

§ 511  
Its effect in  
photographs.

the map or chart itself.<sup>14</sup> So copyrighting photographs of a dancer, dancing, gives no property in her photographed poses.<sup>15</sup>

§ 512  
Graphic  
representations of living  
persons.

It is no objection to the validity of a copyright in a ladies cloak and suit catalogue that the pictures represented actual persons and things, the right to produce which could not be monopolized, since the rule is that while others are free to copy the original, they may not copy the copy.<sup>16</sup>

§ 513  
Paint advertisements.

A card for advertising paints having colored bits of paper attached, with some slight descriptive matter, was held not copyrightable, in so far as the method of advertising involved was concerned.<sup>17</sup> So

§ 514  
Mechanics  
of book  
making.

it appears no copyright can be obtained in the mere mechanics of book making, such as merely assembling the chapters of a story into an entirety,<sup>18</sup>

§ 515  
Pagination,  
etc.

nor, it would seem, in the mere arrangement of reported cases in sequence, their paging and distribution into volumes.<sup>19</sup> Mechanical devices cannot

§ 516  
Mechanical  
devices.

be protected under the copyright statute,<sup>20</sup> in so far as their mechanical aspects are concerned, but, as is pointed out elsewhere,<sup>21</sup> if they are formulated in an original artistic form, no reason appears to exist under the present statute why such form should not be protected by Copyright.

§ 517  
Immoral, indecent and  
libellous  
works.

The law, prior to the enactment of the present Act, was to the effect that no enforceable copyright could be obtained in an immoral,<sup>22</sup> libellous,<sup>23</sup> or indecent<sup>22</sup> work nor in one where an intentional

14—Blunt v. Patten, 2 Paine 397.

15—Falk v. City Item Printing Co., 79 F. 321.

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

17—Ehret v. Pierce, 10 F. 553.

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

19—Banks Law Publishing Co. v. Lawyers Co-operative Pub. Co., 169 F. 386.

20—Amberge File & Index Co. v. Shea Smith & Co., 78 F. 479; Libraco Ltd. v. Shaw Walker Ltd., 30 T. L. R. 22.

21—See §§ 606, 572.

22—Baschet v. London Illustrated Standard Co., (1900) 1 Ch. 73; Stockdale v. Onwhyn, 5 B. & Cr. 173; Dodson v. Marten, 24 Solicitors'

deception or false pretense is contained in the work.<sup>24</sup> In another case, it appeared<sup>25</sup> a journalist published fiction as news. The Courts have held there can be no copyright in the facts which are contained in a news item. It was held he was bound by his "pretense" and had no copyright in the item. It is deemed the principle of the decision last cited would not apply to cases where the pretense, though technically false, was innocent and no one could be deceived by it, as where a novel is given forth as the memoirs of a fictitious person, etc., nor in cases where a statement was true when a work was composed, but was untrue when it was published.<sup>26</sup> Where a catalogue otherwise subject to copyright, contained the false, or misleading, statement that the articles described therein were patented, when they were not, etc., the Court refused it copyright protection.<sup>27</sup> The rule that there can be no copyright in any blasphemous,<sup>28</sup> seditious,<sup>29</sup> or immoral, or libellous work rests in sound principles of public

§ 518  
Works containing apparently intentional mis-statements.

§ 519  
Works contravening public policy.

J. 572 (an astonishing decision, as the Court thought the book involved, immoral and indecent, but as this was not pleaded by defendant, protected it); *Broder v. Zeno Mauvais Music Co.*, 88 F. 74 (an extreme case). The dictum that if the work were purged of the words the Court deemed immoral it could be republished and recopyrighted appears demonstrably erroneous, as the work had had its first publication and it was then, or never, that statutory copyright arose in the work. What the Court probably meant was that since the innocent and immoral matter in the composition were separable, if they were separated and the defendant infringed by copying the innocent matter, the plaintiff would be protected.

23—*Fores v. Johnes*, 4 Esp. 97; *Stockdale v. Onwhyn*, 2 Car. & P. 163.

24—*Davies v. Boes*, 209 F. 53; *Stone & McCormick v. Dugan Piano Co.*, 220 F. 837; *Wright v. Tallis*, 1 C. B. 893, 906; *Chappell v. Davidson*, 2 K. & J. 123 (semble).

25—*Davies v. Boes*, 209 F. 53.

26—*Hayward Brothers v. Lely*, 56 L. T. N. S. 418.

27—*Slingsby v. Bradford Patent Truck Co.*, (1905) W. N. 122.

28—*Lawrence v. Smith*, Jac. 471; *Murray v. Benbow*, Jac. 474 (n); *Burnett v. Chetwood*, 3 Mer. 441 (n). These cases almost certainly would not be followed on their facts, at the present day.

29—*Hime v. Dale*, 2 Camp. 27 (n). See comment on cases in previous note.



policy and is not deemed overruled by the present statute.<sup>30</sup> Since, however, this principle rests in public policy, cases decided in one age, are not a safe guide, on their facts, in subsequent times and the present tendency, undoubtedly, is to allow much more latitude than formerly to free speech and thought. While the doctrine under discussion is sound in principle, its application is to be extended only to clear cases.

§ 520  
Size or purpose of a work do not affect its copyright.

Neither the size, nor the proposed use of a work, can affect the question whether it is copyrightable or not.<sup>31</sup> Brevity is not only the soul of wit but frequently the result only of laborious mental processes, unknown to the easy going creators of far more verbose productions.<sup>32</sup> It has, however, been said<sup>33</sup> there cannot be copyright in a single word. This would appear sound, as a matter of public policy, but protection in proper cases could probably be given on principles of the law of trade mark or unfair competition.

§ 521  
Single word not copyrightable.

§ 522  
Only a single copyright can exist in the same work at the same time.

It has been held<sup>34</sup> that there can be only one copyright existing in the same work at the same time. While this is undoubtedly true, possibilities of much confusion of thought exist unless this rule is properly understood.

§ 523  
The doctrine that a work is not copyrightable, if inci-

In *Hatton v. Kean*,<sup>35</sup> incidental stage music composed for a revival of "Much Ado About Nothing" was held not to be subject to copyright, as not an

30—The view that equitable relief, and nothing more, is refused works falling within the inhibition of this rule (25 Cyc. 1490) is not borne out by the decision in *Stockdale v. Onwhyn*, 2 Car. & P. 163, action at law. See also *DuBost v. Beresford*, 2 Camp. 511; *Fores v. Jones*, 4 Esp. N. P. Cas. 97.

31—*Schumacher v. Schwencke*, 25 F. 466; *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 47 L. ed. 460.

32—Cf. *Chils v. Gronland*, 41 F. 145.

33—*Cairns L. J.*, in *Maxwell v. Hogg*, L. R. 2 Ch. App. 307, 318.

34—*West Publishing Co. v. Edward Thompson Co.*, 176 F. 839; *Caliga v. Inter Ocean Pub. Co.*, 215 U. S. 182, 54 L. ed. 150.

35—7 C. B. N. S. 268. See also *Wallerstein v. Herbert*, 16 L. T. 453.

independent composition but merely an integral part of defendant's stage production. The music had been composed for the defendant and paid for by him. The doctrine of this case has been severely, and justly, criticized.<sup>36</sup> This case seems to confuse the ownership of an original work, composed for another, with the question as to whether, or not, the original work was copyrightable in itself. It is now established law<sup>37</sup> that the purpose for which a work is intended, or adapted, cannot affect the question as to whether, or not, it is copyrightable. The true test of the doctrine of *Hatton v. Kean*<sup>35</sup> is then, would the music have been copyrightable had it not been intended for the play. It cannot be successfully argued that it would not have been. The circumstances under which it was composed, could, then, only affect title to the composition, not the question as to whether it was copyrightable.<sup>38</sup>

central to another, examined.

The doctrine of these cases was recently approved,<sup>39</sup> as holding that even if it was not essential to their decision, that one who contributes to a joint production does not retain any several ownership in his contribution, but that it merges in the whole. The force of this approval is diminished, since it is coupled with other views, since disapproved by the Circuit Court of Appeals.<sup>40</sup>

In another English case,<sup>41</sup> the plaintiff had been employed as conductor of the orchestra in a theatre

§ 524  
The question treated as one of fact.

36—See *Drone: Copyright*.

37—*Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 439, 47 L. ed. 460. See § 110.

38—*Boosey v. Whight*, (1900) 1 Ch. 122, is not an authority to the contrary. That decision held printed directions of a composer of music as to how to play it were only subject to copyright in connection with the use of the musical scores. That case involved a copyright under the British Musical Copyright Acts, not the acts regulating copyrights in books, and this in itself will explain the decision, if the language of the statute involved be examined.

39—*Maurel v. Smith*, 220 F. 195.

40—See *Photo Drama Motion Picture Co. v. Social Uplift etc. Co.*, 220 F. 448.

41—*Eaton v. Lake*, 20 Q. B. D. 378.



and composed the music for a ballet to be performed there. He was paid a weekly salary and had previously composed music for other ballets, for which he had been paid additional amounts. In a dispute between him and the proprietor of the theatre, the Court left it to a jury to say whether the music was an independent, substantial, musical composition apart from the ballet, on which issue the jury found for the plaintiff. This indicates that the question is one of fact and that the English Courts have had misgivings as to treating it as a question of law. The method pursued in *Eaton v. Lake*, indicates an easy method of escape from the indefensible position assumed by the English Courts in the earlier cases cited.<sup>42</sup>

§ 525  
What is a  
copyrightable  
entity.

The question involved in these cases, in reality, narrows down to a determination of what a copyrightable entity is. It has been shown a portion of a given work may be copyrightable, although the balance may not be.<sup>43</sup> For copyright purposes the copyrightable portion of a work is then the copyrightable work, or "writing" itself. But, as has also been shown,<sup>44</sup> if such "work" be combined with another work, there may also be a copyright in that combination. The latter copyright will not affect the earlier one. Or, if a copyright proprietor, in good faith, make another version of his work,<sup>45</sup> this would be a new work, unless a more or less palpable copy, as sometimes appears,<sup>46</sup> and a new copyright could be taken out in the new version, provided it was not, as stated a mere copy. Such new copyright, however, would be merely in the additions and changes made in the original work itself.<sup>47</sup> This is

42—See § 523, n. 7.

43—See § 453.

44—See § 456.

45—See § 661.

46—*Caliga v. Inter Ocean Publishing Co.*, 215 U. S. 182, 54 L. ed. 150.

47—See § 618.

merely a further illustration of the rule that<sup>48</sup> a given copyright will only protect that which is original in the specific work which it is sought to copyright but will protect everything which is original in that work, unpublished at the time when copyright is sought.

On the other hand, that the amount of labor or skill involved, is negligible, is no ground for refusing copyright, if the resultant work otherwise fulfils the statutory requirements.<sup>49</sup>

Congress has shown what it partially deems to be meant by "writings" in the following Section and a detailed enumeration of copyrightable works, will be found in connection with the discussion of that section. It should be carefully noted, however, that Congress has not provided that every work in a class enumerated in that section is copyrightable. The effect of Section 5 is merely that if a work is copyrightable, it is to be classified, on registration, as stated in that Section. But owing to the inclusive nature of Section 4 and the detail of Section 5, there is little doubt that any work described in it, if original and unpublished, is copyrightable.

## § 526

The amount of labor involved in authorship does not affect copyright.

## § 527

Partial enumeration, in detail, of copyrightable works, in the succeeding section.

48—See §§ 484, 470.

49—Falk v. Brett Lithographing Co., 48 F. 678.



## CHAPTER VIII

### CLASSIFICATION OF WORKS FOR REGISTRATION

§ 528  
Classification  
of copyright-  
able works for  
registration.

§ 529  
Books.

§ 530  
Registration  
of copyright.

§ 531  
The general  
purpose and  
effect of the  
section under  
discussion.

*Section 5. That the application for registration<sup>50</sup> shall specify to which of the following classes<sup>51</sup> the work in which copyright is claimed belongs:*

*(a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations.<sup>52</sup>*

Sections 11 and 12 of the Act require the registration of all copyrights secured under the present Act.<sup>53</sup> Section 4 is the section which defines the subject matter of copyright.<sup>54</sup> Section 5 does not purport to do anything more than to provide for a partial classification of some of the works copyrightable under Section 5, when registered, as required by Sections 11 and 12. It does not define that which is made copyrightable. Its position in the Act was, however, probably, dictated by a desire to annex illustrations to Section 4 of what Congress intended to include in the language used in that section, but by the express concluding paragraph<sup>55</sup> of Section 5, the specification of works subject to copyright, in Section 5, is not to be deemed exclusive so as to qualify Section 4. The Copyright Office, hence, is

50—Sections 11 and 12. See §§ 766, 788.

51—Section 5 relates solely to a classification made for the convenience of the Copyright Office and those applying for copyrights: House Report 2222, *supra*.

52—The other sub-divisions of the Section will be found on the pages following, in connection with a discussion of such sub-divisions.

53—See §§ 766, 788.

54—See § 473.

55—See § 588.

in error, when it says, in its Rules and Regulations,<sup>56</sup> that Section 5 "divides the works for which copyright may be secured into eleven classes," for this assumes such classification to be exclusive and hence, interpretive of Section 4, where the Section itself provides the very reverse. A more accurate statement would have been that the Section divides some of the works for which copyright may be secured into eleven classes. These classes, however, are, or may be construed to be, inclusive of the great majority of copyrightable works and their enumeration serves as a non-exclusive definition of what Congress intended to protect by the Act.

The term "books" as used in the first subdivision of the section, includes all literary works (not specified in subdivisions *b*, *c*, *d*) whether reproduced in print, typewriting, photography, handwriting, electro or stereotyping, or any other mechanical process, and whether in the usual shape of a book, or of a pamphlet, leaflet, card, or even a single sheet.<sup>57</sup> By literary works, as used in the foregoing sentence, are meant not merely works of literature in its ordinary sense, but all works, otherwise copyrightable, expressed or formulated in words, not specified in subdivisions *b*, *c*, *d*.

A book did not need to be printed to be subject to copyright.<sup>58</sup>

A book includes the entire volume, and every part, or division of a volume published separately<sup>59</sup> including the illustrations in it.<sup>60</sup>

A book, it would seem, might also include illustrations or pictures, by whatever process produced, in combination, either with words, or with other illus-

## § 532

What is a book under the present Act, for copyright purposes.

## § 533

Printing not necessary.

## § 534

What a book includes.

## § 535

Picture books.

56—See Appendix.

57—Clayton v. Stone, 2 Paine 382; White v. Geroch, 2 B. & Ald. 298; Bogue v. Houlston, 5 De G. & Sm. 275.

58—Roberts v. Myers, 20 F. C. 11906 (13 Monthly L. J. 396).

59—Bogue v. Houlston, 5 De G. & Sm. 267.

60—W. Marshall & Co. v. A. H. Bull Ltd., 85 L. T. N. S. 77; Harper v. Shoppell, 28 F. 613; s. c. 26 F. 519.



§ 536  
The purpose  
or size of a  
work  
immaterial.

trations or pictures only, if such works are not covered by other sections of the Act.<sup>61</sup>

Neither the purpose of a work,<sup>62</sup> nor its size,<sup>63</sup> can affect the question, whether it is, or is not, a book, nor its inclusion with non-copyrightable matter, into a single volume.<sup>64</sup>

There are many decisions under prior Acts illustrating what the Courts have deemed to be books. The English cases, cited below, should be read in the light of the warnings contained elsewhere in this volume, after careful comparison, in each instance, of the statute under which they were decided with the present Act and with a present recollection of constitutional differences between legislative power in England and the United States.

Books, under various statutes, have been held, or said, to include amongst others:

§ 537  
Illustrations  
of what have  
been deemed  
books and  
copyrightable  
under prior  
Acts.

Catalogues,<sup>65</sup>

Dictionaries,<sup>66</sup>

“Tabulated forms of information frequently called charts,”<sup>67</sup>

Mathematical tables,<sup>68</sup>

Librettos,<sup>69</sup>

Descriptions of moving pictures or spectacles,<sup>70</sup>

61—*Maple v. Junior Army & Navy Stores*, 21 Ch. D. 369.

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

63—*Cobbett v. Woodward*, 14 Eq. 407 (semble). This case is overruled on the point actually decided by it. See § 537 (n. 81).

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

65—*Hogg v. Scott*, L. R. 18 Eq. 443; *Da Prato Statuary Co. v. Guilani*, 189 F. 90; *Maple & Co. v. Junior Army & Navy Stores*, 21 Ch. D. 369; *Hotten v. Arthur*, 1 H. & M. 603.

66—*Barfield v. Nicholson*, 2 Sim & St. 1.

67—*Blunt v. Patten*, 2 Paine 493.

68—*M’Neill v. Williams*, 17 Ves. 422; *Hotten v. Arthur*, 11 Hem & M. 603; *Hogg v. Scott*, L. R. 18 Eq. 444.

69—*Universal Feature Film Co. v. Copperman*, 218 F. 578 (semble); *Lee v. Simpson*, 3 C. P. 871.

70—Copyright Office Regulations.

- Annotations of common materials,<sup>71</sup>  
 Collections of statistics,<sup>72</sup>  
 Translations,<sup>73</sup>  
 Digests,<sup>74</sup>  
 Road and guide books,<sup>75</sup>  
 Time tables, to a limited extent,<sup>76</sup>  
 Lists of hounds,<sup>77</sup>  
 Abstracts of titles to lands,<sup>78</sup>  
 Court Calendars,<sup>79</sup>  
 Statutory or legal forms or precedents,<sup>80</sup>  
 Directories,<sup>81</sup>  
 A secret price list, showing cost and  
 selling prices by means of letters, characters and  
 figures,<sup>82</sup>  
 Tables of logarithms,<sup>83</sup>  
 Reports of a mining engineer,<sup>84</sup>  
 Recipes,<sup>85</sup>  
 Lists of trotting records and stud books,<sup>86</sup>  
 Racing charts,<sup>87</sup>

71—*Story v. Holcombe*, 4 McLean 306; *Lawrence v. Dana*, 4 Cliff. 1; *Banks v. McDevitt*, 13 Blatch. 163.

72—*Scott v. Stanford*, L. R. 3 Eq. 718.

73—*Wyatt v. Barnard*, 3 Ves. & B. 77.

74—Cf. *Butterworth v. Robinson*, 5 Ves. 79.

75—*Cary v. Fader*, 5 Ves. 24; *Cary v. Longman*, 1 East. 358.

76—*Leslie v. Young & Sons*, (1894) A. C. 335.

77—*Cox v. Land & Water etc. Co.*, L. R. 9 Eq. 324.

78—*Banker v. Caldwell*, 3 Minn. 94. See also 49 Tex. C. A. 144.

79—*Longman v. Winchester*, 16 Ves. Jr. 269; Cf. *Mathewson v. Stockdale*, 12 Ves. Jr. 370.

80—*Alexander v. McKenzie*, 9 Sc. Sess. Cas. 2nd Ser. 748; *Brightley v. Littleton*, 37 F. 103.

81—*Lamb v. Evans*, (1893) 1 Ch. 218; *Morris v. Ashbee*, L. R. 7 Eq. 34; *Mack v. Peter*, L. R. 14 Eq. 341; *Cobbett v. Woodward*, L. R. 14 Eq. 407, contra, is expressly, and *Ladd v. Oxnard*, 75 F. 703, is probably impliedly overruled.

82—*J. H. White Mfg. Co. v. Shapiro*, 227 F. 956; *Simmons Hardware Co. v. Waibel*, 1 S. D. 488, 11 L. R. A. 267 (common law case).

83—*Baily v. Taylor*, 1 Russ. & My. 73.

84—*Kenrick v. Danube Collieries etc. Co.*, 39 W. R. 473.

85—*Rundell v. Murray*, Jac. 311.

86—*Weatherby v. International Horse Exchange*, 26 T. L. R. 20.

87—*American Trotting Register Association v. Gocher*, 70 F. 237.



Newspaper reports of public speeches,<sup>88</sup>

Telegraphic codes,<sup>89</sup>

Commercial or other circulars, containing information in the form of reading matter, other than mere lists of names and addresses,<sup>90</sup>

Single poems, which include the words of a song without music,<sup>90</sup>

A shipping and railroad guide,<sup>91</sup>

Literary contributions to periodicals or newspapers,<sup>90</sup>

Application forms,<sup>90</sup>

Lists of statistics,<sup>92</sup>

Periodical abstracts of recorded bills of sale, etc., made from the originals filed in public offices.<sup>93</sup>

Copyrightable matter, under copyright statutes covering books, has been held, or said, not to include:

Blank books for use in carrying out any system of transacting business, including records, books of account, memorandum books, diaries or journals, bank books or check books,<sup>94</sup>

Verbatim copies of public documents,<sup>95</sup>

Letter file indexes,<sup>96</sup>

Sleeve pattern charts,<sup>97</sup>

§ 538  
What have  
been deemed  
not to be  
books and not  
copyrightable  
under prior  
Acts.

88—Walter v. Lane, (1900) A. C. 539.

89—Ager v. Peninsular etc. Co., 26 Ch. D. 637; Ager v. Collingridge, 2 T. L. R. 291.

90—Copyright Office Rules and Regulations, p. 6.

91—Bullinger v. Mackey, 15 Blatch. 558.

92—Hansen v. Jacquard Jewelry Co., 32 F. 202.

93—Trade Auxiliary Co. v. Middlesborough etc. Co., 40 Ch. D. 425.

94—Everson v. Young, 26 Wash. L. R. 546.

95—Du Puy v. Post Telegram Co., 210 F. 833.

96—Amberge File & Index Co. v. Shea-Smith Co., 78 F. 479.

97—Hollinrake v. Truswell, (1894) 3 Ch. 420. The case of Drury v. Ewing, 1 Bond 540 (contra) which held a chart, published on a single sheet, containing diagrams representing a system for taking the measures for, and for cutting, ladies' garments, with printed instructions for its practical use, was copyrightable as a book, was disapproved in Baker v. Selden, 101 U. S. 99, 25 L. ed. 841.

Mechanical devices,<sup>98</sup>  
 Face of a barometer—or directions on scales  
 or dials,<sup>99</sup>  
 Sporting tips, (these are mere opinions),<sup>1</sup>  
 Market reports,<sup>2</sup>  
 A railroad ticket designed for punching,<sup>3</sup>  
 Monograms,<sup>4</sup>  
 Cricket score cards,<sup>5</sup>  
 Time tables, unless arranged in form of tours,  
 etc.,<sup>6</sup>  
 News,<sup>7</sup>  
 A drunken unintelligible scrawl,<sup>8</sup>  
 Patent medicine labels,<sup>9</sup>  
 Cards in a filing system.<sup>10</sup>

Various works held books under other statutes are classified under other heads of the present statute. Thus, under other statutes, the following were held books:

A single sheet of music;<sup>11</sup>  
 A single sheet of drawing;<sup>12</sup>  
 Newspapers;<sup>13</sup>

§ 539  
 Examples of what have been held books, under prior Acts, but classified differently under present one.

98—Cable v. Marks, 52 L. J. Ch. 107.

99—Davis v. Committi, 52 L. T. N. S. 539.

1—Chilton v. Progress Printing etc. Co., (1895) 2 Ch. 29.

2—Clayton v. Stone, 2 Paine 382. See § 104 *et seq.*

3—Griffin v. Kingston R. R. Co., 17 Ont. 660.

4—Royal Sales Co. v. Gaynor, 164 F. 207.

5—Page v. Wisden, 20 L. T. N. S. 435.

6—Leslie v. Young, (1894) A. C. 335.

7—Tribune Co. v. Associated Press, 116 F. 126.

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

9—Scoville v. Toland, 6 West. L. J. 84.

10—Libraco Ltd. v. Shaw & Walker Ltd., 30 T. L. R. 22.

11—Clementi v. Golding, 2 Camp. 25; Storace v. Longman, 2 Camp. 26 (n); White v. Geroch, 2 B. & Ald. 298; Bach v. Longman, 1 Cowp. 623.

12—Davis v. Benjamin, (1906) 2 Ch. 491.

13—Walter v. Howe, 17 Ch. D. 708 (overruling Cox v. Land & Water Co., L. R. 9 Eq. 324).



Compilations of common materials,<sup>14</sup> if put into the form of a book;<sup>15</sup>

Illustrations in a book,<sup>16</sup> even where there is practically nothing else in it,<sup>17</sup> or where the illustrations were on a single sheet, and even if not physically attached to the book, if part of it.<sup>18</sup>

§ 540  
General  
observations  
on the nature  
of copyright-  
able books.

From an examination of the foregoing lists of works held subject to copyright under far less inclusive statutes than the present one, it will be noted that cases questioning the copyrightability of given media, sufficiently doubtful to be considered by the Courts, have largely involved questions of fact. There are no decisions holding that novels, dramas, poems, nor works of science, philosophy, or history, are subject to copyright as no one has ever questioned, where there could be no question. Works that are original in subject matter and treatment, have presented no difficulties calling for judicial ruling, in so far as the questions here under discussion are involved. The works which consist of unoriginal subject matter, and whose claim to copyright is based upon the mental labor involved in the combination of selected information, have presented many nice questions of fact, for consideration. Their results have also been fruitful of misunderstanding. Thus, it is a subject for legitimate astonishment to note Lord Halsbury, as deeming the author of a directory to be the canvasser, "who writes down the names and addresses of the persons

14—*Longman v. Winchester*, 16 Ves. 271; *Jarrold v. Houlston*, 3 K. & J. 708.

15—*Rundell v. Murray*, (1821) Jac. 311; *Marzials v. Gibbons*, (1874) L. R. 9 Ch. App. 518 (this case involved a collection of hymns).

16—*Bogue v. Houlston*, 2 De Gex & Sm. 267; *Maple v. Junior Army and Navy Stores*, 21 Ch. D. 369.

17—"There may be such things as picture books for those who cannot read letter press." *Jessel, M. R.*, in case last cited.

18—*Comyns v. Hyde*, (1825) 72 L. T. 250; *Guggenheim v. Long*, 12 T. L. R. 491.

who live in a particular street.”<sup>19</sup> None of the directory cases have gone to the limit of deeming penmanship and authorship as synonymous, but in all such cases there has been, at least, the irreducible minimum of thought involved in classification and arrangement. How meagre this need be to achieve copyrightability is illustrated by the instances specified on the pages immediately preceding. The suggestion in an English case,<sup>20</sup> that while the publisher of a work, containing advertisements composed by third persons and published by him for pay, had no copyright in any such single advertisement, he had it in the advertisements as an aggregation, is a logical consequence of the directory cases. Whether this is law in the United States, or not, will depend entirely upon the future attitude of the Courts, in their consideration of the Constitution and the directory cases.

§ 541  
Directories.

§ 542  
Compilations  
of advertisements.

For the purposes of this section, it appears quite clear that a book means any work, or separable part of a work, expressed in words, whatever its form, subject matter, size or purpose, which is subject to copyright, and which is not included in the classes of works specified in other subdivisions of this section, as well as pictures or illustrations in combination, either with one another, or with words, in so far as such combinations may not be covered by other subdivisions of this section.

§ 543  
“Book”  
defined for  
purposes of  
copyright  
registration.

There is nothing in the present Act, any more than there was in its predecessors, providing for any machinery similar to that existing in the Patent Office, for any preliminary, official examination of works, seeking copyright.<sup>21</sup> There are cogent practical reasons for such an omission from the copyright system. The authority given to the officers charged

§ 544  
The limited  
powers of the  
Copyright  
Office.

19—Walter v. Lane, (1900) A. C. 539.

20—Lamb v. Evans, (1893) 1 Ch. 218.

21—Burrow Giles Lithographing Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349.



§ 545  
The authority  
to make  
rules for  
registration.

with the administrative aspects of the Copyright Act is of the most meagre description. They are, in brief, to act as registrars and depositories of works in which copyright is claimed.<sup>22</sup> The sole apparent discretion confided to such officers is, possibly, in connection with renewals of copyrights<sup>23</sup> and in the authority "to make rules and regulations for the registration of claims to copyright, as provided by this Act."<sup>24</sup>

§ 546  
The Rules in  
general.

Pursuant to this authority, "Rules and Regulations for the Registration of Claims to Copyright" have been issued in the form of a Copyright Office Bulletin.<sup>25</sup> No one who has had any dealings with the Copyright Office can fail to be impressed with the excellence of its administrative detail, and with the zeal and courtesy of its chiefs and subordinates. While it will be necessary, in the course of this work, to point out what are deemed to be errors, some serious and fundamental, in certain views formulated in the Rules and Regulations, consideration of such errors should not obscure the usefulness of the Rules and Regulations, in general. The obscurities of this subject may well account for differences of opinion in connection with it.

§ 547  
Commercial  
and legal  
forms.

The Copyright Office Regulations say the term "books" cannot be applied to forms for use in commercial, legal or financial transactions, which are wholly or partly blank, and whose value lies in their usefulness, and not in their merit as literary compositions. This seems doubtful, as literary merit is no longer a requisite for copyright, and many forms of literate works whose sole value is their usefulness, are, concededly, copyrightable as books, if otherwise original. The view under discussion probably rests in a misunderstanding of Baker

22—See §§ 47-61, inclusive.

23—See §§ 23-24.

24—Section 53, § 1612.

25—No. 15. These are set forth in full in the Appendix.

v. *Selden*<sup>26</sup> where as has been shown,<sup>27</sup> the works involved in the litigation were held not infringed, not totally devoid of copyright.

The Regulations also say puzzles, games, rebuses, labels, wrappers, formulae on boxes, bottles and other receptacles of articles cannot be deemed books. This is probably correct, but the language used to describe or express rebuses, non-mechanical puzzles, and games, labels<sup>28</sup> and wrappers may, or may, not be deemed to constitute a book, depending on its context, as the purpose for which they may be intended, or capable of being used, seems immaterial.<sup>29</sup> Copyright would, of course, only protect the language used in connection with such articles, or the artistic form thereof, and not their essence. Subject matter, not size, form or shape, appears to be the criterion by which to judge whether a work is copyrightable.

§ 548  
Puzzles,  
games,  
wrappers,  
labels, etc.

Thus also the statement in these Regulations that prefaces, or other matter introductory to works themselves not subject to copyright protection, cannot be deemed a book, seems clearly wrong for the same reason.<sup>30</sup> One English case went so far as to say an index would be copyrightable where it was original, but referred to non-copyrightable matter.<sup>31</sup>

§ 549  
Prefaces.

As has been pointed out, there is nothing in Section 53 of the Act which gives the Register of Copyrights the power to make definitions explanatory of the words of the Act and while many of the definitions formulated are valuable, none are controlling.

§ 550  
Indices.

§ 551  
Effect of the  
refusal of the  
Copyright  
Office to  
receive  
copies for  
registration.

26—101 U. S. 99, 25 L. ed. 841.

27—See § 506.

28—In *Higgins v. Keuffel*, 140 U. S. 428, 35 L. ed. 470, the label which was held non-copyrightable bore matter which could not have been copyrighted in whatever form expressed.

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

30—See *Maple v. Junior Army & Navy Stores*, L. R. 21 Ch. D. 369, 376 (semble).

31—*Carnan v. Bowles*, 2 Bro. C. C. at p. 83; Cf. *Banks v. Manchester*, 23 F. 145.



As will be explained in the discussion of a later section of the Act, it is not deemed that any action by the Register of Copyrights with respect to receiving, or refusing to receive, papers and copies on registration of copyright can in any way affect the validity of such copyright.<sup>32</sup> Since, however, the concluding portion of this section provides that no errors of classification in connection with registration shall affect the validity of copyright,<sup>33</sup> it would seem that the Register's rulings in this respect, right or wrong, should, where possible, be followed, if only as a matter of convenience, by applicants for registration.

The second class of works mentioned in Section 5 are

§ 552  
Periodicals.

(b) *Periodicals, including newspapers.*

These terms have been defined above. These works were not specifically mentioned in the old Acts but were held copyrightable thereunder, as books.<sup>34</sup>

The third class mentioned are

§ 553  
Lectures,  
sermons and  
addresses.

(c) *Lectures, sermons, addresses (prepared for oral delivery.)*

This class of works includes productions, generically similar in purpose, being writings intended to be communicated to third persons orally. The specific inclusion of such works in copyright legislation is an innovation. The fourth class created by the Section consists of

§ 554  
Dramatic  
compositions.

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

Dramatic compositions have been previously defined, Dramatico-musical compositions, a new

32—Cf. *Patterson v. J. S. Ogilvie Pub. Co.*, 119 F. 451 (where a copyright was sustained although the copies required to be filed in the Copyright Office never reached it).

33—See § 588.

34—*Walter v. Howe*, 17 Ch. D. 708 (overruling *Cox v. Land & Water Journal Co.*, L. R. 9 Eq. 324; *Harper v. Shoppell*, 26 F. 519).

term in American copyright statutes, means a work in which speech or action, sufficient to constitute a dramatic composition is combined with music, as for example an opera, musical comedy, and similar productions, which are to be acted, as well as sung. This meaning of dramatico-musical composition was illustrated in one case<sup>35</sup> where it was held this term covered a vaudeville sketch, essentially a series of recitations and songs, to be recited and sung by the same person, in different costumes, with a very little dialogue and action but with scenery and lights thrown on the singer.

§ 555  
Dramatico-musical compositions.

§ 556  
Vaudeville singing act.

The Copyright Office Regulations say:<sup>36</sup>

“The designation ‘dramatic composition’ does not include the following: Dances, ballets or other choreographic works; tableaux and moving picture shows, stage settings or mechanical devices by which dramatic effects are produced or ‘stage business’; animal shows, sleight-of-hand performances, acrobatic or circus tricks of any kind; descriptions of moving pictures or of settings for the production of moving pictures (these however, when printed and published are registrable as ‘books’).”

§ 557  
What the term dramatic composition does not include.

This all appears sound enough since “everything put on the stage,” as Ray, J.,<sup>37</sup> said, “or intended for the stage, is not copyrightable,” except that it may be doubted, if ballets, and other choreographic works, if they otherwise comply with definitions of dramatic composition, by describing by action, the story the author has written in words, if performed without music, are not as much dramatic compositions as pantomimes are, (or are not dramatico-musical compositions, if performed with music) and that if animal shows contain animals which perform

§ 558  
Ballets.

