. An unrestricted sale of a single copy has been held a publication sufficient to divest common law copyright and to initiate statutory copyright,<sup>13</sup> even though made for copyright purposes only.<sup>14</sup> Hence a publication is not measured by the size of the public to whom it is made.

No good reason seems to exist why a copyright proprietor cannot, under the general law of contracts, make any agreement with persons with whom he immediately deals, which would be legal with respect to personal property generally. Such contracts may be either express, or implied from the nature of the dealings between the parties. It is believed that all of the cases of "limited" publication, so-called, will, on examination be found to be cases where the implied contract between the parties thereto so limited the nature of one of the parties rights, as to render it impossible for that person, or any other person, to claim his dealings with the copyright proprietor did not preclude him from acting in violation of such rights. In other words, these cases of "limited" publication, so-called, will, it is deemed, be found to be cases involving principles akin to, or part of, the law of quasi-contracts.<sup>15</sup>

12—In *Parton v. Prang*, 3 Cliff at p. 549, Clifford, J., instanced examples of limited publication: "by communication of the contents by reading, representation or restricted private circulation, which will not abridge the right of the author any further than necessarily results from the nature and extent of such limited use, as he has made or allowed others to make of the manuscript or painting."

13—*Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055.

14—*Stern v. Jerome H. Remick Co.*, 175 F. 282 (semble).

15—*Abernathy v. Hutchinson*, 1 Hall & T. W. 28; *Caird v. Sime*, 12 A. C. 326.

Every person who deals with a copyright proprietor necessarily deals with him in a private capacity but he may also be dealing with him as one of the public. Which capacity this may be, involves a question of fact to be determined, not so much by the actual intent of the parties (which is largely immaterial, as there may well be no intent to make a work public property and a publication in spite thereof) as by the nature of the copyrighted property and of its proprietor's dealings therewith.

§ 309  
Intent not  
necessary to  
publication.

These questions are discussed further in connection with what is, or is not, deemed a publication of dramatic compositions or of works of art. Another objection to the expression "limited publication" is that it really begs the question as to whether in situations where it would be applicable, there is not a general estoppel preventing any one from claiming that there was any publication of a work of any sort. It rests upon the popular meaning of publication rather than on its technical legal meaning. The English cases which say that in such cases there is no publication because of the relations of the parties and the implied understanding between them, avoid such possibility of confusion.<sup>15</sup> The expression "limited" publication really means no publication. Since the phrase has been judicially declared "unfortunate," and is quite unnecessary, its use should be abandoned.

§ 310  
A limited  
publication is  
no publica-  
tion.

The Statute (Sec. 62), in one of its too infrequent definitions, speaks of the "date of publication" in the case of a work of which copies are reproduced for sale or distribution, as being the earliest date when copies of the first authorized edition were placed on sale, sold or publicly distributed by the proprietor of the copyright or under his authority. This definition sufficiently describes the publication of books, prints, motion picture films, casts and all

§ 311  
Statutory  
definition of  
publication.

<sup>15</sup>—Abernathy v. Hutchinson, 1 Hall & T. W. 28; Caird v. Sime, 12 A. C. 326.

§ 312  
Its declaratory nature.

of those literary and artistic products which are reproduced in copies, as a means for bringing them before the public. It refers to the simpler forms of publication and is declaratory of the previous law.<sup>16</sup>

§ 313  
Its inapplicability to works not reproduced in copies for sale.

It has been said that one of the great difficulties in this branch of law is that general rules of law have been laid down without regard to the fact that the statutes have been changed, from time to time, by "engrafting" new subjects of copyright on the previous statutes,<sup>17</sup> without making suitable provision by definition in connection with such media. This is strikingly illustrated by the subject under discussion, for this definition does not cover any of the really difficult questions as to what is, or what is not, a publication. The case of printed matter is relatively simple. The right to reproduce copies has been the chief characteristic of copyright therein and this right has given its chief value to the copyright. On the other hand, the proprietor of a dramatic composition has at least a double opportunity:—to print and make copies of the work in book form and, what is much more valuable, to perform the play publicly. So the chief value of a work of art, save in so far as it is adapted for reproduction for advertising purposes, is in the original for sale or for exhibition. A moving picture film occupies a half way place between a book and a dramatic composition. It is printed in copies for sale and use, as a book is, but on being "run" through a projecting apparatus, the result is the illusion of a drama of action. These media all are distinct, have peculiar characteristics and their value lies in the different utilitarian aspects of the diverse works. They are all made public in different ways and under different circumstances. The statute is silent as to how they are to be deemed

§ 314  
Works whose chief value is not for reproduction in copies.

§ 315  
Necessity for determining how such works may be published.

16—See § 317, and following.

17—American Tobacco Co. v. Werckmeister, 207 U. S. 284, at p. 285, 52 L. ed. 208, 209.

published. Yet it is essential to determine this question as they may all be copyrighted under the statute, but only if published, since the duration of copyright, in the case of all media covered by the statute, runs from the date of the first publication of the work in which copyright is claimed.<sup>18</sup>

Before attempting a general definition of publication, it will be well to consider what in the past has been deemed to be, or not to be, a publication in the case of works, embodied in various copyrightable media.

A single sale of a copy of a book is a publication.<sup>19</sup> The public offer of copies of a work for sale is a publication, even though the attention of the public is not called to such offer or works.<sup>20</sup> Giving away pamphlets or leaving them in a hotel lobby, for anyone to take who pleases is a publication.<sup>21</sup> To print and distribute copies of songs gratuitously, to patrons and prospective patrons of a music hall was held a publication of the songs.<sup>22</sup>

It has been held<sup>23</sup> that where copies of a book were placed with a dealer to be sold after a certain date, this was a publication as of the date when they were to be so sold.

Leasing<sup>24</sup> or loaning<sup>25</sup> copies of a book to any member of the public who applies, is a publication, even though coupled with an agreement by the lessees not to disclose the contents of the copies.<sup>25</sup> In another instance,<sup>26</sup> it was held delivery of books

## § 316

The decisions as to what has been held a publication collated.

## § 317

A single sale.

## § 318

A public offer to sell.

## § 319

The gift of copies, indiscriminately.

## § 320

The lease or loan of copies to the public.

## § 321

Delivery to a carrier is not a publication.

18—See § 23.

19—Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; Gottesberger v. Aldine Book Pub. Co., 33 F. 381; Stern v. Jerome H. Remick Co., 175 F. 282.

20—Francis, Day & Hunter v. Feldman & Co., (1914) L. R. 2 Ch. 728.

21—D'Ole v. Kansas City Star Co., 94 F. 840.

22—Blanchett v. Ingram, 3 L. T. R. 687.

23—Wall v. Gordon, 12 Abb. Pr. N. S. 349.

24—Jewelers Mercantile Agency v. Jewelers Pub. Co., 155 N. Y. 241, 41 L. R. A. 846.

25—Ladd v. Oxnard, 75 F. 705.

26—Black v. Henry G. Allen Co., 56 F. 764.

§ 322  
A request not to expose books for sale held to prevent their consignment for sale from being a publication.

§ 323  
Where a newspaper is published.

§ 324  
The public deposit of copies is a publication, even though made to procure copyright.

to a carrier for transmission, even though title changed, was not, in itself, a publication, until the books reached the purchaser. This seems sound, as the books, being packed, were inaccessible. It was further held, and this seems more dubious, that a request contained in an invoice of books that they not be exposed for sale prior to a certain day, by the booksellers to whom they were sold or consigned, might be held a condition of such sale or consignment and that there was no publication, in the absence of proof that it had not been complied with. The persons to whom the books were sold had the opportunity to read them. This, coupled with the passing of title certainly appears a publication. The case could probably not be followed on the second point decided.

In a non-copyright case,<sup>27</sup> *Cozens-Hardy, J.*, deemed a newspaper published when, and where, it was offered to the public by the proprietor.

Deposit of copies in a public office (a), for the purpose of procuring copyright,<sup>28</sup> or (b) pursuant to a statute by which the opinions of a State Court were reported, copies to be delivered to the Secretary of State on completion,<sup>29</sup> has been held, or said, to be a publication even, it seems,<sup>30</sup> though the copy is a manuscript copy of a manuscript. In *Callaghan v. Myers*,<sup>29</sup> it was held that delivery by a state reporter of copies of a volume of law reports to the Secretary of State, for public distribution, was a publication thereof. These cases are all founded on the fact that by the delivery of the books, whatever its occasion, or the form of the transaction, the public, or an indefinite portion of it, were, without further action of the author or proprietor, put in a position where they could freely obtain the contents

27—*McFarlane v. Hutton*, (1899) 1 Ch. 884.

28—*Jewelers Mercantile Agency v. Jewelers Pub. Co.*, 155 N. Y. 241 at p. 254, 41 L. R. A. 846 (semble).

29—*Callaghan v. Meyers*, 128 U. S. 617, 32 L. ed. 547 (semble).

30—*Rees v. Peltzer*, 75 Ill. 475.

of the book. These cases show the inadequacy of Mr. Copinger's statement that:

“To constitute publication it is necessary that the work shall be exposed for sale or offered gratuitously to the general public, so that any person may have an opportunity of enjoying that for which copyright is intended to be secured.”<sup>31</sup>

Deposit of plans of a building, in a City Building Department, by an architect was held a publication.<sup>32</sup> Deposit of a copy of a play with the British Stage Censor, for the purpose of obtaining a license to act it was, on the other hand, held no publication where the evidence showed the public were not permitted access to such copy.<sup>33</sup>

In a case, illustrative of certain business methods, it appeared, a publisher, the plaintiff, had sent out printed copies of books to other publishers, for examination, with a view to obtaining orders. One publisher offered to purchase one of the two samples sent him. Plaintiff refused the offer. The publisher wrote that he was returning one sample but had kept the other. Thereafter, without further correspondence, the plaintiff collected the price for the book retained. It was held there had been a publication, as of the date of the publisher's letter advising plaintiff that he was keeping one of the books.<sup>34</sup>

Printing and distributing “The Autocrat of the Breakfast Table,” serially, in installments, in the Atlantic Monthly, was held a publication of the whole, when all the numbers were published, and of each part, as printed and distributed.<sup>35</sup>

§ 325  
Deposit of building plans.

§ 326  
Deposit for censorship.

§ 327  
Permissive retention of samples.

§ 328  
Serial publication.

31—Copinger: Copyright, p. 189.

32—Wright v. Eisle, 86 A. D. 350.

33—O'Neill v. General Film Co., N. Y. Law Journal, April 9, 1915.

34—Gottesberger v. Aldine Book Publishing Co., 33 F. 281.

35—Holmes v. Hurst, 80 F. 641, aff'd 174 U. S. 83; Mifflin v. Dutton, 61 L. R. A. 134, 112 F. 1004.

§ 329  
The effect of  
acts constitut-  
ing publica-  
tion cannot be  
qualified by  
notice or  
private  
agreement.

A sale of books under contracts by which the purchasers received title, but agreed not to show them to any other person was a publication.<sup>36</sup> And so where songs and the pianoforte score of an opera were printed, in Germany, with a notice that they could not be used for stage performance, this was a publication and the restrictive language, even if effective in Germany, was held of no effect in the United States.<sup>37</sup>

§ 330  
Partial  
publication.

An invention was held public property because of publication but the designs from which it was made, which were not accurately reproduced in the articles marketed, were held not published and hence subject to common law copyright and protected accordingly.<sup>38</sup> Publication of part of a book was not publication of the whole book.<sup>39</sup> Nor was publication of a piano arrangement of an opera nor a few of the orchestral parts, publication of the opera itself.<sup>40</sup> In another case,<sup>41</sup> it was said that the publication of the songs, and vocal score of an operetta under the name of the operetta, would not be deemed such a publication of the title, as would authorize the use of the title by third persons, except in connection with the songs and vocal score. This decision purports to be a copyright case; but unless it be really based on the law of unfair competition, it must be deemed erroneous, as there is no authority, nor can there be any principle, for holding that publication of the whole is not a publication of every component part of the work in question.

§ 332  
Posters, not a

The putting out of pictorial posters depicting

36—Larowe-Lorsette v. O'Loughlin, 88 F. 896.

37—Savage v. Hoffman, 159 F. 584; Wagner v. Conreid, 125 F. 798.

38—Tabor v. Hoffman, 118 N. Y. 30.

39—Low v. Ward, L. R. 6 Eq. 415.

40—Boosey v. Fairlie, 7 Ch. D. 361; Wood v. Boosey, 3 Q. B. 223.

41—Aronson v. Fleckenstein, 28 F. 76.

many scenes of a play, is not a publication of the play.<sup>42</sup>

The private circulation of etchings and presentation of occasional copies to friends was held not a publication.<sup>43</sup> Permitting an inspection of copies of a work with a view to its sale, and even leaving copies with prospective purchasers, appears to have been held no publication. Thus, in an English case,<sup>44</sup> it was held that it was no publication for the author of a report on a mine to print it and give copies to proposed purchasers of the property described in the report, on the understanding that they were to pay for the report, if they proceeded with the purchase, but that otherwise, it was to remain the author's property. Permission to a friend to make a copy of a manuscript was no publication, nor leaving a copy with him for that purpose.<sup>45</sup> In an unreported case cited by counsel in argument,<sup>46</sup> leaving manuscripts by will, for the use of the author's parishioners only, was stated to have been held not to be a publication. The theory on which these cases are sought to be justified, to-wit, "The distinction is in the limit of the circulation; if limited to friends and acquaintances, it would not be a publication, but if general and not so limited, it would be"<sup>47</sup> does not appear to cover the last cited case. The distinction between public and private circulation appears to be in its character, and its extent, or limit, is only important in so far as it may be persuasive evidence of its character.

Writing a letter is not a publication thereof and in fact does not give the recipient the right to make

publication  
of a play.

§ 333

Private  
circulation of  
copies.

§ 334

Permissive  
making of  
private  
copies.

§ 335

Distinction  
between  
private and  
public  
circulation.

§ 336

Writing  
letters.

42—O'Neill v. General Film Co., New York Law Journal, April 9, 1915.

43—Prince Albert v. Strange, 2 De G. & Smale 652, aff'd 1 Mac. & G. 25.

44—Kenrick v. Danube Collieries Co., 39 W. R. 473.

45—Thompson v. Stanhope, Amb. 737.

46—Dr. Paley's Case, 2 V. & B. Jr. at p. 23.

47—Copinger, Copyright (117)



§ 337  
Transmission  
of news by  
ticker.

§ 338  
Protection of  
ticker news  
on non-copy-  
right grounds.

§ 339  
Letters in the  
law of  
copyright.

§ 340  
Rights of  
recipient.

§ 341  
Rights of  
writer.

it public, without the writer's consent, except for his own vindication.<sup>48</sup> Reasoning from this, it was held in a New York case,<sup>49</sup> that the transmission of news over telegraphic tickers was not a publication. Such transmission was deemed to be the sending of letters telegraphically. The case seems unsound, as it ignored the public service character of the sender and the fact that the recipient of such "letters" paid for them, facts not found in the ordinary run of the letter cases. The English Courts<sup>50</sup> have protected ticker messages under the law of unfair competition, as has also the United States Circuit Court of Appeals.<sup>51</sup> The cases with reference to letters may be conveniently summarized at this point.

Letters may be copyrighted<sup>52</sup> and are protected, at common law, prior to publication.<sup>53</sup> The purpose of a letter is to communicate information. Its contents are analogous to publications containing news. The receiver of the letter, accordingly, may make any use he chooses of the letter, provided he does not publish it in copies, in the literary form in which he received it.<sup>54</sup> He may keep it, or destroy it, or dispose of it in any other way, save by publication.<sup>55</sup> The common law copyright in letters remains in the sender.<sup>56</sup> The property in the paper on which it is written is in the receiver and he may enforce his rights in this even against the sender, it seems, if

48—See §§ 339-344.

49—*Kiernan v. Manhattan Quotation Tel. Co.*, 50 How. Pr. 194.

50—*Exchange Telegraph Co. v. Gregory*, (1895) 1 Q. B. 147; *Same v. Central News*, (1897) 2 Ch. 48; *Same v. Howard Press*, 22 L. T. R. 375.

51—*National Telegraph News Co. v. Western Union Co.*, 68 L. R. A. 805, 119 F. 294.

52—*McMillan & Co. v. Dent*, (1907) 1 Ch. 107.

53—*Gee v. Pritchard*, 2 Swans 413; *Woolsey v. Judd*, 4 Duer 379.

54—*Philip v. Pennell*, (1907) 2 Ch. 577.

55—*Griggsby v. Breckenridge*, 2 Bush. (Ky.) 480.

56—*Earl of Lytton v. Devey*, 54 L. J. (Ch.) 293.

the letter fall again into the sender's hands.<sup>57</sup> All letters whether business, social or otherwise<sup>58</sup> stand on the same basis in copyright law, except the letters of public men, written in an official or public capacity.<sup>59</sup> Letters falling within the latter exceptional category cannot be copyrighted.<sup>59</sup> The receiver of a letter may communicate the information contained in it to others in his own language. He may not, however, publish such letters without the sender's consent.<sup>60</sup>

§ 342  
In what letters copyright subsists.

§ 343  
Further rights of recipient.

On the other hand, it has been held that if the author of a letter, authorizes persons other than the recipient to read it, this, in itself, is a publication of the letter, and the recipient may show it to others as well.<sup>61</sup> If necessary for his defense or vindication, he may even publish it<sup>62</sup> but this rather shadowy right rests on considerations of public policy, which limit the right rather strictly.<sup>63</sup> He must produce letters in a Court of Justice if this is required.<sup>64</sup>

§ 344  
Publication for vindication or judicial purposes.

Unpublished letters of Charles Lamb existed in duplicate manuscript form. It was held<sup>65</sup> that the owner of one of such duplicates, who published before the other, could obtain copyright therein. This decision must be deemed doubtful, save in so far as it was founded on the language of the statute involved.

§ 345  
Duplicate letters.

In another English case, it appeared<sup>66</sup> letters were wrongfully obtained by defendant from the addressee. Although the latter had, under the doc-

§ 346  
Instances of protection of recipient, on principles of

57—*Oliver v. Oliver*, 11 C. B. N. S. 139.

58—*Woolsey v. Judd*, 4 Duer 379.

59—*Folsom v. Marsh*, 2 Story 100.

60—*Lytton v. Devey*, 54 L. J. Ch. 293.

61—*Widdemer v. Hubbard*, 19 Phila. 263.

62—*Percival v. Phipps*, 2 Ves. & B. 19; *Widdemer v. Hubbard*, 19 Phila. 263.

63—*Denis v. LeClere*, 1 Mart. (La.) 159.

64—*Hopkinson v. Lord Burghley*, L. R. 2 Ch. App. 447.

65—*McMillan & Co. v. Dent*, (1907) 1 Ch. 107.

66—*Thurston v. Charles*, 21 T. L. R. 659.

general non-  
copyright law.

trine of the cases cited, no property in the literary contents of the letters, it was held defendant had no right to read or show the letters to third persons, without the addressee's consent and substantial damages were awarded. Protection, by way of equitable relief, was given the writer and recipient of letters against a meddler therewith in another case.<sup>67</sup> In a third case,<sup>68</sup> the letters of Mary Baker Eddy were recognized as having a value as autographs. The Court restrained their multiplication either in whole or in part, required the holder to permit the executors of the author to make copies of them, but refused to enjoin the sale and transfer of the letters as manuscripts.

§ 347  
Cases of  
copyright in  
letters  
collected.

§ 348  
Performance  
is not, under  
the decided  
cases, publi-  
cation.

§ 349  
Palmer v.  
DeWitt.

Other cases involving common law and statutory copyright in letters are collected in a foot note.<sup>69</sup>

Public performance of a dramatic or musical composition has, in the United States, after some early wavering, been universally held not to be a publication thereof. The leading case which established this principle in the United States is *Palmer v. DeWitt*.<sup>70</sup> The Court said:

“The right publicly to represent a dramatic composition for profit, and the right to print and publish the same composition to the exclusion of others, are entirely distinct, and the one may exist without the other. The copyright acts

67—*Dock v. Dock*, 180 Pa. St. 14.

68—*Baker v. Libbie*, 37 L. R. A. (N. S.) 944, 210 Mass. 599.

69—*Pope v. Curl*, 2 Atk. 341; *Thompson v. Stanhope*, Amb. 739; *Duke of Queensbury v. Shebbeare*, 2 Eden 329; *Oliver v. Oliver*, 11 C. B. N. S. 139; *Howard v. Gunn*, 32 Beav. 462; *Hopkinson v. Burghley*, (1867) 2 Ch. App. 447; *Lytton v. Devey*, 54 L. J. (Ch.) 293; *Labouchere v. Hess*, 77 L. T. 559, 562; *Thurston v. Charles*, 21 T. L. R. 659; *Folsom v. Marsh*, 2 Story 100; *Wetmore v. Scovell*, 3 Edw. Ch. 515 (overruled); *Hoyt v. Mackenzie*, 3 Barb. Ch. 320 (overruled); *Woolsey v. Judd*, 4 Duer 379; *Eyre v. Higbee*, 22 How. Pr. 198; *Gee v. Pritchard*, 2 Swans. 413; *Palin v. Gathercole*, 1 Coll. 565; *Rice v. Williams*, 32 F. 437; *Barrett v. Fish*, 72 Vt. 18, 51 L. R. A. 754; *Earl of Granard v. Dunkin*, 1 Ball & B. 207.

70—47 N. Y. 542.

which secured to authors the exclusive right, for a limited time, to print and publish their works, did not secure to them the exclusive right of the public representation of their dramatic compositions. Until the passage in England of the statutes 3 & 4 William IV (Chap. 15), an author could not prevent anyone from publicly performing on the stage any drama in which the author possessed the copyright. He could only prevent the publication by multiplication of copies of it. It could be produced on the stage from published copies, and repeating a piece on the stage from memory, was not a publication in violation of the author's right first to print and publish. \* \* \* In 1856, by act of Congress (11 Stats. at Large 138), a like right was given to authors and proprietors of dramatic compositions for which a copyright should thereafter be granted under the laws of the United States. \* \* \* Lectures and plays are not, by their public delivery or performance, in the presence of all who choose to attend, so dedicated to the public that they can be printed and published without the author's permission."

And:

"When a literary work is exhibited for a particular purpose, or to a limited number of persons, it will not be construed as a general gift or authority for any purpose of profit or publication by others. An author retains his right in his manuscript until he relinquishes it by contract, or some unequivocal act indicating an intent to dedicate it to the public."

It was accordingly held defendant's acts in printing and selling copies of plaintiff's drama were not

made legal because the plaintiff had permitted it to be publicly performed.<sup>70</sup>

§ 350  
Discussion of  
opinion.

It should be noted that the Court in *Palmer v. DeWitt* (1), in speaking of the separate and distinct nature of rights of performance and of printing, probably were referring to the distinction drawn between the two, by the then English Statutes. This was so marked, that where a dramatic composition was published and sold as a book, it was held this in no way affected the author's right to a subsequent dramatic or performing right under the 3 & 4 Will. IV c. 15.<sup>71</sup> Performance of the play did not prevent a literary copyright, under the statute applicable to books. But where a book copyright was taken out, under the statute applicable to books and no statutory dramatic copyright had been taken out by the author, it was held all his common law rights inhered in him in connection with his manuscript and were lost, save in so far as saved by statute, when he took out his book copyright.<sup>72</sup> The argument that there were separate and distinct performing and printing rights at common law, in a dramatic composition, was raised in one case but overruled by the Court.<sup>73</sup>

§ 351  
Statutory  
dramatic and  
literary copy-  
right in  
England at  
time of  
decision.

§ 352  
No common  
law dramatic  
rights in  
England.

§ 353  
Discussion of  
early Ameri-  
can and  
English  
decisions  
bearing upon  
question.

The early American decisions betrayed much judicial perplexity with reference to the question as to whether public performance of a play was a publication, or dedication, of it, to the public. The earliest English decision<sup>74</sup> was decided before the decision of *Donaldson v. Becket*,<sup>75</sup> upon the authority of *Millar v. Taylor*,<sup>76</sup> which was overruled by the latter. The force of these decisions, and the necessary consequence of the language of the then statutes

71—*Chappell v. Boosey*, 21 Ch. D. 232.

72—*Reade v. Conquest*, 9 C. B. N. S. 755; *Murray v. Elliston*, 5 B. & Ald. 657 (s. c., 1 D. & R. 299); *Coleman v. Walshen*, 5 T. R. 245; *Warne v. Seebohm*, 39 Ch. D. 73.

73—*Toole v. Young*, L. R. 9 Q. B. 523.

74—*Macklin v. Richardson*, Amb. 694.

75—4 Burr. 2408.

76—4 Burr. 2303.

with reference to publication, appear to have been imperfectly apprehended in the early American cases.

Thus in *Keene v. Wheatley*,<sup>77</sup> a decision of the Circuit Court of the United States, it was held that public performance of a play was a publication but, not being in print, did not affect plaintiff's literary property in it, except as to persons who heard it and by doing so were directly, or indirectly, enabled to copy it. Performance was said to be a general publication, but one with limited consequences. Auditors were deemed to have the right to reproduce it from memory, but not otherwise. The decision plainly confused publication and dedication, and does not represent the present case law on the subject.

This decision was discussed in *Keene v. Clarke*,<sup>78</sup> where the Court deemed performance a dedication of the work to the public and sustained the right to reproduce it from memory. The Court said:

“Where a work is to be communicated to another by the author, it is only to be protected, when an express or implied reservation of it, accompanies such communication and imposes a restraint upon the hearer or recipient preventing him from divulging it; in other words, makes it more or less of a secret.”

The Court deemed some express notice to the audience was necessary, where a play was performed, in order to preserve the author's rights in it.

These views found further favor in the first Massachusetts decision upon the subject,<sup>79</sup> but are all ignored, or overruled, by the later decisions.

Thus in *Tompkins v. Halleck*,<sup>80</sup> overruling *Keene*

§ 354  
Reproduction

77—4 Phila. 157.

78—5 Robert (N. Y.) 38.

79—*Keene v. Kimball*, 32 Mass. 545.

80—133 Mass. 32. See also *Fleron v. Lackaye*, 14 N. Y. Supp. 292; *Roberts v. Myers*, 13 Monthly L. J. 396.

of copies of  
play from  
memory  
unlawful.

§ 355  
Ferris v.  
Frohman.

§ 356  
The doctrine  
that public  
performance,  
not publica-  
tion under  
prior Acts,  
confirmed.

§ 357  
Foreign  
statutory  
definitions of  
publication  
immaterial, in  
determining  
status of work  
in United  
States.

v. Kimball, it was held the performance of a play, never printed, but kept in manuscript, though public and for money, was not a publication of the play and spectators could not make copies from memory, or otherwise, and attempt to perform the play from such copies.

In *Ferris v. Frohman*,<sup>81</sup> a British subject, resident in London, composed a play there in 1894. It was publicly performed there and also in the United States by Frohman, who acquired from the author, after its performance abroad, first, the rights to its production in the United States for five years, and, afterwards, all rights in it, for and in the United States. It was not copyrighted. The defendant purchased an adaptation of the play from one not in privity with the author or Frohman, and went through the formalities incident to obtaining an American copyright. It was held that, even assuming that under the English statutes then in force, public performance of the play was a publication,<sup>82</sup> since the play had not been printed and distributed, the common law rights therein in the United States were not lost, as by the common law, the public performance of the play did not deprive the owner of his rights therein. The decision is deemed sound in respect to its view of the language of the English statute which made performance a publication, since that Act, as pointed out in the Supreme Court's opinion, states that its definition was to be deemed law in the "construction of this Act" only.

Theoretically, up to the time of the decision of *Tompkins v. Halleck*,<sup>83</sup> it was deemed that re-representation of a play from memory was permissible, although "well nigh impossible," as was pointed out in *Crowe v. Aiken*.<sup>84</sup> While this precise point

81—238 Ill. R. 430, aff'd 223 U. S. 424, 56 L. ed. 492.

82—3 & 4 Wm. IV, c. 15.

83—133 Mass. 32; see § 354.

84—2 Biss. at p. 212.

was not passed upon in the Halleck case,<sup>83</sup> it is deemed, on principle, that there is no controlling difference, theoretically, in cases where performances are based on a physical copy for refreshing one's recollection, made from memory and cases of pure memory, that is, to say that the interval of time which elapses before the copy is made is unimportant.<sup>85</sup>

Mr. Justice Hughes, in writing for a unanimous Court, in *Ferris v. Frohman*,<sup>81</sup> *supra*, says of the United States Copyright Acts up to and including the Act of March 3, 1891, with reference to performing right, that their object was to secure to the author of a published<sup>86</sup> play, the right of public performance after it had been printed;<sup>87</sup> that dramatic compositions cannot be reproduced from memory;<sup>88</sup> and that there was a common law right of sole representation.<sup>89</sup> While it may well be doubted how far the latter statement could be proven historically,<sup>90</sup> and while it seems that any book could in a proper case be copyrighted, if reproduced in copies, although not printed,<sup>91</sup> these statements almost certainly represent the result of the American law at the present time, unless this has been changed in effect, by the present Act. The other cases involving the same points will be found either cited, or discussed, in the cases cited in the text.

In connection with *Ferris v. Frohman*,<sup>92</sup> as has

85—*Gross v. Seligmann*, 212 F. 930. See *Frank v. Connelly*, 1 N. Y. Wkly. Dig. 196.

86—47 N. Y. 538.

87—P. 435.

88—P. 436.

89—P. 436.

90—See *Chappell v. Boosey*, 21 Ch. D. 232, dictum of Cotton, L. J., in *Ex parte Hutchins & Romer*, L. R. 4 Q. B. 483, that the right of public performance of music is purely statutory; remarks of Cockburn, C. J., in *Toole v. Young*, L. R. 9 Q. B. 523, 527; and *Marsh v. Conquest*, 17 C. B. N. S. 418 at p. 426.

91—*Roberts v. Myers*, 20 F. C. 11906.

92—238 Ill. R. 430, aff'd 223 U. S. 424, 56 L. ed. 492.

§ 358  
United States  
statutory  
copyright  
under prior  
Acts only  
possible in  
published  
plays.

§ 359  
Reproduction  
from memory  
prohibited.

§ 360  
Common law  
performing  
rights in  
United States.

§ 361  
Common law



copyright  
abolished in  
England.

§ 362  
International  
common law  
copyright.

been stated, the present English Copyright Statute excludes representation of a play in England from the acts constituting a publication<sup>93</sup> but on the other hand,<sup>94</sup> *abolishes common law copyright*. All copyright in England whether before, or after, publication is by that section made purely statutory. This raises an interesting question.