§ 559  
Animal shows.

35—Green v. Luby, 177 F. 287.

36—See Rules, p. 7.

37—Barnes v. Miner, 122 F. 480.



§ 560  
Scenic effects.

§ 561  
Moving pictures.

§ 562  
The registration of songs.

§ 563  
Musical composition.

§ 564  
Songs.

a pantomime, such shows, to the extent applicable to pantomimes,<sup>38</sup> may be deemed dramatic compositions. There is no requirement that human actors perform a dramatic composition in order to render it one<sup>39</sup> and there is a wide distinction between a mere dance and a ballet, which latter may, or may not, have an argument or tell a story. Furthermore, many of the works enumerated in the above quotation may be protected by copyright, if part and parcel of a work otherwise copyrightable. Thus in an English case,<sup>40</sup> the Court were of the opinion that scenic effects were copyrightable if, and as, part and parcel of a drama, although the scenic effects would not be copyrightable standing by themselves.<sup>41</sup> Except for purposes of classification for registration also, of course, a moving picture may, or may not, according to its nature, be a dramatic composition.

The Regulations further provide:

“Ordinary songs, even when intended to be sung from the stage in a dramatic manner, or separately published songs from operas and operettas, should be registered as musical compositions, not dramatico-musical compositions.”

It may be remarked that except for purposes of registration, this may be deemed misleading unless by “ordinary” songs are meant non-dramatic ones. This appears to be the distinction taken in the English cases.<sup>42</sup>

The fifth class created by the section is:

*(e) Musical Compositions.*

This subdivision would appear to include all vocal and instrumental compositions not included under

38—See *Lee v. Simpson*, 3 C. B. 871.

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

40—*Tate v. Fullbrook*, (1908) 1 K. B. 821. See also *Daly v. Palmer*, 6 Blatch. 256.

41—*Serrana v. Jefferson*, 33 F. 347. See also § 186.

42—Compare *Russell v. Smith*, 12 Q. B. 217, (1848); *Clark v.*

the heading dramatico-musical compositions. The Copyright Office deems that a musical composition may, or may not, have words. While this is deemed doubtful, save for registration purposes,<sup>43</sup> it is convenient and may, ultimately, become the law for all purposes.

Adaptations, arrangements, transpositions, medleys, and other musical equivalents for the various changes that can be made in literary works, should be registered as musical works.<sup>44</sup>

§ 565  
Adaptations and combinations of music.

The sixth class is:

(f) *Maps.*

The word "charts," found in all former Acts, has been omitted but the term maps is deemed to include charts of all kinds, as well as terrestrial maps, globes, plats and star maps and diagrams in the nature of maps.<sup>45</sup> As pointed out in the Copyright Regulations, the term does not include ordinary diagrams, astrological charts and landscapes, but it may be doubted, the Regulations to the contrary, whether it does not include maps of "imaginary regions not having a real existence." The language of the section is, probably, broad enough to include an anatomical or physiological chart.<sup>46</sup>

§ 566  
What is a map.

§ 567  
What is not a map.

§ 568  
Anatomical charts.

The seventh class is:

(g) *Works of art; models or designs for works of art.*

§ 569  
Works of art.

The language, employed in this subdivision is new, in its present form. It replaces former statutory

§ 570  
Changes in statutory language.

Bishop, 25 L. T. N. S. 908 and Roberts v. Bignell, 3 T. L. R. 552, with Fuller v. Blackpool Winter Garden Co., (1895) 2 Q. B. 429. In Henderson v. Tompkins, 60 F. 758, a topical song was held copy-rightable, apparently as a book, as the Court refused to pass upon its alleged humor.

43—White-Smith Music Publishing Co. v. Apollo Co., 209 U. S. 1, 52 L. ed. 655. See § 198.

44—See Copyright Office Rules and Regulations, No. 10.

45—Copyright Office Rules and Regulations, No. 11.

46—Hollinrake v. Truswell, (1894) 3 Ch. 420.



§ 571  
The view of  
the Copyright  
Office as to  
meaning of  
works of art.

§ 572  
The narrow  
view  
criticised.

references to "printings, drawings, chromos, statuary and statues."<sup>47</sup> The word "fine" which, formerly, appeared before the word "art," in connection with models or designs, has been omitted.<sup>47</sup>

The Copyright Regulations<sup>48</sup> say that the term "works of art" includes "all works belonging fairly to the so-called fine arts. (Paintings, drawings, sculptures.) Productions of the industrial arts utilitarian in purpose and character, are not subject to copyright registration, even if artistically made or ornamented. No copyright exists in toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics or any similar articles."

This conception appears to take an unduly restricted view of the Act and appears unsupported either by statute or decision. Section 4 shows that Congress intended to make everything copyrightable which it could constitutionally make copyrightable. In changing the phraseology used in the previous Acts, by omitting the enumeration of definite forms of the fine arts, and substituting a general phrase, "works of art," and by omitting the word "fine" before "arts," where it refers to designs, etc., in this subdivision, it might have been deemed that, even without Section 4 of the Act, Congress had ceased to limit copyright protection strictly to works of the so called "fine arts." When, however, the changes in the language of this subdivision are considered in connection with the language used in Section 4, it appears clear that the view taken by the Copyright Office is erroneous. A tapestry is a "woven fabric," a mosaic is neither a "painting, drawing or sculpture." Wonderful Japanese embroideries may show a landscape or field of iris more beautifully than many a painting. Venetian

47—R. S. 4952, as amended by the Act of March 3, 1891.

48—See Appendix.

and other glassware, enamels, ceramics, laces, embroideries, have always justly been deemed works of art, where the thought and taste of the creative mind have guided, and controlled, skilled hands, in the creation and formulation of concrete beauty.

A toy even may be an object of the fine arts<sup>49</sup> and no one who has seen the games of chess which are produced in the Orient will deny that a game, or rather the means for playing it, may also be a work of fine art. Playing cards were held copyrightable under prior, far less inclusive, legislation.<sup>50</sup> The Constitution<sup>51</sup> does not speak of the "fine arts" at all, in the provision under which the Copyright Act is passed, but it does speak of the "useful arts." It is deemed that under this section,<sup>52</sup> in view of its apparent purpose, all works of the fine, or useful, arts are registrable, which are the visible expression of creative ideas, relying for acceptance upon their form or thought or informative qualities, as distinguished from products, mechanical in intention, form or scope, falling within the normal domain of patent law.<sup>53</sup>

The views of the Copyright Office, as above expressed, are doubly wrong when it is remembered that the utilitarian object for which a work may be used, in no way affects its copyrightability, if it, itself, would be deemed copyrightable.<sup>54</sup> Thus in an English case<sup>55</sup> it was held that merely because an

§ 573  
Toys.

§ 574  
Playing cards.

§ 575  
The true meaning of works of art for copyright purposes.

§ 576  
The utilitarian object of a work does not prevent its copyright.

49—*Britain v. Hanks Brothers*, 86 L. T. 765.

50—*Richardson v. Miller*, 20 F. C. 11791.

51—See § 81.

52—Section 4.

53—As to what the requisite originality in such a case is, see *Saunders v. Wiel*, (1893) 1 Q. B. D. 470, a patent design decision.

54—*Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 47 L. ed. 460; *Yuengling v. Schile*, 12 F. 97; *National Cloak & Suit Co. v. Kaufman*, 189 F. 215; *Schumacher v. Wogram*, 35 F. 210; contra, would doubtless not be followed in view of the *Bleistein* case.

55—*Hildesheimer v. Dunn*, 64 L. T. N. S. 452. See also *Louis De Jonge & Co. v. Breuker Kessler Co.*, 182 F. 150, aff'd 235 U. S. 33, 59 L. ed. 113.



article in which copyright is sought is one of commerce, was no reason for holding it was not copyrightable. In that case, the article consisted of a gloved hand, painted on cardboard, the front of the hand being on one side and the back on the other. The cardboard was arranged to open, book-wise. When open, the lines of palmistry appeared on the one interior surface and some verses on the other. The Court was in doubt whether this was a book or a picture, but entertained no doubt it was a copyrightable work and protected it accordingly. In an earlier case<sup>56</sup> an album with designs on each page, around an open space, intended to be filled by the insertion of a photograph, was said to be non-copyrightable as a book, as it was a mere article of commerce. What had been copied in that case was the structure of the work, not the designs, so that there was no infringement by defendant in any event. The dicta in the case appear unconsidered and overruled.<sup>55</sup> Similarly, in another case,<sup>57</sup> a painting, seven inches by four and one-half inches, painted for a corporation, from a design suggested by a woodcut of another's painting, was held copyrightable, neither its small size nor that it could readily be lithographed and used as an advertisement nor that it was suggested by the work of another, affecting this result.

The medium in which a work of art is embodied cannot, in view of Section 4, affect its copyrightability and, since culture may be deemed, at least, as important as mere learning, in national development, it is deemed the subdivision of this section should be construed liberally and that the views of the Copyright Office with respect to the scope of the present statute, in this respect, should be disapproved.

56—*Schové v. Schmincké*, 33 Ch. D. 546.

57—*Schumacher v. Schwencke*, 25 F. 466.

The British Act, Section 35 defines artistic work to include a work of "artistic craftsmanship" and has ceased to limit copyright protection merely to works of fine art. It should be carefully remembered, however, that copyright protection in the case of works of art designed purely for utilitarian purposes would not protect so much of the work as consists in its capacity for use in any given capacity but merely its form, in so far as original.<sup>58</sup> Thus in one case<sup>59</sup> an envelope with the word "The Christograph" printed upon it, containing a piece of cardboard, so cut that it cast a shadow representing the painting "Ecco Homo," and a slip of paper bearing some lines from Longfellow, which served as a key for the use of the cardboard, was held not to be subject to copyright, as it was a mere child's trick, except for the verse and reproduction of the painting, neither of which were the original work of its author or deviser. In another case,<sup>60</sup> it was said that colored designs for rugs and carpets, having a substantial monetary value, painted by skilled persons, were, nevertheless, not copyrightable as paintings but merely registrable as designs. This *dictum*, is doubtful on principle, and not law in the United States.<sup>61</sup>

The eighth class is:

(h) *Reproductions of a work of art.*

The Copyright Office Regulations<sup>62</sup> say, and it is believed correctly, "this term refers to such reproductions (engravings, woodcuts, etchings, casts, etc.) as contain in themselves an artistic element distinct from that of the original work of art which has been reproduced." Unless this view be taken, it is

§ 577  
Artistic  
works under  
the English  
law.

§ 578  
Cautionary  
remarks as to  
scope of  
possible  
copyright in  
works of the  
useful arts.

§ 579  
Reproductions  
of works of  
art.

58—Cf. *Burnell v. Chown*, 69 F. 993.

59—*Cable v. Marks*, 52 L. J. Ch. 107.

60—*Woodward v. London etc. R. R. Co.*, (1878) 3 Ex. Div. 121.

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

62—Number 13.



deemed reproductions of a work, in the public domain, or previously copyrighted, could not be copyrighted, constitutionally.

The ninth class consists of:

(i) *Drawings or plastic works of a scientific or technical character.*

§ 580  
Drawings and  
models of a  
scientific  
nature.

These terms include diagrams of models illustrating scientific, or technical, works, or formulating scientific, or technical, information, in plastic, or linear, form, as for example, a model of the human eye for class room use, architects' or engineers' plans or designs,<sup>63</sup> etc.

The tenth class is:

(j) *Photographs.*

§ 581  
Negatives and  
positives.

This class does not include motion pictures. The words "or negative thereof," found in previous statutes, after the words "photographs," have been omitted. The Copyright Office Regulations accordingly, deem the term, as here used, to cover only positive prints. While ordinarily such an omission would appear to lead to such result, it can scarcely be doubted, in view of the language of Section 4, that negatives are copyrightable, equally as much as positives.

§ 582  
Photographs  
of paintings.

A photograph of a painting has been held<sup>64</sup> an original photograph, subject to copyright. The Court remarked that all photographs are copies of some object. This is of course true, and no objection to deeming that photographs are original. The constitutional aspect of copyright in photographs is discussed elsewhere.<sup>65</sup>

The British Act,<sup>66</sup> defines photographs as including photo-lithographs and works produced by

63—Copyright Office Rules, 14.

64—Grave's Case, L. R. 4 Q. B. 715, p. 723.

65—See § 89.

66—Section 33.

processes analogous to photography, but these, in the United States, are, probably, included in the following class, to wit:

*(k) Prints and pictorial illustrations.*

This term includes engravings, wood cuts, prints,<sup>67</sup> chromos<sup>68</sup> and photogravures, half tones, photo engravings, and all other pictures not photographs, or otherwise classified in the Act, reproduced by mechanical processes. Copyright law with reference to this class of works, is well illustrated by language used in a leading case which dealt with engravings:

§ 583  
What are  
prints and  
pictorial  
illustrations.

§ 584  
The nature of  
copyright in  
engravings.

“An engraver is always a copyist,” said Best, C. J., in *Newton v. Cowie*,<sup>69</sup> but “although a copyist, produces the resemblance by means very different from those employed by the painter or draftsman from whom he copies: means, which require great labor and talent. The engraver produces his effects by the management of light and shade, or, as the term of his art expresses it, the *chiaro-oscuro*. The due degrees of light and shade are produced by different lines and dots; he who is the engraver must decide on the choice of the different lines and dots for himself and on his choice depends the success of his print. If he copies from another engraving he may see how the person who engraved that has produced the desired effect and so without skill or attention becomes a successful rival. The first engraver does not claim the monopoly of the use of the picture from which the engraving is made; he says, take the trouble of going to the picture yourself but do not avail yourself of my labor, who have

67—Whether colored or not. *Hills & Co. v. Austrich*, 120 F. 862.

68—*Yuengling v. Schile*, 12 F. 97.

69—4 Bing. 234.



been to the picture and have executed the engraving.”

§ 585  
Illustrated  
business  
catalogues.

It has been held<sup>70</sup> that the protection of the present Copyright Law is not confined to pictorial illustrations known as works of fine art, so that the commercial purpose, form and utility of an illustrated catalogue was no bar to copyright.

The next class created by the Section is:

*(l) Motion picture photoplays.*

§ 586  
What are  
motion  
picture  
photoplays.

This term means dramatic compositions in photographic form, designed for representation upon a blank wall or screen, by having light cast through them, while in motion. It includes all motion pictures where the arrangement, plot, incidents, or acting form, or the combination of incidents represented, give the work, as a whole, the character of pantomime in photographic form.<sup>71</sup> It does not include scenarios or descriptions of moving picture plays, which would, however, be copyrightable as books.<sup>72</sup>

The final class created by the Section is:

*(m) Motion pictures other than photoplays.*

§ 587  
Other motion  
pictures.

This class includes all copyrightable motion picture photographs, which are not photoplays. In view of the reservation of opinion on that point in *Burrow Giles Lithographing Co. v. Sarony*,<sup>73</sup> it must, despite the decision in *Cleland v. Thayer*,<sup>74</sup> be deemed, technically, an open question whether ordinary, as distinguished from artistic, photographs, are copyrightable. It is believed, however, that by a careful study of the line of testimony which proved effective in the *Sarony* case, almost

70—*National Cloak & Suit Co. v. Kaufman*, 189 F. 915.

71—Prior to the passage of the present Act such works were protected as photographs: *Edison v. Lubin*, 122 F. 240.

72—See § 537.

73—111 U. S. 53, 28 L. ed. 349.

74—121 F. 71.

any photograph can be proven copyrightable, on the facts,<sup>75</sup> as most of the matters that impressed the Court in the Sarony case are common, consciously or not, to most exercises of photography and that this is particularly true of motion pictures.

The Section, after making the foregoing classifications, concludes with the words:

*“Provided, nevertheless, that the above specifications shall not be held to limit the subject-matter of copyright as defined in Section 4 of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act.”*

§ 588  
Express provision that the classification effected by Section 5 is not exclusive.

This language emphasizes that the section under discussion is designed purely for administrative purposes and not as an exclusive enumeration of works copyrightable under the statute.

Errors of classification do not affect a copyright<sup>76</sup> nor do the enumerated classes of copyrightable matters limit the scope of what is copyrightable under the Act. It should be noted, however, that the saving clause in this section with reference to erroneous statements in the application for registration only refers to errors of classification.

§ 589  
Errors of classification.

A serious question may then arise, if the application contain incorrect statements of fact, other than as to the classification of a work. It would appear that having due regard to the machinery of the Act, and the purpose of requiring such information, to-wit, that persons interested may be on their guard against infringement, that such incorrect statements would vitiate the registration.<sup>77</sup>

§ 590  
Misstatements in applications for copyright registration, other than as to classification.

Various classes of copyrightable, or non-copyrightable, works may be discussed here to advantage.

75—Falk v. Brett Lithographing Co., 48 F. 678; Thornton v. Schreiber, 17 F. 603; Falk v. Donaldson, 57 F. 32.

76—Green v. Luby, 177 F. 287.

77—Cf. Thomas v. Turner, 33 Ch. D. 292.



It may also be remarked that all decisions prior to the present Act as to what is not copyrightable require the most careful scrutiny before they be deemed authorities under the present Act, because of the great extension, potentially and actually, made in the subject matter of copyright, by reason of the enactment of Section 4 of the present Act.

§ 591  
Copyright in  
titles of  
works.

Thus the decisions were in conflict as to whether, or not, copyright could be obtained in a title itself. The better opinion, as the law stood, appears to have been that such titles, *per se*, were not copyrightable.<sup>78</sup> They were not "books" but the titles of books.<sup>79</sup> If at the present time, a title shows originality, it would seem, however, that it might be copyrightable as a "writing," since length cannot be a requisite of copyright and much thought may be packed into small compass.<sup>80</sup> Protection has been given titles as trade-marks and along the lines of unfair competition, even where they have not been held copyrightable.<sup>81</sup>

§ 592  
Protection of  
titles on other  
grounds.

§ 593  
Trade-marks.

Trade-marks, as such, are deemed non-copyrightable<sup>82</sup> but a work of art would, it seems, be copyrightable, even though designed to be used as a trade-mark.<sup>83</sup>

§ 594  
Prints and  
labels for  
utilitarian  
purposes.

The Attorney General of the United States has been of opinion that prints or labels, "not connected with the fine arts," but "designed to be used for any other articles of manufacture," are, by virtue of Section 3 of the Act of June 18, 1874, which sub-

78—Dicks v. Yates, 18 Ch. D. 76; Harper v. Ranous, 67 F. 904; Corbett v. Purdy, 80 F. 901; Crotch v. Arnold, 54 Solic. J. 49; Broad v. Meyer, 57 Solic. J. 145.

79—Osgood v. Allen, 1 Holmes 185.

80—In Chils v. Gronland, 41 F. 145, English definitions of foreign words, no matter how short, were held copyrightable.

81—See § 1177.

82—Trade Mark cases, 100 U. S. 82, 25 L. ed. 550.

83—Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 47 L. ed. 460; Rosenbach v. Dreyfus, 2 F. 217, is probably no longer law. See National Cloak & Suit Co. v. Kaufman, 189 F. 215.

division he deems unrepealed, not copyrightable but subject only to registration in the Patent Office, "in conformity with the regulations provided by law as to copyright of prints," except that there shall be paid for recording the title of any print or label, not a trade-mark, six dollars. Both the Patent and Copyright Offices have, necessarily, acted upon this construction of the statutes.

§ 595  
Method of  
registration  
under Act of  
1874.

The Act of June 18, 1874, was an act to amend the law relating to patents, trade-marks and copyrights. No reference was made to any particular statute in any more definite form. That Act, by its first section, regulated the form of notices of copyright and referred, in this connection, to prints, cuts, engravings and chromos, as well as to other classes of copyrightable works. It referred, in its second section, to certain fees, to be paid to the Librarian of Congress. Its third section read as follows:

§ 596  
The Act of  
1874.

"In the construction of this Act, the words 'engraving,' 'cut,' and 'print' shall be applied 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. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label not a trade-mark six dollars, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents to the party entering the same."<sup>84</sup>

84—Act of June 18, 1874.



§ 597  
Provisions as  
to labels, etc.,  
in the drafts  
of the present  
Act.

There can be no question that to the extent of the first two sections and the definition contained in the third section, at least, this Act is repealed.

In the earlier drafts of the present Act, Section 5 contained a subdivision<sup>85</sup> which, if enacted, would have made an especial classification of "Labels, and prints relating to articles of manufacture, as heretofore registered in the Patent Office, under the Act of June 18, 1874." The proposed term of copyright<sup>86</sup> therein was twenty-eight (28) years and a reference thereto made in the section<sup>87</sup> requiring the deposit of copies. All these proposed provisions were stricken out, before the enactment of the present Act. The proposed Act as originally drafted, on the other hand, only purported to give copyright in the "works"<sup>88</sup> of an author, instead of in all "writings." What the significance of the omission of the provisions with reference to labels was is not explained by Committee reports or debates. Whether Congress deemed that since by the Act, it made everything copyrightable which it could make copyrightable, it was unnecessary to make especial provision in the Act for such prints and labels; whether it thought that in omitting the limiting definition of the Act of 1874 with reference to the meaning to be given to "prints," (it is to be noted the words "cut" or "engraving," the use of which was also so limited by the same definition, are entirely omitted from the present Act), the words "prints" and "pictorial illustrations" would comprehend labels or prints designed to be used for other articles of manufacture, or whether it purposed to leave a fragment of the Act of June 18, 1874, with reference thereto in force, is shrouded in

§ 598  
Discussion of  
the omission  
of such provi-  
sions and the  
effect of the  
Act, as passed  
upon registra-  
tion of labels,  
etc., under the  
Act of 1874.

85—See Copyright Office Bulletin No. 12 (1906).

86—Idem, p. 12.

87—Idem, p. 22.

88—See Copyright Office Bulletin No. 12, (1906) p. 12, and House Committee Report 2222, *supra*, § 78.

mystery, as far as extrinsic evidence is concerned. That such prints or labels could be made copyrightable, if original, would seem clear. That Congress intended to make everything copyrightable, which it had the power to make copyrightable, is also known.<sup>89</sup> While in view of these considerations, and the grammatical structure of the Act of 1874, and in view of the self evident fact that the bulk of the Act is repealed by the present one, the correctness of the Attorney General's opinion might be well doubted, still, in view of the great weight given by the Federal Courts to departmental practice and decisions, it is possible that, if questioned, his opinion would be upheld. It should be observed, in this connection, that the construction which that Act required to be put on the words "prints or pictorial illustrations" was limited to the Act and no such limitation is found in the present Copyright Law, although the same words "prints and pictorial illustrations" are used there. So that the question just discussed is not one of the construction of words in Section 5 but whether, or not, so much of the Act of 1874 remains unrepealed as prescribes a different mode of registration for prints and labels intended to be used in connection with articles of manufacture. The learned opinion of the Attorney General<sup>90</sup> curiously enough, does not discuss the effect of Section 4 of the Act, in its bearing upon the problem before him. If the Act of 1874 remain unrepealed, in part, the decision in *Marsh v. Warren*,<sup>91</sup> remains of interest. In that case it was held that the rights and remedies of persons registering labels under that Act, were those contained in the copyright laws and that the Act referred to such labels, prints, etc., as were unpublished, up to the time of registration.

§ 599  
Remedies of  
parties  
registering  
labels.

89—See House Committee Report 2222, *supra*.

90—28 Opinions Attorney Gen. 116.

91—4 Am. L. T. N. S. 126.



§ 600  
Only published labels  
may be  
registered.

§ 601  
News.

§ 602  
Daily price  
quotations.

§ 603  
Advertisements and  
catalogues.

§ 604  
Posters.

§ 605  
Price lists.

It may, however, be noted that by applying the reasoning of that decision to the present Act, that if a portion of the Act of 1874 be still in effect, it, because of the change in that law made by Section 9,<sup>92</sup> now refers to published labels only.

News, as such, is not copyrightable, although the form<sup>93</sup> in which it is expressed, may be.<sup>94</sup> This is really a question of infringement and will be found discussed under that head.<sup>95</sup> The Courts, in one instance,<sup>96</sup> thought daily price quotations of too fugitive a character to be copyrightable, but this case is sustainable on the ground of lack of originality.<sup>97</sup> Such quotations may, however, be protected under the doctrine of unfair competition.<sup>97</sup>

A mere advertisement of a bare list of articles, prices or facts would seem not copyrightable. It would lack the minimum of originality necessary for copyright. On the other hand, catalogues<sup>98</sup> and other advertisements having originality, or a quasi artistic character, are copyrightable. It requires very little originality, indeed, to render proposed advertising matter copyrightable. So catalogues of ladies' suits<sup>99</sup> and of tombstones<sup>1</sup> and circus posters<sup>2</sup> have been held copyrightable. One English

92—See § 729.

93—*Tribune Co. of Chicago v. Associated Press*, 116 F. 126; *Walter v. Steinkopff*, (1892) L. R. 3 Ch. D. 489.

94—*Springfield v. Thame*, 89 L. T. 242.

95—See § 968 *et seq.*

96—*Clayton v. Stone*, 2 Paine 382.

97—*National Tel. News Co. v. Western Union*, 60 L. R. A. 805, 119 F. 294; *Exchange Telegraph Co. v. Gregory & Co.*, L. R. (1895) 1 Q. B. 147.

98—*Hotten v. Arthur*, 5 H. & M. 603; *Maple v. Junior Army & Navy Stores*, 21 Ch. D. 232; *W. Marshall & Co. Ltd. v. A. H. Bull Ltd.*, 85 L. T. 77; *Da Prato Statuary Co. v. Guilani*, 189 F. 90; *National Cloak & Suit Co. v. Kaufman*, 189 F. 215; *Davis v. Benjamin*, (1906) 2 Ch. 491; *J. H. White Mfg. Co. v. Shapiro*, 227 F. 956.

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

1—*Da Prato Statuary Co. v. Guilani*, 189 F. 90; *Grace v. Newman*, L. R. 19 Eq. 623.

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

case has even gone so far as to hold there could be copyright in a catalogue simply consisting of an alphabetical arrangement of druggists' wares, with prices attached, with headings and sub-headings.<sup>3</sup> But it may be questioned whether this, and other extreme English decisions, would be followed here, in view of the Constitution. The tendency of the more modern cases is to increase, rather than to restrict, the subject matter of copyright and this is plainly indicated by the advertisement cases. This is unquestionably due to changes in the language of statutes applicable in the premises.

The Act of May 9, 1902, provides that any new original and ornamental designs for an article of manufacture may be patented. This Act is not specifically repealed by the present Copyright Code but, if such manufactured articles are to be "objects of art," it would appear that designs therefor may be copyrighted as "writings," whether, or not, they may be patented.

It is deemed that it is merely a matter of legislative intention and procedure whether many forms of expression, lying on the borderland between copyright and patent, be subject to the Copyright or Patent Laws, and that such designs fall into the natural, as distinguished from the artificial, historical, domain of copyright. Such designs would accordingly appear both copyrightable and patentable.

In an interesting decision, involving this point,<sup>4</sup> a painting of artistic merit, but suitable also for designs to be printed on boxes, copies of which were intended to be used for that purpose, could, it was held, under the statutes as they existed prior to the adoption of the present Act, be protected either by copyright or patent. The Court said that if an

§ 606  
Designs for  
works of art,  
both patent-  
able and copy-  
rightable.

<sup>3</sup>—*Collis v. Cater*, 78 L. T. 613.

<sup>4</sup>—*Louis DeJonge & Co. v. Breuker & Kessler Co.*, 182 F. 150, aff'd 235 U. S. 33, 59 L. ed. 113.



election was made of either, it was exclusive, but did not intimate that both a design patent and copyright might not have been taken out simultaneously. This decision appears law under the present Act, but is no authority against a ruling that both copyright and patent may not, in a proper case, co-exist in connection with different aspects of a given entity.

Under the English statutes, it has been held<sup>5</sup> that a patent and a design copyright may co-exist in connection with the same work.

§ 607  
The registration of copyrightable matter, not classified by Section 5.

The interesting question remains to be considered whether the copyrightable matter not falling within the classes enumerated, is to be described as "unclassified," in applying for registration or what, if any, "specification" in connection therewith, the application for registration should contain.

It is to be noted that while all copyrights require registration, only certain classes of copyrights, in terms, require specification, in the applications for registration, of the class within which they belong and that the section requiring such specification, expressly provides that no error in classification shall affect the validity of the copyright and that the enumeration of specified classes for specification shall not be taken to limit the subject matter of copyright. It would seem then, that the provision thus made for specification or classification, is merely designed to facilitate the administrative details of the Copyright Office's work and that where no provision is made for classification, no attempt to classify an unenumerated work need be made by the copyright proprietor nor need he describe the work as unclassified. It was probably the intention of the framers of the Act by laying down broad general classes of works to make these as inclusive as possible. Since misdescription will

§ 608  
Prudential rules in filing applications for copyright.

5—Werner Motors Ltd. v. A. W. Gamage Ltd., (1904) 1 Ch. 264.

not affect a copyright<sup>6</sup> but non-description probably would, if it were, subsequently, judicially determined that the work in question could have been properly described as falling within a specified class, it would seem that safe practice, on registration, would require that a work, in doubtful cases, be described as falling within the class which appears most cognate to it, and where the least violence would be done to terminology, if the work were subsequently held to fall within the class. For example, a violinist improvises before a phonograph. This records the resulting harmonics, but the work is not reduced to ordinary musical notation, and the cylinder or disk remains the only record thereof. If it be desired to register this for copyright, it might be deemed open to question whether this could, or could not, be properly called a musical composition, because not in the form of staff notation, but it is a "writing," and hence copyrightable. In registering it, it should accordingly, for safety, be described as a musical composition as the nearest class to it, specified in the Act.

There can only be one application for copyright. There cannot be an amended application. The first application exhausts the author's right.<sup>7</sup>

An agent may make the application for his principal.<sup>8</sup>

§ 609  
Applications  
for copyright  
not amend-  
able.

§ 609a  
Application  
through agent.

6—See § 588.

7—*Caliga v. Inter Ocean Newspaper Co.*, 215 U. S. 182, 54 L. ed. 150.

8—*Meccano, Ltd. v. Wagner*, 234 F. 912.



## CHAPTER IX

### WORKS COMPRISING OR FOUNDED UPON OTHER WORKS

§ 610  
Works, involving matter previously copyrighted, or in the public domain.

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

§ 611  
The public domain in copyright law.

§ 612  
Permissible uses of works in public domain.

§ 613  
New works due to addition, arrangement or combination.

§ 614  
New matter defined.

In the course of years, a great body of works has arisen which either were voluntarily, or involuntarily, made public property, by dedication or publication, without a statutory copyright having been first obtained, or in which the copyright, if obtained, has expired by limitation of time, or been otherwise terminated. These works are said to be in the public domain, since they are public property, in the sense that anyone may use them for any purpose. Such utilization may be either physical or mental. Such works are, from their nature, subject to alteration and the thought manifested in making such changes, renders a resultant new version of the work subject to copyright. If new matter is added to an old work, the result is copyrightable. The new matter, or arrangement, or combination, furnishes the necessary basis of originality. New matter, for this purpose, may be said to be any matter which, if standing by itself, would be entitled to copyright. When combined with old matter, the effect of the copyright is to give absolute protection

to the new matter and also protection to the old and new matter in combination.<sup>8</sup> The old work plus such new alterations and additions, is a new work.<sup>9</sup>

While the use of the word "version," in this connection is not entirely satisfactory,—since for example, it is ill-adapted to describe the simple annotation of a work,<sup>10</sup>—still the term is less likely to mislead than the expression usually used in this connection, that is "new edition." This is illustrated by reference to the English cases.

Thus in two cases involving publisher's contracts,<sup>11</sup> it was held a new edition of a work may, or may not, be a new work, as it may be a mere reprint, or merely a new issue of a work, printed in quantity and put forth in batches, at intervals, as required by the public demand. On the other hand, the new edition may, obviously, differ widely from the work in its first impression, or as it stood when originally issued.

The extent of the copyright in a true new edition, as distinguished from a mere reprint of a work, depends entirely on the nature of the changes made in the original work. If separable parts are altered, only those parts and the combination of old and new matter, in combination, are protected by the new copyright.<sup>12</sup> If, on the other hand, the entire work is reformulated, copyright may be obtained in such reformulation. In either event, the work in which such new copyright is obtained will not be deemed infringed by the publication of the whole, or part of the work, in its original form, unless some

§ 615  
Nature of copyright in combination of old and new matter.

§ 616  
Annotations.

§ 617  
Meaning of new edition discussed.

§ 618  
The nature of copyright in new versions of a work.

§ 619  
Effect of authorized publication of original work.

8—*Lover v. Davidson*, 1 C. B. N. S. 182; *Leader v. Purday*, 7 C. B. 4; *West Publishing Co. v. Edward Thompson Co.*, 176 F. 839.

9—*West Publishing Co. v. Edward Thompson Co.*, 176 F. 839; *Lawrence v. Dana*, 4 Cliff. 1.

10—*Lawrence v. Dana*, 4 Cliff. 1.

11—*Thomas v. Turner*, 33 Ch. D. 292; *Reade v. Bentley*, 27 L. J. Ch. 254.

12—*Cary v. Longman*, 1 East 358; *Black v. Murray*, 9 Scotch Sess. Cas. 3rd Ser. 341. See also *Murray v. Bogue*, 1 Drew 353.



of the newly copyrighted matter is combined with it.<sup>13</sup>

§ 620  
Nature of possible alterations in a work.

The changes in the original work may take various forms. The text may be altered by excision or insertion. The form of the work may be altered, as in the case of the dramatization of a novel. The words in which it is expressed may be altered, either by rephrasing, or by turning it into another language.

§ 621  
Limited scope of copyright in such works.