One of the few American cases which discussed some of the principles which underlie international common law copyright is *Palmer v. De Witt*,<sup>95</sup> *supra*. As we have seen, copyright is an incorporeal property right. The Court in that case said:

“It (i. e., this property) is personal as other movable property, personal in legal contemplation, following the person of the owner and is governed by the law of his domicile. That which is regarded and protected as property by the law of the owner’s domicile as well as by the laws of this State, must be equally within the protection of the law, whether the owner be a citizen or an alien (Story Conf. Law, Secs. 376, 379, 380). If the character of property was impressed upon the fruits of mental labor solely by statute it might be otherwise as the statutes could have no extra territorial force.”

§ 363  
Resident  
aliens entitled  
to common  
law copyright.

Aliens resident in England can have, it seems, common law copyright.<sup>96</sup> All the judges who rendered opinions in that great case, however, appear to have been quite clear that a non-resident alien could not have common law copyright.<sup>97</sup> In *Palmer v. DeWitt*,<sup>95</sup> the further step was taken of holding

93—2 George V, c. 46, Part I, 1.

94—*Idem*, § 31.

95—47 N. Y. 532, 538.

96—*Jefferys v. Boosey*, 4 H. L. C. 815. It should be noted that the present British statutory substitute for common law copyright now enures only to one who at the “date of the making of the work” is a British subject or domiciled at that time within the British dominions. Copyright Act 1911, Part I, 1 b.

97—This is now the rule in England by statute.

that the resident assignee of a non-resident alien could obtain a general territorial "license," under a common law copyright. It appears what was really conferred was an assignment of the common law rights for the United States. If the alien had no such rights, it is difficult to see how his assignee could have had them. However, in view of the decision of *Ferris v. Frohman*,<sup>98</sup> this point must be deemed settled in accordance with the rule of *Palmer v. DeWitt*.<sup>98a</sup>

§ 364  
Resident assignees of non-resident aliens entitled to common law copyright in the United States.

Since, in view of the present English Statute, "the character of property" is "impressed upon the fruits of mental labor,"<sup>98a</sup> in England, solely by statute, it would seem doubtful to what extent an English playwright who does not obtain statutory copyright in the United States can obtain any protection for his works there, if composed since the passage of the present British Act.

§ 365  
Possible effects of statutory abolition of English common law copyright, on United States law.

It seems to be recognized that this peculiar common law property has its origin in the creation of the work by the author. Just as one who takes material objects, not subject to previous individual ownership, and fashions them into such forms as he pleases, would obtain a property therein, so, it is deemed, he who takes ideas and thoughts and by his mental labor reduces them to a concrete form also obtains a property therein. Such a property from its nature must arise on the act of creation. If, however, on its birth, it receives the stamp of property, by statute, that statute as pointed out in *Palmer v. DeWitt*,<sup>98a</sup> defines its territorial limits once and for all, at birth. This seems necessarily to follow from the fact that the theoretical nature of the property rights which have been called copyright, after publication, and common law copyright, before publication are essentially the same and no one has pretended that copyright after publication

98—223 U. S. 424, 56 L. ed. 492.

98a—*Palmer v. DeWitt*, 47 N. Y. 532.

have any extra-territorial force.<sup>99</sup> That point was not discussed in *Frohman v. Ferris*,<sup>1</sup> but that case cannot be deemed an authority to the contrary, as it did not involve the situation created by the present English Statute. The authority of *Ferris v. Frohman*<sup>1</sup> and of *Palmer v. DeWitt*<sup>2</sup> and *Thompkins v. Halleck*<sup>3</sup> as bearing upon questions which may arise under the present United States Copyright Act, may be deemed further doubtful, since the existing statute is not limited to printed dramatic compositions, as prior statutes, according to the *Frohman* case, were; and thus one of the main supports of those decisions is rendered inapplicable for the future.

§ 366

Neither public nor private performance of a drama is a publication thereof.

The modern American cases have all held, then, that the public representation or performance of a play, which has not been published in book form, is not a publication. *A fortiori*, a private performance would not be a publication.<sup>4</sup> The cases use the word "printed" instead of "published in book form" but this is believed to be inaccurate. A book need not be printed to be copyrighted, even where copyright involves a publication<sup>5</sup> and, as the essence of the distinction made with reference to representation not being publication, lies in the fact that plays can be published as books, it is not deemed that there is any valid distinction between what would be a publication in the case of a book which did not contain a dramatic composition or one which did. No one has ever doubted that the public distribution of manuscript, or typewritten, or photographic, copies of a book would be a publication, while limited circu-

§ 367

Private circulation of printed copies of play, for purpose of performance not a publication.

99—*Jefferys v. Boosey*, 4 H. L. C. 815, 847.

1—223 U. S. 424, 56 L. ed. 492.

2—47 N. Y. 532.

3—133 Mass. 32.

4—The reading of a paper before an incorporated dental society was held not a publication. *Dentacura Co. v. N. J. Dental Society*, 58 N. J. Eq. 582.

5—*Roberts v. Myers*, 20 F. C. 11906.

lation of printed copies of a play privately, even to members of a company of actors, to enable them to perform the play, by committing it to memory, has been held not a publication.<sup>6</sup> So the decisions in various cases<sup>7</sup> necessarily involve the proposition that the sale of manuscript copies by the proprietor, either in connection with a sale of copyright, or for the purpose of enabling exclusive territorial licenses to be utilized, is not a publication. Whether such a sale made in connection with a non-exclusive license would be deemed a publication has not yet been determined. It would seem that the bare fact of such sale should, on the whole, be deemed a publication, for all purposes. A sale of the original work is not a publication.<sup>8</sup> But in the case of non-exclusive licenses, the sale is a sale of a copy. If sold, any restrictions on the sale would be ineffectual, as against subsequent purchasers without notice, who could use it for any lawful purpose. Such copy may thus be resold, theoretically, an unlimited number of times. If the so-called license were exclusive, it might amount to an assignment of the copyright and a different result might follow. No case has yet held the grant of licenses a publication. In the case of a dramatic composition, not a mere "closet drama," its chief value lies in the right of representation. A sale imports a price but where a performing license is given, it would seem unusual to exact a separate price for a copy of the play sold, but normally a copy would be furnished for the purpose of enabling the license to be beneficially utilized. On the whole, since a sale is only consistent with publication,<sup>9</sup> it would seem as if such a sale, if established, might be deemed a publication.

§ 368  
The sale of manuscript copies in connection with exclusive and non-exclusive licenses.

6—French v. Krehling, 63 F. 621.

7—Cf., for example, Ferris v. Frohman, 223 U. S. 424, 56 L. ed. 492.

8—White v. Geroch, 2 B. & Ald. 298.

9—Little v. Gould, 2 Blatch. 362

§ 369  
True basis  
for holding  
performance  
is not a  
publication.

Where a dramatic composition is performed, the performance can in no proper sense be said to be a copy of such composition. But although it does violence to the etymological meaning of the word, the right to prevent its public representation by others, without his consent, is part of a copyright in a dramatic composition. What, however, does an author or proprietor of a dramatic work reasonably purpose when he permits its public performance, and for what do the audience who attend such performance pay? That they pay for the privilege of seeing and hearing the performance and for nothing more and that that is all the play's owner purposes they shall have, merely requires to be stated to be admitted, as this is a long established and customary matter. They never see a copy of the work, performance being no copy, nor, as the human mind is constituted, do the overwhelming majority retain anything except a general impression of the action and general recollection of the plot, as differentiated from a detailed knowledge of the ideas composing it. Since then, no copy is seen nor facilities offered for making one, nor any payment made for seeing a copy, no right to make a copy can be implied but on the contrary every implication exists that no such right is granted to auditors at a public performance. This is true whether there be payment, or not, and applies equally to all classes of works capable of representation, performance, rendition, or presentation, including musical compositions, sermons, moving pictures, etc. The result rests in the implied understanding of the parties and not merely in the intention of one party. Since it rests in both parties' understanding, it rests on principles akin to quasi-contract. In the case of lectures<sup>10</sup> any member of the audience may make notes of what he hears for his own use. This may

§ 370  
Lectures.

<sup>10</sup>—Caird v. Sime, 12 A. C. 326; Bartlett v. Crittenden, 4 McLean 300, 5 McLean 32.

mean making a copy if these are made in shorthand and are voluminous. The fact that lectures are not deemed published under such circumstances, it is deemed, can only be explained on the ground that this is the understanding between the parties.<sup>10</sup>

Public performance or presentation is, hence, not a publication in a copyright sense. Whether or not gratuitous public performance or presentation may, or may not, be a dedication of the right of public performance or representation, as distinguished from the right to copy, if the copyright provided by statute, for works not produced in copies, be not taken out, is a different question and will be discussed elsewhere.<sup>11</sup>

Musical compositions are like dramatic compositions in that they are capable both of reproduction, in physical form, for sale, and of performance. The rules as to what is, or is not, a publication of dramatic works, therefore, it seems, apply to musical compositions.<sup>12</sup>

In one instance,<sup>13</sup> the Court refused a preliminary injunction against a musical composition, which was practically a reproduction of plaintiff's copyrighted arrangement of his own music, where it appeared plaintiff had issued uncopyrighted arrangements of the composition for other instruments, from which defendant had made his version. The Court held dedication would be a defense but that whether there had been dedication was a question of fact, to be determined on the trial of the action. On the other hand, a license by the proprietor of an unpublished play to another, to reproduce it in motion pictures and to copyright the resultant films is not a publication of the play.<sup>14</sup> The distinction between these

§ 371  
Public performance of musical compositions is not a publication.

§ 372  
What may be effect of public sale by proprietor of uncopyrighted versions of copyrighted matter: musical arrangements.

§ 373  
Motion pictures based on play.

11—See §§ 398–400.

12—Cf. *Monaghan v. Taylor*, 2 L. T. 685, 686.

13—*Littleton v. Fischer*, 137 F. 684.

14—*O'Neill v. General Film Co.*, *New York Law Journal*, April 9, 1915.

two cases appears to be that in the first mentioned case, the works involved were the same,<sup>15</sup> with colorable variations, but in the other case, that the works, though based on the same theme, were independent and distinct.

§ 374  
Sketches of  
paintings.

The question of fact involved in such cases was further illustrated in another case<sup>16</sup> where it was held that the printing of a superficial crayon sketch of a painting in an art exhibit catalogue was not a publication of the painting.

§ 375  
Miniature  
samples of  
photographs.

In a third instance,<sup>17</sup> it was held that since publication meant the offering of a work to the public for sale or circulation, the distribution of catalogues intended as sample lists, containing miniature photographs of photographs, which it was desired to sell, was not a publication of the photographs which required notice of copyright to be affixed. This decision was based entirely on the language of the statute in force at the time of its rendition and does not affect the question as to whether the distribution of such a catalogue, without having first obtained a statutory copyright, would not have been a publication. It would appear entirely a question of fact in a case like the latter, whether the distribution of the catalogue would work a publication. The fidelity of the miniatures as copies of the originals, not their size or purpose, would appear to control.

§ 376  
Vocal scores  
of operettas.

The libretto and vocal score, with piano accompaniment, of "Iolanthe," were printed and sold, without being copyrighted. The orchestral score was kept in manuscript. This was held<sup>18</sup> a publication, enabling defendant publicly to perform the libretto, vocal score and an orchestral score, which

15—See *Caliga v. Inter Ocean Newspaper Co.*, 215 U. S. 182, 54 L. ed. 150.

16—*Werckmeister v. Springer*, 63 F. 808.

17—*Falk v. Gast Lithograph & Engraving Co.*, 54 F. 890.

18—*Carte v. Ford*, 15 F. 439.

he had made from the printed piano score.<sup>19</sup> The decision in an earlier case,<sup>20</sup> which appears contrary to the above cases, does not appear to be good law, unless it be deemed an unfair competition case.<sup>21</sup>

The proprietor of a music hall<sup>22</sup> composed songs and gave away copies to attract custom. This was held a publication.

On the other hand, by analogy with the dramatic composition cases, public performance, for profit, of a musical composition or its performance before an invited, limited audience, would not be a publication. Whether public performance of music, not for profit, but for whoever chose to hear it, would be a dedication, if not a publication, is doubtful.

The same rules<sup>23</sup> apply to lectures, sermons, addresses and similar productions orally delivered. This has been held true even where the auditors were allowed to make copies, for their personal use and for the instruction of others.<sup>24</sup> The latter result also seems explainable only on the theory of quasi-contract.

“It is not perceived how the legal status of a right of copyright in a painting or statue, so far as concerns their publication, can be distinguished from that of lectures or dramatic compositions,”

said Mr. Circuit Judge Townsend, in an elaborate and instructive discussion of this subject.<sup>25</sup>

It was held, at a relatively early date, that the public exhibition of a painting, for the purpose of

§ 377  
Miscellaneous instances of publication, or not, in the case of music lectures, etc.

§ 378  
Taking notes of lectures.

§ 379  
The publication of works of art.

19—To the same effect see *Carte v. Duff*, 25 F. 183, “The Mikado” case.

20—*Thomas v. Lennon*, 14 F. 849.

21—*Carte v. Ford*, 15 F. 439.

22—*Blanchett v. Ingram*, 3 L. T. R. 687.

23—*Bartlett v. Crittenden*, 5 McLean 32; *Nichols v. Pitman*, L. R. 26 Ch. D. 374; *Caird v. Sime*, L. R. 12 A. C. 326.

24—*Bartlett v. Crittenden*, 5 McLean 32.

25—*Werckmeister v. American Lithographic Co.*, 68 L. R. A. 591, 134 F. 321.

§ 380  
The decisions collated. The effect of public exhibition of such works.



obtaining subscribers for engraved copies thereof, copying being forbidden, was not a publication thereof.<sup>26</sup> The opinion contained a *dictum*, that public, unrestricted exhibition of a painting would be a publication thereof. In an early English case,<sup>27</sup> the question as to whether the public exhibition of a design on paper was a publication of it, was deemed so doubtful that a preliminary injunction was refused.

In *American Tobacco Co. v. Werckmeister*,<sup>28</sup> it was held exhibition of a painting in a gallery where copying was forbidden by the by-laws of the association controlling it, which were strictly enforced, was not a publication thereof, even though the exhibition was open to the general public. The Court did not pass on the question as to whether such exhibition would not have been a publication, if copying had not been forbidden. It has, however, been said<sup>29</sup> that in the absence of direct evidence, permission to the public to make copies, at their pleasure, of a work of art on public exhibition, will not be assumed.

§ 381  
Leaving  
designs with  
prospective  
customers.

It has been held that showing a design to prospective customers with a view of ascertaining if they would give orders for goods to be made from it and obtaining orders therefrom, after leaving copies of the design with such customers while they determine whether, or not, to order, was a publication.<sup>30</sup> The Court said this would be so, even though no orders were obtained, or samples left in the physical possession of the customers, as they had been given an unrestricted opportunity to copy the designs.

26—*Turner v. Robinson*, 10 Ir. Ch. 121, 510.

27—*Dalglisch v. Jarvie*, 2 H. & T. 437; s. c., 2 Mac. & Gor. 213.

28—207 U. S. 384, 52 L. ed. 257. See also *Werckmeister v. American Lithographic Co.*, 68 L. R. A. 591, 134 F. 321.

29—*Werckmeister v. Springer Lithographic Co.*, 63 F. 808.

30—*Blank v. Footman, Pretty & Co.*, 39 Ch. D. 678.

Where an architect who had been paid for plans he drew, filed them in the Building Department of the City of New York, as required by law, this was held<sup>31</sup> a publication. The designing and construction of a building was held a publication of the designs therefor.<sup>32</sup>

§ 382  
Filing building plans.  
§ 383  
Construction of a building.

It has been held that to make copies of copperplates and give them to personal friends, under special circumstances showing a desire to keep them private, was not a publication.<sup>33</sup>

§ 384  
Gifts of private copies of prints.

In an instructive opinion,<sup>34</sup> it was said that the Courts have not yet determined what constitutes the publication of a painting; but it was held that where statutory copyright in a painting had not been taken out until thirty years after it was painted, and until after its author was dead, proof that it had not been published prior to statutory copyright, was not sufficiently supplied by the testimony of two witnesses that they did not know of the author's ever having exhibited it outside of his parlor or having given permission for it to be copied, during the 30 years it had hung in his parlor.

§ 385  
What was held insufficient to prove absence of publication of a painting.

The underlying difficulty with the question of what constitutes publication of a painting seems to be that for an artist to make manual copies of his work is almost unheard of, save amongst the humblest perpetrators of pot boilers. On the other hand the greatest paintings are those owned by the various states, or nations, or their agencies, and hung in public galleries where all are free to copy. It is considered such works may be deemed dedicated to the public<sup>35</sup> and that even though copies of paint-

§ 386  
Reasons for difficulty in determining what is publication of a painting.

31—Wright v. Eisle, 86 N. Y. A. D. 358.

32—Gendell v. Orr, 13 Phila. 191.

33—Prince Albert v. Strange, 2 De G. & S. M. 652.

34—Bosselman v. Richardson, 174 F. 622.

35—In Gendell v. Orr, 13 Phila. 191, the Court deemed there could be copyright in a portico or porch, in a proper case, but that such work was published by being made part of a house on a public highway and left there three years.

§ 387  
Suggested  
rule as to  
what may  
constitute  
publication.

ings be not produced, if they can be produced, such potential capacity points the way as to what may be deemed publication of a painting.

It would seem from the foregoing cases with reference to paintings, designs, etc., that the rule to be drawn therefrom is that if there be an unrestricted opportunity afforded the public or any fraction thereof to copy the work, this amounts to the equivalent of a publication, in the nature of a dedication thereof to the public. It is deemed that works of art are at least as akin to books in their nature as to dramatic or musical compositions. The characteristics of the latter are their capacity for public representation or performance, by means either of human or mechanical agencies, and also that they are capable of reproduction in printed or written copies. While a work of plastic, or pictorial, art is primarily designed to be seen and is, hence, capable of exhibition, no exclusive right to its public exhibition is given by statute. While it is true, as pointed out in one of the cases cited,<sup>36</sup> that often an artist's chief object "is to secure the profit arising from the sale of the original work," it may be suggested that an author's object in connection with any disposition of his work is of no controlling importance, save in so far as it squares with rules of positive law, or rests in contract, express or implied, before publication. If the original manuscript of a book were voluntarily put by the author in a position where the public were afforded the means of copying it without restriction, it is deemed that an assertion that this was done to procure a purchaser for it, would be no answer to a claim that this was a publication or a dedication.

§ 388  
Publication  
of photo-  
graphs and  
motion  
pictures.

Photographs, other than motion picture films, are sufficiently like books for it to appear that what is a publication in one case should be deemed a publica-

36—*Werckmeister v. American Lithographic Co.*, 134 F. 321.

tion in the other. Motion picture films occupy an intermediate ground between books (both being reproduced in considerable numbers of copies by "printing") and dramatic compositions, as they are also designed for representation or performance. While, it is deemed, the public representation, or running off, of a film would not be a publication, by analogy with the cases governing dramatic compositions, it is by the analogy of the cases governing other printed matter, deemed that even a single public sale of one copy would constitute a publication.<sup>37</sup>

It has been said by Learned Hand, J.,<sup>38</sup> that publication occurs when a work is made public in any way, unrestrictedly, and further, that it did not involve an effort at commercial exploitation or putting on the market. On the other hand, any offering or disposal of a work to the general public, upon a commercial basis, is a publication.<sup>39</sup>

If the Court, in using the word "unrestrictedly," in the case first cited,<sup>38</sup> had in mind implied, as well as express, restrictions, this definition appears important. In the *Werckmeister* case,<sup>40</sup> the following language from Slater: Copyright,<sup>41</sup> is approved:

"It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such book common property."<sup>42</sup>

37—See § 317.

38—*Stern v. Jerome R. Remick Co.*, 175 F. 272.

39—*Vernon Abstract Co. v. Waggoner Title Co.*, 49 Tex. Civ. App. 144.

40—207 U. S. 384, 52 L. ed. 257.

41—P. 92.

42—Also quoted by Hough, J., in *Universal Film Mfg. Co. v. Coperman*, 212 F. 301, 303.

§ 389  
Judicial  
definitions of  
publication.

§ 390  
English  
statutory  
definition.

In the British Copyright Act of 1911,<sup>43</sup> publication is defined as the issue of copies of the work to the public and it is said not to include the performance, in public, of a lecture, the exhibition, in public, of an artistic work, or the construction of an architectural work of art. The issue of photographs or engravings of architectural works or sculpture is not to be deemed a publication of the works so photographed. While this definition is confined, by its terms, to the Act itself, it is to be noted that it repeals the previous British *statutory* rule with reference to performance of a play being publication and appears to make a finding of publication conditional (a) on a previous multiplication of physical copies of the original, and (b) on some of such copies coming into the possession, temporary or permanent, of members of the public, with the consent, or by the act, of the proprietor of the copyright.

§ 391  
Comparison  
of the English  
and American  
statutory  
definitions.

As has been seen, the definition contained in the present United States Act is limited to the case of (works of which copies are reproduced for sale or distribution.) Issuing copies of a work to the public and placing copies on sale or selling or publicly distributing them are not very different, especially when the terms are construed in the light of the case law existing at the time the respective statutes in question were passed.

§ 392  
Definition of  
publication  
as to works  
reproduced, or  
capable of  
being  
reproduced,  
in copies.

On the other hand, the fact that the definition contained in the American Act is limited, makes it necessary to consider further and to attempt to define (what would be a publication in the case of works not reproduced in copies for sale or distribution.) Having in mind the language of the present Act and the adjudicated cases, it may be said that it would seem that if works are capable of reproduction in copies, but are not reproduced in copies for sale or public distribution, (the sale, offer for sale, or

43—I section, 1 sub., 3.

public distribution, of copies, for whatever purpose the copies were made, is a publication.

To sum up this branch of the subject: there is only one publication recognized by the Act, to wit, general publication. A limited publication is a contradiction in terms, either meaning a private communication, which is no publication, or one where the rights of the immediate parties rest in contract, governed by principles other than that of the law of copyright. Under the authorities, it is deemed there can be no publication for the purpose of enabling statutory copyright to vest, which does not involve the sale, or offering for sale, or public distribution of a copy, or copies, of a work by the author or proprietor thereof, gratuitously, or for a price, nor can there be a publication for the purpose of preventing statutory copyright which does not involve acts which from their nature, and having regard to the rights of the proprietor, existing or possible, does not necessarily imply such a dedication, or free gift of such rights, in a work or its subject matter, to the public, as is inconsistent with any claim to the retention of any such private rights therein by the author or former owner.

The interesting and difficult question may now be considered whether the present Act, through enlarging the subject matter and scope of statutory copyright,<sup>44</sup> has or has not, changed the previous law with respect to common law rights in dramatic compositions.

It has been noted that the Supreme Court has said<sup>45</sup> that there was a right of public performance of a dramatic composition at common law. The Court did not, however, either hold, or say, that such right existed as a separate right, as distinguished from a mere right resultant from the general common law copyright. If it were the Court's view that

§ 393  
Summary of law as to what is a publication:

§ 394  
a) To secure statutory copyright:

§ 395  
(b) To prevent statutory copyright.

§ 396  
The question discussed as to whether the present Act has changed the effect of performance without copyright.

44—Cf. § 1 (d).

45—*Ferris v. Frohman*, 223 U. S. 424, 56 L. ed. 492.

there was such a separate independent right, and this were sound, it would seem to follow that publication of a play in book form, could not affect this asserted common law right of performance, a proposition for which there is no authority.<sup>46</sup> Previous cases<sup>47</sup> had gone no further than to hold that there was a right to prevent others from copying, or performing, an unpublished play and that this right was not, in the absence of statute permitting statutory performing right in an unpublished play, lost by public representation of the play by its owner. It would seem that there may be a distinction between a right to forbid others to perform, and a right to perform one's self, and that the one could exist without the other, unless lost by some act of the owner.

§ 397  
Sections 11  
and 1 of the  
Act discussed.

Section 11 of the Act refers to statutory copyright in works not reproduced in copies for sale. It is to be noted that there is nothing in that section that refers to books, save in so far as lectures, or dramatic compositions, may be embodied in book form, nor is there any requirement that the copies called for by the section, be printed. The Act, however, only provides for one kind of copyright, for, although the formalities for obtaining it differ, once obtained, it has the same scope and incidents in every case where the same kind of work is involved, and its term runs in every instance from the first publication of the work.<sup>48</sup> Now, ordinarily, it would seem that if a statute gives certain rights upon compliance therewith,<sup>49</sup> a failure to comply therewith would

46—*Toole v. Young*, L. R. 9 Q. B. 523, 527; *Marsh v. Conquest*, 17 C. B. N. S. 418.

47—In *Macklin v. Richardson*, 2 Amb. 694, the authority upon which all the later decisions are based, it appeared that defendant sent a shorthand writer to a theatre at which plaintiff's manuscript play was being performed and from his notes printed the first act of the play. It was held that by doing so plaintiff's rights in his manuscript were infringed.

48—Section 28.

49—Section 1.

prevent any of such rights from existing. Section 11 says that "copyright" may be had in the works enumerated therein, being those chiefly useful for exhibition, representation, or performance. This copyright, which may be so had, cannot refer to common law copyright, because this, where it exists, does so independently of statute, and it seems difficult to conceive of Congress saying something could be had which already exists. Under Sections 1 and 11, all the rights which an author could have at common law may be obtained by registration under the latter section, with this difference only, that, as will be shown, such rights would not be perpetual but limited as in the case of other copyrights.

One of the rights conferred by Section 1 in connection with copyrights under the Act is the sole right of representing or performing a dramatic composition, whether in manuscript, or not, or whether reproduced in copies for sale, or not.

The ground on which statutory copyright was held to have rendered common law copyright after publication impossible, was that the Statute of Anne, which enabled copyright to be taken out in published books, took away common law copyright in published books, if it existed, because it conferred statutory copyright in published books.<sup>50</sup> It will be noted Section 2 of the present Act confers no rights. It is purely a saving clause of undefined non-statutory rights. The view, which appears fundamentally erroneous, announced in several recent cases, that<sup>51</sup> by force of this section, an author's "literary property" or common law rights persisted even after he had taken out a statutory copyright, has been disapproved.<sup>52</sup> The Court in discussing this

§ 398  
The scope of  
Section 2  
considered.

50—Donaldson v. Beckett, 4 Burr. 2408; Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055.

51—Maurel v. Smith, 220 F. 195, for example.

52—Photo-Drama Motion Picture Co. v. Social Uplift, etc., Co., 220 F. 448.



§ 399  
Statutory  
change of  
the prior law.

section said, that the section was only intended to indicate that the statute does not displace the common law right. "Whoever elects to avail himself of the statute however, must be held to have abandoned his common law right." The Court did not, however, discuss, nor was it incidental to its decision, what the rights so saved were. The prior United States Copyright Acts limited the rights of public performance conferred by them, to cases of works reproduced in copies for sale or public distribution.<sup>53</sup> The dramatic rights in such works were simply incidental to the other rights given in such works. Dramatic copyright was not possible unless a play was reproduced in copies. The present Act<sup>54</sup> shows that it was intended to apply to cases where a play was kept in manuscript, and that dramatic rights might be obtained under it in dramatic works unpublished up to the time when copyright vested.<sup>55</sup> No case can be suggested where dramatic copyright is not possible under the present Act. In view of the effect given the Statute of Anne, such a saving clause was, hence, natural and necessary. The question of its scope, however, is important, as, unless alleged common law rights of performance are saved by it, it would seem that by applying the reasoning which resulted from the passage of the Statute of Anne and the original United States Copyright Act,<sup>56</sup> such rights would be destroyed by the present Act, which purports to confer equivalent statutory rights in printed *or* manuscript dramas. This great change in the law and its possible far reaching effects appear to have been unremarked so far.

§ 400  
Further  
examination  
of the scope of  
Section 2.

It should be noted very carefully just what rights Section 2 purports to save. These are purely the rights which the author had at common law to *pre-*

53—*Ferris v. Frohman*, 223 U. S. 424, 56 L. ed. 492.

54—Cf. § 1 (d).

55—Cf. § 11.

56—*Donaldson v. Beckett*, 4 Burr. 2408; *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055.

*vent third persons* from interfering with his work, without his authority. The section in no way refers to any rights which he, himself, may have had, to copy, publish or use this work but simply to his preventative rights. Any right which he, then, may have had, at common law, to perform the work himself, is not preserved by force of this section. If, then, the statute, applying the reasoning suggested, be deemed, in any event, to have taken away this right, if it existed, the question whether the voluntary performance of a play will not (in the absence of implied agreement, etc.) have consequences under the present statute analogous to those of publication under the Statute of Anne, must be considered a difficult and serious one.<sup>57</sup> The same result would be reached in the case of musical compositions and all other works, where statutory copyrights equivalent to the asserted common law rights are offered.

In the last analysis, publication, or dedication to the public, is a question of fact in each case. Custom and ordinary social and business usages, play an important role in determining the implications to be drawn from various acts of a proprietor of a common law copyright. The nature of different media for putting forth ideas and the nature of the rights which enure, or might enure, in such different classes of works, also has a most important bearing.

Registration of copyright<sup>58</sup> or even, it seems, attempted, but ineffectual, registration of a copyright<sup>59</sup> under the statute, is an abandonment of common law copyright. This appears to follow from

§ 401  
Publication is  
a question  
of fact.

§ 402  
Abandonment  
of common  
law copyright.

57—Cf. *Bouccicault v. Chatterton*, 5 Ch. D. 267; Slater: Copyright 99; Drone: Copyright 287 (quoted with approval in *Werckmeister v. American Lithographic Co.*, 134 F. 32). See *Bouccicault v. Delafield*, 1 H. & M. 597.

58—*Photo-Drama Motion Picture Co. v. Social Uplift Film Co.*, 220 F. 448.

59—*Jewelers Mercantile Agency v. Jewelers Publishing Co.*, 155 N. Y. 241, 41 L. R. A. 846.

§ 403  
Foreign  
publication.

the rule that the necessary deposit of copies is a publication.<sup>60</sup>

Acts amounting to publication, are equally a publication, although they transpire abroad, without the United States.<sup>61</sup> Consent by an author to publication abroad, it seems, is an abandonment of the right to statutory copyright.<sup>62</sup> This subject is discussed at great length elsewhere.<sup>63</sup>

§ 404  
Estoppel, is  
equivalent of  
dedication.

Finally, it is deemed principles of the law of estoppel, and the maxim that, a man is presumed to intend the necessary consequences of his acts, will aid the solution of many cases arising under this heading. Where such an estoppel is claimed however, it must be shown by clear and satisfactory proof. Thus if the publisher of a work claims he published with the author's consent, such consent must, apparently, be shown unequivocally. This was illustrated in a case<sup>64</sup> where it appeared Whistler had authorized the defendants to write a work in the nature of his biography. He did not expressly authorize the publication of his letters in this. The Court said the latter authority would not be implied from the established authority.