In either such case, the original thought used in the selection, arrangement and combination of existing materials is copyrightable.<sup>14</sup> There can be no copyright in the matter itself, since this is in the public domain, but there can be copyright in the arrangement, formulation and combination of such matter. On the other hand, the plan of such arrangement, or combination, is not copyrightable apart from the matter used. That is to say, anyone else can use such plan or combination in connection with other matter.<sup>15</sup> It is even more important here than elsewhere to bear in mind the sharp distinctions between copyrightability and the effect and extent of copyright when obtained. These are totally distinct questions, as is shown in detail elsewhere,<sup>16</sup> and unless the difference between them is borne in mind, confusion is certain.

§ 622  
Arrangement, etc., of such a work is copyrightable but not the plan of arrangement.

There could be copyright, then, even before the enactment of the present Section, for the same reasons and subject to the same limitations, in translations,<sup>17</sup> dramatizations,<sup>18</sup> and abridgments,<sup>19</sup> whether in the form of digests, or otherwise, if there be true abridging, rather than mere mechanical

§ 623  
Translations; dramatizations; abridgments; digests.

13—Thomas v. Turner, 33 Ch. D. 292.

14—Emerson v. Davies, 3 Story 768; Lawrence v. Dana, 4 Cliff. 1.

15—Perris v. Hexamer, 99 U. S. 675, 25 L. ed. 308.

16—See § 505.

17—Wyatt v. Barnard, 3 Ves. & B. 77; Emerson v. Davies, 3 Story 768.

18—Shook v. Rankin, 6 Biss. 477; Fleron v. Lackaye, 14 N. Y. Supp. 292.

19—Gray v. Russell, 1 Story 11; Folsom v. Marsh, 2 Id. 100.

omission and recopying, or in any other version, or change of form of given matter, which does not involve mere repetition.<sup>20</sup>

The same result may be deemed achieved, although with more difficulty, where old matter is added to old matter.<sup>21</sup> Copyright can then exist in the collocation of the matter. The theoretical basis for such copyright is the thought exercised in the selection and arrangement of the works or matter so to be combined. Such works, which, generically, include all those in which the element of compilation is predominant, mark the limit, in this direction, of copyrightability.

Very little consideration is requisite to show the necessity for permitting copyright in such works, for as is convincingly demonstrated in *Gray v. Russell*,<sup>22</sup> originality in the use and exposition of existing works and materials, free to all for use in this manner, is the foundation of all truly valuable classical, scientific and technical works. It is only by using, and expounding existing materials that a text book or a work of reference can have value. Scholarship, as distinguished from creative genius, must deal with existing materials, yet no one can deny the value of the works it produces nor their just claim to copyright.

The very fact, however, that such works may be copyrighted, necessarily leads to important considerations with respect to the effect of copyrights, when obtained.

It is obvious that anyone may use old matter or common material, even for the same general purposes as has the proprietor of a compilation in which it occurs. If such use is accurate, a resulting

§ 624  
New versions  
in general.

§ 625  
Copyright in  
the simple  
combination  
of old matter:  
its scope and  
theoretical  
basis.

§ 626  
The reason for  
allowing  
copyright in  
works based  
on prior  
works.

§ 627  
Effect of  
allowing  
copyright in  
such works,  
upon its  
nature and  
scope.

20—*Wood v. Boosey*, L. R. 2 Q. B. 340, aff'd 3 same 223; (piano arrangement of opera) *Atwill v. Ferrett*, 2 Blatch. 39.

21—The directory cases illustrate this. See § 537. See also *Taft v. Smith*, 134 N. Y. Supp. 1011; *Lewis v. Fullerton*, 2 Beav. 6.

22—1 Story 11.



§ 628  
Similarities  
due to com-  
mon subject  
matter.

§ 629  
Lawful use of  
common  
sources, in-  
cluding those  
indicated by a  
copyrighted  
work.

§ 630  
Copyright in  
such works  
simply pre-  
vents copying.

§ 631  
Lists of  
battles.

compilation may be identical. Thus a compilation of lyric verse covering a given period, if made by equally competent scholars or critics, might well be precisely similar to an earlier one. In the case of translations or abridgments, striking similarity would be expected. In the case of the arrangement of historical material, especially where it is sought to maintain a common theory, the same result is probable.<sup>23</sup> This is true also, although to a somewhat lesser degree, in the case of dramatizations.<sup>24</sup> Yet in each such instance, the author of the second work may have acted in entire good faith and even have been ignorant of the prior work. If so, he has merely exercised his rights to use common materials, just as his predecessor did, and his work is as truly original, and hence, as copyrightable, as his predecessor's was. As long as the author of the second work has not copied his predecessor's work, as distinguished from copying their common material, his predecessor cannot complain<sup>25</sup> because the former has achieved the same, or an essentially similar, result. He cannot complain even though his work, by indicating the common sources, has facilitated, or led to, consultation of these by his successor.<sup>26</sup> The scope of copyright in such works, which is discussed elsewhere, is then limited so as simply to prevent a subsequent laborer in the same vineyard from seeking to save time or trouble by copying his predecessor's work.<sup>27</sup> This is just, as little originality is needed to render such works copyrightable.

This was illustrated by a case in which<sup>28</sup> a list of battles, with the casualties sustained in each, made

23—Pike v. Nicholas, 5 Ch. App. 251.

24—Robl v. Palace Theatre Ltd., 28 L. T. R. 69; Glaser v. St. Elmo Inc., 175 F. 276; Spiers v. Brown, 6 W. R. 352; Harper Brothers v. Kalem, 169 F. 61 (semble).

25—See § 454.

26—Pike v. Nicholas, 5 Ch. App. 251.

27—Spiers v. Brown, 6 W. R. 352.

28—Hansen v. Jacquard Jewelry Co., 32 F. 202.

from official documents and chronologically arranged, was held copyrightable as a compilation of value. The same result was reached in connection with a list of race horses and their past performances.<sup>29</sup> Blank legal forms, intended for applicants for liquor licenses, consisting of a combination of necessary papers, were held<sup>30</sup> copyrightable.

The various decisions which deal with copyright in law reports may be mentioned at this point. There can be no copyright in the opinions of the Court<sup>31</sup> but there can be a copyright which will include all the original work of the reporter comprehended in the preparation of the volumes, as for example,<sup>32</sup> in their title pages, tables of cases, headnotes, if written by him and not by the Court, statements of facts, arguments of counsel, indices, order and arrangement of cases, the division of the reports into volumes, the numbering and pagination of the volumes, tables of the cases cited in the opinions, the subdivision of indices into appropriate condensed titles and cross references therein. The same result is reached in the case of statutes.<sup>33</sup> If, however, the only original work, in reports, attributable to a reporter, is the mere arrangement of cases in sequence, their pagination and distribution into volumes, such mechanical details will not support a copyright.<sup>34</sup> It is the classification, compilation and rearrangement of matter which forms the basis of his rights,<sup>35</sup> and the incidental results of the mechanics connected therewith, not the mechanics themselves, are the subject of his copyright. In any event, a copyright in so far as it can exist in the plan,

§ 632  
Lists of race horses.

§ 633  
Statutory legal forms.

§ 634  
Law reports.

§ 635  
Judicial opinions.

§ 636  
Reportorial work.

§ 637  
Compilation of statutes.

§ 638  
Mechanical details of book-making.

29—Egbert v. Greenberg, 100 F. 447.

30—Brightley v. Littleton, 37 F. 103.

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

32—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547.

33—Howell v. Miller, 91 F. 129.

34—Banks Law Publishing Co. v. Lawyers Cooperative Pub. Co., 169 F. 386.

35—West Publishing Co. v. Edward Thompson Co., 176 F. 839.



§ 639  
Annotations  
by citations  
of cases.

§ 640  
Digests.

§ 641  
Literal  
reproductions  
of common  
materials.

§ 642  
Engravings  
of printed  
matter.

§ 643  
Colorable  
changes in  
reproducing  
common  
materials.

arrangement and combination of materials, can only protect that which is original in such plan, arrangement and combination.<sup>36</sup> Citations, in the form of notes to Court Rules, have been protected.<sup>37</sup> A digest, or synopsis of judicial decisions, may be copyrighted, as well as the selection, and arrangement, of cases referring to a particular subject.<sup>38</sup>

There are, however, limits to the copyrightability of such works, of the general character under discussion. If the old matter is simply reproduced, without addition or change, there can be no copyright in such bare reproduction. Thus it has been held<sup>39</sup> there could be no copyright in specifications of patents, copied from the originals in the Patent Office. This decision may be contrasted to advantage with another case,<sup>40</sup> where an engraving of printed patent specifications, on file in the same office, was held subject to copyright, since the common materials were, in the latter case, simply used as a basis for a new work, formulated in a different medium from the original.

The new work as stated, cannot be a mere copy of the old one, nor can the changes in it, if merely colorable, give any substantial rights.

These rules were well illustrated in a case,<sup>41</sup> where a photograph had been published, without its author obtaining a copyright. Thereafter, he made some minor changes, which he etched upon the negative and attempted to copyright the result, as a photograph. It was held he could not do this. The work he attempted to copyright, it was held, if copyrightable at all, was copyrightable only in so far as the

36—Bullinger v. Mackey, 15 Blatch. 558.

37—Banks v. McDivitt, 13 Blatch. 163.

38—West Publishing Co. v. Lawyers Cooperative Co., 64 F. 360, aff'd 35 L. R. A. 400, 79 F. 756.

39—Wyatt v. Barnard, 3 Ves. & B. 77.

40—Newton v. Cowie, 4 Bing. 234. See also Vernon Abstract Co. v. Waggoner Title Co., 49 Tex. C. A. 144.

41—Snow v. Laird, 99 F. 813.

etching was concerned and that such a colorable change, in a photograph in the public domain, could create no rights in the photograph.

Adding alto parts to hymns in the public domain was held not such new and original work as would give a copyright in the composite result.<sup>42</sup> So merely changing the musical notation of a work for the pianoforte, so that it could be played on the clarionet, was held not to render the result copyrightable.<sup>43</sup> These cases, save in so far as they may be deemed to deal with the scope of copyright, rather than with the question of what is copyrightable, or to represent an application of the doctrine of "de minimus lex non curat," may be deemed doubtful, as no good reason can be shown why musical works and those embodied in words, should not be treated in accordance with the same principles.

There cannot be two successive copyrights in the same work,<sup>44</sup> the one not being a renewal of the other, nor can two copyrights subsist, at the same time, in the same subject matter.

This rule was illustrated in a case decided by the Supreme Court,<sup>45</sup> in which it was held that where an artist had copyrighted a painting, he could not copyright a photograph of it, without proof that the copyright in the painting had terminated, as he could not have two copyrights at the same time, in the same subject matter. This decision may, however, be misunderstood, unless carefully considered. The action, in which it was handed down, was one for penalties, where rules of strict construction and proof obtain. If the photograph had been original, in the sense in which photographs are original<sup>46</sup>

§ 644  
Attempted  
successive or  
simultaneous  
copyrights  
in a single  
work.

42—Cooper v. Janes, 213 F. 871.

43—Jollie v. Jacques, 1 Blatch. 18.

44—Miffin v. Dutton, 61 L. R. A. 134, 112 F. 1004.

45—Caliga v. Inter Ocean Newspaper Co., 157 F. 186, aff'd 215 U. S. 182, 54 L. ed. 150.

46—See Grave's case, L. R. 4 Q. B. 715.



and not a mere mechanical copy of the painting, it would seem there might have been copyright in it, as a photograph, though not in its subject matter, as the fact that the author of the painting was also its author, would not appear controlling in its bearing upon the vital question of whether it was in fact original.<sup>47</sup> In the absence of satisfactory proof on the point, however, the Court undoubtedly, and correctly, deemed the photograph a mere copy of the painting and not original.

§ 645  
New versions  
of copyrighted  
works.

While the previous discussion has dealt with matter in which copyright does not subsist, it is equally applicable to copyrighted matter, with certain necessary differences.

§ 646  
The consent  
of the  
proprietor  
essential.

Copyrighted matter can only be used in compilations, or abridged, adapted, arranged, dramatized, translated or formulated in versions other than the original, with the consent of the proprietor of such copyrighted work, as long as the copyright in it subsists.<sup>48</sup> This is true although the result of such reformulation would be, or is, practically a new work, if made from a previously copyrighted work, in which copyright still exists. This rule is so broad that it will prevent an adaptation of a story, or a dramatization, without the author's consent, if it contains the plot or theme, if original, of the story.<sup>49</sup> Such a work cannot be used in any manner inconsistent with the copyright proprietor's rights, without his consent but may be used, as indicated in this section, with his consent. The fact, if it be one, that the new work is an improvement on the earlier one can, of course, make no difference, as the copyright proprietor is not bound to permit his property to be improved without his consent.<sup>50</sup> If

§ 647  
Plots of  
novels.

§ 648  
Improvements  
in copyrighted  
works.

47—See § 482.

48—Campbell v. Scott, 11 Sim. 31; Carte v. Evans, 27 F. 861 (semble).

49—Dam v. Kirk La Shelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902; Stevenson v. Fox, 226 F. 991.

50—See Reed v. Holliday, 19 F. 325.

the consent is given, however, the same rule applies as in the case of new versions of uncopyrighted works. Thus, the fact that a pianoforte arrangement of an opera, would have been an infringement, if made without authority, it was held,<sup>51</sup> would not prevent it from being a new composition, for purposes of copyright, if made by authority.

§ 649  
Piano  
arrangement  
of opera.

This section, it will be noted from the cases cited, is largely declaratory, but its presence in the Act prevents, for example, the injustice of the previous English law, where these rules were by no means so clear.<sup>52</sup>

§ 650  
Declaratory  
nature of  
section.

There is nothing, in the language of the section, restricting the rule of law laid down by it to literate works. It would, hence, appear to apply to dramatic,<sup>53</sup> musical,<sup>54</sup> artistic and other works to the same extent as to literate works, so far as the nature of such works and the various expressions used in the section, permit. Thus, for example there may be a compilation, adaptation or arrangement of music but there could be no translation or dramatization of such a composition. A work of sculpture could not be compiled, but might be adapted, and so on down the list of copyrightable media. This is in accordance with the prior law.<sup>55</sup> Thus a photograph of a painting was held subject to copyright,<sup>56</sup> as was an engraving made from patent specifications, on file in a public office,<sup>57</sup> and the setting of words to old airs so as to make a new song.<sup>58</sup>

§ 651  
Photographs  
of paintings.

§ 652  
New words to  
old music.

51—Wood v. Boosey, L. R. 3 Q. B. 223.

52—Toole v. Young, L. R. 9 Q. B. 527.

53—Bouccicault v. Fox, 4 Blatch. 87.

54—Carte v. Evans, 27 F. 861; Reed v. Carusi, 1 Tancy 73, contra, is not in accordance with the modern authorities and may be deemed not law.

55—Carte v. Evans, 27 F. 861; Bouccicault v. Fox, 4 Blatch. 87.

56—Grave's Case, L. R. 4 Q. B. 715.

57—Newton v. Cowie, 4 Bing. 234.

58—Lover v. Davidson, 1 C. B. N. S. 182; Leader v. Purday, 7 C. B. 134.



§ 653  
Statutory  
limitation of  
effect of copy-  
right in new  
versions, etc.,  
of old works.

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

§ 654  
Discussion of  
application of  
foregoing  
portion of  
section.

This portion of the section is designed to prevent the section from being made the basis for attempted claims of copyright in uncopyrightable matter, or for perpetual copyright, by successive additions of "new" matter, etc., to works previously copyrighted. After copyright of a new version of a work in the public domain, the original work still remains in the public domain and may be used as freely as before and the fact that in the course of such use, successive versions may be made and copyrighted, would give no rights to any one of such copyright proprietors, by preoccupation or otherwise, as against the others, if the later versions be, in fact, independently made. The rights of the public, once vested, cannot be divested. In a work in which such public property appears, only the original work of the author of the new version of the work, is subject to copyright. He need not specify what this is, in applying for, or claiming, copyright, since the statute requires no such specification. But on the other hand, no breadth of claim, or form, or grant, of application can give him copyright in that which not he but others have created and which belongs to the public.

§ 655  
Legal status  
of works on  
expiration of  
copyright  
therein.

On the expiration of a copyright, if unrenewed, or on the expiration of a renewal of copyright, the work involved becomes public property and its situation thence forward is just the same as if there never had been copyright in the work.

On the expiration of the copyright in a work, any one may use it for any purpose and neither the pro-

prietor, nor one claiming under him, can prevent this, because he has lawfully made other versions or forms of it, during the life of the copyright, as long as such other versions or forms are not copied.<sup>59</sup>

§ 656  
Status unaffected by copyright of new versions.

This result cannot be evaded; but, it appears clear, that in so far as such new versions of a work are original, the copyright in them is not affected by the expiration of the copyright in the original, or parent, work.

The consent of a copyright proprietor to the use of his work under this section should not, it would seem, penalize him with respect to third persons, as to any act of the person receiving such consent, unless such act is clearly authorized by the proprietor. The consent is purely personal to the person receiving it, it would seem;<sup>60</sup> is in the nature of a limited license;<sup>61</sup> and the copyright would remain unaffected thereby, technically, although practically, such a consent, if acted upon, might much reduce its value. Such consents appear non-assignable, as the proprietor of a copyright would seem, by implication, to rely upon the personality of the individual who receives the consent, to make an acceptable version of the work.<sup>62</sup>

§ 657  
Consents of copyright proprietors to the making of new versions, etc.

No form is prescribed for such consent which, accordingly, may, it would seem, either be written or oral, or evidenced by acts.

§ 658  
The proprietor's consent may be verbal.

No provision is made for recording such consents and purchasers of copyright must, under counsel's advice, seek such protection as they may, against such consents being outstanding when they purchase.

§ 659  
Recording unnecessary.

On the other hand, the path of the translator, adapter or compiler may be beset by unexpected difficulties. Thus in one case<sup>63</sup> it was deemed that

59—Glaser v. St. Elmo Inc., 175 F. 276.

60—Cf. § 1535.

61—Cf. § 1519.

62—Cf. § 1537.

63—Murray v. Bogue, 1 Drew 353.



§ 660  
Unlawful  
retranslation  
of a lawful  
foreign  
translation.

if a foreigner were to translate an English work abroad, as he lawfully might, and this were then to be translated into English, in England, this would be an infringement, even if this were done in good faith, in ignorance of the fact that what was being retranslated was a translation.

This section suggests a further interesting question for discussion.

§ 661  
Utilization by  
the copyright  
proprietor in  
person, of the  
right to make  
a new version  
of a work.

If the proprietor of a copyrighted work, instead of permitting a third person to dramatize it, or to change the form in which it was copyrighted, does so himself, it may be questioned whether this is a new work, requiring a new copyright and if no new copyright be obtained, what would be the effect of a publication of the work, in its new form, upon the copyright of the work in its original form. It would seem that under this section, the copyright proprietor who chooses to utilize his statutory right to alter the form of his original work,<sup>64</sup> may obtain a new copyright in connection with the publication of the new version, as it would seem what he can permit another to do, he can do himself. Since, however, his original copyright is not merely in the words or groups of words in which he has expressed his thought, but rather in the intellectual conceptions so expressed, in so far as these are the product of his original thought,<sup>65</sup> and, since one of his rights is to vary the form in which he has chosen originally to record his thought,<sup>64</sup> it would not necessarily follow that since such a change of form, if made by a third person, would, necessarily, be a new work, because the third person's thought would be a new intervening factor, that such a change would be a new work, if made by the original author. If the new version could be deemed a copy of the first work, in the broad sense in which "copy" is used in this

64—See § 173 and discussion thereunder.

65—See § 504.

branch of law,<sup>66</sup> and the original copyright notice is affixed to such new version, it may be possible that the original copyright would cover the new version.<sup>67</sup> It may be significant as bearing upon this point that the wording of the present statute gives copyright in a work<sup>68</sup> and not merely in certain forms of a work. If the new version is not a copy of the original, in that it differs from it substantially, it may be doubted whether the original copyright would protect the new version and whether an uncopyrighted publication of the new version would not defeat the original copyright. The matter appears largely one of degree. Common prudence will counsel the taking out of new copyrights in all such cases and the printing of notices of the old and new copyright on every copy of the new version, one beneath the other.

§ 662  
The necessity for a new copyright.

If the original notice of copyright only were printed, the Courts might take the middle ground, where possible on the facts, of holding that those portions of the work which were in the original work, were still protected by the original copyright, but, on the other hand, they might deem the copyright was in the work, as an entirety, and that substantial alteration in such entirety and publication without re-copyright destroyed the entirety and hence the copyright.<sup>69</sup>

§ 663  
Effect of notices of copyright.

On authority,<sup>70</sup> a notice of copyright of the new version will suffice, without notice of earlier copyrights in prior versions of the work made by the same author. It may be questioned, however, whether, under such circumstances, the effect of failing to affix the notice of prior copyright is not

§ 664  
Notices of copyright in case of new versions.

66—See §§ 1023-1045.

67—Cf. *Caliga v. Inter Ocean Newspaper Co.*, 157 F. 186; *aff'd* 215 U. S. 182, 54 L. ed. 150.

68—Section 5.

69—Cf. *West Pub. Co. v. Edward Thompson Co.*, 176 F. 839.

70—*Lawrence v. Dana*, 4 Cliff. 1; *West Pub. Co. v. Edward Thompson Co.*, 176 F. 839.



§ 665  
Effect of  
inclusion of  
copyrighted  
work in pub-  
lished uncopy-  
righted work.

to render the work, in its original form, public property and is not simply to protect the new matter, in the new version, as well as the combination of the old and new matter, in combination.

A further aspect of this question was illustrated in a recent decision. There a work was copyrighted in the United States. Its proprietor compiled a larger work, into which he incorporated the copyrighted work. He published this in England and sold imported copies in the United States. Each of such English copies bore a notice reading as follows:

“This Code includes the Telegraph Cyphers, entered according to act of Congress, in the year 1906, by E. I. Bentley, in the office of the Librarian of Congress. All rights reserved. Entered at Stationers Hall.”

It was held<sup>71</sup> that the larger work became *publici juris*, as an entirety, when imported and sold by its author, because it was uncopyrighted and did not bear a proper statutory notice of copyright, as the notice affixed to it did not specify where it included the copyrighted work, and the public were not bound to compare the two works to find out what was copyrighted and what was not.

71—Bentley v. Tibbals, 223 F. 247.

## CHAPTER X

### WORKS IN PUBLIC DOMAIN AND GOVERNMENTAL PUBLICATIONS

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

§ 666  
Copyright forbidden in works in public domain.

§ 667  
Effect of governmental reprints of copyrighted matter regulated.

This section deals with a twofold subject. It provides that no copyright shall subsist in the original text of any work in the public domain, or in any work which was published in this country, or in any foreign country, prior to the passage of the Act, not theretofore copyrighted in the United States, nor in Federal publications or reprints. It also contains a provision that Federal use of copyrighted matter shall not affect the copyright proprietor's rights in his work.

§ 668  
Twofold subject matter of section.

Thus, by express provision of statute, there can be no copyright in any publications of the United States Government and this would include its

§ 669  
Federal publications not copyrightable. Governmental publications, in general.



departments and officers, acting as officers. This would appear to be strictly in consonance with a sound public policy and declaratory of prior law. Thus, prior to the passage of the present Act, it had been held that copyright could not be obtained even by the judges,<sup>72</sup> in the opinions of judges or courts, Federal or State, or in statutes, although copyright might be obtained in headnotes, not written by the judges, indices, abstracts of arguments of counsel, annotations, and pagination and arrangement by the reporter, of the matter set forth in such works.<sup>73</sup> While the States are not mentioned in this section, it may be questioned, for the reasons underlying the decisions cited, whether any copyright may be obtained by any State, or State officer, in any State paper or publication,<sup>72</sup> since a republic can only rest upon a firm basis if its citizens are afforded as untrammelled a means as possible of knowing its affairs and doings and communicating that knowledge to others, and since works composed by public officers in their official capacity, belong to the people whom they represent and who pay them for their services in making such compositions.

§ 670  
State ownership of  
copyright.

In one instance,<sup>74</sup> a copyright in the reports of decisions of State Courts, made by a salaried law reporter, for the State was held valid. The Secretary of State had entered these in his name, "in trust for the State of New York." The decision is authority merely for the proposition that the State, in this instance, stood in the same position as any other employer and does not hold that its copyright is greater in scope, or subject matter, than that of any other reporter, or employer, would have been.

It should be noted that there is nothing in this Section of the Act which permits the reprint of

72—*Banks v. Manchester*, 128 U. S. 245, 32 L. ed. 426.

73—*Callaghan v. Myers*, 128 U. S. 617, 32 L. ed. 547. See §§ 508, 634.

74—*Little v. Gould*, 2 Blatch. 362.

copyrighted matter by the Government, without the consent of copyright proprietors, but the latter are protected against the consequences of any such use by the Government, whether with, or without, their consent, on principles of public policy. The reference to Governmental use of copyrighted matter was inserted in the Act as a convenience, to obviate the necessity for passing individual Acts protecting copyrights, in each instance where such use was made, the passage of such Acts having been deemed requisite, under prior legislation, for the copyright proprietors' protection.<sup>75</sup>

§ 671  
Federal  
reprints of  
copyrighted  
matter.

Attention has been called, elsewhere, to the radical extension in the subject matter of copyright effected by the passage of Section 4 of the present Act.<sup>76</sup> While it may well be doubted whether that Section, even if standing alone, would have been construed so as to permit copyright, even by its author, in the original text of any work which had become part of the public domain,<sup>77</sup> the wisdom of preventing such a construction of the Act, which might well have resulted in holding it unconstitutional, probably dictated the enactment of the portion of Section 7 which provides that there can be no copyright in the original text of works in the public domain. Section 6 of the Act furnished statutory authority for the public use of such works.<sup>78</sup> The law has been shown to be elsewhere, in connection with the discussion of Section 2,<sup>79</sup> that a work becomes part of the public domain as soon as published, unless it is copyrighted, on or before, such publication. It should be noted that Section 7 refers to works which are in the public domain or to works which were published in the United States, prior to the passage of the

§ 672  
Works in the  
public domain,  
not copy-  
rightable.

§ 673  
The effect of  
the section as  
to when works  
become part  
of the public  
domain, since  
its enactment.

75—House Report 2222, p. 10.

76—See § 475.

77—Cf. *Encyclopedia Britannica Co. v. Werner Co.*, 135 F. 841.

78—See § 610.

79—See § 265.



Act. It is not deemed that this reference to publication, limited in time as it is, in any way militates against the view expressed as to when works become a part of the public domain.

A reference to the early drafts of the present Act<sup>80</sup> is helpful in this connection. These contemplated a provision that copyright should not subsist "in the original text of a work by any author, not a citizen of the United States, first published without the limits of the United States, prior to July 1, 1891, or in the original text of any work which has fallen into the public domain."<sup>80</sup> The dates to which reference was made in the language quoted, was the date when the so-called Chace Act<sup>81</sup> became effective in its amendment of the then Revised Statutes,<sup>82</sup> so as to permit copyright by non-resident aliens of their works, under certain conditions therein set forth. The precise purpose of this suggested enactment is not clear. That, if passed, it would have furnished a basis for a claim that prior foreign publication after 1891, would not have prevented United States copyright, is apparent. Its language was wholly retrospective. That it did not commend itself to Congress, is shown by the amendments made in it before the passage of the Act. It is deemed that instead of denoting a Congressional intention to fix a time-boundary to the "public domain," or that works published without copyright were not to be considered as falling within that domain, that the language with reference to publication, properly construed, was simply intended to deal with works falling within it, prior to the passage of the Act, while the provision with reference to works in the public domain was intended to cover works which might become part of it, both before and after the enactment of the present Statute.

80—Copyright Office Bulletin No. 12, p. 15.

81—Act of March 3, 1891.

82—Section 4952.

Attempts have been made in connection with the discussion of the question as to whether first publication outside of the United States, without prior copyright, in the United States, forfeits the right to such copyright to lay stress on the portion of this section which says that no copyright shall be obtained in works published abroad prior to the passage of the Act, to prove that Congress intended by this to allow copyright in such works, if published abroad after the passage of the Act. Such assertions appear to misapprehend the purpose and scope of the section. While this matter is discussed elsewhere,<sup>83</sup> it may be noted here that the portion of the section under discussion, refers to publication in the United States, or abroad, prior to the passage of the Act only, as enacted, and that no one could claim that publication after the passage of the Act, in the United States, without obtaining statutory copyright, would not defeat a claim to future United States Copyright. If it be answered that other provisions of the statute apply to publication in the United States after the date of the Statute, this in reality merely emphasizes that this portion of the section in no way affects the problem as to the effect of foreign publication, after the passage of the statute, but is retrospective only. This whole subject, in its different aspects, is discussed elsewhere.<sup>83</sup>

§ 674  
Discussion of  
the question  
whether the  
section affects  
the problem  
of works first  
published  
abroad.

83—See § 763.



## CHAPTER XI

### PERSONS WHO MAY OBTAIN COPYRIGHT

§ 675  
Who is en-  
titled to  
copyright.

*Section 8. That the author or proprietor of any work made the subject of copyright by this Act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this Act: Provided, however, That the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:*

§ 676  
Resident  
aliens.

*(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or*

§ 677  
Non-resident  
aliens.

*(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.*

§ 678  
Presidential  
proclama-  
tions.

*The existence of the reciprocal conditions afore-  
said shall be determined by the President of the  
United States, by proclamation made from time to  
time, as the purposes of this Act may require.*

That authorship can alone afford the necessary theoretical and constitutional basis<sup>84</sup> for statutory copyright is recognized by Section 4 of the Act,<sup>85</sup> and is emphasized by Section 8. The language used in the latter section refers both to authors or proprietors, of works, and is a substantial re-enactment of prior legislation.<sup>86</sup> As has been shown elsewhere,<sup>87</sup> the author's right to a statutory copyright may be assigned prior to taking the steps requisite to statutory copyright. Such assignment may either be express or, as follows from the very language of Section 8, may, if the author die before copyrighting his work, result from operation of law, by devolution to the author's personal representatives. An early instance where it was held that the right to copyright could be bequeathed by will involved the letters of George Washington.<sup>88</sup>

§ 679  
Authors.

§ 680  
Assignments  
of right to  
copyright.

§ 681  
Inheritance  
of right to  
copyright.

Prior to copyright, the right to copyright is inchoate.<sup>89</sup> It does not arise by force of any rule of common law, but purely by reason of the statutes which render statutory copyright possible.

§ 682  
Inchoate  
right to  
copyright

§ 683  
Its statutory  
origin.

The inchoate right to copyright may be assigned, verbally, prior to the copyright being taken out.<sup>90</sup> The transfer of the right, although it begins by being personal, since it arises out of the act of authorship, is regulated, in the absence of statutory provision, by the rules of law applicable to property generally.<sup>90</sup>

§ 684  
Verbal and  
other assign-  
ments of right  
to copyright.

Thus while there can be no copyright in an inchoate work,<sup>91</sup> there can be a valid, equitable

84—See § 83; *Saake v. Lederer*, 174 F. 135.

85—See § 473.

86—See R. S. 4952.

87—See § 124.

88—2 Story 100.

89—*Callaghan v. Myers*, 128 U. S. 617, 32 L. ed. 547; *Black v. Henry G. Allen Co.*, 9 L. R. A. 433, 42 F. 618.

90—Cf. *Parton v. Prang*, 3 Cliff. 537; *Aronson v. Baker*, 43 N. J. Eq. 365.

91—See § 496.



§ 685  
The right to  
copyright  
works written  
under  
contract.

§ 686  
Equities bind-  
ing assignor.

§ 687  
Assignments  
of rights  
incident to  
copyright  
distinguished  
from right to  
copyright.

§ 688  
Effect of sub-  
sequent copy-  
right on such  
prior partial  
assignments.

§ 689  
Effect of at-  
tempted copy-  
right by such  
partial  
assignee.

§ 690  
Record of  
assignments  
prior to copy-  
right not  
necessary.

§ 691  
Proprietors.

agreement to assign a book to be written and if the book is written and delivered, pursuant to such an agreement, the right to copyright it, has been held,<sup>92</sup> to vest in the purchaser, even though he has not paid for the book.

Such assignments must, however, be distinguished from contracts to assign.<sup>93</sup> The assignee stands in his assignor's shoes and takes the assignment subject to all known,<sup>93</sup> and, possibly, all unknown, equities.

Assignment of rights which would be comprehended in a statutory copyright, are not, however, necessarily equivalent to the assignment of the right to take out the copyright.

If one or more of the separate rights which are comprehended in a statutory copyright, if obtained, be assigned, prior to copyright, a copyright taken out in the name of the proprietor of the right to copyright, will protect such assignee.<sup>94</sup> Similarly, where the contract between the parties granted the stage rights in the United States, the author agreeing to copyright the play, this was held to involve a retention of the right to copyright by the author and that an attempted copyright by the assignee of such rights was entirely ineffectual.<sup>95</sup>

There is nothing in the Act, any more than there is in the English Statutes,<sup>96</sup> that requires the record of assignments, executed prior to copyright, of the right to copyright a work or of any or all of the rights which are comprehended in a copyright if obtained.

The proprietor of a work, is also, in a proper case, entitled to copyright. The word "proprietor,"

92—*T. Ward Lock & Co. Ltd. v. Long*, (1906) 2 Ch. 550. See § 406.

93—*T. B. Harms & Francis, Day & Hunter v. Stern*, 229 F. 42.

94—*Ford v. Charles E. Blaney Amusement Co.*, 148 F. 642.

95—*Saake v. Lederer*, 174 F. 135.