§ 405  
Publication,  
to terminate  
such rights  
must be by  
the author or  
one authorized  
by him.

Since the consequences of a publication are as great as they are, principles of obvious justice require such publication to be made by the proprietor of the work to be effective and a publication made by a third person, without his authority, cannot affect his rights.<sup>65</sup>

Thus in one case,<sup>66</sup> it appeared the American serial and book rights in a novel were sold to plaintiffs. It appeared that prior to the serial publication of the work in the United States and before copy-

60—See § 324.

61—Carte v. Duff, 25 F. 183.

62—Bouccicault v. Wood, 2 Biss. 34.

63—See § 736 *et seq.*

64—Philip v. Pennell, (1907) 2 Ch. 577.

65—Shook v. Neuendorff, 11 N. Y. Daily Reg. 985.

66—Harper & Bros. v. M. A. Donohue & Co., 144 F. 491.

right was obtained there, the owners of the English serial and book rights, published the work both in England and the United States. It was held that this publication did not affect the plaintiff's rights, as there was no privity between the English and American proprietors and that the author's consent to the acts of the English owners did not vary this result, since plaintiff's consent was lacking. On the other hand, in another case,<sup>67</sup> it appeared Richard Wagner has sold the exclusive right of publication of "Parsifal," for all countries, reserving the acting rights of the opera. He had previously transferred to the purchaser "the absolute possession" or "unconditional ownership" (the contracts were in German and there was a dispute as to their meaning) of the composition and libretto. The purchaser sent copies to its New York agent, for sale. It was held this was a publication which prevented Wagner's subsequent attempt to enjoin the performance of the opera.

The question next to be considered is who is an author or proprietor, entitled to copyright in the sense in which these terms are used in copyright law. The definitions found in the cases apply equally to common law, or statutory, copyright. The creator of a work of pure literature or art is its author. Ordinarily, he both originates, and executes, his ideas. But human thought tends to range in narrow, rather than wide, limits. Mechanical facility often does not accompany a mind capable of creative thought. One or more may conceive and one or more, other than they, execute. Difficult questions then may arise, as to who is the author of the resulting work.

The Supreme Court<sup>68</sup> stated an author to be, in Worcester's words: "he to whom anything owes its

§ 406  
Author,  
defined.

§ 407  
The author of  
a photograph.

67—Wagner v. Conreid, 125 F. 798.

68—Burrow-Giles Lithographing Co. v. Sarony, 111 U. S. 53, 23 L. ed. 349.

origin; originator, maker, one who completes a work of science or literature," but as will be shown, this definition only covers the simpler cases. In the case in which this language is found, it was held that one who posed a subject for portraiture and arranged draperies, lights and accessories so that he might photograph the result, was the author of the resulting photograph. He contributed the thought. Everything else done in taking the picture was mechanical. In another case,<sup>69</sup> a firm of photographers sent employees to make photographs. The employees who actually made the exposures resulting in the negatives were the authors thereof. Bowen, L. J., said<sup>69</sup> the author was "the man who really represents or creates or gives effect to the idea or fancy or imagination, the man in fact who is most nearly the effective cause of the representation when completed." Cotton, L. J., said:<sup>69</sup>

"Author involves originating, making, producing as the inventive or master mind the thing which is to be protected."

Brett, M. R., thought the author to be he who was "the effective cause of the result by arrangement, etc."<sup>69</sup> In still another English decision,<sup>70</sup> it was held, on the other hand, that where the person who actually took a photograph did so under the immediate control of another, as his manual assistant, the person in control was the author of the photograph.

There can be no copyright taken out by the photographer in photographs taken for hire and paid for by the sitter,<sup>71</sup> but he can take out a copyright in photographic portraits which he does not make for pay.<sup>72</sup> But it has been held that where a photograph

§ 408  
Commercial  
photography.

69—Nottage v. Jackson, 11 Q. B. D. 62.

70—Melville v. Mirror of Life Company, (1895) 2 Ch. D. 53.

71—Ellis v. Ogden, 11 T. L. R. 50; Press Publishing Co. v. Falk. 59 F. 324 (semble).

72—Ellis v. Marshall, 11 T. L. R. 522; Press Publishing Co. v. Falk, 59 F. 324.

is taken at the request of the sitter, there is an implied promise to pay for it, if nothing more appear, and that the copyright therein is, accordingly, in the sitter, although the property in the negative may be in the photographer.<sup>73</sup>

The modeler of toys was treated as their author, and, hence, proprietor, although he acted for a partnership of which he was a member.<sup>74</sup>

A sub-editor of a newspaper, who re-wrote a reporter's account of an accident, was the author of the resultant account, not the reporter.<sup>75</sup> The reporter furnished the raw material, viz, the facts, but the sub-editor furnished the thoughts which clothed them and their form.

One who conceived the idea of making birdseye views of places where wars were being waged and collected the necessary geographical and historical data but, because he could not draw, employed another to put them together for him, was the author of the resultant print.<sup>76</sup> Here we have one conceiving not only a central idea, or general plan, but also formulating its details, minutely. His mind controlled the draughtsman's throughout and the latter was really only a mechanical agency for the former's use. On the other hand, it has been held<sup>77</sup> that one who conceived the idea of having drawings made of a hand holding a pencil in the proper way to mark ballots was not the author of the resultant drawing but the artist he employed to make it, was. In the latter case what had been conceived was a bare non-artistic and non-literary idea. The drawing, not the idea, alone was copyrightable and this being so, the artist who made the drawing was alone its author.

§ 409  
The modeler  
of toys.

§ 410  
Editors.

§ 411  
The conceiver  
of a work, as  
distinguished  
from the  
mechanical  
executant  
thereof.

§ 412  
Limitations  
on doctrine  
of human  
instrumentalities.

73—*Boucas v. Cooke*, (1903) 2 K. B. 227.

74—*Britain v. Hanks Bros.*, 86 L. T. 765.

75—*Springfield v. Thame*, 89 L. T. 242.

76—*Stannard v. Harrison*, 14 L. T. 570.

77—*Kenrick & Co. v. Lawrence & Co.*, 25 Q. B. D. 99.

That the practical effect of the doctrine of such cases may be very limited, was shown in a recent decision.<sup>78</sup> There defendant, a business man, had rather concrete ideas as to the form in which he wished an advertisement drawn. He communicated these to the plaintiff, an artist, who embodied his conception of the ideas in a drawing which he copyrighted. A dispute followed and the defendant employed another artist who made a second drawing from the same statement of defendant's desires, without seeing the first drawing. It was held the reproduction of the second drawing, necessarily very similar to the first, was no infringement, as the similarity was due to the use of common ideas of which the copyright proprietor was not the originator or author.

§ 413  
Elaboration  
of simple  
ideas.

An actor communicated the idea of a vaudeville sketch to one Pink who for a consideration put it into dialogue. It was held Pink was the author of the resultant sketch.<sup>79</sup> This is another instance where one contributed a rough, general idea and another elaborated and developed this to such an extent, that his contribution to the result far outweighed that of the conceiver of the first idea. This result would be the more certain where none of the ideas were suggested to the author and he was not an employee but an independent contractor. Thus a dramatist was employed to write a play by a theatrical manager. It was held this did not create the relation of employer and employee, so as to make the manager proprietor of the resultant work.<sup>80</sup> One who made substantial changes in a play in the public domain, "Trilby," was held to be the author of the play, as changed.<sup>81</sup> Here the original ideas were common property but the ideas grafted

§ 414  
Plays written  
to order.

§ 415  
Adaptation.

78—McCarthy v. L. Adler Brothers & Co., 227 F. 630.

79—Tate v. Fullbrook, (1908) 1 K. B. 21.

80—Levy v. Rutley, L. R. 6 C. B. 523.

81—Tree v. Bowkett, 74 L. T. 77.

on these original ideas, had an author, to wit, the adaptor of the original play. So the arranger, not the composer of the original work of music, is the author of the resultant arrangement.<sup>82</sup>

One who took a cast of fruit and leaves is the author of the resulting cast,<sup>83</sup> as an exercise of ingenuity, artistic taste and arrangement and modeling was involved.

§ 416  
The maker of  
casts.

One who sent out questions to a number of golf players and compiled biographical notes from the answers, was the author of such notes.<sup>84</sup> So it would appear in the case of a compilation, he who exercised the selective thought necessary to obtain the result<sup>85</sup> is the author. So in the case of a dramatization, or arrangement, or adaptation, of a work, the author would not be the author of the original work, but the person whose thought was the preponderating cause in the effect which we, in such cases, call dramatization,<sup>81</sup> or arrangement, or adaptation.<sup>86</sup> This seems correct, as he is the one who exercised new thought in their arrangement and compilation.

§ 417  
Compilation.

In *Walter v. Lane*,<sup>87</sup> it was held a reporter of the London Times who made shorthand notes of a public, uncopyrighted, original speech by Lord Rosebury and published a verbatim report thereof from such notes, was the author of that report, to an extent entitling his employer to copyright in the report. Lord Halsbury said, p. 545, in discussing the "authorship" of directories:

§ 418  
Verbatim  
stenographic  
reports.

"If the producer of such a book, can be an author within the meaning of the Act, I am unable to understand why the labour of reproducing spoken words into writing and first

82—*Wood v. Boosey*, L. R. 2 Q. B. 340, aff'd 3 same 223; *Boosey v. Fairlie*, 7 Ch. D. 301, 309.

83—*Caprioni v. Alberti*, 65 L. T. 785.

84—*James Nisbet & Co. v. The Golf Agency*, 23 T. L. R. 370.

85—See §§ 454-469.

86—*Lover v. Davidson*, 1 C B N. S. 182.

87—(1900) A. C. 539.



publishing it as a book, does not make the person who has so acted, as much an author, as the person who writes down the names and addresses of those who live in a particular street.”

§ 419  
Walter v.  
Lane dis-  
cussed and  
criticized.

This is a plain misapprehension of the *ratio decidendi*, and effect, of the directory cases, which have held the selection, putting together or arrangement of the names, not their mere manual transcription, furnished the basis of copyright. Lord Halsbury deemed each reporter of the speech would have copyright in his transcription of it, which would be good as against everyone, save possibly Lord Rosebury. Lord Davy thought it immaterial whether or not the speech, so reported, was public property.

Lord James of Hereford said a mere copyist of written matter was not an author, but a translator was, and that a person to whom words were dictated for reproduction was not an author but he here, doubtfully, reached the conclusion that the reporter was an author.

Lord Robertson, who alone dissented, pointed out that a good phonograph might report as faithfully as a stenographer-reporter and that there was structure and arrangement even in the collections of time tables, catalogues and directories mentioned in the prevailing opinions.

This is an extreme case which would probably not be followed in the United States, in any event, because the subject matter of the copyright, would, as far as the reporter was concerned, lack even the modest degree of originality required under the provisions of the Constitution. But even aside from this the case seems quite wrong in principle. All that the reporter did was to exercise a mechanical facility, first, in taking his notes and, secondly, in transcribing them. The only exercise of mental power accompanying this was that of momentary

memory. He was for the time being, a mere conduit through which another's ideas were placed on paper, a mere mechanical adjunct to reproduction of another's ideas. The prevailing view appears to be based, primarily, upon the directory and compilation cases. But such works, in their final form, and last analysis, show the exercise of some arrangement and some selection and the copyright therein is only based upon the use of such selection. The directory cases have been an endless source of confusion and mischief in the theory of the law of copyright, where, as in the principal case, the results of the decisions only, and not the reasons underlying them, have been considered. There may be as much originality in arrangement due to thought, as in thought expressed in words. Indeed, thought without arrangement, can be of little permanent value. Since it is theoretically possible, by stretching some such reasoning, to hold that directories, etc., representing an arrangement of facts, may have an author, what ideas he does use, or embody, are his, and no one else's, and it is just this fact which distinguishes him from the shorthand stenographer in the principal case. No one regards the stenographer who writes out one's letters or briefs as their author, any more than one regards the printer of a book as its author. Copyright was never intended to belong to mere mechanics. Authorship, at its lowest, involves the exercise of some independent thought, appearing either in the context, form, or arrangement, of a literary or artistic work. It may be doubted whether the case is law in England, as the present Copyright Law (1911) is distinctly limited to "original" works, and it may be more than doubted whether the stenographic work in question could be deemed original.

From the cases cited, it clearly appears authorship is a question of fact and that where more than

§ 420  
The author-  
ship of  
directories.

§ 421  
Distinction  
between the  
authorship of  
directories  
and verbatim  
transcriptions  
of speeches.

§ 422  
The question  
raised whether  
Walter v.  
Lane is now  
law even in  
England.

§ 423  
Authorship a  
question  
of fact.

one person contributes to the copyrightable result, he who was the master mind of the group of producers, that is to say, who preponderated mentally in the creation and completion of the work, in its final form, is its author in that form.

§ 424  
Joint  
authorship.

Cases may well exist where there may be several or joint authors and it is not believed that an exact equality of contributive thought or effort is required in such cases, but merely that the contribution of each be furnished, primarily, according to a joint design previously conceived, be substantial, and that there not be the relation of employer and employee between the authors. In the leading case of *Levy v. Rutley*,<sup>88</sup> it was held that where a play was written by one for another, the fact that that other made alterations in it, for the purpose of making it more attractive and suitable for stage representation, would not make him a joint author, or co-author of the play. To constitute joint authorship, it was held, the work must be written originally, by two or more, in furtherance of a preconceived, common design. If this exists, it was held, different portions may be the sole production of either and they may be joint authors, but there must be an original joint design for this rule to apply. The doctrine of this case was recently applied in an action<sup>89</sup> where it had been agreed between plaintiff and defendant that the latter would write a comic opera, for which the former wrote the scenario. The defendant, by agreement, made many changes in the scenario but used, and adopted, the whole plot, frame work and scheme of the scenario. A third person wrote lyrics for the opera, with knowledge of plaintiff's and defendant's relations. It was held the three were joint authors of the result. The case last cited<sup>89</sup> further held that when several collaborators knowingly engage in the

§ 425  
Who is, or is  
not a joint  
author.

88—L. R. 6 C. B. 523. See also *Shelley v. Ros*, L. R. 6 C. P. 531.

89—*Maurel v. Smith*, 220 F. 195.

production of a piece, which is to be presented, originally, as a whole only, they adopt the common design necessary to make them joint authors, although they do their work after the original common design is conceived, and unless they undertake expressly to apportion the return to them for their contributions, they are entitled to equal shares of the resultant returns.

§ 426  
Effect of  
joint author-  
ship, on divi-  
sion of  
profits.

It was further held both the joint authors and publishing house, which published for one of them, were bound to account for their profits, to the extent of the third author's one-third interest therein.

In a State court decision, it appeared the defendant and another had purchased the American rights to a German play.<sup>90</sup> This was translated and adapted to the American stage, for them, by one Smith. The plaintiff was engaged to write the music for the play. He would not collaborate with Smith and one Hobart was engaged to write its lyrics and plaintiff set these to music. It was shown his work was limited to such music for the lyrics. Motion pictures of the resultant comic opera were made, with the consent of the defendants and Smith. The plaintiff sought to restrain their production, claiming they infringed his rights as a joint author of the play. It was held he was not a joint author, his work being separate and distinct from the play, and an injunction was refused him. It was further held that even if he were a co-owner of the play, he could not restrain the motion pictures, without proof that the third persons producing them were not licensees of his fellow co-owners.

§ 427  
Incidental but  
distinct  
contributions  
to a work do  
not create  
joint  
authorship.

The joint owners of a copyright may contract with reference to it, *inter se*, and this agreement, rather than their original rights under the statute, will control their rights to print and publish a book covered by it.<sup>91</sup>

§ 428  
Contracts  
between joint  
authors.

90—Herbert v. Fields, N. Y. Law Journal, April 1, 1915.

91—Gould v. Banks & Gould, 8 Wend. 562.

§ 429  
Employers,  
as authors of  
the works of  
their  
employees.

§ 430  
General  
summary of  
meaning of  
"author."

§ 431  
Who is pro-  
prietor of a  
work: the  
author or his  
transferee.

§ 432  
After  
transfer, the  
author's  
rights, in con-  
nection with  
the work,  
terminate, ex-  
cept under  
special  
contract.

§ 433  
Rights of  
transferee.

The Act<sup>92</sup> provides that the term "author," as used in it, shall include an employer, in the case of works made for hire. While this definition only applies to statutory copyright, as this is far more important than common law copyright, it serves to solve many difficult questions, as in cases where many contributed to the formulation of a work, they are apt to be employees of the same employer.

From the subject matter of the cases cited, it thus appears that the word "author," as used in copyright law, not only includes persons whom we call authors in ordinary speech, that is, the makers of literary or quasi-literary works, but also dramatists, sculptors, painters, musicians, architects (probably), modelers and, generally, creators of all copyrightable works in whatever media expressed or embodied.

The author of a work is its original proprietor. Anyone to whom he transfers the whole title therein becomes the proprietor, when the transfer becomes executed, and the author's rights in the work, aside from contract, then cease. Thus in one case, it appeared that<sup>93</sup> the author of an article, had sold it and the right to copyright it. It was held that upon such sale all his rights of literary property therein ceased, and he could not sue the purchaser, for damages, because of the manner in which it was published, in the absence of contract stipulations, or of facts not amounting to a showing that the publication was made in such a manner as to be a libel. Similarly, it was held, that in the absence of contract, he could not complain that it was not published under the author's name.<sup>94</sup>

The purchaser of a manuscript may, in the absence of contract, refuse to publish it,<sup>95</sup> or change,

92—Section 62.

93—American Law Book Co. v. Chamberlayne, 165 F. 313.

94—Jones v. American Law Book Co., 125 N. Y. A. D. 519.

95—Clemens v. Press Publishing Co., 80 N. Y. Misc. 206.

or modify, its contents to any extent he sees fit,<sup>96</sup> provided he does not publish it in a manner to work a fraud on the public or constituting a libel on the author.

The author of a work may expressly,<sup>97</sup> or impliedly, limit his rights therein, as against parties in privity of contract with him, or the public.<sup>98</sup> Thus it has been held there is an implied contract where a photographic portrait is taken by a professional photographer, for hire, that the negative will only be used for printing such photographs as the sitter might order or authorize.<sup>99</sup>

One who made sketches and drawings while in the Government service, it being understood that all such sketches and drawings were to be the property of the Government, was not the "author" thereof, in the sense contemplated by the statute, and any attempted copyright thereof by him was ineffectual.<sup>1</sup>

An author was employed by a publisher under a contract which, while nominally providing for a salary, actually fixed his compensation on the basis of a price for each page accepted, or rejected, by the publisher. The contract provided that the copyright in all works prepared by him under the contract, was to belong to the publisher. He prepared two works, using the office facilities, supplies and library of the publisher, which refused to accept or pay for the works. It was held<sup>2</sup> he was not an employee but that under the contract, the works became the publisher's property whether paid for or not.

In an early case<sup>3</sup> the right of an author to restrain

§ 434  
Limitations  
on general  
rights of  
proprietor  
arising out of  
express or im-  
plied contract.

§ 435  
Proprietor-  
ship by  
special  
contract.

§ 436  
Miscellan-

96—Hackett v. Water, 80 N. Y. Misc. 340.

97—See Gould v. Banks & Gould, 8 Wend. 560.

98—See Heine v. Appleton, 4 Blatch. 125.

99—Moore v. Rugg, 44 Minn. 28, 9 L. R. A. 58; Pollard v. Photographic Co., 40 Ch. D. 345.

1—Heine v. Appleton, 4 Blatch. 125.

2—Edward Thompson Co. v. Clark, 109 N. Y. Supp. 700.

3—Drummond v. Althemus, 60 F. 338.

eous instances of protection of author's reputation, after transfer of copyright.

publication of works, as his works, was sustained, where the copies were garbled and partial, although he had parted with copyright in the works, but such relief was refused the proprietors of the common law copyright in the works, for lack of jurisdiction.<sup>4</sup> The grounds advanced to sustain the first mentioned decision<sup>3</sup> are stated as the prevention of a fraud upon the public, etc. Similar protection was given an author to prevent the use of his name, by a person not in privity of contract with him, by affixing it as author to a collection of uncopyrighted stories, partly written by him, and partly not.<sup>5</sup> The English cases hold that though an author has parted with his copyright, the purchaser may not change the work in such a manner that the author's reputation will be injured, without becoming liable to the author for damages,<sup>6</sup> but not to injunctive relief.<sup>7</sup> Where a work has become *publici juris*, it has been held a third person in republishing it, may do so, not only by including the author's name, as part of it, but also the pen name under which he produced it.<sup>8</sup>

§ 437  
Summary of law as to who is proprietor.

A proprietor, then, need be neither the author nor inventor of the work, but only the legal assignee of the author or inventor can be the proprietor of the work.<sup>9</sup>

§ 438  
Remedies available for protection of common law copyright.

It has been said that if the rights of the proprietor of a common law copyright are violated, he is entitled to the same remedies to which the owner of other personal property may resort for redress.<sup>10</sup>

§ 438a  
Damages.

The remedies available to protect a common law copyright were enumerated by Cozens-Hardy, M.

4—Pott v. Althemus, 60 F. 339.

5—Harte v. DeWitt, 1 Cent. L. J. 360.

6—Archbold v. Sweet, 5 C. & P. 219; Clark v. Freeman, 11 Beav. 112.

7—Cox v. Cox, 11 Hare 118; Lee v. Gibbings, 8 T. L. R. 773.

8—Ellis v. Hurst, 70 N. Y. Misc. 122.

9—Mifflin v. R. H. White Company, 190 U. S. 260, 47 L. ed. 1040; Marzials v. Gibbons, (1874) L. R. 9 Ch. App. 518.

10—Aronson v. Baker, 43 N. J. Eq. 365.

R.<sup>11</sup> as follows: first, an action at the common law; secondly, a suit in equity, for an injunction founded on the common law right; thirdly, a suit in equity, where the piracy has been accompanied by circumstances of fraud, or breach of trust, confidence or contract, express or implied. In a case of the latter type,<sup>12</sup> delivery up of infringing copies was ordered by the Court. Delivery up of wrongful copies, *pendente lite*, to a receiver appointed by the Court, was ordered in a somewhat similar case.<sup>13</sup>

§ 439  
Injunction.

§ 440  
Delivery up  
of copies.

Since the power to order an accounting has always been deemed incident to the right to grant an injunction, it is not doubted that, in a proper case, if infringement of a common law copyright were established, that defendant's profits might be reached by plaintiff.

§ 441  
Accounting  
for profits.

It has been held, in a decision<sup>14</sup> citing numerous authorities, that when the material object in connection with which a common law copyright exists, as for example a manuscript or painting, is converted, the plaintiff may sue for conversion, and his damages in such case are the work's value to the owner, to be determined by a jury, in its discretion, subject to being set aside as excessive. A verdict of five hundred dollars for conversion of a manuscript list of customers<sup>14</sup> and one for five thousand dollars, in the case of a poem<sup>15</sup> were sustained, where no actual damage was proven.

§ 442  
Conversion of  
material  
property in  
connection  
with which  
common law  
copyright  
exists.

§ 443  
The measure  
of damages.

The plaintiff in such cases should be mindful of the nature and limitations of such property, in drafting his pleadings. Thus, merely alleging that there had been a conveyance of an unpublished play, was held not to show that plaintiff became its proprietor, as the author might have sold it to another or lost

§ 444  
Pleading.

11—Mansell v. Valley Printing Company, (1908) 2 Ch. 441.

12—Prince Albert v. Strange, 2 De G. & M. 693.

13—Simmons Hardware Co. v. Waibel, 1 S. D. 488, 11 L. R. A. 267.

14—Taft v. Smith Gray & Co., 134 N. Y. Supp. 1011.

15—Press Publishing Co. v. Monroe, 51 L. R. A. 353, 73 F. 196.



his rights therein by publication, before his conveyance to plaintiff.<sup>16</sup>

§ 445  
Innocent  
infringement,  
no defense.

That innocence is no defense where infringement is established was illustrated in an English case where,<sup>17</sup> in an action at law, the owner of unpublished pictures and designs, suitable for advertisements, recovered damages, the cost of producing the works in question, from an innocent infringer who had purchased them, in good faith, from a surreptitious copier.

§ 446  
Cost of  
production  
allowed as  
damages.

§ 447  
Jurisdiction  
in common law  
copyright  
causes.

The United States Courts have no jurisdiction, unless R. S. 4967 remain unrepealed,<sup>18</sup> in cases involving common law copyrights, except on general grounds of jurisdiction, unconnected with copyright. The State courts have jurisdiction in cases involving common law copyrights, and this is not lost, although the effect of their decisions, as for example, in passing upon the title to a given work, may indirectly affect the question whether a party defendant has a valid statutory copyright.<sup>19</sup> If a work is published, a State court has no jurisdiction, either on the ground of statutory, or common law, copyright, although, in a proper case, it may award relief on the ground of unfair competition.<sup>20</sup>

§ 448  
Jurisdiction  
of state  
courts.

§ 449  
Equitable  
relief to  
authors,  
apart from  
copyright law.

Even where an author has no common law or statutory copyright, protection is frequently afforded as between the parties, on the ground of breach of trust or confidence or contract, express or implied. Thus, for example, an employer was protected against the publication of stenographic notes for letters, taken by an employee to a third person, who knew how they were obtained.<sup>21</sup> Similarly, it was held<sup>22</sup> that unwritten interpolations in a play,

16—Ockenholdt v. Frohman, 60 Ill. App. 300.

17—Mansell v. Valley Printing Co., (1908) 2 Ch. 441.

18—See § 1661.

19—Stern v. Laemmle Music Co., 74 N. Y. Misc. 263.

20—Potter v. McPherson, 21 Hun N. Y. 559.

21—Laidlow v. Lear, 30 Ont. 26.

22—Keene v. Wheatley, 4 Phila. 157.

“gags” so-called, composed by an actor in plaintiff’s employ, while not a possible subject of copyright, could not be used by a rival manager, who obtained them by a breach of confidence on the part of the actor. Such cases, a number of which are collected in the footnote,<sup>23</sup> are decided on general principles of law entirely apart from questions of copyright. Similarly, in another instance,<sup>24</sup> a newspaper publication of the contents of an unpublished, unperformed play then in process of rehearsal, was restrained on the ground that its subject matter must have been obtained through a breach of confidence by one of the actors in the play.

Protection is also given, at times, where the facts warrant it, upon principles of the law of unfair competition. This latter subject is discussed elsewhere.<sup>25</sup>

§ 450  
Relief on  
principles of  
unfair com-  
petition.

23—*Jovatt v. Winyard*, 1 Jac. & W. 394; *Reuters Telegram Co. v. Byron*, 43 L. J. Ch. 361; *Lamb v. Evans*, (1893) 1 Ch. 218; *Louie v. Smellie*, (1895) 11 T. L. R. 515.

24—*Gilbert v. Star Newspaper*, (1894) 11 T. L. R. 4.

25—See § 1180.

## CHAPTER VI

### EXTENT AND SCOPE OF COPYRIGHT

§ 451  
Effect of  
copyright  
under present  
Act, in con-  
nection with  
prior and  
subsequent  
copyrights.

§ 452  
Copyrights  
in composite  
works.

§ 453  
Copyright in  
works not  
entirely  
original.

§ 454  
Works, only  
partially  
original,  
copyright as  
to the original  
portion  
thereof.

*Section 3. That the copyright provided by this Act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act.*

This section of the law deals with the situation disclosed in the great bulk of non-imaginative works, whether of literature, music, or applied art.

It has been shown that originality is essential to render a work subject to copyright.<sup>26</sup> Such originality may, however, consist either in the matter or arrangement of a work,<sup>27</sup> but not in matter copied, literally, from prior works.<sup>28</sup>

It is, of course, self-evident, that all works are not copyrightable, but it is not always appreciated so readily, that a work may be partially copyrightable and partially not so. In an excellent opinion,<sup>29</sup> containing one of the mines of copyright dicta characteristic of early American copyright decisions,<sup>30</sup> Mr. Justice Story showed<sup>31</sup> that originality

26—See § 118.

27—Emerson v. Davies, 3 Story 768.

28—Barfield v. Nicholson, 2 Sim. & St. 1.

29—Gray v. Russell, 1 Story 11.

30—Compare, for example, Lawrence v. Dana, 4 Cliff. 1.

31—Page 17.

in the use and exposition of previously existing works and materials, free to all, for use, is the foundation of all classical, scientific and technical works. The original notes made by Professor Gould to Adams Latin Grammar, an uncopyrighted work, as well as their plan and arrangement, were, accordingly, held subject to copyright. Annotations of Wheaton's Elements of International Law were held subject to copyright.<sup>31a</sup> Similarly, a work comprising letter press within the public domain, with original wood cuts, was held<sup>32</sup> copyrightable. These decisions illustrate the points, decided in various other cases,<sup>33</sup> that publishing copyrightable with non-copyrightable matter does not make the copyrightable matter any the less subject to copyright.

On the one hand, it was held<sup>34</sup> that copyright of a book would protect the original illustrations in it, since these were subject to copyright, but on the other hand, it was held<sup>35</sup> copyright of a book containing a replica of a monogram, would not protect the monogram, since a monogram could not be the subject of copyright.

This section of the statute, then, is largely declaratory of previous law.<sup>36</sup> The matter which is worked into new shape by the applicant, for a new copyright may either be copyrighted,<sup>37</sup> or uncopyrighted, matter. Whichever it be, the resultant work is a new work.<sup>38</sup> His work may consist in the addition

§ 455  
Notes, annotations and illustrations, in works themselves in the public domain.

§ 456  
Combination of copyrightable with uncopyrightable matter.

§ 457  
Such new matter must, however, itself be copyrightable for the rule to apply.

§ 458  
Declaratory nature of the section, in general.

§ 459  
What is a new work made

31a—Lawrence v. Dana, 4 Cliff. 1.

32—Bogue v. Houlston, 5 De G. & Sm. 267.

33—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618; White v. Geroch, 2 B. & Ald. 298.

34—W. Marshall & Co. v. A. H. Bull, Ltd., 85 L. T. N. S. 77. See also Munroe v. Smith, 42 F. 266 (cover and illustrations, *semble*).

35—Royal Sales Co. v. Gaynor, 164 F. 207.

36—Kipling v. G. P. Putnam's Sons, 65 L. R. A. 873, 120 F. 631.

37—As shown elsewhere, § 646, copyrighted matter cannot be used for any such purpose without the consent of the copyright proprietor.

38—Lawrence v. Dana, 4 Cliff 1; West Publishing Co. v. Edward Thompson Publishing Co., 176 F. 839.

out of old materials.