96—*Troitsch v. Rees*, 3 L. T. 773.

as used in this section means only a legal assignee of the author.<sup>97</sup> Mr. Drone's apparent view to the contrary,<sup>98</sup> is not in accord with authority,<sup>97</sup> and is manifestly erroneous, in its disregard of constitutional limitations on United States copyright legislation.<sup>99</sup>

Attempted copyright by one who is not the author of the work, does not stand in privity of title with the author or does not act for him, in his name, as his agent, would be a mere nullity.<sup>1</sup> The questions as to who may be deemed the author or proprietor of a work have been considered elsewhere.<sup>2</sup>

Joint authorship is also discussed in other portions of this work.<sup>3</sup> The latter expression while convenient, appears liable to create misunderstanding. All the authorities appear to agree that where several persons participate in the ownership of a copyright, they hold it as tenants in common, not as joint tenants.<sup>4</sup> The technical results which flow from this result have, at times, been overlooked, where the joint origin of a work, rather than the resultant estate in common, in the copyright in it, appear to have been given erroneous importance by the Courts. Thus the English and American authorities appear in direct contradiction with reference to the rights of co-owners of a copyright with respect to granting licenses to third persons

§ 692  
Attempted copyrights by persons not acting for proprietor.

§ 693  
Joint authorship creates tenancy in common.

§ 694  
Conflict of authority as to licenses by one co-owner of copyright.

97—Cf. *Mifflin v. R. H. White Co.*, 190 U. S. 260, 47 L. ed. 1040.

98—Page 241, "There is no reason why a person who is the owner of an unpublished manuscript or work of art which has been found or otherwise brought to light, may not obtain a copyright therein, altho the name of the author be unknown." "Moreover, if it was necessary under the Act of 1831, that a person who was not the author should show a title derived from the author, that requirement cannot be regarded as now existing."

99—See § 124.

1—*Clementi v. Walker*, 2 Barn & Cr. 861; Cf. *Ferris v. Frohman*, 223 U. S. 424, 56 L. ed. 492.

2—See § 406.

3—See § 424.

4—*Powell v. Head*, 12 Ch. D. 686; *Carter v. Bailey*, 64 Me. 458; *Lauri v. Renaud*, (1892) 3 Ch. 403.



to use the copyrighted work. The English view, which appears based upon the sounder technical reasoning,<sup>5</sup> is that a license in which all the owners of a copyright do not join, is a nullity, as against a non-assenting owner,<sup>5</sup> while the precise contrary has been held<sup>6</sup> in several cases decided by the New York Courts. Such questions are discussed in more detail in connection with the subject of renewal,<sup>7</sup> and assignment<sup>8</sup> of copyright.

§ 695  
Statutory formalities to procure copyright: performance by agent.

In accordance with provisions found elsewhere in the Act,<sup>9</sup> statutory copyright arises upon the performance of certain specified acts. Registration of copyright is also essential<sup>10</sup> and, in various instances, notice of copyright must be affixed to copies of the copyrighted work.<sup>11</sup> Such notice must contain the name of the copyright proprietor, in various instances.<sup>11</sup> It should be noted that the various ministerial acts essential to perfecting a statutory copyright need not be performed, in person, by the person entitled to the copyright. It should also be noted that there is nothing in the use of the term "proprietor" which limits the class of those entitled to copyright, to holders of the beneficial interests in a work. On the contrary, it may be deemed established that there is nothing in the copyright law to prevent one from taking out a copyright as trustee for another and the trust need not appear on the face of the copyright proceedings.<sup>12</sup>

§ 696  
Equitable proprietors of copyright. Secret trusts.

5—Powell v. Head, 12 Ch. D. 686.

6—Nillson v. Lawrence, 148 N. Y. A. D. 678; Herbert v. Fields, New York Law Journal, April 1, 1915; s. c. New York Law Journal, May 20, 1915.

7—See §§ 962, 424.

8—See § 1525.

9—See § 729.

10—See § 762.

11—See § 730.

12—Little v. Gould, 2 Blatch. 362.

In one case,<sup>13</sup> a copyright was taken out in the name of a publisher. The author was a married woman. It was held the fact of coverture was immaterial, as it would be presumed, under the special circumstances of the case, that legal title to the work had vested properly in the complainant and it was immaterial who had the beneficial interest in the royalties in it.

In another case,<sup>14</sup> gratuitous services were rendered by the plaintiff, a friend of the widow of Prof. Wheaton, in the annotation of Wheaton's Elements of International Law, upon the understanding that the result would be copyrighted, but that he should retain his property in the notes so made by him apart from their use with the book in question. It was held his contributions became Mrs. Wheaton's property, as made, as did the inchoate right of copyright in the notes, but that she held this right in trust for him, in so far as concerned his right to the separate use of the notes, but that this trust did not prevent her taking out a statutory copyright in the notes, in her own name, without mention of the plaintiff, in connection with the proceedings. Thus the legal title to a copyright may remain in the proprietor, while the beneficial interest therein, to the extent which may be agreed upon, may be in another party.<sup>15</sup>

Such trusts, then, may be either express or implied. This was illustrated in a case<sup>16</sup> where the plaintiff and defendant had agreed that the defendant would write a comic opera. The plaintiff wrote the scenario. The defendant, by agreement, made many changes in it, but used its substance. A third person, having knowledge of the agreement, wrote

§ 697  
Implied trusts.

13—Scribner v. Clark, 50 F. 473; aff'd sub. nom., Belford v. Scribner, 144 U. S. 488, 36 L. ed. 514.

14—Lawrence v. Dana, 4 Cliff. 1.

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

16—Maurel v. Smith, 220 F. 195.



§ 698  
Trust implied  
from subse-  
quent  
acquiescence  
in copyright.

the lyrics. The latter were published separately. The defendant took out a copyright in the work, as an entirety, in his own name; the third person, a copyright in the lyrics and music, in the name of the firm of music-publishers who printed and issued the lyrics. This was done without any preliminary consent by the plaintiff. It was held that the work was an entire work; that the parties to its production were its joint authors; that the copyright proprietor and the music publishers would be deemed trustees of the copyrights to the extent of the plaintiff's interests therein and that the subsequent acquiescence of the plaintiff in the copyrighting of the work was as effectual as if the plaintiff had authorized the taking out of the copyrights in the first instance.

In a very recent case, it appeared that a composer had entered into a contract with defendant, a publisher, granting the latter, upon a royalty basis, the sole and exclusive production and publishing rights of all music composed by him within a period of five years. The composer, in violation of the agreement, assigned the right to copyright one of his works to plaintiff, who took with full knowledge of defendant's contract. The resultant copyright was held valid, but deemed to be held in trust, for defendant.<sup>17</sup> The trust arose *ex maleficio*.

§ 699  
Limitation on  
doctrine of  
implied trust.

§ 700  
Unauthorized  
copyright by  
assignor after  
assignment.

But, it seems, there must be some legal basis, in the relations between the parties from which such a trust can arise, for the doctrine to apply. Thus where the bare fact of assignment of the right to copyright was proven, it was held,<sup>18</sup> the assignor could not, thereafter, take out a copyright in his own name, even if intended for the assignee and that, even if the assignee joined with him as co-plaintiff in a suit for infringement, the suit would fail. The assignor's act was that of a pure volunteer, who

17—T. B. Harms & Francis, Day & Hunter v. Stern, 229 F. 42.

18—London Printing & Publishing Alliance v. Cox, (1891) 3 Ch. 291.

had neither legal nor equitable title and was, hence, a nullity.

A copyright may be obtained in a trade name<sup>19</sup> by a person entitled thereto and successive copyrights in various editions may be taken out in different trade names.<sup>20</sup> This is true even though the trade-name be that of an alien, if he be entitled to the copyright<sup>21</sup> or if it be that of a corporation.<sup>22</sup>

Section 62 of the Act provides, an "author shall include an employer in the case of works made for hire." This provision is probably simply declaratory of prior law.<sup>23</sup> It is probably still the law that the mere fact that the author of a work is an employee does not vest copyright in it in his employer.<sup>24</sup> The employment must relate directly to the work which the employer claims to be his, as a result of the relationship. That is, to say, the employee must be employed to make that specific work or on the understanding, express or implied, that the work in question shall belong to his employer.<sup>25</sup> What the contract between the parties was, would depend on general principles of law, unconnected with the law of copyright. Attempts to ignore this rule can only result in error: to apply it, enables the parties to regulate their rights by appropriate agreement. Injustice can readily be prevented by application of the rule that, where the facts warrant it, an agreement that a work is to be the property of one who pays for it may be implied.<sup>26</sup>

§ 701  
Copyrights  
taken out  
under trade  
names.

§ 702  
Employers, as  
authors.

19—Scribner v. Henry G. Allen Co., 49 F. 854.

20—Scribner v. Clark, 50 F. 473.

21—Werckmeister v. Springer Lithographic Co., 63 F. 808.

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

23—Little v. Gould, 2 Blatch. 165; Heine v. Appleton, 4 Blatch. 125; Lawrence v. Dana, 4 Cliff. 1 (semble).

24—Bouccicault v. Fox, 5 Blatch. 87; Bishop of Hereford v. Griffin, 16 Sim. 190; Shepherd v. Conquest, 17 C. B. 427; Levy v. Rutley, L. R. 6 C. P. 523.

25—Sweet v. Benning, 16 C. B. 459.

26—Cf. Lawrence & Bullen v. Aflalo, (1904) A. C. 17.



§ 703  
Copyright  
formerly  
limited to  
citizens or  
resident  
aliens.

§ 704  
The Chace  
Act.

§ 705  
The present  
law as to  
aliens seeking  
United States  
copyright:  
resident  
aliens.

The property in works made for an employer is discussed in more detail elsewhere.<sup>27</sup>

Prior to the year 1891, copyright in the United States was limited to citizens of the United States or aliens, resident therein.<sup>28</sup> In 1891, as a result of prolonged efforts,<sup>29</sup> an Act<sup>30</sup> was passed which provided, after omitting the language restricting copyright to citizens or resident aliens,

“this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America, the benefit of copyright on substantially the same basis as its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may at its pleasure become a party to such agreement. The existence of the conditions aforesaid shall be determined by the President of the United States by proclamation made from time to time as the purposes of this Act may require.”

Under the present Act, all citizens of the United States, wherever resident or domiciled, are entitled to copyright in works of which they are the authors. All alien authors, domiciled<sup>30a</sup> in the United States at the time of the first publication of their works, are entitled to copyright.

Alien authors, who are the citizens or subjects of any country, which shall have been determined by Presidential proclamation, as granting either by treaty, convention, agreement, or law, the benefit of

27—See §§ 1634–1652. See *Bentley v. Tibbals*, 223 F. 247, for history of subject.

28—See R. S. 4952. See §§ 739, 72.

29—See George Haven Putnam: “The Question of Copyright,” for a history of these.

30—Act of March 3, 1891.

30a—See § 707.

copyright on substantially the same basis as to its own citizens, or, which has, by similar proclamation, been deemed to be a party to an international agreement for reciprocity in the granting of copyright, to which the United States may become a party, at its pleasure, are also entitled to United States copyright.

§ 706  
Non-resident  
aliens.

The word "domiciled" is used in this section in its ordinary sense of actual residence at a particular place, accompanied by positive, or presumptive, proof of an intention to remain there for an unlimited time.<sup>31</sup>

§ 707  
"Domiciled"  
defined.

The prior statutes used the term "resident" instead of "domiciled" in this connection, but the courts did not make any distinction in this respect, holding, in view of the obvious purpose of the Act, that mere temporary residence was not meant by the term but that residence, plus an intention to continue to reside permanently in the United States, was essential.<sup>32</sup>

An English case<sup>33</sup> which held a mere temporary residence by an alien anywhere in the English dominions sufficient to enable such alien to procure an English copyright, was decided under the language of 5 and 6 Vict. c. 45 and is no longer an authority on the point so decided, because of differences between that act and later statutes. The further point decided in it that the purpose of such residence, whether merely to procure copyright or not, is immaterial, appears entirely sound.

§ 708  
Purpose of  
change of  
domicile  
immaterial.

The change in statutory language to which attention has just been directed tends to remove opportunities for confusion in the case of those not familiar with the case law.

That the term "United States," as used in this

31—*Mitchell v. U. S.*, 21 Wall. 350, 22 L. ed. 584; *Sun Printing Assn. v. Edwards*, 194 U. S. 377, 48 L. ed. 1027.

32—*Bouccicault v. Wood*, 2 Biss. 34.

33—*Rutledge v. Low*, 3 H. L. C. 100.



§ 709  
Meaning of  
"United  
States" as  
used in  
section.

§ 710  
The question  
raised as to  
where the first  
publication  
referred to in  
section must  
be made.

§ 711  
Reciprocity or  
not, of coun-  
try of origin  
of resident  
aliens.

§ 712  
Partly  
naturalized  
aliens.

section, includes the territorial dependencies of the United States, such as Porto Rico, the Philippines, Alaska and Hawaii, appears to follow from the decisions<sup>34</sup> and language of Section 34 of the Act.<sup>35</sup>

It is to be noted that while the statute provides that alien authors or proprietors may have copyright in their works, irrespective of questions of reciprocity in copyright, if they are domiciled in the United States, at the time of the first publication of their works, it is not stated in this section whether the "first publication" in question, must, or need not, be made in the United States. It is deemed that this term refers to the first publication indicated in Section 9 of the Act and, according, that the question whether the "first publication" of a work, in this instance, means in the United States, depends on the general question whether the first publication required by the statute to obtain copyright must, or need not, be made in the United States. This question is discussed elsewhere.<sup>36</sup>

It is to be noted in connection with alien authors and proprietors domiciled in the United States, that it is a matter of no importance under the statute whether the country of which they are citizens, or subjects, has been proclaimed subject to reciprocal copyright, or not. In fact it appears immaterial, under the language of the section, whether they are citizens or subjects of any country or not, or whether they are in the indeterminate status of the partly naturalized.

Domicile, not citizenship, is the essential question in their case.

This is in direct contradistinction from the case

34—*De Luna v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041; *Goetze v. U. S.*, 182 U. S. 221, 45 L. ed. 1065; *Dooley v. U. S.*, 183 U. S. 151, 46 L. ed. 128; *14 Diamond Rings v. U. S.*, 183 U. S. 176, 46 L. ed. 138; *U. S. v. Heinzen*, 206 U. S. 370, 51 L. ed. 1098.

35—See § 1388.

36—See § 736.

of aliens not domiciled in the United States, at the time of the first publication of their works. In their case, the essential question is whether, or not, they are citizens or subjects of a country which the President has proclaimed to satisfy the requirements of this Section of the Act.

The Courts will not investigate, or pass upon, the facts, or law, on which the President based such proclamation<sup>37</sup> nor upon subsequent changes in such law. The proclamations stand until revoked by the President.<sup>38</sup> By the express provisions of the section, in the absence of proclamation, it is immaterial whether reciprocal copyright conditions with a foreign country, or state, prevail, or might prevail.<sup>37</sup> Citizens or subjects of countries or states mentioned in such proclamations, are entitled to copyright, wherever domiciled or resident. On the other hand, the right is limited to citizens and subjects of such countries, and does not embrace residents therein, nationals of countries not mentioned in such proclamations.

Any proprietor of a work entitled to copyright may, if the right to copyright it has passed to him from the author, have copyright in it, if the author, but for such assignment, would have been entitled to such copyright. While this section would, apparently, permit the proprietor of a work to obtain copyright therein, if himself, nationally qualified, although the author himself would not be so qualified, and hence not entitled to copyright before assignment, this is not the law<sup>39</sup> but, on the contrary, in the words of the Copyright Office Regulations, "if the author of the work should be a person who could not himself claim the benefit of the copyright act, the proprietor can not claim it."<sup>40</sup>

§ 713  
Non-resident  
aliens: pro-  
clamation as  
to their  
country of  
origin essen-  
tial to their  
right to  
copyright.

§ 714  
Nature and  
effect of  
presidential  
proclamations  
under Act.

§ 715  
Assignees of  
aliens.

37—*Bong v. Campbell Art Co.*, 214 U. S. 236, 53 L. ed. 979.

38—*Chappell & Co. v. Fields*, 210 F. 864.

39—*Bong v. Campbell Art Co.*, 214 U. S. 236, 53 L. ed. 979.

40—Paragraph 2, § 2.



In the case of aliens not domiciled in the United States, the question whether, or not, the author was a subject or citizen of a state or country proclaimed by the President to satisfy the requirements of this section, determines the proprietor's right to copyright, whatever the national status of the proprietor. This appears equally true where alien proprietors are domiciled in the United States, and the alien authors are not so domiciled, and, as the language in each instance is the same, would seem to be equally true in the case of American citizens, who become proprietors of the works of alien authors not domiciled in the United States.

§ 716  
Alien employees of domestic employers.

Attention has been called to the fact that, pursuant to the provisions of Section 62 of the Act, "the word 'author' shall include an employer in the case of works made for hire." The situation of alien employees of a domestic employer, would suggest the question whether such an employer would be entitled to copyright in works made for him by such employees, if such employees would be unable themselves to procure copyright in the works, by reason of non-inclusion among the aliens capable of obtaining copyright under this section. This must be deemed a doubtful question,<sup>41</sup> but reasons of expediency appear to render it likely that the literal reading of the two sections will be adopted and such copyrights permitted. The possibilities of an evasion of the Act, under color of such employment contracts, may lead to a different conclusion.

§ 717  
Devices for obtaining copyright protection for alien works under prior law.

A means for enabling alien authors, not themselves, entitled to copyright, to procure qualified protection, more especially against the unwary infringer, is suggested by a decision under the prior law.<sup>42</sup> In that case, the composer of the music of "The Mikado" was an alien, who could not procure a copyright in the United States, as the law then

41—Cf. *Gessendorfer v. Mendelsohn*, 13 T. L. R. 91.

42—*Carte v. Evans*, 27 F. 861.

stood. He gave his consent that a citizen of the United States make a piano-forte arrangement of the orchestral score from the original manuscript. This arrangement was copyrighted by its maker and the copyright in such arrangement was, thereafter, assigned to the alien composer of the original score. The copyright was held valid and enforceable. It should be noted that there is no suggestion in this decision, that the effect of this copyright was to give any copyright protection to the original work. Any one was at liberty to use this despite the copyright.<sup>43</sup> But since the copyright in the arrangement was valid, no one could copy the arrangement, without violating the copyright proprietor's rights.

Similarly, in a later decision,<sup>44</sup> the alien publishers of the Encyclopedia Britannica procured copyrighted articles for insertion in their publication, with the express purpose of preventing the work from being reprinted in the United States, as an entirety, without their consent.

Such copyrights were sustained and effected this purpose. These decisions are direct authorities for the rule that a copyright taken out by a person entitled thereto, may be assigned to a person who would not himself have been entitled to take it out, without in any way affecting its validity.

On the other hand, it has been held<sup>45</sup> that an alien not entitled to copyright, could not by assignment to a person otherwise capable of taking out a copyright, enable such person to take out a copyright, since he could not confer a right which he did not himself have.

Some stress is laid, in the opinion of the Court, upon the fact that the assignor retained title to the material object in connection with which the copy-

#### § 718

Assignments of copyrights to aliens not entitled to copyright.

#### § 719

Distinction between such assignments and attempted assignments by unqualified aliens of right to copyright.

43—Cf. *Carte v. Duff*, 25 F. 183.

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

45—*Bong v. Alfred S. Campbell Art. Co.*, 155 F. 116; *aff'd* 214 U. S. 236, 53 L. ed. 979.



§ 720  
Effect of retention by alien of material exemplification of work.

right was sought, but this does not appear to affect the result, as the right sought to be asserted and the material object in question are separate and distinct.<sup>46</sup> Thus in another case decided by the Supreme Court,<sup>47</sup> a painting was sold abroad to one person and the artist, for a valuable consideration, executed a paper, by which he "hereby transfers the copyright in my picture" to another. It was held that he might, before copyright, assign his right to copyright, independently of the ownership of the tangible article itself and that the paper in question, was effective in causing a complete transfer of such right in connection with such picture.

§ 721  
Countries mentioned in presidential proclamations.

Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and her possessions, Italy, Mexico, the Netherlands and possessions, Norway, Portugal, Spain and Switzerland were proclaimed as countries where the reciprocal conditions contemplated by this section exist, except in the case of mechanical reproductions of music, by proclamation dated April 9, 1910.

Proclamations of June 29, 1910, with reference to Luxemburg; May 26, 1911, with reference to Sweden; October 4, 1912, referring to Tunis, and October 5, 1912, with reference to Hungary, have added these countries to the list in question.

§ 722  
Treaties affecting copyright.

Special treaties with reference to the matter exist with China, Japan and Hungary and by virtue of ratification of the Pan-American Convention of Mexico, with such countries, as have adhered, or as may from time to time, adhere to this.

The Chinese and Japanese treaties are so limited as not to be of especial importance. The convention with Hungary expressly makes enjoyment and exercise of the reciprocal rights granted, subject to the performance of the conditions and regulations

46—Section 41.

47—American Tobacco Co. v. Werckmeister, 207 U. S. 384, 52 L. ed. 257.

of the country where protection is claimed under that convention. It is interesting to observe that this convention refers both to published and unpublished works.

The Mexico City Convention of 1902, provides amongst other things:<sup>48</sup>

§ 723  
Pan-American  
Conventions.

“The signatory States constitute themselves into a Union for the purpose of recognizing and protecting the rights of literary and artistic property, in conformity with the stipulations of the present Convention.<sup>49</sup>

In order to obtain the recognition of the copyright of a work, it is indispensable that the author or his assigns or legitimate representative, shall address a petition to the official department which each Government may designate claiming the recognition of such right, which petition must be accompanied by two copies of his work, said copies to remain in the proper department.

If the author or his assigns should desire that this copyright be recognized in any other of the signatory countries, he shall attach to his petition a number of copies equal to that of the countries, he may therein designate. The said department shall distribute the copies mentioned among those countries accompanied by a copy of the respective certificate in order that the copyright of the author may be recognized by them.

Any omissions which the said department may incur in this respect shall not give the author or his assigns any rights to present claims against the State.<sup>50</sup>

The authors who belong to one of the signatory countries or their assigns shall enjoy in the

48—37 U. S. Stat. at Large, 1632.

49—Article 1.

50—Article 4.



other countries the rights which their respective laws at present grant, or in the future may grant, to their own citizens, but such right shall not exceed the term of protection granted in the country of its origin.”<sup>51</sup>

§ 724  
Countries  
adhering to  
Mexico City  
Convention.

This Convention was ratified by the United States, March 16, 1908.<sup>52</sup> It was proclaimed in effect, April 9, 1908, more than six years after its negotiation. In the intervening period, only five other countries, Guatemala, Costa Rica, Salvador, Honduras and Nicaragua, had adhered to it, as appears from the proclamation of the President putting it into effect.<sup>53</sup>

§ 725  
Effect of Con-  
vention in  
United States.

It is, of course, familiar law that treaties may, or may not, be self executing.<sup>54</sup> There does not appear to be any appropriate legislation on the part of the United States, for putting this Convention into force, and it may be doubted as to just what effect it has, save to entitle citizens and subjects of countries which are parties to it, to copyright upon compliance with the general Copyright Act.

§ 726  
The Buenos  
Ayres Con-  
vention.

The Buenos Ayres Convention of 1910, contains amongst others, the following provisions:

“The acknowledgment of a copyright obtained in one State, in conformity with its laws, shall produce its effects of full right in all the other States without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property right.”<sup>55</sup>

“The author of a protected work, except in case of proof to the contrary, shall be considered the person whose name or well-known

51—Article 5.

52—Senate Documents Vol. 48, 61st Congress, 2nd Session.

53—35 U. S. Stat. at Large, 1945.

54—Cf. *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766.

55—Article 3.

nom de plume is indicated therein; consequently suit brought by such author or his representative against counterfeiters or violators shall be admitted by the courts of the signatory states.”<sup>56</sup>

“The authors or their assigns, citizens or domiciled foreigners, shall enjoy in the signatory countries, the rights that the respective laws accord, without those rights being allowed to exceed the term of protection granted in the country of origin.”<sup>57</sup>

“The reproduction of extracts from literary or artistic publications for the purpose of instruction or chrestomathy, does not confer any right of property, and may, therefore, be freely made in all the signatory countries.”<sup>58</sup>

“The indirect appropriation of unauthorized parts of a literary or artistic work having no original character, shall be deemed an illicit reproduction, in so far as affects civil liability.”<sup>59</sup>

This convention was ratified by the United States Senate, February 16, 1911.<sup>60</sup> This convention still awaits the ratification of other governments to become effective. In view of the length of time which has elapsed since its negotiation, such further ratification appears problematical. Discussion of the Convention, accordingly, is unnecessary at the present time, except that extreme doubt may be expressed as to whether Article 3 is as “simple” as Mr. Bowker deems,<sup>61</sup> or whether this convention could have the effect apparently intended by it, without further legislation.

56—Article 5.

57—Article 6.

58—Article 12.

59—Article 13.

60—Senate Documents Vol. 10, 62nd Congress, 3rd Session.

61—Bowker, p. 336.



§ 727  
Proclama-  
tions referring  
to mechanical  
music.

Proclamations of December 8, 1910, with reference to Germany; June 14, 1911, with reference to Belgium, Luxemburg; Norway, and October 15, 1912, as to Hungary, proclaimed these countries to be on a reciprocal basis, in connection with mechanical reproductions of music.

§ 728  
European  
International  
Conventions.

Discussion of European international copyright conventions falls without the scope of this volume. The Pan-American Conventions and the Berne, Paris and Berlin Conventions are however reprinted, for purposes of convenience, in the Appendix.<sup>62</sup>

62—See Appendix.

## CHAPTER XII

### HOW STATUTORY COPYRIGHT MAY BE SECURED

*Section 9. That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under Section 21 of this Act.*

§ 729  
Method of securing copyright prescribed.

§ 730  
When notice of copyright required.

#### (a) IN GENERAL

This section is new and the procedure for obtaining copyright outlined in it, and in the following sections, reverses the former procedure, as laid down in R. S. Section 4956, as amended by the Act of March 3, 1891. Under the prior law, deposit of copies and registration were required to be made on, or before, the day of publication: under the present Act, as will be shown, publication is required to precede registration.

§ 731  
The method of securing copyright under the present and prior Acts.

Subject to a possible qualification to the contrary, in the case of works not reproduced in copies for sale or public distribution, which will be fully discussed in connection with Section 11 of the Act,<sup>63</sup> copyright in a copyrightable work now vests on the act of publication being made, provided that the work, when published, bear the notice of copyright required by this section, in the form prescribed in Section 18 of the Act.<sup>64</sup> Various formalities are

§ 732  
Copyright vests upon publication, with notice of copyright.

§ 733  
Registration.

63—See § 766.

64—See § 853.



§ 734  
Publication,  
not registra-  
tion, secures  
copyright.

§ 735  
Effect of  
change in law.

§ 736  
First publica-  
tion without  
the United  
States.

§ 737  
Indefinite  
language of  
present Act.

§ 738  
The struggle  
for inter-  
national  
copyright.

thereafter required to obtain registration of copyright,<sup>65</sup> and a failure to observe these requirements may avoid the copyright,<sup>66</sup> but it should be carefully remembered, since this is a matter of primary importance, that copyright is not obtained, under the present law, by registration, but by publication with notice of copyright. This changes the prior law, as under it, statutory copyright arose on registration. Under the present statute, the historical boundary between common law and statutory copyright—publication—is restored and emphasized. This change in the law can only merit commendation. The meaning of the word “publication,” in its double aspect,<sup>67</sup> and its effects, historical and present,<sup>68</sup> has been discussed elsewhere.

Two of the great open questions under the Act are, must the publication which initiates copyright be made in the United States and what, if any, effect will a first publication without the United States, have on a subsequent attempted copyright therein.

There is nothing in the Statute which, in terms, states that the first publication which initiates, and which alone can initiate, statutory copyright must take place in the United States, nor that publication without the United States, before publication in the United States, prevents statutory copyright therein. In these respects, the Statute differs from predecessor statutes. Its verbiage here, unfortunately, is indefinite.

After the authors or booksellers had lost the battle for perpetual copyright,<sup>69</sup> their next great struggle was for international copyright. This campaign is still unfinished. The victory won in removing alienage, uncoupled with residence, as a bar to

65—See § 788.

66—See § 789.

67—See § 262.

68—See §§ 283, 289, 293, 398.

69—See § 22.

copyright,<sup>70</sup> marked a definite stage in the struggle. It has not, however, satisfied the protagonists, who desire international copyright.<sup>71</sup> They seek a system where publication in any country will ensure copyright in every country. The failure of the present Act in so many words to negative this conception, has been deemed to leave its effect doubtful. This fact and the absence of final judicial decisions, complicates the difficulty, while it emphasizes the necessity, for passing upon the great question involved.

A brief résumé of prior legislation may precede a discussion of the matter.

The first Copyright Act, Section 3,<sup>72</sup> provided that no one should be entitled to copyright, unless he deposited a printed copy of the title of the work, before publication, in a designated place and (Section 5) that nothing in the Act should be construed "to prohibit the importation or vending, reprinting or publishing within the United States" of a copyrightable work, written, printed or published by any person, not a citizen of the United States, in foreign parts or places, without the jurisdiction of the United States. In the Revision of 1831,<sup>73</sup> the first-mentioned provision was preserved and the latter broadened so as to prevent copyright in all works by "any person not being a citizen of the United States, nor resident within the jurisdiction thereof," which were first published without the United States. In the Revision of 1870,<sup>74</sup> it was provided that no person should be entitled to copyright unless he, before publication, deposited a title in the mails addressed to the Librarian of Congress and, after publication, deposited required copies. The language of the Act of 1831, changed to correspond with the

§ 739  
Prior legisla-  
tion with  
respect to  
initial foreign  
publication.

70—See § 704.

71—See for example Bowker: X.

72—Act of May 31, 1790.

73—Act of Feb. 3, 1831, 21st Congress, 2nd Sess. c. 16.

74—Act of July 8, 1870, 41st Congress, 2nd Sess. c. 230.



enlarged subject of copyrights, was retained with respect to works of persons not citizens of the United States nor resident therein, first published abroad. The Revision of 1873,<sup>75</sup> did not change the statutory provisions in question. Under all these statutes, then, by their express language, only citizens of the United States or residents<sup>76</sup> therein, were permitted statutory copyrights.

When the agitation against this exclusion of non-resident aliens, who, up to that time, were totally unable to obtain any protection for their works, in any manner, culminated in the passage of the Act of March 3, 1891, Section 4956 of the Revised Statutes was amended so that it read that no person should be entitled to copyright unless he should, "on or before the day of publication in this or any foreign country," deliver to the Librarian of Congress, or mail in the United States to him, the printed title required by the Act and also "not later than the day of publication thereof in this or any foreign country" similarly deliver, or mail in the United States, two copies of the work. The provisions of prior law which, in terms, made works by persons not citizens of the United States, or resident therein, public property, were repealed by this Act, and the privilege of copyright was extended to certain resident and non-resident aliens.<sup>77</sup>

By the Act of March 3, 1905,<sup>78</sup> Section 4952 of the Revised Statutes was amended by providing that whenever the author or proprietor of a book in a foreign language, first published in a foreign country, deposited a complete copy thereof, within thirty days after such first publication, in the office of the Librarian of Congress, placing a notice of the reservation of copyright therein and in all other

75—Act of Dec. 1, 1873 (R. S. 4956, 4971).

76—See § 707.

77—See § 704.

78—Fifty-first Congress, 2nd Sess. c. 565; 58th Congress, 3rd Sess. c. 1432.

copies sold or distributed in the United States, and, within twelve months from the date of first publication, filed a title and two copies of the book, in the original language, or, in his option, of an English translation printed from type set in the United States, or from plates made therefrom, he should for twenty-eight years from the date of recording the title or the English translation, have the sole liberty of printing, reprinting, publishing, vending, translating, and dramatizing the said book.

It will appear from an examination of the statutes thus quoted, that before 1891, there was no express statutory reference to foreign publication, but that the works of alien non-residents, wherever published, were not copyrightable in the United States. Writing with reference to the statutes prior to 1891, Mr. Drone<sup>79</sup> expressed the opinion that the Courts would hold that the publication referred to in the statutes meant first publication in the United States, and that first publication abroad would prevent statutory copyright in the United States.

“It cannot be doubted,” said Brown, J., writing in 1882, “that the purpose of the copyright laws from the foundation of the government has been to encourage native talent and to protect American authors and artists only.”<sup>80</sup>

“It is immaterial whether the publication,” i. e., by which common law rights terminate, “be made in one country or another. Such rights of authors as are saved by statute are not recognized extra-territorially. They can only be enforced in the sovereignty of their origin,” said Wallace, J.,<sup>81</sup> in 1885.

The English judges, no matter how much they differed on other points, in the great controversies which centered about the Statute of Anne, were

§ 740  
The law as to  
initial foreign  
publication  
prior to 1891.

§ 741  
The English  
view.

79—Drone: Copyright, p. 295.

80—Yuengling v. Schile, 12 F. 97, 103.

81—Carte v. Duff, 25 F. 183.



steadfastly of opinion that first publication, without Great Britain, would prevent a British copyright.<sup>82</sup>

“The doctrine of a prior publication abroad destroying the right of the foreign author to publish here so as to acquire English copyright appears to me to rest upon satisfactory grounds,” said Mr. Justice Crompton.<sup>83</sup> “When the work has been made public abroad, there is no statute which makes that publication the commencement of the monopoly here and the work becoming *publici juris* here, and it being once lawful for any one to publish it in England, it would be impossible to hold that a subsequent publication here was a first publication within the meaning of the Act, so as to give a monopoly which would make unlawful the continuing to publish what had once been *publici juris* and might have been lawfully published here.”<sup>83</sup>

§ 742  
The effect of  
the Act of  
1891 upon the  
question.

The Act of 1891 contemplated either a first publication in this country or abroad, *but* it provided for the public deposit of copies in this country, on or before the date of publication abroad.<sup>84</sup> Hence in the case of works published abroad it, theoretically, provided for, at least, a simultaneous publication of the work in this country and abroad, as deposit of copies in the Copyright Office is in itself a publication, independently of what is done elsewhere.<sup>85</sup> A simultaneous publication, it has been held, will satisfy the requirements of a statute requiring first publication to be made in a given country.<sup>86</sup> The Act of 1895 which provided for

§ 743  
Simultaneous  
foreign and  
domestic  
publication.

§ 744  
The Act of  
1895.

82—See opinions of Judges in *Jefferys v. Boosey*, 4 H. L. C. 815. And see cases cited, § 756 (n.) 8.

83—*Jefferys v. Boosey*, 4 H. L. C. 815, at 852.

84—See § 69.

85—See § 324. The publication required by this section does not require any effort at commercial exploitation or putting of the work on the market. *Stern v. Jerome H. Remick Co.*, 175 F. 282.

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

so-called ad interim copyrights, was limited to books in foreign languages, provided for deposit within thirty days after foreign publication<sup>87</sup> and was plainly intended to further translations of books in foreign tongues into English or to facilitate the prompt introduction of such works, in their original condition, into this country.

Having this prior legislation in mind, the present statute may now be considered. The apparently unrestricted language used in the section is not decisive, as to its proper judicial construction.

In 1904, Congress passed an Act<sup>88</sup> to afford protection to exhibitors of foreign works at the Louisiana Purchase Exposition. In this it was provided that the author of any of certain specified works, "published abroad prior to November thirtieth, nineteen hundred and four, but not registered for copyright protection in the United States copyright office," "or produced without the limits of the United States" prior to said date, "intended for exhibition at the Louisiana Purchase Exposition" should, upon compliance with the Act, have copyright in such works. The term of copyright was to be two years "from the date of the receipt of the book or other article in the copyright office." Machinery was provided for the extension of this term, by domestic reproduction, within the initial copyright period. No registration was to be made under the Act after Nov. 30, 1904. In the only reported decision<sup>89</sup> which construed this Act, it was held that this Act, despite its broad language, did not enable copyright to be taken out under it for a book previously sold abroad and by other publishers in the United States, for many years prior to the passage of the Act.

§ 745  
The Louisiana Purchase Exposition Copyright Act.

§ 746  
Narrow judicial construction of its sweeping language.

87—See § 75.

88—Act of January 7, 1904 (58th Congress, 2nd Sess. c. 2).

89—Encyclopedia Britannica Co. v. Werner Co., 135 F. 841.



§ 747  
Rule as to  
judicial con-  
struction  
applicable  
to such  
statutes.

The Supreme Court<sup>90</sup> has stated that it will hesitate to construe the Copyright Act in such a manner that foreign authors and composers can obtain rights in this country which they cannot secure in their own, by international copyright laws passed before the existing statute.

§ 748  
First publica-  
tion to secure  
copyright  
must take  
place in  
United States.

Registration of copyright now follows the vesting of copyright instead of preceding, or being synchronous with it. Publication, with notice of copyright, secures copyright *but such notices are only required to be affixed to copies published or offered for sale in the United States*. Since copyright is procured by publication with notice and the notice essential to create copyright is only necessary where publication takes place in the United States, and such notices outside of the United States would be quite useless and futile,<sup>91</sup> it would seem to follow, *ex proprio vigore*, from the language used in this section, that, save in cases of ad interim copyrights, the initial publication contemplated by the present Act to secure copyright, must take place in the United States.

This view is supported by the general rule of construction that, wherever possible, the general words of a statute are to be so construed as to avoid giving it an extra-territorial effect.<sup>92</sup> It is also supported by an examination of House Report 2222<sup>93</sup> which accompanied the present Act on its passage through the House, and, after adoption by the Senate Committee on Patents,<sup>94</sup> on its passage through the Senate. The Congressional Record shows the present Act was passed substantially without discussion, largely on the strength of this Report.

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

91—See § 760.

92—American Banana Co. v. United Fruit Co., 213 U. S. 347, 53 L. ed. 826.

93—Sixtieth Congress, 2nd Session.

94—See § 78.

The Report is a somewhat elaborate analysis of proposed changes or re-enactments of then existing copyright statutes. There is no statement contained in it to show any intention to change the pre-existing law, which made first publication in the United States essential to the securing of United States copyright. A fundamental change such as this, if intended, would almost certainly have been discussed in the Report. Reference may be made to this Report for light in construing the Act.<sup>95</sup>

It seems clear, then, that the publication required, by this section, to initiate United States copyright must take place within the United States. Such publication means first publication. No instance has been found in the books or statutes where the word "publication" used alone, without qualifying adjective or adverb, to describe the act upon which a statutory copyright may be predicated, has not been deemed to mean first, or initial, publication. Such initial, or first publication, has marked the historic boundary of statutory copyright since the Statute of Anne.<sup>96</sup> There can be but one initial or first publication.<sup>97</sup> Once it takes place, no matter where, the work is public. Steamship, railroad, cable, telegraph, wireless, speedily spread it over the face of the civilized world, if it have merit, or popular appeal to nations outside of the country of origin, but, even if this is not done, the work is public. This being so, great doubt may be expressed whether Congress could, constitutionally, permit copyrights in matter which had been published abroad, unless, if at all, such copyright were made conditional on almost immediate subsequent publication in this country, in such exceptional cases as are provided

§ 749  
"Publication" as used  
in this section  
means first  
publication.

§ 750  
Constitutional  
questions as  
to copyright  
in works first  
published  
abroad.

95—*Holy Trinity Church v. U. S.*, 143 U. S. 457, 464, 36 L. ed. 226, 229; *Binns v. U. S.* 194 U. S. 486-495, 48 L. ed. 1087-1090; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 19, 20, 49 L. ed. 363, 370, 371.

96—See §§ 25, 247 *et seq.*

97—*Thomas v. Turner*, 33 Ch. D. 292.



for in Sections 21 and 22 of the Act with reference to ad interim copyright, for books. It should always be borne in mind that the power of Congress to enact copyright laws is not unlimited; it can only pass such statutes as are calculated, at least, to some degree, "to promote the progress of science and the useful arts."<sup>98</sup> As it can only legislate for the United States, this must mean promote such progress in the United States. It is somewhat difficult to see how such progress in the United States could be promoted by any laws which would confer property rights, in the United States, in connection with publications made outside of the United States, while, on the other hand, theoretically at least, even a nominal first publication in this country promotes the progress of science and the useful arts.

The constitutional aspects of this question have not been ignored, it would seem, by the framers of the various proposed bills, which have avowedly been intended to create international copyright.<sup>99</sup> Simultaneous publication in the United States, as well as in the country of the work's origin or its substantial equivalent, was a general characteristic of such bills.

§ 751  
Discussion of the question whether a first publication abroad will not defeat a subsequent United States copyright.

Anyone may buy the work abroad and import a copy, if no copyright has been obtained in the United States for the work. Save as restrained by the copyright laws, he may make any use of it he sees fit. If uncopyrighted, he may copy it.<sup>1</sup> If the case be supposed of French publication in 1909, can it possibly be argued that by merely failing to take any steps amounting to publication within the United States, the author might, for example, in 1915 take out United States copyright and proceed

98—See § 81.

99—The history of this movement will be found in Bowker: Copyright, p. 341.

1—Maule, J., in *Jefferys v. Boosey*, 4 H. L. C. at p. 894; *Waver & Co. v. Seebohm*, 39 Ch. D. 73.

against anyone who in the interval had incautiously reproduced, in the United States, copies of such work purchased in France? Many works have no ear-marks showing the country of their origin. This is especially true of non-literate works. The mere presence of copies in a given country is, hence, no proof that they were produced in that country. Can it be argued that once the work is within this country, and part of the general mass of property therein, anyone who desires to reproduce it must endeavor, at his peril, to search the balance of the world to ascertain the country of origin and whether the author took out a copyright in the country of origin or elsewhere, or not? Even if the work bore a notice of its origin, or reservation of rights, which might, or might not, be true, this could not affect the situation, as no notices printed on works published abroad can have any effect in the United States, even if valid under the local foreign law.<sup>2</sup> Moreover the mere taking out of a foreign copyright, being a matter of local extra-territorial statute, cannot affect the situation of the work in the United States. The question whether such situation may be altered by treaty is considered elsewhere.<sup>3</sup> Once the work be published abroad, then, whether or not the author has a foreign copyright, is a matter of no importance. So that if the view were taken that first publication abroad did not defeat American copyright, this would be true even if the work became part of the uncopyrighted public domain of the country of origin. Such a situation was, obviously, not intended. If Congress could not give copyright, constitutionally, in a work in the public domain in this country, it could not well do so in a work in the public domain in a foreign country. For these reasons, therefore, and since as has been shown, the first publication, which initiates

2—Savage v. Hoffman, 150 F. 584; Wagner v. Conreid, 125 F. 798.

3—See § 752.



copyright (and there can be but one), must take place in the United States, it would seem clear that a publication abroad, without copyright in the United States, would cause the work to fall into the public domain in the United States. By publication, in this connection, is meant such a publication as at common law would have ended common law copyright.<sup>4</sup> What judicial authority there is, is to the effect that a publication abroad, (unless it amount only to what is called a publication solely by force of a foreign statute) terminates common law rights everywhere.<sup>5</sup> Since the right of first publication is a common law right,<sup>6</sup> and the exercise of this right is essential to initiate statutory copyright, if the common law right is lost, the statutory right cannot arise.

For the reasons given it is deemed both that the first publication required by the statute to initiate copyright must be had in the United States (except possibly in cases where *ad interim* copyrights are sought)<sup>7</sup> and that first publication abroad (except possibly where the formalities incident to *ad interim* copyrights are observed)<sup>7</sup> will prevent subsequent statutory copyright in the United States.

§ 752  
The feasibility  
discussed, of  
international  
copyright by  
treaty.

Attention has been directed elsewhere to various copyright treaties and conventions to which the United States is a party.<sup>8</sup> Since the treaty making power is practically unlimited,<sup>9</sup> it may well be that that may be done by treaty which could not be done by statute passed under the limited congressional power with respect to copyrights. Unless, however, such treaties are so drafted as to be self-executing,<sup>10</sup> interesting questions would arise, if

4—See §§ 356-7.

5—See §§ 756 (n. 8), 755.

6—See § 252.

7—See § 927.

8—See §§ 722-726.

9—*Geofrey v. Riggs*, 133 U. S. 258, 33 L ed. 642.

10—See § 725.

Congress attempted by appropriate legislation, to render them efficacious, and this legislation were such that it transcended the copyright clause of the Constitution. As this has not yet been attempted, it is unnecessary to discuss the question at this time and place.

A great judge<sup>11</sup> has pointed out, that if foreign publication would not defeat domestic copyright, the attempts to establish international copyright by treaties, or conventions, would be altogether unnecessary, and such considerations, while they emphasize the views enunciated in the text, would appear to indicate the line of least resistance for international copyright. Since, as has been indicated, a simultaneous publication in this country and abroad, would be deemed a first publication in each of the countries where it takes place,<sup>12</sup> no hardship can result to any author, vigilant and advised of his rights, by requiring first publication in the United States as a condition for the grant of statutory copyright therein. Much hardship to individual citizens may, on the other hand, be avoided and the general advancement of the public interest may be furthered,<sup>13</sup> by ensuring the speedy importation of foreign works, by steadfast adherence to the rule indicated.

Such judicial authority as exists, in connection with cases which have arisen under the present Statute, supports the foregoing conclusions.

The Supreme Court of the State of New York (Bijur, J.) held first publication abroad prevented copyright in the United States, without, however, giving any reasons for its view.<sup>14</sup>

11—See remarks of Follock, C. B. in *Chappell v. Purday*, 14 M. & W. 303.

12—*Francis Day & Hunter v. Feldman & Co.*, (1914) L. R. 2 Ch. 728; *Cocks v. Purday*, 2 Carr. & Kir. 268.

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

14—*Stern v. T. B. Harms Co.*, N. Y. Law Journal, Nov. 18, 1914.

### § 753

The justice and public policy of requiring domestic first publication.

### § 754

The decisions applicable to the foregoing questions cited and discussed.



§ 755  
Universal  
Feature Film  
Co. v.  
Copperman.

In a recent important and instructive case,<sup>15</sup> the following facts appeared: The plaintiff was assignee of an alleged United States copyright, procured by a Danish corporation upon a motion picture photo-play made by it in Denmark. It had sold numerous copies of the play outside of the United States, inserting in the invoices, a statement that the films so sold were not to be used outside of the country where sold. The defendant purchased a second-hand copy, without notice of the attempted territorial restriction, from a third person, in London. After he brought this to the United States, the Danish Company attempted to obtain a United States Copyright under Section 11 of the Act and then brought suit against the defendant to prevent exhibition of his copy. The lower Court, (Hough, J.) in rendering judgment for defendant, held that publication in Europe defeated the subsequent effort at United States Copyright protection. The Court did not, however, discuss the matter and, evidently, assumed the previous law in this respect to be unchanged. The Court said incidentally:

“Section 9 of the Act of 1909 carries forward substantially the historic method of obtaining copyright and corresponds to Rev. Stat. Section 4956 when it says: ‘any person entitled thereto by this Act may secure copyright for his work by publication thereof without the notice of copyright required by this Act.’ Around this method of procuring copyright has grown a great body of case law, the sum of which is that publication with notice is the essence of compliance with the statute and publication without such notice amounts to a dedication to the public sufficient to defeat all subsequent efforts at copyright protection.”<sup>16</sup>

15—Universal Film Co. v. Copperman, 212 F. 301.

16—212 F. 301, 302.

On appeal, this decision was affirmed by the Circuit Court of Appeals,<sup>17</sup> on the ground that the copy involved was not an infringing copy, without discussion of the question of foreign publication, save inferentially. While this decision is sound, there is much in the opinion of the Circuit Court of Appeals which will not bear critical examination. Thus it speaks of the Danish Company's "common law rights" in England, although common law copyrights no longer exist there, having been abolished by statute.<sup>18</sup> It would be difficult to conceive of common law "rights" in Denmark, the country of origin, as the common law never prevailed there.<sup>19</sup> When the Court states that the Danish Company "abandoned its common law property in the United States when it took out the statutory copyright," the question suggests itself how could it have any such property to abandon, when it apparently did not, and could not have it, in any other country in the world? This leads to the further question as to when the court deemed this common law property in the United States, arose? It could not have well been on the production of the photoplay in Denmark. The mere act of creation in Denmark could not well, simultaneously, create property rights in the United States, where there was nothing to mark the accrual of such rights, if created, without any evidence whether such rights arose in Denmark or not. Yet common law rights, where recognized, are supposed to arise on the act of creation. If the Court did not take this view, are the rights supposed to have accrued when the Danish Company first

§ 756  
The foregoing  
decision, on  
appeal.

17—218 F. 578.

18—British Copyright Act, (1911) § 31.

19—Barrielli v. Bettman, 199 F. 838, and cf. as to the presumption in such matters. *Cuba R. R. v. Crosby*, 222 U. S. 473, 56 L. ed. 274, 38 L. R. A. (N. S.) 40; *Savage v. O'Neill*, 44 N. Y. 298; *Lucia Mixing Co. v. Evans*, 146 N. Y. A. D. 416; *Matter of Hall*, 61 N. Y. A. D. 266; *Crashley v. Press Publishing Co.*, 179 N. Y. 903; *Schweitzer v. H. A. P. A. Gesellschaft*, 149 A. D. 900.



brought a copy of the work into this country? If so, they would apparently arise out of the act of importation, which would be somewhat of a novelty in copyright law. There are no cases which, in terms, hold that there can be a common law copyright in this country, where there was not, at some time, a common law copyright in the country of the work's origin. Did the Circuit Court of Appeals regard it a matter of no importance whether, or not, the work had been published in the country of origin, or elsewhere, before being imported? The decision is silent on this point. The essence of common law copyright is the right of first publication. All cases prior to this decision have deemed it immaterial where this right of first publication was exercised. Once exercised, it was gone and the common law copyright with it. What the Court meant by saying that the sale of films after copyright was as consistent with the proprietor's statutory ownership, as was the sale of films before copyright, with its common law ownership, is not clear. The copyright had been registered under Section 11 of the Act. Section 12 requires, expressly, a re-registration, if the work is produced in copies for sale. Such copies are required to bear statutory notices. No such notices were affixed, nor was there any re-registration of the work, after copies were produced for sale. It is elementary law that sales of works, whether intended to be read or performed, are inconsistent with common law copyright.<sup>20</sup> The sale of copies terminates the latter, and it is difficult to see why this is not equally as true of printed copies of a motion picture film as of books. It would seem that if the Court had used the word "inconsistent" instead of "consistent," in this portion of its opinion, it would have more nearly approximated correctness. It is not clear from the Court's opinion

20—See § 317.

whether it regarded the attempted United States copyright as valid.<sup>21</sup> If so, its opinion may, with all due respect, be deemed less convincing than that of the lower Court upon this point, the more especially as it advances no reasons in support of any contention that the statutory copyright involved was valid. These criticisms, however, run to the language of the opinion, rather than of the point actually and necessarily decided, to-wit, that whether or not the copyright was valid, the copy involved was not an infringing one.

In a case decided under the prior Act,<sup>22</sup> an English authoress had, it appeared, sold the American serial and book rights in her novel, including the sole right to publish it in the United States, to the plaintiffs. The contract provided that the plaintiffs should take all necessary steps under the United States Copyright Acts, "to secure their own rights and those of the author in said work." She sold the English rights to other publishers. Whether this was before, or after, her contract with plaintiffs, does not appear. The proprietors of the English rights published the story, serially, in England and the United States, before the plaintiffs began publication of the work. The plaintiffs copyrighted the work, serially, as chapters appeared in the periodical published by them, and as an entirety, simultaneously with its English publication as an entirety. It was held, amongst other things, that the prior United States and English publication of the work did not affect the plaintiff's copyright, as there was no privity between the plaintiff and the English publishers who had published it serially, as indicated, and that the consent of the author to what the English publishers did had no effect upon the plaintiff's copyright. This decision was affirmed

21—For further discussion of this decision, see § 748.

22—Harper Bros. v. M. A. Donahue & Co., 144 F. 491.



without opinion by the Circuit Court of Appeals.<sup>23</sup> The Court's apparent view that only prior publication in the United States can affect the right to United States copyright appears novel<sup>24</sup> and unsound.<sup>25</sup> The Court's further apparent view that there may be a difference between prior publication by an author, and similar acts by the licensee of an author appears, if sound, to rest upon the special language of prior statutes.<sup>26</sup> The date and tenor of the author's agreement with the English publishers, if this had been in evidence, might have had a controlling bearing upon the proper decision of the case. As it was, upon the facts stated in the decision, it may well be that the case is properly sustainable on the ground that the rights conveyed to the American publishers were so broad as to include the right to the American copyright under the then statute,<sup>27</sup> in which event, neither subsequent domestic or foreign publication, either by the author or a third person, probably, could affect the rights of such assignee to United States copyright.

Earlier cases holding foreign publication to be a dedication of the work to the public will be found below.<sup>28</sup>

§ 757  
Differences  
between copy-  
rights and  
patents  
respecting  
foreign

At this point an important difference between patents and copyrights may again be noted, arising out of the difference between the words "author"—meaning an originator or creator—and "inventor,"

23—146 F. 1023.

24—See § 740.

25—Cf. *Chappell v. Purday*, 14 M. & W. 303.

26—R. S. 4962.

27—R. S. 4952.

28—*Daly v. Walrath*, 40 N. Y. A. D. 220; *Bouccicault v. Wood*, 2 Biss. 34 (semble); *Clementi v. Walker*, 2 Barn. & Cr. 861; *Guichard v. Mori*, 9 L. J. Ch. O. S. 227; *Chappell v. Purday*, 4 Y. & C. Exch. 435; *Rutledge v. Low*, L. R. 3 H. L. C. 100; *Cocks v. Purday*, 5 C. B. 860; *Jefferys v. Boosey*, 4 H. L. C. 815; *Bouccicault v. Delafield*, 1 Hem. & M. 597; *Low v. Ward*, L. R. 6 Eq. 415; *Bouccicault v. Chatterton*, 5 Ch. D. 267; *Clementi v. Walker*, 2 Barn. & Cr. 861; *Page v. Townsend*, 5 Sim. 375.

which may include a mere discoverer, of the idea of another, as well as a creator. Under the patent laws, prior foreign use of an article, patented in good faith, in this country, is no defense, unless it was described in a prior printed article or publication. No more cogent appreciation of the international fluidity of writings would be possible than that evidenced by this section of the patent laws, and the absence of similar provisions in the copyright laws is deemed significant.

publication  
or use.

If the view that first publication of a work must be made in the United States be sound, a contemporaneous domestic and foreign publication would satisfy this requirement.<sup>29</sup>

§ 758  
Simultaneous  
publication  
is first  
publication.

In an English decision,<sup>30</sup> it was said that in view of its consequences, if established, proof of prior foreign publication must be clear and convincing.

§ 759  
Proof of  
foreign  
publication.

The notice of copyright required by the present Act must be affixed to every copy of a work published or offered for sale in the United States, except in cases of ad interim copyright. Notice need not be affixed to copies published abroad<sup>31</sup>—even by the proprietor.<sup>32</sup> Since works deposited in the Copyright Office are “published,”<sup>33</sup> it would seem the notice should be affixed to such works and this is especially important where, through one reason or another, it is desired to rely on this deposit as constituting the required statutory publication.

§ 760  
Notice of  
copyright:  
when  
requisite.

As the proprietor of a copyright should not be held responsible for acts of persons not in privity with him, the failure to annex notices of copyright

29—Francis, Day & Hunter v. Feldman, (1914) L. R. 2 Ch. 729; Cocks v. Purday, 5 C. B. 884; Buxton v. James, 5 De G. & Sm. 80; Boosey v. Purday, 4 Exch. R. 145.

30—Ex parte Davidson, 18 C. B. 297, 311.

31—Harper v. Donohue, 144 F. 491.

32—United Dictionary Co. v. G. & C. Merriam Co., 208 U. S. 260, 52 L. ed. 478.

33—See § 324.



§ 761  
Unauthorized  
foreign  
publication.

to copies, not published, or offered for sale by his authority, is immaterial.<sup>34</sup> Similarly, a foreign publication, without the consent of the author, cannot affect his rights in the United States.<sup>35</sup>

(b) REGISTRATION OF COPYRIGHT

§ 762  
Registration  
of copyright.

*Section 10. That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in Section 55 of this Act.*

§ 763  
Certificate of  
registration.

With the possible exception of the instances discussed under the following section,<sup>36</sup> copyright no longer arises on the deposit of copies, as under the former statutes,<sup>37</sup> but vests upon publication of the work with the prescribed statutory notice upon it.<sup>38</sup> Registration of such copyright continues to be essential, however, for while the language of this section appears permissive, the language of Section 12, which also deals with registration, in connection with the deposit of copies, is mandatory.<sup>39</sup> The question as to what are the consequences of a failure to register a work under the present Act, is dealt with in connection with the discussion of that Section.<sup>40</sup>

§ 764  
Registration,  
essential.

§ 765  
Who may  
obtain certifi-  
cates of  
registration.

The Section, in its reference to the persons who may obtain registration under it, appears to refer to all persons comprehended within the language of Section 9.<sup>41</sup> It does not appear to include persons

34—Bouccicault v. Wood, 2 Biss. 34 (semble).

35—Bouccicault v. Wood, 2 Biss. 34 (semble); Shook v. Neuendorff, 11 N. Y. Daily R. 985.

36—See § 766.

37—See §§ 734, 789, 731.

38—See § 729.

39—See § 788.

40—See § 789.

41—See § 729.

who obtain copyrights under Section 11. This omission appears to have a direct bearing upon the question as to who can obtain certificates under Section 55 of the Act, a question which is discussed in connection with that section.<sup>42</sup>

(c) AS TO WORKS NOT REPRODUCED IN COPIES FOR SALE

*Section 11. That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under Sections 12 and 13 of this Act, where the work is later reproduced in copies for sale.*

§ 766  
How copy-  
right may be  
obtained in  
certain works  
not repro-  
duced in  
copies for  
sale.

The questions which arise under this section of the law present matters of great commercial importance and of equal legal doubt. The matters in question hinge primarily upon whether the copyright contemplated by this section is in unpublished, or published, works only. There are at least four possible views which may be taken of this Section: (a) that it only contemplates copyright in works, unpublished prior to copyright; (b) that it contem-

§ 767  
The question  
discussed  
whether this  
section refers  
to published  
or unpub-  
lished works.

42—See § 1629.



plates copyright only in published works, not reproduced in copies for sale; (c) that it contemplates copyright in unpublished works of the classes specified therein, save in the case of motion pictures but only in published motion pictures; and, (d), that it contemplates a sort of reinforced common law copyright, which view, however, merely, it seems, deals with the effect of the section and not with its subject matter, save in so far as it, having the historical common law copyright in mind, assumes it to be in unpublished works. The Copyright Office has taken the first view.<sup>43</sup> So, although with difficulty, has Mr. Bowker, in his work on Copyright.<sup>44</sup> He also takes the last view suggested. On the other hand in the only adjudicated case which discusses the matter, Hough, J., was of the opinion<sup>45</sup> that this section referred to published works, not however reproduced in copies for sale.

Before proceeding to a critical examination of the question, a few general observations on the section are necessary.

§ 768  
Scope and  
effect of the  
section as  
originally  
enacted.

As originally enacted, the section contained no express reference to motion pictures. It called therefore, in every case covered by it, for the deposit of at least one copy of the work, in the Copyright Office, with claim of copyright, since a "photograph or identifying reproduction of a work of art, etc.," would, almost certainly, be deemed a copy thereof within the technical use of the word copy made in the preceding sentence. According to cases previously cited, the deposit of the requisite copy would be a publication of the work,<sup>46</sup> so that before the passage of the amendment of 1912,<sup>47</sup> the question under discussion was not important.

§ 769  
Its amend-  
ment in 1912.

43—Copyright Office Regulations, 1, 17.

44—Page 179.

45—*Universal Film Co. v. Copperman*, 212 F. 301, aff'd on another point, 218 F. 578.

46—See § 324.

47—Act of August 24, 1912.

In 1912, however, provision was made permitting the deposit of a title and description, with prints taken from each scene or act of a photoplay or from two different sections of a complete motion picture other than a photoplay, instead of a copy of such works, if copyright were sought under this section. It is the situation created by this amendment that has chiefly complicated, and given importance to, the question under discussion.

It is to be noted that only a limited number of classes of works are covered by Section 11. Books, for example, other than dramatic works, are not covered by it. The works that are mentioned in it have all one common characteristic, that is, they are in their nature primarily adapted for representation, presentation or exhibition. The works chiefly designed to be covered by the section were dramatic and artistic works and these, except in the case of photographs perhaps, are not usually reproduced in copies for sale, nor are they normally "published," having due regard to the doctrine that mere exhibition or performance, though public, is not publication.<sup>48</sup> Such works under the common law, if unpublished, enjoy a very substantial degree of protection,<sup>49</sup> so great in fact, that under past statutes, permissive statutory copyrights in various classes of such works, were the exception rather than the rule.

There are three great difficulties with common law copyright, however, (a) the proprietor may at any time, to his surprise, learn that something he has done has amounted to a publication and ended his rights; (b) if his title is challenged, he may, in the absence of registration, especially after lapse of time, have difficulty in procuring evidence of title, and (c) in case of infringement, he can only procure

§ 770  
Nature and subject matter of works covered by the section.

§ 771  
Their protection at common law.

§ 772  
Limitations on common law protection.

48—See §§ 348, 356, 396.

49—See § 438.



§ 773  
General observations on reasons for preferring statutory, to common law protection.

actual damages, not penalties or fixed damages, and often, though damaged, he cannot prove actual damages, technically. These considerations may well induce the surrender of a common law copyright and the taking out of a statutory one. Their existence is the true reason for copyright legislation. Thus the Statute of Anne was passed because of the desire for effective remedy, by way of penalties,<sup>50</sup> against infringement. On the other hand, a common law copyright is perpetual, if there be no publication<sup>51</sup> and under our Constitution, a statutory copyright must be limited to time.<sup>52</sup> Imitation or copying, in subtle form, which may, or may not, amount to piracy, is rendered more facile by statutory copyright, which makes copies accessible to the public. An enlightened public policy, however, while recognizing the logical right of an author in and to his work, also recognizes the great public interest in seeing that the ideas embodied in such works may be made accessible to the public, at least in some degree, so that the progress of science and the arts may be promoted thereby, which generally could not be the case as long as such works remained strictly private, that is to say, unpublished. The tendency has been to strike a mean between such public and private interests, by leaving it to the author to determine whether he chooses to rest upon his inherent rights, or whether he chooses to obtain statutory rights from the public, as embodied in Government, and, in return, make his work public, that is, to publish it.

§ 774  
The general scheme of vesting of copyright under the present Act.

Since Congress, conscious of the historical boundary between common law and statutory copyright,<sup>53</sup> had fixed on publication as the basis of copyright under the statute,<sup>54</sup> it became necessary to furnish

50—*Millar v. Taylor*, 4 Burr. 2350, per Aston, J.

51—See § 270.

52—See § 121.

53—See §§ 247-263.

54—See House Report 2222, referred to elsewhere (§ 78).

machinery for copyrighting works upon the same basis, where such works were of classes, which for commercial reasons, were ordinarily not published. This was not essential under prior statutes, where registration was made the basis of copyright, but provision had to be made for this, when the change in theory of statutory copyright was made, to which attention was directed elsewhere.<sup>55</sup> By initiating copyright in such cases on the deposit of copies, the same result was reached, however, since such deposit was a technical publication.<sup>56</sup> This statutory scheme is further indicated, with reasonable clarity, by Section 12 of the Act, which appears to provide that "*after copyright has been secured by publication of the work with notice of copyright as provided in Section 9 of the Act*" there was to be promptly deposited, *if the work was not reproduced in copies for sale*, "the copy, print, photograph or other identifying reproduction provided by Section 11 of the Act."<sup>57</sup> It will be noted that this language was appropriate to Section 11, before the inclusion of motion pictures, *eo nomine*. It was further emphasized by Section 23 of the Act, which alone fixes the duration of copyright and provides this shall be twenty-eight years "from the date of publication of the work."

The Courts had held that the term "photographs" covered and included motion pictures,<sup>58</sup> so that as Section 11 stood before the amendment of 1912, motion pictures were included, although not specifically mentioned. But a motion-picture film costs money and even the single copy required before the section was amended, represented a fairly substantial investment. Therefore, although this was by no means the ostensible ground for the amendment,

§ 775  
Practical reasons for the amendment of 1912.

55—See § 731.

56—See § 324.

57—See § 788.

58—American Mutoscope, etc., Co. v. Edison Mfg. Co., 137 F. 263.



which, on the contrary, purported to put motion picture men on an equality with proprietors of other plays, the section was amended, so as for the first time to require, not the filing of copies, but, titles, descriptions, and prints from different portions of motion pictures, on the copyright of such works under Section 11. This is a much cheaper method of procedure than the deposit of a copy. Section 12 was not amended at the same time at which Section 11 was, but the phrase "identifying, reproduction" used in it, when speaking of Section 11, may be broad enough to include the matter now required to be deposited under it, in the case of motion pictures. It would seem, then, that if Section 11 refers to published works, in every case of copyright under it, except motion pictures, the deposit of the requisite copy satisfies any requirement of publication, provided it bear the notice of copyright referred to in Section 9 but that in the case of motion pictures, whether photoplays or otherwise, since what is to be deposited since 1912 is not a copy, an independent precedent publication prior to deposit is requisite, if publication is required in cases of copyright under this Section.

§ 776  
Effect of deposit of works, other than motion pictures, in obtaining copyright under this section.

§ 777  
Discussion of theory that Section 11 refers to unpublished works or reinforces common law copyrights by statutory protection.

The view that the section refers to unpublished works appears to rest, partly upon certain phrases in the statute, partly upon what its framers probably had in mind in connection with early drafts of the Act, and also upon a conception that works which are not reproduced in copies for sale, cannot be published and, hence, that the section can only refer to unpublished works. But there is nothing in the nature of the works enumerated in Section 11 which would render them incapable of publication and a copyright in any work incapable of publication would seem a contradiction of terms, upon its face. This section refers to the situation which exists at the time when statutory copyright is sought. It deals, not so much with what can be done with the

works to which it refers, as with what has, or has not, been done with them, prior to that time. Any conception therefore, that the works enumerated in Section 11 cannot be published, would appear demonstrably fallacious. Mr. Bowker<sup>59</sup> deems that this section confers "a common law copyright, fortified by statutory protection, an ideal example of copyright law." Unfortunately, he adduces no reasons for the view of the section so taken by him. It will be noted that his position goes beyond that necessarily taken by the Copyright Office, as he deals with the nature of copyright under Section 11, while the Copyright Office's view only, necessarily deals with the possible subject matter of copyright under that section. Mr. Bowker,<sup>60</sup> in support of his views, suggests first, that this section makes "a grant" "for protection under the common law rather than a statutory and limited grant of privilege" and in the following paragraph advances the alternative view that Congress is "here not making a grant but is offering statutory protection to the inherent right of an author in his unpublished work." An examination of the Report of the House of Representatives Committee in charge of the Act, shows that Congress had neither of these views in mind when the Act was passed.<sup>61</sup>

Mr. Bowker's view appears to do palpable and unnecessary violence to the language of the section and to the whole scheme of the statute. There is no language in the statute, which, in terms, provides for more than one kind of copyright under the statute. Copyright is nowhere defined in the Act, but, since, as has been pointed out,<sup>62</sup> statutory copyright consists of the rights, or incidents thereto, conferred by the statute which creates it, and since the section

59—Page 145.

60—Page 180.

61—See § 78.

62—See § 143.



of the statute enumerating these is general, copyright under the statute, once obtained, is one and the same thing in all cases, under whatever section of the statute it is procured.