§ 460  
Nature of the copyright in such works.

of original work to original work, or original work to uncopyrighted work, or of unoriginal work to previously copyrighted work. The result is the same in each instance. These facts are fully recognized by this section. It, accordingly, protects copyrightable, and also previously copyrighted, matter when combined with uncopyrightable matter. But the extent of such protection is naturally, and necessarily, limited. The uncopyrighted matter so combined with the copyrightable matter is, standing by itself, in no way affected by the copyright obtained in the entire work, nor is the duration of the copyright in any previously copyrighted matter extended, by such a new, or combination, copyright. An excellent illustration as to how this portion of the section may work out was supplied in one of the *Encyclopedia Britannica* cases. The proprietors, being aliens, and the great bulk of the contributions being written by aliens, the work, as the law then stood, was not copyrightable in the United States. Extensive unauthorized reproductions followed. The proprietors had, however, procured certain articles to be written by citizens of the United States and, purchasing these after copyright together with the copyrights therein, included the articles in their *Encyclopedia*. On the *Encyclopedia* being reproduced, it was held<sup>39</sup> the inclusion of these copyrighted articles with uncopyrightable matter, did not affect the copyright therein and relief, necessarily comprehensive in scope, was given the proprietors.

§ 461  
Claims of copyright in such works.

A general claim of copyright may be made covering an entire work, partly copyrightable and partly not.<sup>38</sup> The validity of copyright at the present day is fixed, not by the claim of copyright but by other considerations, so that the fact that the claim, if general, would be too broad would be immaterial.

38—*West Publishing Co. v. Edward Thompson Publishing Co.*, 176 F. 839; *Lawrence v. Dana*, 4 Cliff. 1.

39—*Black v. Henry G. Allen Co.*, 9 L. R. A. 433, 42 F. 618.

But if the copyrightable matter cannot be picked out from the non-copyrightable matter, the whole copyright would fail, since the burden is on an author to show his work was copyrightable, if challenged, and unless he can prove this in whole, or part, his copyright cannot be sustained.

§ 462  
New editions.

Where a new edition of a copyrighted work is published before the expiration of the first copyright, such new edition may be either unchanged, that is, be a mere reprint, or may contain alterations or additions in or to the copyrighted matter, that is, be a new version of the earlier work.<sup>40</sup> Under the former laws,<sup>41</sup> a copyright proprietor was required to deposit, either in the mail, or in the office of the Librarian of Congress, a copy of every subsequent edition wherein any substantial changes were made. Whether this was all that was requisite, aside from questions of notice, for copyright to enure in the new edition, was not settled by any adjudicated case. The question does not require present discussion, as under the statute now in force, which does not contain the language quoted, it appears clear that new editions, containing substantial changes, would require separate copyright, to protect original additions, alterations and changes embodied in such new work. This view is not affected by the fact that the proprietor of a copyrighted work has, concededly, under Section 1, the right to make other versions thereof. The right is not to be confused with the result. The former arises under the first copyright; the latter may require a second copyright to protect the new matter contained in such changes. Copyright in such new editions, or versions, runs from the date of the new edition, with respect to the new matter contained in it, as well as with respect to the combination made in such edition of the old, with

§ 463  
The former rule.

§ 464  
New versions require separate copyright.

40—See *Thomas v. Turner*, 33 Ch. Div. 292; *Murray v. Bogue*, 1 Drew 353.

41—R. S. 4959.

§ 465  
Effect of  
expiration of  
copyright  
in original  
version.

the new matter. By the express terms of this section, however, the copyright term of the matter first copyrighted is not extended by any subsequent copyright, other than a renewal, and anyone would be at liberty to use such first copyrighted matter (except in combination with matter covered by the second copyright) at the expiration of the original copyright term, or renewal thereof, as the case might be.

§ 466  
Copyright in  
new editions  
or versions  
discussed.

New editions of either copyrighted or non-copyrighted works are, then, subject to copyright, if they contain original matter, either supplementary to the work in its earlier form, or consisting of substantial changes in such work. As to such new matter, the new edition is a new work.<sup>42</sup> The distinction is between mere reprints<sup>43</sup> and original alterations or additions. The question is one of fact<sup>44</sup> and degree.<sup>45</sup> Since the protection afforded is so slight, being limited to the new matter,<sup>46</sup> and to the combination of the old and new matter, it would seem that a liberal view may well be taken of what is, and what is not, a new edition.

§ 467  
Composite  
works.

Composite works mean those consisting of matter drawn from various different sources or contributed by different authors. The term would be clearly deemed to cover encyclopedic works were these not mentioned separately, in Section 5, thus showing an apparent conception by Congress, that the one does not necessarily include the other. In spite of this separate reference, however, the term "composite works" seems inclusive enough to cover all compilations, provided only that they consist of several distinct parts, drawn from separate sources.

42—Murray v. Bogue, 1. Draw at p. 365; Kipling v. G. P. Putnam's Sons, 65 L. B. A. 873, 120 F. 631.

43—Thomas v. Turner, 33 Ch. D. 292.

44—Black v. Murray & Son, 9 M. 341.

45—S. D. 383 at p. 387.

46—Kipling v. G. P. Putnam's Sons, 65 L. B. A. 873, 120 F. 631.

Periodicals, include newspapers, magazines and other journalistic productions, as well as publications appearing serially, or regularly at fixed times or intervals. The Copyright Office Regulations<sup>47</sup> speak of the necessity of periodicals appearing at intervals of less than a year to be deemed periodicals but there appears no reason for this limitation, if the times of their appearance are fixed and regular.

§ 468  
Periodicals.

A proprietor of composite works can only copyright such works as an entirety, if he has shown selection and arrangement in assembling the whole, except as to those parts of which he is the author or proprietor, which he can, of course, copyright for other reasons. In either event, one copyright by him, will copyright everything he can copyright. This was illustrated in a case,<sup>48</sup> where it was said the copyright of an atlas would protect all maps in it, without necessity for individual copyright of each map. He cannot copyright matter of which he is not the author or proprietor, without the author's or proprietor's consent or authority but he may, if the circumstances show this was intended, be deemed a trustee of the copyright for the proprietors of portions of the work not owned by him, even though the copyright is taken in his own name, without any indications that he is such trustee.<sup>49</sup> Any attempt on an author's part to take out a copyright, in that author's name, on matter that has appeared in a periodical, for which a general copyright has been taken in the name of the publisher, is so inconsistent with any claim of such a trust, however, as to negative any contention that it was intended.<sup>50</sup>

§ 469  
Nature of copyright in composite works.

§ 470  
One copyright of a work protects everything copyrightable therein by the proprietor.

§ 471  
Copyrights for benefit of third persons.

Thus, this section does away with any necessity

47—Copyright Office Bulletin No. 15, p. 7.

48—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618.

49—Lawrence v. Dana, 4 Cliff. 1.

50—See § 814.



for the taking out of individual copyrights on several contributions of different persons, included in a single publication, if all of these are owned by one proprietor, or if he represents all of the proprietors, in taking out the copyright.

§ 472  
Effect of Act  
on copyrights  
obtained  
under prior  
acts.

In a very recent decision,<sup>51</sup> the question arose whether a copyright, obtained under the Act prior to the present one, in a song, consisting of music and words, would protect the words from separate publication. The plaintiff invoked this section of the law for its protection. The Court deemed, however, that the application of the section was limited to copyright, taken out under the present Act. The Court appears to have been unaware of the declaratory aspects of the section and of the prior law of infringement by partial reproduction.<sup>52</sup> For reasons given elsewhere,<sup>53</sup> its view of the section is not deemed sound. The portion of the section with reference to the "scope" of prior copyrights would appear to refer rather to the extent of the matter copyrighted or to the duration of rights therein, than to the aggregate of rights constituting copyright. This decision is discussed in detail elsewhere.<sup>54</sup>

51—*M. Witmark & Sons v. Standard Music Roll Co.*, 221 F. 376.

52—See § 1031.

53—See § 245. See also *Kelly v. Hooper*, 4 Jur. 21.

54—See §§ 1655-9, 1010, 1614.

## CHAPTER VII

### SUBJECT-MATTER OF COPYRIGHT

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

§ 473  
The present subject matter of copyright.

This section has a two-fold aspect. It shows both the general subject matter of copyright and the necessarily inherent limitations which underlie what may be copyrighted.

Congress has, by using the very words which are used in the section of the Constitution from which it drew the power to pass this Act,<sup>55</sup> shown its intention to exercise that power with respect to all matter in which it could allow copyright constitutionally.<sup>56</sup> It must, therefore, be deemed that everything is copyrightable under the present Act which could, constitutionally, be made copyrightable.

§ 474  
Everything now copyrightable in which Congress may permit copyright.

In this respect, the Act marks a revolutionary advance in copyright legislation, as all previous Acts confined copyright protection to limited, specified classes of works. Decisions which held, under prior Acts, that works of a given type were not copyrightable under such Acts should, accordingly, be read, and cited, with extreme caution, and only after being carefully considered in connection with the change effected by this section.<sup>57</sup> The importance of this section has, apparently, been

§ 475  
Effect of enactment present section on prior law.

<sup>55</sup>—See § 81.

<sup>56</sup>—See House Report 2222 (*ante*, § 73) at p. 10.

<sup>57</sup>—Cf., for example, *J. L. Mott Iron Works v. Clow*, 72 F. 168 (an excellent and interesting opinion which is not law; Cf. *Da Prato Statuary Co. v. Giuliani*, 189 F. 90.)

§ 476  
What writings  
are copy-  
rightable.

§ 477  
The writings  
need not  
possess  
merit.

overlooked even by the Copyright Office, judging from its Regulations.<sup>58</sup>

Copyright is now possible to an "author" in any of his "writings."<sup>59</sup> Such writings must merely tend to promote the "progress of science and the useful arts,"<sup>60</sup> to be copyrightable. Literary merit is not essential. Artistic merit is not requisite.<sup>61</sup> The courts will not act as critics<sup>62</sup> and, curiously enough, the more cultured the judge<sup>61</sup> the more reluctant he is, apparently, to pass on any question involving the taste, merit or intrinsic value of a given work in which copyright is claimed.

As has been shown, however, a work must be original or there is no constitutional warrant for its being made the subject of copyright.<sup>63</sup> Judge Shipman expressed the matter as follows:<sup>62</sup>

"It is difficult to lay down any precise rule which can be applied in all cases as a test of originality. A work may be original in the eye of the law when it is not in the eye of the critic. . . . The policy of the law is to encourage literary labor so far as it can be done without infringing upon the rights already granted to others. Plagiarism and servile imitations are not to be encouraged. Those literary thefts which are committed upon copyrighted works the law promptly suppresses. The mere copyist or the slavish imitator who reproduces old materials substantially in their old form without new combination is entitled to no protection under the statute. But the law rests upon no code of comparative criticism. It protects alike the humblest efforts at instruction or amuse-

58—See § 571.

59—See § 87.

60—See § 93.

61—*Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239; *Hein v. Harris*, 175 F. 875.

62—*Bouccicault v. Fox*, 4 Blatch. 87.

63—See § 118; *DuPuy v. Post Telegram Co.*, 210 F. 883.

ment, the dull productions of plodding mediocrity and the most original and imposing displays of intellectual power.”

Very little reflection upon the subject matter of copyright will demonstrate the necessity for these views.

Judges have, however, occasion when, sitting on the Patent side of the Court, constantly, to consider questions of novelty or originality and cannot, logically, escape similar consideration in Copyright causes. It has, however, been said,<sup>64</sup> that where the copyrightability of a given production is challenged for want of originality, the Court will rarely, if at all, on demurrer, take judicial knowledge of whether it is original or not.

Each theory<sup>65</sup> as to the origin of property in the physical expression of thought, must recognize the existence of a vast fund of ideas and of literary and artistic works in which there is no copyright and which constitute a field or fund available for the use of all men, that is, works in “the public domain” of formulated thought. It is deemed Congress could not, constitutionally, allow copyright in works in that “domain,” since, as such works are there for anyone to use, to allow anyone, even their author, a copyright therein, after they became free to the public, could not possibly “promote” that “progress of science and the useful arts” for which alone Congress may legislate. Such progress has been “promoted” by such a work, as fully as possible, before, and after, it became part of the “public domain.” *A fortiori*, and from the very language of the constitutional provision, Congress could not grant copyright in a work in the public domain, to anyone other than to its author or originator.<sup>66</sup>

§ 478  
“Originality” and merit are not synonymous.

§ 479  
Judicial knowledge not taken of “originality.”

§ 480  
The public domain of uncopyrighted works.

§ 481  
Matter in the public domain is not subject to copyright.

64—Henderson v. Torpkins, 60 F. 758.

65—See §§ 139, 140.

66—See §§ 81, 93, 611.

§ 482  
Meaning  
of the  
originality  
necessary to  
copyright.

As a contrary result would be unconstitutional, it is not doubted the broad language of the Act will be so limited by judicial construction as to render it coextensive only with the limit of congressional power.<sup>67</sup> A decision under the temporary Act passed in connection with the Louisiana Purchase Exhibition reached this result.<sup>68</sup> On the other hand, as has been pointed out, the originality necessary for copyright, does not involve the use of this term in any very exact or scientific sense. The thoughts which are conceived by the great mass of men are simply a reformulation of thought impulses derived from other men, other works, or external factors. Thoughts which have never been thought before are of an exceeding rarity. The new combination, or refurbishing of old thoughts, or old matter, is due to independent thought, is meritorious and usual. Copyright is not an aristocratic institution. It is, hence, not limited to the product of genius, or even talent, but extends to the tangible product of any thought which is the result of independent mental effort and not mere mechanical repetition or deliberate copying. It is not necessary, hence, that the thoughts in works need be novel to be protected. They may be suggested, though not copied, by the works of another.<sup>69</sup> All that is required to afford the needed degree of originality, is independent thought and an absence of copying the work of others. To this somewhat limited and non-exacting extent, writings, to be copyrightable must be original.

Unless a work is original, it is not the work of the pretended author.<sup>70</sup> All thought, unless plainly

67—Clayton v. Stone, 2 Paine 382.

68—Encyclopedia Britannica Co. v. Werner Co., 135 F. 841.

69—Schumacher v. Schwenke, 25 F. 466; American Mutoscope Co. v. Edison Mfg. Co., 137 F. 263 (an extreme case).

70—Dicks v. Yates, 18 Ch. D. 76 at p. 92; Byrne v. Statist Co., (1914) 1 K. B. 622.

perverted, is of value to the State, as progress and civilization spring from, and increase with thought. Unoriginal thought, mere repetition, can only hinder true thought by encouraging mental laziness or dishonesty. Hence, public policy forbids its encouragement, and, as has been pointed out, copyright acts are intended to give protection commensurate with the original work done by an author himself.<sup>71</sup>

§ 483  
Copyright in the original portion of a partially original work.

Very few works, however, taking the mass of copyrighted works by and large, are entirely original.<sup>72</sup> That they are not entirely original will not prevent copyright in so much of the work as is original.<sup>73</sup> There may be copyright in part of a work only.<sup>74</sup> Copyrighting a work will only copyright the copyrightable matter contained in it.<sup>75</sup> The work of others is not the "writing" of the applicant for copyright, or the author under whom he claims, and he cannot obtain copyright in a stranger's work. If this principle is kept firmly in mind, it will prevent much confusion of thought and many errors in the understanding of case law.

§ 484  
Copyright only protects the portions of a work copyrightable.

Copyrighting a given work, hence, does not, necessarily, copyright everything in that work. As has been shown, a work may consist of both copyrightable and uncopyrightable matter.<sup>76</sup> Where a work containing both copyrightable and uncopyrightable matter is copyrighted, the only effect of the copyright is to protect the original copyrightable matter contained in it.<sup>77</sup> This rule was well illustrated in a case<sup>78</sup> where English copyright was taken out in Oliver Wendell Holmes, "The Guardian Angel." All but the last six chapters had been pub-

§ 485  
Effect of copyrighting a work, part of which is public property.

71—Dicks v. Brooks, L. R. 15 Ch. Div. 22.

72—Emerson v. Davies, 3 Story 779.

73—Hein v. Harris, 175 F. 875.

74—Low v. Ward, L. R. 6 Eq. 415; Reid v. Maxwell, 2 T. L. R. 790.

75—Royal Sales Co. v. Gaynor, 164 F. 207.

76—See § 453.

77—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547.

78—Low v. Ward, L. R. 6 Eq. 415.

lished in the United States, before application was made for English copyright. The Court held, that where the parts of a work could be separated, there might be copyright in any distinct part of it and that, hence, the copyright was valid as to the last six chapters of the novel, although invalid as to the rest of the work.

§ 486  
Copyright  
may exist  
either in  
matter or its  
arrangement.

§ 487  
But not in  
mere copies.

The originality requisite for copyright may consist either in the formulation of ideas by independent thought, whether in words, or in, or upon, some material substance, or it may consist in the assemblage or arrangement of facts, as in the case of directories, maps, etc. That is, copyright may be either in matter or arrangement, but not in matter copied from prior works.<sup>79</sup> Thus it was held<sup>80</sup> there could be no copyright in specifications of patents copied from the originals in the Patent Office but, on the other hand, daily digests of instruments filed in public offices, were held copyrightable.<sup>81</sup>

§ 488  
Independent,  
honest  
duplication  
of copyrighted  
works.

If the originality consist in assemblage or arrangement, it necessarily follows that materials common to all mankind may be, and usually are, used. Since such materials are open to anyone to use as he sees fit, the same result may be achieved, independently, by several and, if so, each would be entitled to copyright in his resultant work. This result, inevitable from the very nature of the usual and permissible method for manufacturing the great bulk of copyrighted works, is still, from time to time, overlooked by judges when considering the exceptional, novel or palpably meritorious work before them. Copyright law, accordingly, differs radically from patent law, as the monopoly given by the latter is unqual-

79—*Barfield v. Nicholson*, 2 Sim. & St. 1; *Emerson v. Davies*, 3 Story 768.

80—*Wyatt v. Barnard*, 3 Ves. & B. 77.

81—*Trade Auxiliary etc. v. Middleborough etc.*, 40 Ch. D. 425.

ified, while the right given by the former is preventative in many respects rather than positive.

It may be suggested that if a work be novel or have literary or artistic merit, this may be persuasive evidence of originality, approaching the effect of a *prima facie* presumption of fact.

While, as has been shown,<sup>82</sup> there can be no copyright in a work until it has been given concrete expression, nevertheless, the original work need not remain in physical existence after it has once had physical being, in order to be copyrightable, if copies of it survive in any physical medium. Thus it was held<sup>83</sup> that where drawings were made for designs and dies were engraved from the drawings and the drawings then destroyed, cards being printed from the dies, the drawings were copyrightable after the destruction of the originals.

Definitions of the word "writings," as used in the Constitution, and now in the Act, are relatively infrequent, in the books. What is a "writing" under the Constitution is considered also elsewhere.<sup>84</sup> Mr. Justice Miller's remarks,<sup>85</sup> previously quoted, will bear repetition at this place:

"By writings in that clause is meant the literary productions of those authors and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression."

Caution should be used not to misunderstand the phrase "literary productions," used by the Court, in the language quoted, in the case cited, as in applying this definition, it has held a photographic por-

§ 489  
Inherent  
evidence of  
originality.

§ 490  
Destruction  
of the  
original  
copyrighted  
work, before  
copyright.

§ 491  
What are  
"writings"  
in general.

82—See §§ 2, 90.

83—*Millar & Lang Ltd. v. Polak*, (1908) 1 Ch. 433.

84—See § 87.

85—*Burrow Giles Lithographing Co. v. Sarony*, 111 U. S. at p. 58, 28 L. ed. 349.



trait embodying original intellectual conceptions in the posing of the subject, was a "literary production"—a use of language which if to be understood literally, would be somewhat unusual.

§ 492  
The possibility of copyright in the audible expression of thought discussed.

Mr. R. R. Bowker, in his interesting work on Copyright, says:<sup>86</sup> "It seems evident that the phrase 'visible expression' as used in this decision was intended to give a broad definition and not to narrow the definition by the exclusion, for instance, of 'audible expression,' as otherwise the *performance* of a drama or of a musical composition could not be included under copyright protection." This statement may be questioned and the latter portion is a *non sequiter*. There is no support to be found in any adjudicated case for Mr. Bowker's views, as thus expressed. It is deemed that no matter how broad a judicial construction may be given to the word "writings," there must be a "visible expression" of thought, before a right of property can arise in thought. A book can be read aloud, a drama performed and music played, but this capacity goes merely to the use which can be made of the work itself, after its creation. If there be copyright in a work, its unlawful use may be forbidden and its lawful use protected, but this is not the equivalent of saying that there could be a copyright in such use. If there could be a property in "audible expression," there could be a property in original speech and asserted infringement might be the rule rather than the exception.

§ 493  
Works of art and music are "writings."

While there are no cases discussing the constitutional aspect of copyright in sculpture, paintings and musical compositions, they are undoubtedly subject to copyright, as a result of universal acquiescence in congressional legislation, making them the subject of copyright.<sup>87</sup> The artist gives visible expression to his "ideas," on canvas; the sculptor,

<sup>86</sup>—Page 67.

<sup>87</sup>—See § 98.

in marble, bronze or wood; the photographer, on negative, or positive; the architect, in buildings; the designer, in prints; the author, on paper; and so down the line of all possible media in which fugitive thought may be fixed and preserved. "Writings," then, are not confined to books composed of letters, or manuscripts, or printed matter. There is nothing in the Constitution to show there was any intention to limit artistic copyright to the so-called fine arts. Economic conditions existing at the time of the adoption of the Constitution were not such as to require the protection of the rights of reproduction, etc., of works of the fine arts as there were no utilities for such reproduction. Care should be taken, therefore, that the legislative assumption that Congress had power to grant copyright protection to works of the fine arts, does not obscure the fact that, on the face of the power as expressed, it had such authority with respect to works of the useful arts, and has probably so legislated by adoption of the section under discussion.<sup>88</sup>

§ 494  
Works of the  
useful arts.

The subject matter of United States copyright at the present time, then, is all "writings," by which are meant each and every visible expression of the ideas of an author, embodied in any tangible medium, or combination of media, whatsoever, whether on, or in, paper, canvas, marble, bronze, stone, metal, textiles, ivory or any other substance.

§ 495  
The subject  
matter of  
copyright  
defined.

But broad as the subject matter of copyright now is, still, it is not unlimited. Thus there can be no copyright in an inchoate projected publication.<sup>89</sup> So, in England, it was held that a work must be in being before it can be subject to copyright.<sup>90</sup>

§ 496  
Inchoate  
works not  
copyrightable.

There can be no copyright in ideas, as such, but only in their mode of expression. Ideas themselves, from their very nature, have been deemed free. So,

§ 497  
Ideas not  
copyrightable.

88—See §§ 81, 97, 572.

89—Centennial Catalogue Co. v. Porter, 5 F. C. 2546.

90—Maxwell v. Hogg, L. R. 2 Ch. App. 307.

§ 498  
Opinions not  
copyrightable.

§ 499  
Ideas, and the  
means for  
communicat-  
ing ideas,  
distinguished.

§ 500  
Consequences  
of the dis-  
tinction.

§ 501  
Mathematical  
tables.

§ 502  
Trade  
catalogues.

§ 503  
Translations.

an opinion, as such, being a mere idea, is not copyrightable although the language in which it is expressed may be copyrightable. Thus, a daily list of the horses which a newspaper expected to win races, was not protected.<sup>91</sup>

The United States Copyright Acts do not attempt to give a monopoly in ideas, but only to particular cognate forms, or media, for reproducing or communicating ideas.<sup>92</sup> Thus, copyright is not conferred in the ideas formulated, or expressed, in writings, but in the writings themselves, that is, in the expression of such ideas. It may, accordingly, be gravely doubted whether writings could be protected in accordance with their "essence," rather than in accordance with their form, or forms, as their essence would be the ideas embraced therein and protection, in essence, would then be copyright in ideas.

While it is almost impossible to reconcile the decisions which appear to give protection to certain works according to their essence, and in other cases do not do so, certain suggestions may be helpful. The impossibility of generalization should be patent on a consideration of what may be the subject matter of copyright. To take extreme instances, mathematical tables, logarithms, were held<sup>93</sup> original and subject to copyright, where plaintiff swore they represented his calculations, although there were similar preexisting tables. Trade catalogues have been held copyrightable,<sup>94</sup> even where the subjects shown were representations of existing persons.<sup>95</sup> Translations<sup>96</sup> are copyrightable, even though the work translated is not subject to copyright. It appears obvious that the just measure of the protec-

91—*Chilton v. Progress Printing & Publishing Co.*, (1894) 2 Ch. 29.

92—*Kalem v. Harper Brothers*, 222 U. S. 55, 56 L. ed. 92.

93—*Baily v. Taylor*, 3 L. J. Ch. 66 (1 Russ. & My. 73).

94—*W. Marshall & Co. Ltd. v. A. H. Bull, Ltd.*, 85 L. T. 77.

95—*National Cloak & Suit Co. v. Kaufman*, 189 F. 215.

96—*Wyatt v. Barnard*, 3 Ves. & B. 77.

tion to be given such works cannot be the same, in practice, as must be given, for example, to a work centering around a novel dramatic situation. The same rules of law apply, however, to all copyrights and the protection to be given a copyrighted work can only be commensurate with the copyright. This suggests that the true rule is that the degree of protection afforded a given work is measured by what is actually copyrightable and copyrighted in it, that is to say, by the degree and nature of the original work contained in it, or from which it results.<sup>97</sup> The degree of protection to be given a work should never be confused with the question as to whether the work itself is copyrightable, either in whole or part.

In a leading case,<sup>98</sup> the complainant asserted copyright in a book, or series of books, consisting of an introductory essay explaining a system of bookkeeping, with forms of blanks annexed, consisting of ruled lines or headings, illustrating the system and showing how it was to be used in practice. The defendant made account books using the same plan, as far as results were concerned, but with a different arrangement of columns and different headings. It was held that the defendant had not infringed the plaintiff's copyright.

This decision is instructive, in that it illustrates the difference between the question as to whether, or not, a given work is copyrightable and the question of what acts by others, a copyright will prevent. The decision, in spite of *dicta*, did not hold the complainant did not have copyright in at least part of his works, but merely that defendant had only made such use of them as was lawful and proper. Similarly, in an early case,<sup>99</sup> Patterson's "Book of Roads," comprising maps of all the principal roads in England, was held a proper subject for copyright

§ 504  
The measure of originality in a work, marks the scope of the copyright therein.

§ 505  
Necessity of distinguishing between the subject matter of and the rights incident to, copyright.

§ 506  
The distinction illustrated.

97—Cf. *Dicks v. Brooks*, L. R. 15 Ch. D. 22.

98—*Baker v. Selden*, 101 U. S. 99, 25 L. ed. 841.

99—*Carnan v. Bowles*, 2 Brown's Ch. R. 65.

but a textual description of these very roads, made from it, was held not to infringe the maps contained in it.

§ 507  
Examples of  
failure to  
observe the  
distinction.

On the other hand, the distinction illustrated by these cases is not always observed with clearness. Thus an English decision<sup>1</sup> purports to hold that a drawing, showing a hand holding a pencil in the proper way to mark ballots, could not be copyrighted, except as against exact literal reproduction. The point actually involved, however, was less whether plaintiff had a copyright, than whether copying the idea which his sketch was intended to convey was infringement of his copyright. It is impossible to differentiate a drawing of a hand, technically, save as a matter of degree, from a portrait and no one would even attempt to argue<sup>2</sup> that a portrait is not subject to copyright merely because it represents a living person, whom other artists are free to copy. In another instance,<sup>3</sup> the Court held no blank forms containing any particular arrangement of matter required by the California statutes to be delivered to state officers could be copyrighted, on the ground of public policy, in that the state officers, who were also required to make up forms, could not be embarrassed by the existence of such copyrights in preparing their forms. This decision seems to be a fair example of confusing the right to copyright with the degree of protection afforded a copyright proprietor.

§ 508  
Examples of  
what may not  
be copy-  
righted:  
Judicial

There can be no copyright in judicial opinions<sup>4</sup> in the United States, even by a state, it seems, for reasons of public policy,<sup>5</sup> nor, for similar reasons

1—*Kenrick & Co. v. Lawrence & Co.*, 25 Q. B. D. 99.

2—See *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 47 L. ed. 460.

3—*Carlisle v. Colusa County*, 57 F. 979.

4—*Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055.

5—*Banks v. Manchester*, 128 U. S. 245, 32 L. ed. 426; *Banks v. West Publishing Co.*, 27 F. 50; Cf. *State of Connecticut v. Gould*, 34 F. 319.

apparently, in the letters, speeches and conversations of a public man<sup>6</sup> nor in facts, whether these be new<sup>7</sup> or, *a fortiori*, old nor in a plan<sup>8</sup> or method<sup>9</sup> or art, even though entirely novel, although there may, of course, be copyright in the description<sup>10</sup> of the plan, method or art, as contrasted from the plan, method or art itself. "The copyright book is sacred but not the subject of which it treats" said Judge Coxe.<sup>11</sup>

opinions;  
public mat-  
ters; facts;  
plans, meth-  
ods or arts.

§ 509  
But the  
description  
of the latter  
may be  
copyrighted.

The United States Supreme Court has phrased the general rule as follows:

"The description of an art in a book entitled to copyright lays no foundation for an exclusive claim to the art itself. The object of the one is explanation, the object of the other, use. Publication of the book, if the art is novel, and not protected by patent, dedicates the art to the public."<sup>12</sup>

Similarly, it has been held<sup>13</sup> that the copyright of a map of certain wards in the City of New York marked with arbitrary colorings and signs, explained by a reference or key, so that one looking at the map could readily ascertain the characteristics of the buildings located in such territory, was not infringed by a similar map of Philadelphia, as the copyright was of the map, as such, not of the system or contrivance used to facilitate its use. For the same reasons, copyright in a map or chart will not prevent anyone from observing and setting down, the natural objects and public records from which maps are made, so long as he does not copy

§ 510  
The effect of  
copyright  
in maps or  
charts.

6—Gilmore v. Anderson, 38 F. 846.

7—Tribune Co. of Chicago v. Associated Press, 116 F. 126; Walter v. Steinkopff, L. R. 3 Ch. D. 489.

8—Burke v. Johnson, 146 F. 209.

9—Ehret v. Pierce, 10 F. 553.

10—Mutual Advertising Co. v. Refo, 76 F. 961.

11—Griggs v. Perrin, 49 F. 15. See also Sayre v. Moore, 1 East 357.

12—Baker v. Selden, 101 U. S. 99, 25 L. ed. 841.

13—Peiris v. Hexamer, 99 U. S. 675, 25 L. ed. 308.