This result is not affected by differences in requirements as to registration or re-registration, as the nature of the right secured, as distinguished from its record, is definite and distinct. Evidence of this, if needed, is found in the fact that this section (11) elsewhere provides for the re-registration of works copyrighted or registered under it, but does not provide for a new copyright on such re-registration, the copyright merely continuing on re-registration, the same after, as before. Section 2 preserves common law rights in unpublished works and Congress in that section was careful not to use the term "copyright" in connection with the rights so preserved, thus avoiding possible confusion. The language of Section 2 refers to an existing right; the language of Section 11, to future rights. The words "copyright may also be had," with which Section 11 begins, would be a curious method of phrasing, with respect to an existing right. Such language would also be a strange way of saying that the holders of common law copyrights were to be entitled to the remedies of the Act. The language used does not fit any such intention but plainly points in the opposite direction. The words used furnish persuasive internal evidence that Congress intended to create rights under Section 11 and not merely to recognize existing rights, as it had under Section 2. The whole scheme of the statute, evidenced on comparing Sections 9, 10, 11, 12 and 23 of the Act with one another, and, in turn, contrasting these sections with Sections 4952 and 4956 of the Revised Statutes (which such provisions of the existing statute supersede), shows that under the present statute, copyright was to be secured by publication with notice and not merely on registra-

tion, as had been the case formerly. Such a statutory scheme is harmonious and conforms to the historical, technical theory that publication is the end of common law, and the potential beginning of statutory, copyright.<sup>63</sup> The difficulty with the view that this section does not create copyrights but merely gives statutory protection to existing common law rights is, firstly, that it in no way corresponds to the language of the section nor, secondly, to the scheme of the statute.

It may further be suggested that if the copyright covered by Section 11 were merely common law copyright, the rights of the proprietor would only be those existing at common law and not those set forth in Section 1, which constitute statutory copyright; otherwise, the scope of his right, as distinguished from remedies for its protection, would be increased, and hence cease to be solely a common law right. This result would probably be thoroughly unpalatable to proprietors of such copyrights, especially, in view of the fact that they would always, except where their works were motion pictures, be open to the contention that the deposit of a copy in the Copyright Office was a publication which worked its usual result. This would seem to lead to the apparently absurd conclusion that the common law right was lost by the very action which was intended to protect it, without procuring the statutory right which would, were it not for this view, if sound, accrue on the act of publication.

As for the alternate view that this section contemplates a statutory copyright in unpublished works, it may be said that this view is open to much the same objections. There is, admittedly, an additional and very serious argument against it, which also appears to be an almost insuperable obstacle to deeming that the section can refer to works which

63.—See §§ 246-263.



are not published before, or on, copyright under it. The only provision in the statute as to the duration of "the copyright secured by this Act" is that it shall be 28 years "from the date of first publication." Unless, then, Section 11 refers to published works, or works which are published on a copyright being taken out under it, no duration would be fixed for the copyright which may be had thereunder, and such a copyright would be beyond the powers of Congress to grant, since it may only secure such rights to authors for limited terms.<sup>64</sup> It would seem that even a view that Sections 23 and 11 when construed together (if the view that Section 11 refers to unpublished works, were to prevail), were intended to grant copyrights until publication and for 28 years thereafter, would not cure this difficulty, since, as publication might then never take place, such term would not seem limited, in point of time, as required by the Constitution.

Confronted with this difficulty of the duration of copyright under Section 11, the Copyright Office, despite its view that the section is designed to create copyright in unpublished works, issues certificates stating the copyright to be for 28 years, but without mentioning the initial date. This would, presumably, be the date of the certificate and this in turn, would, normally, be substantially the date of deposit, and, hence, publication, where a copy is deposited. There is no apparent warrant, in the statute, for this action of the Copyright Office, with respect to moving pictures in any event, unless the view be correct, that this section refers to published, and not to unpublished, works; but its action in this respect is virtually an admission that publication is requisite, or must be incident, to all copyright under the statute.

64—See § 81.

Mr. Bowker,<sup>65</sup> in an effort to meet this difficulty, suggests, apparently, that first performance of a work may be deemed the equivalent of first publication for the purpose of fixing the beginning of the statutory term provided for in Section 23. He says "in any event the author has clear rights for 28 years from the date of publication or the date of first performance, whichever the earlier." Pains-taking effort has been made to find any language in the statute, or any judicial authority, sustaining this view. The decisions, save as based upon special language of English statutes, not found in the present Act, are to the precise contrary<sup>66</sup> and there is no provision in the Act which appears to lend itself to this view. It was probably based on the fact that the earlier English statutes provided, in effect, that the copyright term should run from the time of the first performance of a dramatic work and upon inadvertent conclusions drawn from cases construing the provisions of these Acts.<sup>67</sup>

Other clauses in the Statute may, however, be deemed to support the theory that this section refers to unpublished works only. The phrase, "privilege of registration of copyright under this section," used in Section 11 is confusing and has, doubtless, been parent to much of the perplexity caused by the section. Since, however, the section both purports to confer copyright and also, partially, provides for its registration, there is no necessary reason for laying undue emphasis on the language in question. It may also be argued, although this seems doubtful, that this phrase shows the section is merely intended to cover the registration of copyrights obtained in accordance with Section 9, in cases where works are not reproduced in copies for sale, which would lead

65—Pages 179, 180.

66—See § 348.

67—3 and 4 William IV. c. 15; 5 and 6 Vict. c. 45.



to the result, that Section 11 applies to published works.

The other phrase which requires discussion in this connection, will be found at the end of Section 60, with reference to the disposal of copyright deposits, reading: "That no manuscript of an unpublished work shall be destroyed during its term of copyright without specific notice to the copyright proprietor of record, permitting him to claim and remove it." This language can only fit Section 11 of the Act and although not noticed in, or discussed by, any decision or text writer, it, at first impression, appears to sustain the views of Section 11, entertained by the Copyright Office and Mr. Bowker.

Fortunately, however, there is some extrinsic evidence available, which appears highly significant, both as to the reason why this provision is in the Act, and also as to the proper construction to be given this section.

It has been held that a badly expressed and apparently contradictory enactment (and this section is both) may be interpreted by a reference to the Journals of Congress, where it appears that the peculiar phraseology in question, is the result of an amendment introduced without due reference to language in the original bill.<sup>68</sup> This rule may be invoked with benefit at this place.

An examination of the original Bill<sup>69</sup> presented to Congress and a comparison of its language with that of this section is illuminating. As originally drafted, Section 11 of the Act was part of Section 10 and *dealt solely with registration.*

Section 10 of the proposed Bill read as follows:

"That such person" (referring to the proprietor of the copyright under Section 9) "may

68—Blake v. National Bank, 23 Wall. 307, 23 L. ed. 119.

69—Copyright Office Bulletin 12; Senate B. 6330; H. B. 19853; 59th Congress, 1st Session.

obtain registration of his claim to copyright by complying with the requirements prescribed in this Act; and such registration shall be prima facie evidence of ownership.

“Registration may also be had of works, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of the title and one complete printed or manuscript copy of such work if it be a lecture or similar production, or a dramatic or musical composition; or a photograph or other identifying reproduction thereof, if it be a work of art, or a plastic work or drawing; the notice of copyright in these latter cases being affixed to the original before publication as required by Section 9 above. But the privilege of registration secured hereunder shall not exempt the copyright proprietor from the requirement of deposit of copies under Section 11 herein where the work is later reproduced in copies for sale.”

The language quoted from Section 62 comes unchanged from the original draft of the bill and was quite harmonious with the remainder of the original draft. It will at once be noted that, while the original draft of the bill only purported, in this section, to confer the right of registration of a claim to copyright, that is, of an existing right, the section, as enacted, purports to confer copyright. This change in language appears too significant to be deemed accidental. It will further be observed that the section, *as proposed*, may well have been designed to cover common law copyrights in unpublished works. This view is strengthened by the fact that the proposed bill contained a section (Section 21) giving protection by way of injunction and damages for infringement of unpublished works, of a very different character however, from the protection given in the case of published works, which



section was stricken out when the bill, as introduced, was amended into its present form. The term prescribed for copyrights in the original draft did not refer to unpublished works, thus making it clear that the proposed Act in referring to unpublished works did not intend to put them on a parity with published productions but merely to give them the privilege of registration and protection, in the Federal Courts, by way of injunction and damages. A comparison of the differences, between what was proposed, and what was enacted, appears to make it clear that the efforts made by the authors of the bill, which later ripened into the Copyright Law, to have it apply to unpublished, as well as to published works, did not find favor in the eyes of Congress and that only unskillful amendment has caused doubts to be expressed where none, in view of the manifest legislative intent, should really exist. If, however, the word "unpublished," as used in Section 60, be construed, "unpublished before the time of deposit under Section 11," the quotation in question presents no difficulties to what appears the proper solution of the question, since motion pictures, which are the only class of works, covered by the section, of which copies need not be deposited, are certainly not manuscripts. Since the phrase was apparently overlooked, because of its location in the statute, when the amendments, to which attention has been called, were made to the original draft, judicial ingenuity may doubtless be safely entrusted with the task of properly construing this survival of the original draft of the Act.

§ 778

The view discussed that this Section refers both to published and unpublished works.

Reference has been made to a possible view that this section may refer to unpublished works save in so far as it refers to motion pictures but with reference to these, it contemplates prior publication. This view, which is suggested, rather than definitely formulated, in the opinion of the lower court, in

*Universal Feature Film Co. v. Copperman*,<sup>70</sup> rests upon the somewhat tenuous basis of the punctuation of the section. It did not find favor with the Circuit Court of Appeals<sup>71</sup> and may be deemed doubtful. It may be said that it is to be regretted that the Circuit Court of Appeals, in the decision cited, did not discuss the lower Court's view that Section 11 only refers to published works, thus leaving the question open whether it would so hold, if the question were essential to its decision of a given cause.

While in the absence of decisions fully discussing the matters set forth herein and finally passing thereon, the question as to the proper scope and application of this section is of the utmost difficulty and full of doubt, it is deemed, that, having regard to Constitutional limitations, the language of the section and the general scheme of the statute, this section applies to published works only,<sup>70</sup> creates a copyright therein, and does not merely fortify a common law right with new remedies. The only expression of judicial opinion available,<sup>70</sup> appears to support this view, and many of the suggestions in its favor contained in this work, do not appear to have been before the Court when it rendered its opinion.

It is deemed, however, that under a proper reading of the language of this section, it may well be held that the publication requisite may be contemporaneous with registration, that is to say, that the deposit of the prescribed copy in the Copyright Office is sufficient publication of the work and that, if there has been no prior publication, the copyright will date from the time of deposit of the copy. Such a publication would arise in the case of all works mentioned in the section, save motion pictures, where under the section, a copy is not to be deposited. As to the latter works, it would seem an

#### § 779

The opinion expressed that this section does not refer to works unpublished after copyright.

#### § 780

The view expressed that the publication, essential to copyright under this Section, may be contemporaneous with registration.

<sup>70</sup>—212 F. 301.

<sup>71</sup>—218 F. 578.



independent publication, with notice, would be essential prior to deposit, and, since the commercial interests involved in motion pictures are large, it would seem wise to err on the side of taking every precaution in this connection.

§ 781  
Meaning of words "not reproduced 'in copies' for sale."

A question of no little importance, is the meaning to be attributed to the words, works "of which copies are not reproduced, for sale," with which Section 11 alone deals. As has been previously pointed out, the word "sale" as used in the Act does not appear to be limited to technical sales, but also covers public distribution, not technical sales.<sup>72</sup> Whether this extended construction will be given to the word, as here used, is an open question. It is a little difficult to see why works reproduced in copies for lease, exchange, gift or any other purpose, in the course of which their possession will pass into the hands of the public, should not stand on the same basis as works reproduced in copies for technical sale. If so, they would not be copyrightable under Section 11, but would only be copyrightable under Sections 9, 10 and 12. While this result would appear just, as the proprietors of works reproduced in copies for any such purposes should, it would seem, stand on one and the same footing, it is uncertain whether, or not, such a construction of the Section will prevail.

§ 782  
Works covered by Section 11.

The scope of the section, with reference to the copyrightable media covered by it, is relatively limited. Thus it does not apply to books, periodicals, maps, prints or pictorial illustrations, and possibly not to reproductions of a work of art, but does cover the other classes of works specifically enumerated in Section 5.<sup>73</sup>

§ 783  
What is a description of a work.

It will be noted that the section calls for the deposit of a "title and description of the work," if a moving picture be copyrighted under it.

72—Section 62.

73—See § 528 *et seq.*

In an English case,<sup>74</sup> in considering what the requirements were of a statute which provided for "a short description of the nature and subject of a work" in connection with its registration, the Court deemed the object of such a requirement to be to enable a person who had it before him to judge whether the registration applied to a work which he intended to copy. The Court, accordingly, held the requirements of such a statute were satisfied by describing a work as "a painting in oil," plus its title if not over-fanciful.

A somewhat less liberal rule has been applied in the United States. Thus, it has been held,<sup>75</sup> that where a statute required that a description of a photograph be furnished and a copy of the work be filed, on registration, merely filing a copy, although this was "in itself a description" was an insufficient compliance with the statute to support an action for penalties under it. The penal nature of the statute involved in the decision cited, and the nature of the action in which it was rendered, make it doubtful, however, whether this decision would be followed under the present Act, in preference to the English case cited.<sup>74</sup>

No machinery is provided for any judicial action by the Copyright Office here, any more than elsewhere in the Act, and every copyright proprietor who acts under Section 11 does so at his peril, in being able to prove, subsequently, that his work was not, at that time, reproduced in copies for sale. The practice of the Copyright Office in issuing certificates under this Section is discussed elsewhere.<sup>76</sup>

In a recent case,<sup>77</sup> it was said that the effect of the amendment of 1912 was to allow separate copyrights

§ 784  
The functions of the Copyright Office with respect to copyrights under this Section.

§ 785  
Separate copyrights in different mani-

74—Ex parte Beal., L. R. 3 Q. B. 387.

75—Bennett v. Carr, 96 F. 213.

76—See § 1616.

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



festations of  
said work.

in a drama expressed in words and the same work expressed in motion pictures, but it may well be doubted whether this was not also the law, prior to the passage of the amendment.

The section in cases where it may be utilized, merely furnishes a convenient and cheap method of copyright and attempts to stretch it beyond its patent scope should be discouraged, whilst its legitimate use should be favored.

§ 786  
Copyright un-  
der Section  
11 is not ex-  
clusive.

It scarcely need be said, although this was questioned, that motion pictures as well as the other works enumerated in Section 11, may be copyrighted under Section 9, instead of under Section 11, if they have been previously published.<sup>78</sup>

Except as to motion picture films, whatever the final construction which will be given to Section 11 in general, little practical difficulty can arise. With respect to such films, however, the need for abundant caution should be apparent to all proprietors who chose to register under the section.

§ 787  
Re-registra-  
tion of copy-  
rights pro-  
cured under  
Section 11.

Finally, by the express provisions of the section, copyrights procured thereunder must be re-registered by the deposit of copies under Section 12, if the work is reproduced in copies for sale, at any time, after initial copyright. The possible extended meaning of "sale" in this connection has been pointed out.<sup>79</sup> The original copyright is neither extended nor otherwise affected, by such re-registration. No time is specified within which such copies must be deposited on re-registration but it would appear, by fair implication, from the language of Section 12, that copies should be deposited "promptly," after they are so reproduced, placed on sale, sold or publicly distributed. No express penalty is prescribed for non-compliance with these requirements. The consequences of a failure to register in compliance with the statute, is a subject

78—Universal Film Co. v. Copperman, 212 F. 301.

79—See § 781.

which may most conveniently be dealt with as an entirety and is discussed elsewhere.<sup>80</sup>

(d) DEPOSIT OF COPIES OF WORK

*Section 12. That after copyright has been secured by publication of the work with the notice of copyright as provided in Section 9 of this Act, there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work to be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in Section 15 of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction provided by Section 11 of this Act, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.*

§ 788  
Deposit of  
copies, after  
copyright.

Under Section 4956 of the Revised Statutes, no person was to be "entitled to copyright," unless he made the required deposit of copies, on or before

§ 789  
The question  
discussed as  
to what the  
effect of a

<sup>80</sup>—See § 789.



failure to  
deposit copies  
is.

the day of publication. This language admitted of but one construction and the law was well settled that failure to make the required deposit defeated any alleged copyright.<sup>81</sup> The present Act differs, radically, both in scheme and language, from the former one and the initial question presented by this section is, what are the consequences of a failure to comply with the requirements of the present Act with respect to registration. This must be considered doubtful in the absence of express decision. While the general opinion appears to have been that the rules of law applicable to the question remain unchanged, there are statutory differences which do not appear to have been remarked.

Under the present Act, the deposit of the requisite copies or copy is required to be made "promptly," after publication, and persons entitled to copyright, are to "have it, upon complying with the provisions of the Act."<sup>82</sup>

It would seem probable that under this provision, if it stood alone, under the cases cited,<sup>81</sup> a failure to make the requisite deposit promptly, would defeat a copyright, even though it had previously vested. But the last sentence of Section 12 and the following Section (13), complicate the question.

The last sentence of Section 12 provides that no action or proceeding shall be maintained for infringement, until after compliance with the statutory requirements of deposit and registration. Under the former English Statute,<sup>83</sup> a somewhat similar provision was held to permit registration at any time before suit brought, without affecting a right of action for past infringement,<sup>84</sup> or the

§ 790  
The prior  
English law.

81—Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; Callaghan v. Myers, 128 U. S. 245, 32 L. ed. 426; Belford v. Scribner, 144 U. S. 488, 36 L. ed. 514; Baker v. Scribner, 2 Blatch. 39.

82—Section 1.

83—5 and 6 Vict. c. 45, s. 13.

84—Goubaud v. Wallace, 36 L. T. N. S. 704.

validity of the copyright. Failure to register only affected the right to sue and in no way affected the copyright.<sup>85</sup> This result was, however, a necessary consequence of the express provisions of that Act, which, after requiring registration or entry, without, however, specifying any time within which it was required to be made, said:

“Provided always that the omission to make such entry shall not affect the copyright in any book but only the right to sue or proceed in respect of the infringement thereof as aforesaid.”<sup>86</sup>

Under this statute registration on the same day as when suit was instituted, but at a time before the suit was started, was held sufficient.<sup>87</sup> In such a case, the actual hour of registration may be proven.<sup>87</sup> This is in accordance with the rule that where a statute provides that certain acts are to be done in a certain order, if they all appear to have been done on the same day, the Court will presume they have been done in the prescribed order.<sup>88</sup>

Section 13 provides that should the copies called for by Section 12 not be deposited promptly, the Registrar of Copyrights may, on demand, require their deposit and if this is not made within three months, if sent from the continental United States, or, within six months, from any outlying territorial possession or foreign country, the copyright proprietor is to be liable to a fine, “and the copyright shall become void.” Section 13 was, obviously, designed to ensure that copies of all published works

§ 791  
The possible bearing of Section 13 upon the question.

§ 792  
Discussion of Section 13.

85—Effect failure to register. *Low v. Rutledge*, (1864) L. R. 1 Ch. 42; *Stannard v. Lee*, L. R. 6 Ch. 346; *Hogg v. Scott*, L. R. 18 Eq. 444; *Chappell v. Davidson*, 18 C. B. 194.

86—5 and 6 Vict. c. 45, s. 13.

87—In this respect the American Acts have always differed from the former British Act where it was held the object of registration was not notice to the public. See *Cate v. Devonshire Newspaper Co.*, L. R. 40 Ch. D. 500.

88—*Callaghan v. Myers*, 128 U. S. 617, 32 L. ed. 547.



should be available to the Library of Congress. The section is an amplification of Section 4960 of the former Revised Statutes but the earlier statute simply provided a fine for failure to make the requisite deposit, if required by the Librarian. The present Act, in this respect, marks a return to the provisions of the Act of March 3, 1865.

No cases have been found however, construing the provisions of that Act, in respect to the subject under discussion. If it still be the law that failure to comply with the provisions of the Act for the prompt deposit of copies, avoids any copyright, it appears difficult to understand why the copyright should, under Section 13, be treated as apparently still subsisting and only to become "void" at the expiration of a somewhat lengthy time, after a more or less problematical demand.

The object sought by compelling registration is that third persons, by inquiry, may ascertain whether, or, not, any proposed acts or works would violate any existing statutory copyright. The primary object of requiring the deposit of copies is that the subject matter of works in which copyright is claimed, may be made public and available, for purposes both of information and of avoiding infringement. A purely secondary object is the enrichment of the Library of Congress. The primary purpose would be entirely defeated unless the deposit were made "promptly." If the only necessary effect of failure to make the deposit, "promptly," were to prevent the institution of suit, until the deposit was made, the statute would become, as the former English one was justly called, a mere snare for the unwary, who were foolish enough to rely upon absence of registration as showing absence of copyright.

Having in view the patent objects sought to be realized by Section 12, the language of Section 1,

and the cases cited,<sup>89</sup> it might be deemed that, unless the language of the concluding portion of Section 12 and Section 13 prevents, the Courts would hold a failure to make the deposit promptly avoids the copyright.

In examining Section 13 critically, one is struck by the length of time afforded for compliance with it. The difference between "promptly" and three to six months is suggestive. So is the object of the section, which is not so much the affording of quick information to the public, so that infringement may be avoided, as that the work may be permanently accessible, if desired, in the Library of Congress. This object cannot be realized by mere deposits in the mails, especially foreign mails, but only on actual deposit in the Copyright Office. The section is, accordingly, barren of provisions permitting the deposit of copies in the mails in compliance with the demand authorized by the section and ample time is allowed for the actual deposit of copies in the Copyright Office. Section 12, on the other hand, permits mailing, as this, in the great majority of cases, will ensure the copies reaching the Copyright Office. Section 59 of the Act provides that of the articles, "deposited in the copyright office under the provisions of the copyright laws," the Librarian of Congress shall determine what shall be transferred to the permanent collections of the Library. If, then, Section 13 be construed to cover cases where copies are mailed, but do not reach the Copyright Office, the provision for avoiding copyrights in such cases, if copies are not furnished on demand, would be necessary and intelligible and, if limited to such cases, it would fit into the apparent general statutory scheme. It may also be suggested that a failure to comply with Section 12, under Section 1 renders the copyright unenforceable, by depriving

89—See § 789.



§ 793  
Uncertainty of  
present law  
as to effect  
of failure to  
register be-  
fore demand.

§ 794  
Innocent in-  
fringement  
before regis-  
tration.

it of all the exclusive rights that alone give it value, thus protecting the public but that such copyright might remain technically in being, unless avoided under Section 13, for the purpose of enabling the National Library to be built up, without raising serious constitutional questions as to the right of Congress to require the deposit of works in which the copyright has ceased, but this appears doubtful. These suggestions are largely tentative. The language of these sections points one way; their object, another. The Courts have before this refused to follow the literal reading of the Copyright Act to effect its apparent object.<sup>90</sup> It may well be they will do so again in connection with this question. In view of these doubtful provisions, it would seem that an adjudication of the important question of the effect of a failure to comply with the provisions of Section 12 is most desirable, at an early date.

If the Courts ultimately hold that non-compliance with Section 12 is only penalized by inability to sue before registration, the question will arise as to the status of persons innocently infringing a copyright in the interval between publication and ultimate registration. Since good faith is no defence to infringement, this cannot be regarded, but such matters, if they arise, may be disposed of on principles of estoppel<sup>91</sup> or, it may be held that the effect of failure to register, while it continued, would be to prevent acts which take place in the interval and which otherwise might be deemed to infringe, from being infringement. This does not however appear to have been the English rule,<sup>92</sup> and the English decisions would almost certainly be followed in such

90—American Tobacco Co. v. Werckmeister, 207 U. S. 384, 52 L. ed. 257.

91—See 29 Opinions of the Attorney General (U. S.) 65.

92—Goubaud v. Wallace, 36 L. T. N. S. 704; Talbott v. Judges, 3 T. L. R. 398; Schové v. Schmincké, 33 Ch. D. 546; Murray v. Bogue, 1 Drew 353.

case. These questions are merely suggested, as the present uncertainty of the main question involved, does not render their extended discussion, at this time, profitable.

The word "promptly," as used in this section, has been defined, says the Copyright Office,<sup>93</sup> as "without unnecessary delay." "It is not essential however that the deposit be made on the very day of publication." This quotation is probably a correct statement of the law and "promptness" would be, in each instance, a question of fact. While there are no copyright cases in point, it would seem that, except under extraordinary circumstances, the deposit should be made not later than the day after publication, to be safe, or, if this is not possible, within a reasonable time thereafter.<sup>94</sup> Whether this be law or not, common caution commends deposit as quickly after publication as possible in every instance.

The last sentence in this section was construed in two suits brought by the New York Times Co. against The Star Company,<sup>95</sup> and against the New York Sun Printing Association<sup>96</sup> in connection with Amundsen's discovery of the South Pole. The plaintiff's bill of complaint alleged publication with notice and that two copies of the best edition of its newspapers containing his account of his journey, when published, were about to be deposited by plaintiff in the mail. The suits, begun March 8th, where the copies were deposited March 9th, were held prematurely brought, under the express provisions of this section. These decisions were technically correct, were required by the very wording of the statute and caused by the apparent peculiarities

§ 795  
"Prompt"  
deposit de-  
fined.

§ 796  
Actions  
brought be-  
fore the de-  
posit of copies.

93—Regulations, 22.

94—See *McCleskey v. Howell Cotton Co.*, 147 Ala. 537, a noncopyright case, holding "promptly" means within a reasonable time.

95—195 F. 110.

96—204 F. 586.



§ 797  
The protection  
of exclusive  
news features  
in general.

of plaintiff's procedure. The complainant's contention was expressly overruled, that suits could be begun under the section, before deposit, but not prosecuted before registration, that is, that "maintained" did not include, and hence bar, initiation.

As has been previously pointed out, facts, news, cannot be copyrighted,<sup>97</sup> since they are public property, although the form in which they are expressed, i. e., the language in which they are clothed, may be copyrighted.<sup>98</sup> But the first publication of facts, from a journalistic standpoint, possesses great value. The only way such publication of such facts may, ordinarily, be prevented, if at all, is under the copyright law, although there are exceptional cases where the law of unfair competition has given relief. The cases, above cited, represent an effort, ineffectual as it was, to escape from the situation created for *The Times*, in the cases arising out of the discovery of the North Pole by Admiral Peary. Both the London *Times* and the New York *Times* had contracted with him for the right to publish his account of his journey in the first instance, simultaneously in England and the United States, respectively. Owing to the difference of time between London and New York, correspondents of the New York papers were enabled to cable synopses of the London *Times*' account before the editions of the same morning's United States papers had gone to press. The New York *Times*, however, had published the story in pamphlet, or book, form, before newspaper publication and had attempted to copyright this. A preliminary injunction issued by the United States District Court for the Southern District of New York, was dissolved, on hearing, on the ground that since the magazine and book rights in the account had, by the New York *Times* contracts, been reserved to Admiral

97—*Davies v. Boes*, 209 F. 53.

98—See § 601.

Peary, the New York Times had procured an unauthorized copyright, despite the fact that authority to protect the article in the United States, generally, had been conferred by the author on The Times. The United States District Court for Illinois, Grosscup, J., reached an opposite result, which, on the whole, appears sounder, since there could be only one copyright in the article in whatever form published and the parties appear to have intended that the Times protect the author's rights in this country.<sup>99</sup> Thus, the views underlying Judge Hand's decision appear to have been expressly disapproved, recently,<sup>1</sup> and on the other hand, in an earlier decision,<sup>2</sup> a copyright taken out in the publisher's name was held valid, where the contract between the author and the publishers contemplated copyright protection for the work and the publishers agreed to take the action necessary to secure their own rights, as well as those of the author. It is somewhat difficult to understand why copies of the newspapers in question, in the Amundsen cases, were not mailed before the affidavits were drawn, as, if this had been done, plaintiff might have obtained some protection.

The deposit required by the Section 12 may be made either directly in the Copyright Office, or in the mails. If made in the latter manner, and properly addressed, it is effectual from the time of mailing. No action on the part of the Copyright Office, or any of its officers, in refusing to receive the copies, or in returning them, or in refusing to register the copyright, can affect its validity, if the requisite deposit be made promptly in the mails. None of the machinery provided by the Patent Acts for quasi-judicial examination of inventions before patent, is

798  
Deposits by  
mailing.

§ 799  
Effectual  
when mailed.

99—These cases are reported in 76 *Publisher's Weekly* 643, 957.

1—*Photo Drama Motion Picture Co. v. Social Uplift Feature Film Co.*, 220 F. 694.

2—*Harper & Bros. v. M. A. Donohue & Co.*, 144 F. 491.



§ 800  
Evidence of  
mailing.

to be found in the Copyright Acts. Thus it has been held,<sup>3</sup> that the uncorroborated, but unimpeached, testimony of the plaintiff, that he mailed the copies required by statute, is sufficient to sustain a copyright, even though they are never received by the Librarian of Congress.

§ 801  
Receipts on  
mailing.

Receipts from the postmaster are provided for and the copies so deposited, are to be carried post free.

§ 802  
The mailing  
must be done  
in the United  
States.

While there is no express provision that the mailing required by Section 12 must be done in the United States, Section 14 appears, quite clearly, to indicate that this is the construction to be given this provision.

§ 803  
What is the  
"best" edi-  
tion of a  
work.

Save in the exceptional cases mentioned, two copies of the work must be deposited and these must be of the best edition published. What such edition is, is a question of fact in every case. The question whether the copies filed must be absolutely exact copies or whether substantial copies will do, does not appear to have been raised as yet. In conformity with the doctrine of such cases as *Black v. Henry G. Allen Co.*,<sup>4</sup> it is probable that substantial copies, if part of the best edition, would suffice, but it would seem that the omission, changes, errata or differences involved, must only be trifling and not such as affect the essence of the work, in any degree, for the doctrine to apply. On the other hand, in a decision involving questions of pleading, it was held<sup>5</sup> that complete copies of a work are not necessarily copies of the "best edition thereof then published."

§ 804  
Substantial  
copies.

§ 805  
Complete cop-  
ies: not nec-  
essarily of  
"best edi-  
tion."

§ 806  
Copies depos-  
ited need not  
be printed.

There is no requirement that the edition be printed.

Where separate articles were copyrighted and published in an encyclopedia, it was held the best

3—*Patterson v. J. S. Ogilvie Pub. Co.*, 119 F. 451.

4—56 F. 764.

5—*Crown Feature Film Co. v. Levy*, 202 F. 805.

edition requirement was satisfied, by cutting out the pages of the compilation comprising the articles and depositing such pages.<sup>6</sup> The copies deposited, must of course, be complete and should, it seems, on principle, and under the wording of the present Act, despite a contrary decision under the former act,<sup>7</sup> bear notice of copyright. If later, or better, reprints are published after copyright, there is no need to deposit copies of these, unless the work requires to be re-copyrighted.

§ 807  
Copies, part  
of other  
works.

§ 808  
Copies must  
bear notice of  
copyright.

§ 809  
Subsequent  
reprints.

§ 810  
The Amend-  
ment of 1914.

The provision that, if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country is to be deposited, which, if the work is a book or periodical is to be produced in accordance with Section 15, is the most recent amendment to the copyright law.<sup>8</sup> The amendment also provides: "All Acts or parts of Acts in conflict with the provisions of this Act are hereby repealed." The scope, effect and intention of this amendment are not readily apparent. If it was purposed by this provision to couple Section 21, referring to ad interim copyrights, with the general section referring to deposits of copies, it would seem plainer language might have been used. This is also true if a similar intention existed in connection with books published abroad in foreign languages, copyrighted under so much of the Act of March 3, 1905, as may be still unrepealed.<sup>9</sup> If, on the other hand, this amendment was an effort to bolster up contentions that first publication abroad, save in cases of ad interim copyright, was equivalent to first publication in the United States, the place and manner of the amendment seem equally unusual.

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

7—See § 877.

8—Act of March 28, 1914.

9—R. S. 4952 as amended, 1905.



The language used would also appear inapt for this purpose, as it does not refer to the foreign publication to which it alludes as being the initial, or first, publication, of the work. It should be remembered that this section primarily deals with the deposit of copyrighted works and not with their copyright. The deposit called for, is to be made *after* publication, with notice of copyright, "as provided in Section 9."<sup>10</sup> But, as previously pointed out, Section 9 only requires notices on works published in the United States.<sup>10</sup> This section it should be remembered, refers to a time succeeding the time when copyright vested or did not vest, under the previous sections. If a fundamental change in the law of domestic or foreign initial publication had been purposed, it would seem that a direct statement to that effect would have been inserted in the Act. A further curious feature of the amendment is that it is limited to works by foreigners, not citizens, published abroad. It does not include works of citizens of the United States, published abroad. It is inapplicable to proceedings under Section 11 of the Act and its reference to the manufacturing clause of the Act, excludes from its operation books published abroad in English.<sup>11</sup> Since American citizens are, apparently, discriminated against by this amendment, and such a construction should, if possible be avoided, it would seem that the amendment should be construed as narrowly as possible. This result might be effected by holding that it referred to the situation which might arise where there was a simultaneous, or subsequent, publication abroad, as well as a technical first publication in the United States. One of the oversights in the present statute is that no provision is made for ad interim copyrights in the case of books published abroad in foreign languages. Unless, as is extremely doubtful,

10—See § 729.

11—See §§ 838, 841.

the pertinent portion of the Act of March 5, 1905, remains in force, the proprietors of such works required relief. An interval of time may elapse between copyright and deposit of copies. Facilities for printing works in foreign languages, where special type are required, are more readily available abroad than here, as is recognized by the omission of such works from the clause making printing, etc., of other works in the United States compulsory. If the work is published abroad in such interval, this may be the publication to which allusion is made by the portion of the section under discussion. A technical first publication of such a work in the United States would satisfy the Statute. The subsequent actual publication of the work abroad (using the word in its business sense) will produce copies of the edition which, it may well be, Congress deemed should be deposited as the "best edition" of the work, rather than the flimsy makeshifts characteristic of technical publication. As the provision with its reference to the manufacturing clauses of the Act, can only refer to books in languages other than English, such a view of the clause may suggest reasons for its consequent construction within limits, which will not exceed the apparent statutory scheme of the Act as a whole. The fact that the language used may embrace foreign works other than books, will not vary this result, as the same considerations, *mutatis mutandis*, are deemed applicable to such works. It has also been suggested that the object of this clause was to lessen the deposit burden upon foreigners to induce them to procure American copyright more freely.

If the work is a contribution to a periodical, and a special registration of the contribution, apart from the general registration of the entire contents of the periodical, is sought, one copy, of the issue, or issues, containing the contribution, is to be filed.

§ 811  
The separate registration of contributions to periodicals.



§ 812  
The copyright  
of periodicals,  
in general.

§ 813  
Authority req-  
uisite for  
publisher to  
take out copy-  
right, in his  
name, in con-  
tributions  
thereto.

§ 814  
Serial and  
book publica-  
tion.

A general copyright of a periodical can cover all its contents, which are copyrightable. The copyright in it will, normally, be taken out in the name of the publisher of the periodical. If he is the proprietor of all articles appearing in it, no further question can, of course, arise as to the validity of the copyright. If, on the other hand, he only has serial rights, or other limited rights, in any of the articles, or other matter, contained in his publication, a copyright can only be obtained in his name, if he is authorized to obtain copyright by the authors or proprietors of the matter so copyrighted on their behalf.

Such authority may be express, or implied, and may be negatived by the necessary inference drawn from subsequent acts of the authors. Thus,<sup>12</sup> the copyright in "The Professor at the Breakfast Table" was held invalid, as Dr. Holmes, after the great bulk of the work had appeared serially in *The Atlantic Monthly*, without specific claim of copyright in the author's name, published the complete work, with copyright claimed in his own name, and then permitted publication of the remainder, serially, without reference to his, the author's, copyright. The same result was reached in connection with Mrs. Harriet Beecher Stowe's, "The Minister's Wooing," on similar facts.<sup>13</sup> Mr. Justice Brown, writing for the Court, in the *White* case,<sup>12</sup> pointed out that an authority to print in a periodical was not equivalent to an authority to copyright the matter so printed and that, while the latter authority might be presumed, it was negatived where the author himself attempted to copyright in his own name, after the publishers had attempted to copyright in their name. The Circuit Court of Appeals, in its opinion, had pointed out that there was no claim that the pub-

12—*Mifflin v. R. H. White Co.*, 190 U. S. 260, 47 L. ed. 1040.

13—*Mifflin v. Dutton*, 190 U. S. 265, 47 L. ed. 1043.

lishers had acted as trustees, but rather that they had acted as agents.<sup>14</sup>

In another case,<sup>15</sup> it was held that a general claim of copyright by a magazine company in one of its monthly publications would not be limited, with respect to all literary material owned by it in the magazine in question, in which the authors had reserved no rights, so as to give it only such protection as it needed as publisher of the magazine. It was said that there might be such a limitation of rights in connection with stories contained in it, in selling which the author had reserved rights of dramatization, that a general notice of copyright, in such cases, would be insufficient to protect the owner of the dramatic rights, unless some reference were made to such reserved rights, in the notice, or unless their owner copyrighted his rights, contemporaneously in his own name. These dicta were unnecessary, are contrary to authority<sup>16</sup> and appear erroneous. They confuse the right to a statutory copyright, with rights that might accrue under a common law copyright. The suggestion as to a reservation of rights by notice appears to read a requirement into the Act which does not exist. Such a notice would appear futile, as it is difficult to see how the consequences of publication could be avoided thereby. The point actually decided by the decision, however, appears entirely sound.

The difficulties suggested by these cases can, of course, be avoided by affixing individual notices of copyright to the various contributions in a periodical not owned by the publisher, in addition to the general notice of copyright in the aggregate. If, however, this is not done, but the authors of such contributions have authorized the publisher to copyright,<sup>17</sup>

## § 815

The effect of general claim of copyright in a periodical.

## § 816

Dicta with reference to cases of reserved dramatic rights in periodical contributions.

## § 817

Individual notice of copyright.

## § 818

The nature of an author's rights where copyright is taken out in a periodical

14—Mifflin v. Dutton, 61 L. R. A. 134, 112 F. 1004.

15—Dam v. Kirk LaShelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902.

16—See §§ 470, 471.

17—See § 699.



by the publisher.

he would hold the copyright in their respective works as trustees,<sup>17</sup> subject to subsequent assignment to them, voluntarily, or by decree in equity.

After assignment, the name of the assignee may be substituted in the notice,<sup>18</sup> but until such assignment, the notice on all copies, by whomever published, should conform to the original notice and thus avoid the result of the Mifflin cases, *supra*.<sup>19</sup>

§ 819  
Assignments  
of copyright  
in a single  
contribution  
covered by a  
blanket copy-  
right.

There can be but one copyright in a given work.<sup>20</sup> But, as has been shown, there can be copyright in an aggregation of works, as an aggregation, which will protect any original individual component works contained therein.<sup>21</sup> Copyright is generally deemed indivisible.<sup>22</sup> If then the proprietor of a periodical who had taken out copyright in the entire publication, in his own name, were to attempt to assign the copyright in any of the individual contributions to its author, a question might be raised, although this point does not appear to have been made, in at least one decision where the question was involved,<sup>23</sup> whether such an assignment of part of the copyright would be effectual so as to enable the assignee to sue in his own name. This question can be avoided either by separate registration or, where permitted, by suit in the original proprietor's name. There is nothing, as pointed out by this section of the statute, to prevent the individual registration of such parts of a work in the name of their respective proprietors, and this would prevent any such questions, as have been discussed, from arising.

A further aspect of this matter, suggesting various possibilities, was dealt with in a case where

18—Section 46.

19—190 U. S. 260, 47 L. ed. 1040.

20—Mifflin v. Dutton, 61 L. R. A. 134, 112 F. 1004. And see § 644, *ante*.

21—See §§ 469, 454 *et seq.*

22—See § 1524.

23—Dam v. Kirk LaShelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902.

a preliminary injunction was refused.<sup>24</sup> The plaintiff, an author, had had dealings with Munsey's Magazine, which resulted in its publication of one of his stories, he receiving pay and signing a receipt in which he reserved all literary and dramatic rights in the story. The contents of the magazine were copyrighted by the publisher. Some years afterwards, the copyright in the story was sold by Munsey's, to the defendant. The Court was of opinion that Munsey's was a trustee of the copyright for the author but that the defendant, in the absence of fraud, or notice, actual or constructive,<sup>24a</sup> was justified in relying on the record legal title to ownership of the copyright, and hence could not be held liable, as an infringer, by the author.

§ 820  
Third persons may deal with the proprietor, unaffected by secret trusts.

The Copyright Office Regulations<sup>25</sup> say that where special registration is sought for a contribution to a periodical, "the entire copy should be sent; sending a mere clipping or a page containing the contribution does not comply with the statute," and this appears a correct view of the Section.

§ 821  
What is a copy of a contribution for deposit purposes.

Deposit of copies, without prior publication, would, in the case of works reproduced in copies for sale, appear<sup>26</sup> to be quite ineffectual, as there would not be the necessary precedent publication required by Section 9.<sup>27</sup>

§ 822  
Deposit of copies before copyright.

No form for the claim of copyright required to be made by this section is provided for by the Act. The Copyright Office Regulations translate "a claim of copyright" into "application for registration."<sup>28</sup> This is in accordance with Section 5 of the Act, in cases covered by that Section.<sup>29</sup> A series of forms

§ 823  
Forms for registration.

24—Brady v. Reliance Motion Picture Corporation, 229 F. 137.

24a—Brady v. Reliance Motion Picture Corporation, 232 F. 259.

25—Rules: No. 39.

26—Cf. Correspondent Newspaper Co. v. Saunders, 13 W. R. 804 (12 L. T. 540).

27—Cf. Henderson v. Maxwell, 5 Ch. D. 892.

28—Rules 22 and 24.

29—See § 528.



for different classes of works are issued by the Copyright Office. Copies are furnished free on request.<sup>30</sup> A list of the forms is contained in the Appendix.<sup>31</sup> The forms contain a specific claim of copyright, as required by the statute. The necessity for this is not stated in the Rules, however, so that if proprietors of copyright have occasion to formulate their own notices of claim, they should bear this in mind, in reading Rules 31 and 32 of the Copyright Office.

§ 824  
Incorrect  
statements on  
registration.

Various English decisions have discussed the question as to what the effect was of an incorrect statement made in connection with the registration of a work. They universally held, such an incorrect statement would vitiate the registration.<sup>32</sup> Whether incorrect statements in applications for copyright under the present Act would have this effect, has not been considered in any reported American decision.<sup>33</sup> There is no statutory reference to the matter except in so far that mistakes of classification are not fatal.

§ 825  
Affidavits of  
manufacture  
of books.

Reference should be made to Sections 15 and 16 of the Act, for information with respect to the affidavit of manufacture, required in the case of copyright registration of books and periodicals.<sup>34</sup>

§ 826  
Compulsory  
deposit of  
works.

*Section 13. That should the copies called for by Section 12 of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any*

30—Rule 33.

31—See Appendix.

32—See *Thomas v. Turner*, 33 Ch. D. 292.

33—See § 590.

34—See §§ 829, 845.

*part of the United States, except an outlying territorial possession of the United States or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.*

This section is discussed elsewhere.<sup>35</sup>

*Section 14. That the postmaster to whom are delivered the articles deposited as provided in Sections 11 and 12 of this Act shall, if requested, give a receipt therefor and shall mail them to their destination without cost to the copyright claimant.*

§ 827  
Postal  
receipts.

§ 828  
Free postage  
of copies de-  
posited in  
mails.

35—See § 791.



## CHAPTER XIII

### MANUFACTURING PROVISIONS APPLICABLE TO COPIES OF CERTAIN COPYRIGHTED WORKS

§ 829  
The domestic  
manufacturing  
clause.

*Section 15. That of the printed book or periodical specified in Section 5, subsections (a) and (b) of this Act, except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this Act, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of type setting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo engraving process, then by a process wholly performed within the limits in the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photo engraving process, and also to separate lithographs or photo engravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art; but they shall not apply to works in raised characters for the use of the blind, or to books of foreign origin in a language or languages other than English, or to books published abroad in the English language seeking ad interim protection under this Act.*

At the time when Congress made copyright possible to aliens, under certain conditions,<sup>36</sup> it amended R. S. 4956, so as to provide, amongst other things, that no person should be "entitled to copyright," unless he deposited copies of certain works, "*Provided*, That in the case of a book, photograph, chromo or lithograph the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom."<sup>37</sup>

§ 830  
History of  
Section.

That Section of the law, for reasons persuasively outlined in an opinion of the Attorney General of the United States,<sup>38</sup> was deemed to be prospective only, in its operation and deemed not to affect works which were copyrighted prior to its enactment.

In an equally convincing opinion,<sup>39</sup> the Attorney General, deemed however, that the present Act, because of the striking changes of phraseology it made in dealing with the question of importation,<sup>40</sup> prevented the importation and, hence, protection of books, copyrighted prior to 1909, and subsequently printed abroad.

§ 831  
Retrospective  
nature of Act  
with respect  
to importation  
foreign books.

It should be noted that this section changes the prior statutory rules in numerous respects. It is limited to the books and periodicals specified in Section 5 (a) and (b), thus expressly excluding other printed matter, whether in book form or not, comprised in other sub-divisions of Section 5. Thus, for example, dramatic compositions, lectures, etc., are not covered by it. In determining what the scope of the section is the rule of strict construction applies.<sup>41</sup>

§ 832  
Statutory  
changes ef-  
fected by  
present Sec-  
tion: its  
scope.

§ 833  
The Section to  
be construed  
strictly:  
dramatic com-  
positions and  
music, in

36—See § 704.

37—Act of March 3, 1891.

38—23 Opinions Attorney General 373.

39—28 Opinions 91.

40—See § 31.

41—*Hervieu v. J. S. Ogilvie Pub. Co.*, 169 F. 978.



book form excluded from its operation.

§ 834  
Lithographs and photo-engravings, included.

§ 835  
Exception.

§ 836  
Effect of Section.

§ 837  
Rebinding.

§ 838  
The books and periodicals covered by the Section.

The decisions that music, although in book form<sup>42</sup> and dramatic works, were not within the Act of 1891, apply with additional force to cases governed by the phraseology of the present Act.

This Section, in addition to applying to books, also covers lithographs and photo-engravings, whether bound in books as illustrations, or, apparently, if separate and in no way connected physically with books,<sup>45</sup> except in cases where the subjects represented are located abroad and are of a scientific and artistic nature. It may be deemed an open question whether the Courts will, in view of the rule of strict construction applicable to this Section, sustain the Attorney General's view that it applies to "separate" photo-engravings and lithographs, but it is deemed probable that in view of the apparent intention of the Section, his view<sup>43</sup> will prevail. Prints and pictorial illustrations, other than those produced by the two processes in question, are not covered by the Section nor are reproductions, by such processes, of copyrighted paintings, even though painted in the United States, for the palpable purpose of being reproduced by such processes and then sent abroad for such reproduction.<sup>44</sup>

The type-setting, making of plates, lithographing, photo-engraving, printing and binding in cases covered by the Section must all be entirely performed in the United States. This changes the former law. But there is nothing in the Statute which prevent foreign rebinding of books, originally bound in the United States.<sup>45</sup>

All "books" and periodicals whether in English or not, written by a citizen or alien domiciled in the United States, published in the United States, must comply with this Section, except books intended for

42—Littleton v. Oliver Ditson Co., 67 F. 905.

43—See 28 Opinions Attorney General 150.

44—See 28 Opinions Attorney General 557.

45—See 28 Opinions Attorney General 209.

the use of the blind, the original text of books "of foreign origin," in languages other than English, and books in English published abroad, which seek ad interim protection in the United States.

Mr. Bowker<sup>46</sup> states that he was the partial author of this Section when originally drafted. He calls attention to the possible difference between the phrases, "the original text of a book of foreign origin," and "books of foreign origin," in each case referring to non-English works, which are, among the works excepted from the operation of the Section. He deems it probable that these two phrases will receive the same construction,<sup>46</sup> but he appears to deem that such construction would be such as, for example, to limit it to the original work, strictly enough to bar even a translation of it by a foreigner, in a non-English language.<sup>47</sup> This would seem a doubtful result, in view of the penal nature of the Section.

The words books "of foreign origin" used in this Section apparently refer to authorship. The Copyright Office deems them to exclude resident aliens,<sup>48</sup> but on the other hand to exclude also non-resident citizens of the United States. This view appears contradictory as, if nationality of the author is the test, his domicile would appear immaterial and, vice-versa, if domicile control, his nativity would appear non-essential. What the Courts would hold in such a case may well be doubted, but it would appear reasonable to assume that their construction will be such as not to discriminate against American citizens, in favor of aliens, wherever domiciled.

The importation of copies printed in violation of this section would be unlawful, both as a result of inference from it,<sup>49</sup> and also by virtue of the pro-

§ 839  
The meaning of "original text of books of foreign origin."

§ 840  
Books by resident aliens.

§ 841  
Books by non-resident citizens.

§ 842  
Section 31 and 11 of Act to be read with Section 15.

46—Page 156.

47—Page 155.

48—Rules: No. 29.

49—Harper Bros. v. M. A. Donohue & Co., 144 F. 491.



visions of Section 31 of the Act,<sup>50</sup> but would not invalidate a pre-existing copyright.<sup>51</sup>

It should be noted that the provisions of Section 31 except various works, and copies of works, from its prohibition against importation,<sup>52</sup> which are not excepted by Section 15 from the classes of works covered by it. The words in Section 15, excepting works from its operations, "as below provided,"<sup>53</sup> may possibly be used as a means for harmonizing the exceptions in the two sections, as meaning that in such cases Section 15 is to control.

§ 843  
The Section does not require "books" to be printed.

Since the question was raised, it may be noted that there is, as the Attorney General apparently correctly deemed,<sup>54</sup> nothing in these sections which requires all books copyrightable under the Act to be printed, or which prevents the copyright of type-written copies of a work.

§ 844  
Printing in Philippine Islands.

Under the prior Act, the Attorney General deemed that the requirements of the statute corresponding to this Section were not satisfied by manufacture of works in the Philippine Islands,<sup>55</sup> but this view appears doubtful under the decisions,<sup>56</sup> and for the reasons stated elsewhere.

The question as to what the effect may be of a failure to comply with the requirements of this Section is discussed elsewhere.<sup>57</sup>

§ 845  
Affidavits of domestic manufacture.

*Section 16. That in the case of the book the copies so deposited shall be accompanied by an affidavit, under the official seal of any officer authorized to administer oaths within the United States, duly made by the person claiming copyright or by his*

50—See § 1368.

51—Bentley v. Tibbals, 223 F. 247.

52—See that section, (§ 1369) for a list of such exceptions.

53—See § 829.

54—28 Opinions 265.

55—25 Opinions 179.

56—See § 709.

57—See § 848.

*duly authorized agent or representative residing in the United States, or by the printer who has printed the book, setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made within the limits of the United States from type set therein; or, if the text be produced by lithographic process, or photo-engraving process, that such process was wholly performed within the limits of the United States, and that the printing of the text and binding of the said book have also been performed within the limits of the United States. Such affidavit shall state also the place where and the establishment or establishments in which such type was set or plates were made or lithographic process, or photo-engraving process or printing and binding were performed and the date of the completion of the printing of the book or the date of publication.*

The affidavit required by this Section, is requisite only in the case of "books," within the meaning of that word, as used in Section 16, and not in the case of periodicals, or of separate lithographs, or photo-engravings. It must, where requisite, accompany the copies deposited on registration. Its detailed nature is readily apparent, from a reading of the Section.

Attention is called in the Copyright Office Rules,<sup>58</sup> to common mistakes in affidavits, prepared under this Section. The affidavit required by this Section is not possible, nor hence required, in the case of books printed or bound abroad, whether written in some foreign language or, where this is permitted, in English.

No penalty is provided, in terms, for a failure to comply with the preceding Section or with this Section. It should be noted that the language used

§ 846  
When affidavit  
required.

§ 847  
Books printed  
abroad.

§ 848  
Effect of  
failure to  
comply with  
provisions



of manufac-  
turing clause,  
etc.

in Section 15 is that copies accorded protection under the Act, shall be manufactured in accordance with its requirements. Whether "copies" means "works," and whether under Section 1, non-compliance with Section 15 would avoid a copyright, or whether this Section would only create an estoppel against actions for infringement in favor of persons copying, etc., from copies of a work produced in violation of this clause, is a matter for the future construction of the Courts. It may be noted that Section 15 both refers to the copies requisite for registration of copyright, and also to copies produced thereafter for the proprietor's general purposes. The problem of the proper construction of the Section, in the respect under discussion, is not, necessarily, essentially similar to the questions as to the effect of non-compliance with Section 12 which are discussed elsewhere.<sup>59</sup> It should be noted that Section 17 makes a copyright void,<sup>60</sup> if there is a conviction for making a false affidavit, under Section 16. Whether this in any way affects the question under consideration is also problematical.

In a very recent decision,<sup>61</sup> a defendant charged with infringement, claimed that plaintiff did not come into Court "with clean hands," where he had violated this section by importing copies of a work, which he had composed and printed in England, but which contained the substance of his prior work, copyrighted in the United States. The Court overruled this contention, but did not discuss the language of Sections 1, 15 and 17, to which attention has just been directed. The decision may, however, be deemed an authority to the effect that a violation of Section 16, after copyright has been secured in compliance with it, will not, *per se*, affect the validity of such copyright.

§ 849  
Foreign print-  
ing, after  
copyright.

59—See § 789, *et seq.*

60—See § 851.

61—*Bentley v. Tibbals*, 223 F. 247.

Under the Act of 1891, it was said that it was unnecessary for plaintiff to plead compliance with the manufacturing clause of the statute and that an omission to comply therewith, if necessary, was a matter for affirmative defence.<sup>62</sup> The same result was reached in considering plaintiff's prima facie proof under that Act.<sup>63</sup>

§ 850  
Pleading.

*Section 17. That any person who, for the purpose of obtaining registration of a claim to copyright, shall knowingly make a false affidavit as to his having complied with the above conditions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, and all of his rights and privileges under said copyright shall thereafter be forfeited.*

§ 851  
False affidavits of manufacture.

This Section has a harsh and drastic aspect, at first sight, in that it apparently provides for a forfeiture of copyright in cases where a false affidavit is made by one other than the proprietor of the work.

§ 852  
Criminal and civil consequences of the making of such false affidavits.

However, it should be observed that the forfeiture is only to result after a conviction in criminal proceedings, where the falsity of the affidavit, and the defendant's knowledge of its falsity, would have to be established beyond a reasonable doubt. In view of the fact that only the proprietor of a copyright could have "rights and privileges" to be forfeited, this result could only follow on his conviction and not upon the conviction of any of the other persons mentioned in Section 16. Thus viewed, it may be doubted whether the Section has any unreasonable, or unjust, possibilities inherent in it.

62—Osgood v. A. S. Aloe, etc., Co., 69 F. 291.

63—Patterson v. J. S. Ogilvie Pub. Co., 119 F. 491.



## CHAPTER XIV

### NOTICES OF COPYRIGHT

§ 853  
Notices of  
copyright.

*Section 18. That the notice of copyright required by Section 9 of this Act shall consist either of the word "Copyright" or the abbreviation "Copr.," accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in sub-sections (f) to (k), inclusive, of Section 5 of this Act, the notice may consist of the letter C inclosed within a circle, thus: ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: Provided, That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright is subsisting when this Act shall go into effect, the notice of copyright may be either in one of the forms prescribed herein or in one of those prescribed by the Act of June 18, 1874.*

§ 854  
When notice  
of copyright  
requisite, in  
general.

The notice of copyright required by this Section must be affixed to each copy, published, or offered for sale, in the United States, by authority of the copyright proprietor.<sup>64</sup>

In connection with copyrights obtained on or after July 1, 1909, the requirements of the Act are as follows:

64—Section 9.

In the case of books, periodicals, lectures, sermons, addresses or dramatic, dramatico-musical or musical compositions and motion pictures, photo-plays or otherwise, the word "Copyright" or the abbreviation "Copr.," accompanied by the name of the then copyright proprietor, must be affixed to each published copy of the work.

§ 855  
Form of notice for books, motion pictures, dramatic and musical works, etc.

If such work be a *printed* literary, musical or dramatic work, the year in which the copyright was secured by publication, must be added.<sup>65</sup> The word "literary," as used in this section, would probably be given a broad and inclusive definition, to avoid the necessity for a judicial assumption of the role of critic.<sup>66</sup> It is probable, in fact, that "literary," and "dramatic" works would be deemed to cover most printed literate works, capable of copyright. While the language used in this connection is broad enough to cover the case of motion-picture photo-plays, which are both dramatic compositions and printed from negatives, it does not appear that the year is required to be added in notices of copyright of photo-plays,<sup>67</sup> although common prudence suggests that this be added, until such time as this clause is judicially construed. The term "printed," however, will undoubtedly be construed to include books whether printed from type or produced by lithography, photography, electro or stereotyping or any other mechanical process,<sup>68</sup> but probably would not be held to include manuscript copies.

§ 856  
When the year of copyright must be added.

In the case of works of art, or reproductions thereof, maps, models, or designs for works of art, drawings, plastic work, photographs or pictorial

§ 857  
Form in other cases.

65—The decision in *Mathieson v. Harrod*, L. R. 7 Eq. 270, where it was held the day of publication was required to be stated, rests in the particular language of the statute involved and does not apply to the present Act.

66—Cf. § 19, which appears to indicate the printed works mentioned are those which are paginated.

67—See § 853.

68—See § 532.



illustrations, the notice may consist of the form of notice just discussed, or of the letter C enclosed in a circle, thus ©, accompanied with the initials, monogram, or usual mark or symbol of the proprietor.

Where this latter optional form of notice is used, the name of the copyright proprietor must be placed on some accessible portion of the copy itself or on the margin, back, permanent base, pedestal or substance on which it is mounted.

§ 858  
Form of notice for works copyrighted under prior Acts.

In the case of works copyrighted before July 1, 1909, the foregoing forms of notice may be used or, in the alternative, one of the following:

“Entered according to act of Congress, in the year . . . . ., by . . . . ., in the office of the Librarian of Congress, at Washington,”<sup>69</sup>

or

“Copyright, . . . . ., by . . . . .”

the first blank, in each instance, to be filled with the year in which the copyright was entered, for example, 1891, and the second blank, with the name of the person by whom it was taken out.

§ 859  
The name to be inserted in such notices.

The name to be inserted in the notices required by the statute on first publication, is that of the proprietor of the right to copyright for the time being. This means the holder of the legal title to such right.<sup>70</sup> The name of the author should not be inserted, unless he is still the proprietor of the copyright at the time when the notice is affixed. If the right to take out a copyright has been assigned prior to publication, the notice should be in the name of the person or persons in whom such right is vested at the time when the copyright vests. If the copyright is assigned after it is secured, the assignment must be recorded<sup>71</sup> and, after record, the assignee's

§ 860  
When assignee's name may be substituted.

69—Act of June 18, 1874.

70—See § 691.

71—Section 44.

name may be substituted for the assignor's, in the notice.<sup>72</sup> Unless, however, there be a recorded assignment, the assignee's name may not be substituted, and the name of the record proprietor of the copyright must continue to be printed in such notices. It has been intimated that if there be a partial assignment, the partial assignee's name may not be substituted,<sup>73</sup> or added. The question as to whether there can be a partial assignment is discussed elsewhere.<sup>74</sup>

There are two essential elements in copyright notices, the absence of which will vitiate the notice, that is (I) the word Copyright, or the abbreviations "Copr." or ©, where the use of the latter is allowed,<sup>75</sup> and (II) the proprietor's correct, but not necessarily full,<sup>76</sup> name must be inserted. Thus<sup>77</sup> inserting the name of the proprietor as N. Sarony instead of Napoleon Sarony, the former being his usual trade name, was held sufficient; but an incorrect corporate title, differing widely from the corporate proprietor's actual title, was held insufficient.<sup>78</sup> And the use of the word "Registered" for "Copyright," with the registry number instead of the proprietor's name, was held doubly bad.<sup>79</sup>

The proprietor's trade name may be inserted in the notice,<sup>80</sup> even though an alien,<sup>81</sup> and if these decisions be sound, if the author be the proprietor, no good reason can exist why such author's pen name, or pseudonym, cannot be inserted, the Copy-

§ 861  
Essential  
elements in  
valid notices.

§ 862  
Initials of  
proprietor's  
first name.

§ 863  
Incorrect  
trade name.

§ 864  
"Registered"  
for copy-  
righted.

§ 865  
Trade names.

§ 866  
Pen names.

72—Section 46.

73—Bowker, p. 136.

74—See § 1517.

75—Higgins v. Keuffel, 140 U. S. 428, 35 L. ed. 470.

76—Mifflin v. R. H. White Co., 190 U. S. 260, 47 L. ed. 1040.

77—Sarony v. Burrow-Giles Lith. Co., 17 F. 591.

78—Record & Guide Co. v. Bromley, 175 F. 153.

79—Higgins v. Keuffel, 30 F. 627, aff'd 140 U. S. 428.

80—Griggs v. Perrin, 49 F. 15; Scribner v. Clark, 50 F. 473; Scribner v. Henry G. Allen Co., 49 F. 854; Rock v. Lazarus, L. R. 15 Eq. 104.

81—Werckmeister v. Springer Lith. Co., 63 F. 808.



right Office to the contrary notwithstanding, as such author's trade name, unless some state statute be violated.<sup>82</sup>

§ 867  
Trustees.

§ 868  
Surplusage  
in notices.

§ 869  
Trusts, con-  
tinued.

The Copyright Office Regulations<sup>83</sup> correctly state that the notice should not state that *A* takes it out for the benefit of *B*, although it may be doubted whether such a notice would be deemed fatally defective under the rule<sup>84</sup> that surplusage in a notice of copyright may be disregarded, if the essentials are contained in such notice, but the Copyright Office's further deduction<sup>85</sup> that the beneficiary's name is to be printed, rather than that of the person taking copyright out for such beneficiary, is liable to be misconstrued. While the result indicated by the Copyright Office is desirable, it is not at all necessary, as a trust would arise if this were not done and the name of the trustee in the notice, though without reference to any trust, is sufficient.<sup>85</sup> Similarly it would seem an agent might take out a copyright in his own name for his principal if authorized to do so under circumstances which might cause a trust to arise, but not otherwise.<sup>86</sup>

§ 870  
Stating the  
proprietor's  
name.

In an English case,<sup>87</sup> it was held the name of one member of a partnership which owned a given work might be stamped on it as proprietor, where he was its author, without affecting the validity of the copyright, but this decision is unsupported by other authority. In a further case,<sup>88</sup> it was held a statement that a work was published by a given individual satisfied the requirements of a statute which provided that the name of the proprietor must be stated.

82—Haas v. Leo Feist, Inc., 234 F. 105.

83—Rules, § 26.

84—See § 873.

85—See Lawrence v. Iowa, 4 Cliff. 1.

86—Cf. Petty v. Taylor, (1897) 1 Ch. 465; London Printing & Publishing Co. v. Cox, (1891) 3 Ch. 291.

87—Britain v. Hanks Bros., 86 L. T. 765.

88—Graves v. Ashford, L. R. 2 C. P. 410. See also Hills & Co. v. Austrich, 120 F. 862.

It was also held <sup>89</sup> that where the proprietor's name actually appeared on the work, he need not be designated as proprietor, even though another name also appeared on it.

Where a reference to the year of publication is required, the date of publication, not of printing, should be inserted.<sup>90</sup> Thus, a notice of copyright, where a date is required, was held <sup>91</sup> insufficient, where there is a date on the periodical copyrighted but this is the date of the issue and is separated from the balance of the notice by a complete line. If this be done, it is immaterial whether, or not, the imprint date correspond with the date in the copyright notice or not. The date may be in Roman numerals,<sup>92</sup> as well as Arabic, and may be abbreviated, according to one case <sup>93</sup> although the doctrine of this decision should, it would seem, be applied with caution. Where a notice incorrectly gave the date "1846" where "1847" was the correct date, the variance was held immaterial, since it shortened, rather than extended, the copyright term.<sup>90</sup> Conversely, and applying the same reasoning, it would seem if the notice had given the date "1848," this would have invalidated the notice, as an attempt to extend the copyright term by deceiving the public. In the same case,<sup>90</sup> it was held insertion of the names of two persons as proprietors, where, in fact, only one person was the proprietor, was immaterial, in the absence of proof that any one was misled thereby. This is in accordance with the theory, running through various cases, that the inclusion of extraneous, or additional, words into a notice which con-

§ 871  
Dates in  
notices.

§ 872  
Incorrect  
dates.

§ 873  
Surplusage:  
addition of  
the names of  
third persons  
in notices.

89—Newton v. Cowie, 4 Bing. 234.

90—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547; overruling Baker v. Scribner, 2 Blatch. 82.

91—Record & Guide v. Bromley, 175 F. 156.

92—Stern v. Jerome H. Remick Co., 175 F. 282.

93—Snow v. Mast, 65 F. 995.



§ 874  
Substantial,  
not exact  
compliance,  
essential.

§ 875  
Test as to  
sufficiency  
of notices.

tains all the essential elements, will not invalidate it but will be treated as surplusage.<sup>94</sup>

“Careful” compliance with the Section, “in substance,” is essential.<sup>93a</sup> The object of the inscription is to give notice of the copyright to the public, and when the letter of the law is not violated by the form of notice adopted, and the object of the statute accomplished, that is enough.<sup>95</sup>

The test as to notices, as laid down by the Supreme Court, may be found in the following language:<sup>96</sup>

“It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained, since the right being purely statutory the public may justly demand that the person claiming a monopoly of publication shall pursue in substance, at least, the statutory method of securing it. *Thompson v. Hubbard*, 131 U. S. 123. In determining whether a notice of copyright is misleading we are not bound to look beyond the face of the notice and inquire whether under the facts of the particular case, it is reasonable to suppose an intelligent person could actually have been misled.”

Substantial compliance with the Act in good faith is all that is necessary,<sup>97</sup> subject to an inclusion of essential words. Thus 1889, Copyrighted by B. J. Falk was held a substantial compliance with a statute requiring “Copyright, 1889 by B. J. Falk.”<sup>98</sup> But if the date is required it must be made part of the notice and if this is lacking it cannot be supplied

93a—*Callaghan v. Myers*, 128 U. S. 617, 32 L. ed. 547.

94—*Hefel v. Whitely Land Co.*, 54 F. 179; *Hills & Co. v. Austrich*, 120 F. 862; *Same v. Hoover*, 136 F. 477.

95—*Sarony v. Burrow-Giles Lith. Co.*, 17 F. 591.

96—*Mifflin v. R. H. White Co.*, 190 U. S. 260, 47 L. ed. 1040, per *Brown, J.*

97—*Myers v. Callaghan*, 5 F. 726.

98—*Falk v. Shumacher*, 48 F. 222.

because of an imprint date elsewhere on the same page although immediately above the notice and only separated from it by a printed line. The case last cited contains a collection of cases decided under the Act of June 18, 1874.

It should be noted that the decisions, which took the view of liberal construction of copyright notices, were decided under the prior statutes, which made the deposit of copies of a work, a condition precedent to copyright.<sup>99</sup> The question that exists under the present Act, with respect to the consequences of a failure to register a given work,<sup>1</sup> could not arise under such statutes, provided that the requirements of the statute were observed. Any sort of a notice which directed the attention of third persons to inquiry at the Copyright Office was all that was essentially necessary to the purposes of such Acts. Whether if the Courts hold that a failure to deposit copies under the present Act will not avoid a copyright,<sup>1</sup> they will, in turn, adopt a more rigid standard for copyright notices, for the protection of the general public, whose only means of information as to the details of copyright these might then be, is a question lying in future decision.

As has been previously pointed out, the notice should be on copies deposited in the Copyright Office, as these are "published," within the Act.<sup>2</sup> The *dictum* to the contrary in a case under the prior Act,<sup>3</sup> appears inadvertent.

Under the present Act, only copies of a work, as distinguished from the original, appear to require notice of copyright,<sup>4</sup> but a notice is required on every copy published, or offered for sale, in the

§ 876  
Possible bearing of statutory changes on the foregoing doctrine.

§ 877  
Notices on copies deposited in Copyright Office.

§ 878  
When notice of copyright essential.

99—See § 731.

1—See § 789.

2—See § 324.

3—Osgood v. A. S. Aloe & Co., 69 F. 291.

4—This follows, *a fortiori*, from American Tobacco Co. v. Werckmeister, 207 U. S. 384, 52 L. ed. 257.



§ 879  
Many copies  
on one sheet.

§ 880  
Composite  
works.

§ 881  
Copies pub-  
lished or sold  
abroad.

§ 882  
Unauthorized  
copies.

§ 883  
Unauthorized  
omission of  
notice by  
licensee.

§ 884  
Reprints.

§ 885  
New versions.

United States. Thus where twelve complete copies of a painting were lithographed on one sheet, the painting having been fashioned so that this might be done and make a harmonious whole, it was held that a separate notice of copyright was requisite for each of such twelve copies, and one for the entire sheet was insufficient.<sup>5</sup> On the other hand, only one notice is required in the case of an original composite work.<sup>6</sup>

No notices are required on copies of a work published or sold abroad, even with the direct consent of the copyright proprietor,<sup>7</sup> or on copies that are published without the copyright proprietor's authority. Thus in a case, where the result appears to have been very harsh,<sup>8</sup> it was held that the proprietor of a copyrighted article did not lose any rights to sue one who copied it from a reproduction by a licensee, who had been authorized to publish it in a limited territory, upon express condition of affixing the usual copyright notice,<sup>9</sup> but who, inadvertently, omitted this, even though defendant acted in good faith, without any knowledge of the existence of the copyright.

Where copyrighted matter is republished in its original form, the original copyright notice with original date unchanged, must be placed upon it.<sup>10</sup> If, on the other hand, there has been any alteration or addition to a copyrighted work, since the work plus such alterations and additions is subject to a new copyright, the Circuit Court of Appeals for the Second Circuit, despite its evident agreement with

5—*Louis De Jonge & Co. v. Breuker & Kessler Co.*, 182 F. 150, aff'd 235 U. S. 33, 59 L. ed. 113.

6—*Edison v. Lubin*, 122 F. 240.

7—See § 760.

8—*American Press Publishing Co. v. Daily Story Publishing Co.*, 66 L. R. A. 444, 120 F. 766.

9—Cf. *West Publishing Co. v. Edward Thompson Pub. Co.*, 169 F. 833.

10—*Record & Guide v. Bromley*, 175 F. 156.

the technical correctness of Mr. Drone's<sup>11</sup> views to the contrary, felt constrained to hold<sup>12</sup> that the new notice of copyright on the work is all that is requisite, without printing the notice of the prior copyright. Careful practitioners will, however, despite this decision, affix both notices of copyright to such works, as Section 6 of the Act, which the Circuit Court of Appeals deemed controlling, expressly states the effect of the publication of such new work shall not affect the force or validity of any subsisting copyright upon the old matter employed in the new work, or "secure or extend copyright therein," and it may, hence, well be that the Supreme Court, were the question to come before it, might take a view of the matter contrary to that of the Circuit Court of Appeals.

The notice should be placed in each volume of a work, if more than one, and on each reel of film in a motion picture.<sup>13</sup>

No other notice than that required by this section is necessary to the validity of American copyright, although to reserve foreign rights, notices under foreign statutes are sometimes added. It is unnecessary to reserve rights of translation, performance or dramatization under the present Act, by notice of reservation. No notices are required where a copyrighted work is publicly performed or represented, either orally or by printed notice, except the notices on published copies required by this section.

The suggestion has been made that if a work is protected by various copyrights, obtained in various years, these may be conveniently combined, for example, thus "Copyright 1909, 1911, 1914 by A. B." but this appears a dangerous practice, as the result

§ 886  
Works in  
multiple parts.

§ 887  
Exclusive na-  
ture of re-  
quirement for  
notice.

§ 888  
Reservation  
of rights.

§ 889  
Notices in a  
work protected  
by several  
copyrights.

11—Drone, p. 270.

12—West Publishing Co. v. Edward Thompson Co., 176 F. 839.  
See also Lawrence v. Dana, 4 Cliff. 1.

13—See § 902.



is only one notice, and this is too uncertain to be effectual.

§ 890  
Illegible  
notices.

The notice if so badly blurred and indistinct as to be illegible, is insufficient.<sup>14</sup> The same result obtains where the copyright proprietor's symbol, if on a work, is so small that the average observer could not discover it.<sup>15</sup>

§ 891  
Indefinite  
notice.

Where a copyright notice merely directs attention to the fact that a compilation includes copyrighted material, without stating, or indicating, where it is included, or what it is, such a notice is insufficient, as one into whose hands it comes, is not bound to purchase a copy of the original work, if he can, and make his own comparison.<sup>16</sup>

§ 892  
Civil effect  
of false  
notice.

A false notice of copyright on a book<sup>17</sup> will work an estoppel to prevent a denial that it has been published.<sup>18</sup>

§ 893  
Where notice  
of copyright  
to be affixed:  
printed  
matter.

*Section 19. That the notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical, either upon the title page or of the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music: Provided, That one notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.*

§ 894  
Music.

§ 895  
Single notice  
sufficient.

One notice of copyright is sufficient to cover everything copyrightable in a given work, even though it consist of individual parts, in so far as he who affixes the notice has the right to copyright such

14—Strauss v. Penn Printing & Publishing Co., 220 F. 977.

15—Alfred Decker, Cohn Co. v. Etcheson Hat Co., 225 F. 136.

16—Bentley v. Tibbals, 223 F. 247. See § 665 for the form of notice held bad in the case cited.

17—See § 1348.

18—Larrowe-Lorsette v. O'Loughlin, 88 F. 896.

parts.<sup>19</sup> On copyrighting the contents of a magazine, one notice of copyright is sufficient<sup>19</sup> and it is unnecessary to affix a separate notice to each story,<sup>20</sup> or to each illustration,<sup>21</sup> in it.

While only one notice of copyright is required under this section, to protect the contents of an entire single number of a periodical, the question as to whether such a copyright is one single copyright of the contents, in combination, as an entirety, or an aggregation of copyrights in the separate articles, would probably necessarily be answered in favor of the first view. In cases then, where individual contributors own contributions so included, the important question whether the copyright proprietor could assign to them the copyright procured by him, in their contributions, that is, make an assignment of such portion of the copyright as covers their contribution, with the technical difficulties this conception involves,<sup>22</sup> may be most serious. The absence of decisions discussing the question, would seem to recommend the separate and individual copyright of important contributions, or at least the placing of a separate notice of copyright upon the title page of each contribution, as well as the usual general notice of copyright upon the periodical, as an entirety.

§ 896  
Notices on periodicals, where contributions owned by more than one person.

If the copyright of parts of a work is owned by more than one, and there is no copyright in the entirety, each proprietor must, it would seem, be named in a notice of copyright. Thus registration of a book in the name of the author of the letterpress, would not, it was held, confer copyright protection with reference to illustrations made by, and belonging to, others.<sup>23</sup>

§ 897  
Composite works.

19—Harper & Bros. v. M. J. Donohue & Co., 144 F. 491.

20—Dam v. Kirk La Shelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902.

21—Mail & Express Co. v. Life Publishing Co., 192 F. 899.

22—See §§ 819, 1524.

23—Petty v. Taylor, (1896) 1 Ch. 465.



§ 898  
Meaning of  
various words  
in Section.

What the word "printed" means, as used in this section, has been discussed in connection with the previous section. "Book or other printed publication," appears, possibly, to be somewhat broader, than "printed literary, musical or dramatic work," but in view of the references, in the section under discussion, to pagination and the evident legislative intention shown by the Sections 18 and 19, when read together, it is deemed that the two phrases would be construed as identical.

§ 899  
Works in sev-  
eral volumes.

It should be noted that each volume of a work consisting of several volumes, requires a separate notice of copyright. Each number of a periodical requires a separate notice. Separate notices are not required on illustrations forming part of a printed work. The general notice of copyright of the work will protect them, equally with the text of which they form an integral part.<sup>23a</sup> This rule has been extended to cover the situation where a directory was issued with a detached map in a pocket in the cover. More copies were printed of the map than of the directory. The two could be, and in some instances were, sold separately. The map referred to the directory but was capable of independent use and sale. There was but one valid notice of copyright, to-wit, on the directory. The notice on the map was deemed insufficient. The Court was precluded by stipulation from considering whether there had been an abandonment of copyright. It was held<sup>24</sup> that the map was a part of the book and that, hence, the notice on the directory was sufficient to protect the map as well. The result of this decision may be doubted. The dissenting opinion appears the sounder. The majority view seems to ignore the purpose of the statutory notice, which is to warn the public against infringement. It would be absurd to require sepa-

§ 900  
Illustrations.

§ 901  
Parts of a  
work, not  
connected  
physically.

23a—See § 895.

24—Lydiard-Peterson Co. v. Woodman, 204 F. 922; on rehearing, 205 F. 900.

rate notices to be put upon parts of a work, if physically connected, merely because such parts can be severed. Such a result is not intended by the copyright proprietor nor is it normal. But if a work be so constructed that it is issued with separated parts, with the knowledge that these may, and will, be used separately, each such separate part may well come into different hands, and since each might be copyrighted separately, if the proprietor chooses to copyright the parts as an entirety, consideration of the practical purpose of notices of copyright would seem to require that one such notice be on each part of the work issued separately.

§ 902  
Motion  
pictures.

Under the prior Act, it was held<sup>25</sup> that notice of copyright need only appear at the end of a motion picture film. There appears, however, to have only been one reel of film in question and it may well be doubted whether the decision would have been the same had there been more than one reel.

§ 903  
Title page.

The question as to what is the title page of a book, was discussed in a decision<sup>26</sup> where it was held that a notice not printed on the title page of a work, as required by statute, was entirely ineffectual, for any purpose.

*Section 20. That where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the*

§ 904  
Inadvertent  
omissions of  
notices.

25—Edison v. Lubin, 122 F. 240.

26—Freeman v. The Trade Register, 173 F. 419.



*innocent infringer his reasonable outlay innocently incurred if the Court, in its discretion, shall so direct.*

§ 905  
Prior law as  
to omission  
of notices.

This provision is an innovation in copyright law. Under the previous law, the omission of the prescribed statutory notice from even a single copy of a work, by the owner or his agents,<sup>27</sup> prevented any action for infringement of the copyright. This was true even where the defendant had actual notice of the copyright. Thus, in one case,<sup>28</sup> a contract had provided for the sale and transfer of a copyright and regulated the relations of the parties. The transferee omitted copyright notices on some of the editions of the work published by him. The transferor published copies. It was held that the transferee, the copyright proprietor, could not maintain suit for infringement. The Court said:

“The plain declaration of the statute is, that no person shall maintain an action for the infringement of his copyright, unless he shall give notice thereof by inserting the prescribed words in the several copies of every edition published. That means, copies which he, as controlling the publication, publishes. His failure to give such notice debars him from maintaining an action for the infringement of his copyright. The word ‘action’ means either in law or equity.”

The prior statute<sup>27</sup> prevented the application of the maxim, *de minimis lex non curat*, to the most trifling omissions of notice. The effect of the change effected by the enactment of the section of the Act under discussion, in changing the prior statutory rule, is, as will be shown,<sup>29</sup> substantially to write this maxim into the Act, in so far as the Act applies to notices of copyright.

§ 906  
Effect of  
change in  
prior law.

27—R. S. § 4962.

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

29—See §§ 908-912.

The Section has, however, definite limitations. Thus, there can be no real question, that its saving clause would not apply in cases where, even through accident or mistake, the first copy published did not bear the prescribed notice, as statutory copyright hinges on the question whether such initial publication was made with, or without, notice,<sup>30</sup> and this section is only effective in cases where a valid copyright has been obtained.

§ 907  
Omission of  
notice from  
first copy  
published.

The Section states that it only applies to cases where it can be shown that the copyright proprietor has sought to comply with the provisions of the Act concerning notice. This can only be proven by testimony that he has obtained a copyright, involving at least one correct notice, and, further, it would seem, by proof that an indeterminate number of the great bulk of the copies issued, bore the prescribed notice. Use of the words "the particular copy or copies," in the Section, appears to indicate that the copies from which the notice was omitted were to be the exception, not the rule.

§ 908  
Preliminary  
proof neces-  
sary for Sec-  
tion to apply.

It is a matter for defense that copies did not bear the prescribed notice of copyright. Thus,<sup>31</sup> it has been held that while the plaintiff must plead and prove that all copies of the copyrighted work, issued by him bore the statutory notice, separate, distinct and specific proof as to each copy was not requisite to make a prima facie case, but that a general allegation and general proof was sufficient for that purpose. But in the same case,<sup>32</sup> reported elsewhere, it was said that testimony given in connection with a defense that the plaintiff had failed to inscribe the statutory notice on the copy which the defendant had copied, should be scrutinized, with unusual care. It was also held that, in connection with such a defense, it was necessary to show that

§ 909  
Pleading and  
proof as to  
omitted  
notices.

30—See § 729.

31—Falk v. Gast Lithographing & Engraving Co., 40 F. 168.

32—48 F. 262.



such copies did not bear such notice when they left the hands of the copyright proprietor.<sup>33</sup> It is not sufficient to show that given copies did not bear the notice when they came into the hands of third persons, not dealing directly with the copyright proprietor.<sup>33</sup> His rights could not be prejudiced by removal of the notices by third persons, unconnected with him, at some time after they left his hands, but before the copies reached the defendant.<sup>33</sup>

§ 910  
Burden of  
proof under  
present Act.

§ 911  
Nature of  
such proof.

§ 912  
Mistakes of  
law.

§ 913  
Application  
of Section  
hinges on  
facts.

It would seem that under the present Act, if the defendant establish that a given copy, or copies, of a work did not bear the requisite notice when they left the copyright proprietor's hands, the burden would be upon the latter of proving facts, if he could, which would bring him within this Section. To do so, it would appear necessary for him to establish that he had sought, in good faith, to comply with the Act and that the particular copy, or copies, which did not bear the requisite notice, failed to bear it as a result of accident or mistake.

Whether such mistake would include a mistake of law is a question upon which the Act sheds no light. As the juridical meaning ordinarily attached to the word "mistake," limits it to mistake of fact, it is improbable that the word as used in this Section would be given a different construction.

Whether the omission of the notice was due to accident, or mistake, or otherwise, would present a question of fact in each case. Where a copyright notice affixed to a work was so badly blurred and indistinct as to be illegible, it was held<sup>34</sup> the resultant situation brought the proprietor within the scope of this Section. A notice legible only by an expert and not by the ordinary man, received the same treatment.<sup>35</sup>

The result of this portion of the Section is, then,

33—Falk v. Gast Lithographing & Engraving Co., 54 F. 890.

34—Strauss v. Penn Printing & Publishing Co., 220 F. 977.

35—Alfred Decker Cohn Co. v. Etchison Hat Co., 225 F. 136.

that an otherwise valid copyright will not be invalidated by the accidental or mistaken omission, either in whole, or *a fortiori*, in part, of the prescribed notice from any particular copy or copies. Intentional, or negligent, omission, or omission from all or, perhaps, substantially all copies would, it seems, not permit the application of the saving provisions of the Section. Unless the omission of the notice is such as described in this Section, its omission would, it seems, quite clearly, under Section 1, and well settled rules of law, invalidate the copyright, or, at least, prevent suit for its infringement.<sup>36</sup>

§ 914  
The present law as to effect of omitting notices.

In cases which are saved by the operation of Section 20, a two-fold situation may exist. Since the copyright in such cases is not invalidated by the failure to give the prescribed notice, anyone who has violated it is an infringer. This Section at this place makes a further important distinction and innovation in the law of copyright. In view of human frailty, and since perjury and piracy may well go hand in hand, the law in the past, wisely, has been that innocence in infringement was no defense to an action for violation of copyright.<sup>37</sup> Since, however, this rigorous, if salutary, rule was mitigated in practice by requiring the copyright proprietor to give notice of his rights, upon every copy of a work leaving his hands, the mitigation of the latter rule, in his favor, required a corresponding relaxation in favor of such persons as infringed his rights, in good faith, because of his omission of the prescribed notice.<sup>38</sup> As against anyone who deliberately infringes a copyrighted work or who does so with actual knowledge of the existence of the

§ 915  
Innocent infringement.

§ 916  
Deliberate infringement.

36—Cf. *Thompson v. Hubbard*, 131 U. S. 123, 33 L. ed. 76; *Record & Guide Co. v. Bromley*, 175 F. 156.

37—See § 1047.

38—In connection with the present English law, it should be noted that the whole machinery of registration and notice was swept away by the Act of 1911, but that this contains a provision, § 8, which prevents any relief, save by injunction in cases where the defendant



copyright, its proprietor may still, as far as concerns this Section, pursue any remedy given him by the Act, as freely as if he had not accidentally, or mistakenly, omitted notice from a particular copy or copies of his work. His excusable omission will not change the character of an act of inexcusable commission.

§ 917  
Status of innocent infringers, under present Section, in cases of omitted notices.

In respect to innocent infringers, however, a different situation exists. While the intention of the framers of the Act probably was to do exact justice between the copyright proprietor and the innocent infringer, the language actually used appears to fall short of this effect.

§ 918  
Damages not recoverable.

The proprietor cannot recover damages, either actual or stipulated, it would seem, against such innocent infringer for anything done or begun before notice of the copyright proprietors' rights is brought home to him. It would seem he could, under this Section, recover no damages for the completion of infringing acts, innocently "begun." Infringement rarely consists of an isolated act. For example, an infringing book is (a) printed, (b) published, and (c) sold. Let the case be assumed of an innocent infringer who has printed an edition of a work which did not bear the requisite notice of copyright, on all its copies. If he cannot sell these, they are valueless and he loses the moneys laid out by him in the printing.

§ 919  
Permanent injunction only procurable conditionally.

The Section expressly provides that no permanent injunction shall be awarded, unless the copyright proprietor shall, if the Court in its discretion so direct, reimburse to an innocent infringer, his reasonable outlay innocently incurred. Such proprietor, however, is not bound to pray for an injunction in suing an infringer. Unless, however, such an innocent infringer were permitted to dispose of such infringing copies as he had on hand, proves he did not know and had no reasonable ground to suspect, that copyright existed in the work infringed by him.

without being exposed to an action for damages by reason of such sale, there would be no need for an injunction, as the liability for damages would, theoretically at least, have the same effect. This was not the intention, it seems, of the framers of the Act and this result may be avoided by construing the word "begun" accordingly. It is believed that an entire transaction, though consisting of separable acts, or stages, each of which might be deemed infringing, if independently performed, should be treated as an entirety, if innocently "begun," for the purposes of this Section, and that in connection with such transactions, there can be no relief by way of damages. This is no hardship to the copyright proprietor, as he can always stop the further activities of such originally innocent infringer, by injunction if he be willing, if the Court deem proper, to reimburse him for his reasonable outlays, previously made in good faith.

Save in exceptional cases, appealing to the conscience of the Court, "reasonable outlay" would appear to mean the amount actually expended. It could not include prospective profits, nor moneys voluntarily expended after notice of the plaintiff's rights, save, it would seem, in connection with the completion of works previously "begun." It may be doubted whether the expense of litigation could be included. It would seem that whatever defendant's innocence, he would have to defray this and also to pay the costs of any action for an injunction brought against him, in which the plaintiff is successful, even though on condition of reimbursement for innocent outlay.<sup>39</sup> Under such circumstances, it would seem that what discretion the Court has should be exercised in favor of such defendant.

Curiously enough, no provision is made for the relief of innocent infringers, if the plaintiff proceeds

§ 920  
"Reasonable  
outlay."

§ 921  
Costs in cases  
of innocent  
infringement.

§ 922  
Writs of  
seizure.

39—Section 40.



by writ of seizure under Section 25 of the Act and Rules 3-5 of the Supreme Court Rules of Copyright Practice and Procedure, unless the Courts will hold that the copies, plates, molds, etc., made by an innocent infringer in cases covered by Section 19 are not infringing copies, etc., within the meaning of Section 25, subdivisions (c) and (d). There are no adjudicated cases bearing upon any of these questions.

§ 923  
Profits.

It has, however, been held, that <sup>40</sup> the profits made by an innocent infringer may be recovered in a case covered by this Section, although not damages actual or fixed. This decision, unjust as its result appears to be, seems to have been required by the language of the Act and to be sound, from a technical point of view.

§ 924  
Temporary injunction.

While no check is placed by this Section, upon the issuance of preliminary or temporary injunctions, it is deemed the Court will be slow to grant temporary relief, save upon carefully prescribed terms, where it would apparently only grant final relief, upon the compensatory basis contemplated by the statute.

§ 925  
Application of Section considered with respect to innocent infringement generally.

The point may be raised, at some future time, that the provision of this Section with respect to the discretion of the Court to require re-imbusement of outlays in the case of innocent infringement, is not limited to cases where there has been an absence of the prescribed notice, on a particular copy, or copies, but that the concluding portion of the Section refers to all cases of innocent infringement. While such an extension of judicial discretion might be beneficial, it is considered that the Section will be limited to apply only to cases of notices, defective or absent on issue, by application of the maxim *noscitur a sociis*, in its construction.

In cases of defective notices, as distinguished

40—Strauss v. Penn Printing & Publishing Co., 220 F. 977.

from cases where there are no notices at all, it may well be doubted whether there can be innocent infringers, save where the inquiry entailed by the defective notice, though reasonably diligent, is fruitless.<sup>41</sup>

§ 926  
Defective  
notices.

In a very recent case<sup>42</sup> it was held that where only a very few copies of chromos did not bear notice of copyright and defendant was not misled by the omission, it would be presumed that such copies had been sent out as samples and did not require notices to be affixed thereon.

§ 926a  
Presumption  
in cases where  
omission  
trifling.

41—Cf. *Alfred Decker Cohn Co. v. Etchison Hat Co.*, 223 F. 247.

42—*Stecher Lithographic Co. v. Dunston Lithographic Co.*, 233 F. 601.



## CHAPTER XV

### AD INTERIM COPYRIGHTS

§ 927  
Ad interim  
copyright.

*Section 21. That in the case of a book published abroad in the English language before publication in this country, the deposit in the Copyright Office, not later than thirty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book, shall secure to the author or proprietor an ad interim copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of thirty days after such deposit in the Copyright Office.*

§ 928  
General copy-  
right after  
ad interim  
copyright.

*Section 22. That whenever within the period of such ad interim protection an authorized edition of such book shall be published within the United States, in accordance with the manufacturing provisions specified in Section 15 of this Act, and whenever the provisions of this Act as to the deposit of copies, registration, filing of affidavit, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book for the full term elsewhere provided in this Act.*

§ 929  
Ad interim  
copyrights  
under prior  
law in non-

The legislative history of these sections is instructive. The former Act<sup>42</sup> provided for ad interim copyrights in books printed abroad, in lan-

42—R. S. 4952, as amended by Act of March 3, 1905.

guages other than English. A special form of notice was to be inserted, as follows: English works only.

“Published nineteen hundred and.... Privilege of copyright reserved under the Act approved March third, nineteen hundred and five by.....” That Act did not provide for ad interim copyrights, in the case of foreign works published in English.

When the present Act was introduced, it differed widely, as has been pointed out elsewhere,<sup>43</sup> in its general scope, from the Act as passed. Sections 16 and 17 of the proposed Act,<sup>44</sup> were the sections corresponding to the ones under discussion. The proposed sections provided for ad interim copyrights in books both in foreign languages, in the English language, or partly in one, or the other. § 930  
Early drafts of Sections under discussion.

For many years there had been great complaint on the part of English authors because the United States, one of their great markets, was necessarily closed to them, for copyright purposes, as they were required to be citizens of the United States, or resident therein, to obtain copyright and, if they published there first, could not obtain British copyright. When the restrictions as to alienage were removed, the restriction as to place of publication remained. § 931  
Reason for proposed change in law.

It has been a marked attribute of governmental policy, at all times, and in all countries, if possible, to ensure that the first publication of copyrightable works take place in such countries, so that their nationals might have the earliest and surest opportunities for apprehending the ideas contained in such works. The original draft of the present Act provided for the deposit of copies for registration within 30 days after the publication which initiated copyright.<sup>44</sup> The Section under discussion, as originally drafted, was undoubtedly intended to conform § 932  
Policy underlying ad interim copyrights.

43—See § 777.

44—S. 6330, H. R. 19853, 59th Congress, 1st Sess., § 11; Copyright Office Bulletin No. 12.



§ 933  
Further discussion of drafts of sections.

to Section 11 of the Act, *as originally drafted*,<sup>45</sup> so as to permit initial foreign publication of works, whether written in English or not. It has been previously pointed out, that it is questionable whether an act conferring copyright upon works published abroad would be constitutional,<sup>46</sup> or whether its enactment could, without any requirement for speedy American publication, be, in any event, deemed within the constitutional powers of Congress. This situation, as well as the necessity for conciliating the American printing, and allied, trades, undoubtedly influenced the draftsmen of the Act, in its various forms.

§ 934  
The expressed intention, as distinguished from the effect of this Section.

In the Report of the House Committee which accompanied the bill, it was said that non-resident authors, writing in English, wished the same rights as those writing in foreign tongues.<sup>47</sup> But the present Act eliminated ad interim copyright, save in the case of works written in English. Congress accordingly acceded to this wish by depriving authors writing in foreign tongues of the right to ad interim copyrights and by conferring such rights upon writers in English. Thus a plea based upon equality, was met with a favorable answer, but also by a simple shifting of the non-equality. In view of this legislative history, it becomes difficult to contend that any portion of the Act of March 3, 1905, is still in force, no matter how desirable a contrary result would be.<sup>48</sup> The somewhat astonishing result of this desire to confer equality may have been partially induced by the effort, made in the draft bill, to enlarge the term of ad interim copyrights in books in foreign languages to two years, which would not, apparently, have promoted "the progress of science and of the useful arts" in the United States.

§ 935  
Ad interim copyright now possible only in works in English.

45—See § 777.

46—See § 750.

47—See House Report 2222, cited elsewhere, § 78.

48—See § 810.

A countervailing complication is introduced by the passage in Section 15 which refers to books of foreign origin in a language, or languages other than English.<sup>49</sup> These need not be printed in the United States. This provision may furnish a slender basis for argument, to those who would contend that there may be ad interim copyrights in works published abroad in non-English languages.

Turning to the language of Section 21, it is to be noted that the foreign-produced copy must be filed in, and cannot be mailed to, the Copyright Office, in order to procure ad interim copyright under these sections, but that subsequently produced American copies may be mailed, if extension of the original copyright is sought.

The maximum period that an ad interim copyright can endure is sixty days after the initial foreign publication.

The general language of the Section with respect to persons who can obtain such copyrights, is to be deemed limited by Section 8, referring to the classes of foreign authors, in whose works copyright may be obtained.<sup>50</sup>

No form of notice of copyright appears to be prescribed in connection with ad interim copyrights under the present Act. Under the express provisions of Section 9, no notice is required on the copy deposited to procure ad interim copyright under these sections.<sup>51</sup> Whether, however, affixation of the statutory notices is not requisite in the case of copies of such work imported during the duration of an ad interim copyright, if such importation is permissible, as it seems to be, is an open question.

The word "book," as used in Section 21, would probably be given a reasonable construction.<sup>52</sup>

§ 936  
Filing of copy essential to secure ad interim copyright.

§ 937  
Duration.

§ 938  
Who may obtain such copyright.

§ 939  
Notice of such copyright.

49—See § 829.

50—See § 675.

51—See § 730.

52—See §§ 532, 537.



§ 940  
In what books  
such copy-  
right may  
inhere.

§ 941  
Songs.

§ 942  
Requirements  
where general  
copyright de-  
sired after  
ad interim  
protection.

§ 943  
Effect of  
sections on  
question of  
foreign first  
publication.

Works, partly in English, partly in foreign tongues, would probably be held to be included in the scope of the Section, provided that the English portion of the text preponderated. It is a question, in the case of songs with English words, what the scope of an ad interim copyright would be, if obtainable. While the Courts will probably hold such a copyright may be obtained,<sup>53</sup> it seems such copyright would not be in the music or in anything connected with the work, except in the words of the song, if original.

It is to be noted that under these sections, the proprietor of an ad interim copyright need not publish an edition in the United States himself, to procure general copyright: such edition need only be an authorized edition. Whether a translation would comply with this requirement, is a subject for future judicial determination. Copyright notices in cases where the proprietor himself does not publish in the United States, should contain his name as copyright proprietor and the year of first American publication.

On the principle of *inclusio unius, exclusio alterius est*, all books published abroad in which an ad interim copyright is not procured, become incapable of American copyright. This would follow from these sections of the statute, even if this result would not be worked by their becoming part of the public domain, on publication, without statutory copyright.<sup>54</sup> The same rule of construction lends weight to the argument that since there can be no ad interim copyright, save in the case of books, and no American copyright in books, published abroad, unless ad interim copyright be obtained, that there can be no American copyright in works other than books, first published abroad.<sup>55</sup>

If a copy of an English novel were purchased

53—See § 191.

54—See § 265.

55—See also § 736, *et seq.*

abroad, on first publication, imported and reprinted before an ad interim copyright were secured in this country, the question might arise what the rights and liabilities of the printer would be. Since no notice of copyright is required in many foreign countries, such reprint might be made in perfect good faith, without any knowledge or means of obtaining knowledge, as to whether thirty (30) days had, or had not, expired after the time of initial publication. It is not believed, however, that the question of good faith would affect the result. Since the statute is plain, the copyright when obtained, would prevent further sales of the reprinted work by such third person, but since statutory copyright is not retroactive, he would not be compelled to account for profits or respond in damages, for past sales.<sup>56</sup>

§ 944  
Effect of ad  
interim copy-  
right on prior  
innocent pub-  
lication by  
third persons  
in United  
States.

<sup>56</sup>—See *Monckton v. Pathe Freres Pathephone*, (1914), 1 K. B. 395.



## CHAPTER XVI

### DURATION AND RENEWAL OF COPYRIGHT TERMS

§ 945  
Duration of  
copyright.

*Section 23. That the copyright secured by this Act shall endure, twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: Provided, That in the case of any posthumous work or of any periodical, cyclopaedic or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopaedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and exten-*

§ 946  
Renewal of  
copyright.

*sion of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in default of the registration of such application for renewal, and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.*

The date of first publication, which initiates statutory copyright, is defined elsewhere,<sup>57</sup> in the case of works reproduced in copies for sale or distribution, as 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. The question of what constitutes a publication, in cases not covered by this definition, is discussed elsewhere.<sup>58</sup> The effect of this Section in its application to copyrights secured under Section 11, is also discussed elsewhere.<sup>59</sup>

Copyright under the Act runs for 28 years after first publication and not from the date of registration save in cases of ad interim copyrights.<sup>60</sup> While the length of the initial term is the same as in previous statutes,<sup>61</sup> except that the term granted by these ran from registration,<sup>62</sup> not publication, the length of the renewal term, where authorized, has been doubled.<sup>63</sup> The term "renewal," is used in the discussion of this Section, for purposes of convenience, although, as pointed out subsequently,<sup>64</sup>

§ 947  
Date of the  
inception of  
copyright.

§ 948  
Duration of  
copyright.

§ 949  
Renewal term.

57—Section 62.

58—See §§ 348–400.

59—See § 777.

60—See §§ 927, 928.

61—R. S. 4953.

62—R. S. 4954.

63—Cf. R. S. 4954.

64—See § 951.



§ 950  
Meaning of  
"renewal" of  
copyright.

§ 951  
Who is en-  
titled to re-  
newal of  
copyright.

§ 952  
When a pro-  
priator, not  
the author,  
may have a  
renewal.

the second copyright term to which it refers is to be deemed a new one rather than a strict renewal of the initial copyright in a given work.

Every proprietor of a copyrightable work is entitled to a copyright therein but every proprietor of a statutory copyright is not entitled to a renewal of such copyright, on the expiration of its initial term. As pointed out in an excellent opinion,<sup>65</sup> citing and comparing the various statutory provisions bearing on the subject matter of the succeeding section, it has been a uniform legislative policy, manifested in all of the American statutes, to differentiate between proprietors, who were not the authors of copyrighted works, and such authors, or their families, when renewals of copyright were involved.

The present statute makes the following provisions as to when the proprietor, as distinguished from the author of a work, may obtain a renewal: the proprietor may have it with respect to

- (a) posthumous works,
- (b) periodicals, except as to contributions copyrighted separately, and
- (c) cyclopaedic, or other composite works, with the exception noted under (b).

But renewals in cases (b) and (c) may only be obtained where the original copyright was obtained by "the proprietor thereof." Whether this means proprietor at the time of renewal, or not, or proprietor of the work and its contents, as distinguished from a mere publisher, or mere technical proprietor, of the copyright in such publication, as an entirety, is not entirely clear. It is deemed however, the words mean entire proprietor of the work and of its contents, at the time of original copyright. The proprietor may also obtain a renewal, in cases

<sup>65</sup>—White-Smith Music Publishing Co. v. Goff, 180 F. 256 (Brown, D. J.), aff'd 187 F. 247.

depending on his, or its, character—that is, in cases of works copyrighted by

(d) a corporation—except as assignee or licensee, or by

(e) employers, whether corporate or not, for whom the work was made, for hire.

In no cases other than those specified above, is a copyright proprietor entitled to a renewal term, by mere virtue of his ownership of the original copyright of the work in which the copyright subsists, or by mere force of the statute. It seems this must be equally true, though the proprietor became such before publication, or copyright, as no matter when or how, he became the owner of the work, unless he was its author, the clear distinctions made by the statute between authors and those claiming under them, militate against him.

Except in the cases which have been specified, where the proprietor is entitled to a renewal copyright, the persons hereinafter named are entitled to a renewal or extension, if living, in the order named: the author, his widow or her widower, the author's children, or executors, or next of kin, if there be no will.

§ 953  
When author, his family, etc., entitled to renewal.

The contingent rights created by this Section (other than those reserved to copyright proprietors) are strictly personal and hence, incapable of assignment, before they have crystallized into new copyrights. The machinery of the statute so contemplates. Hence an assignee cannot obtain a renewal copyright, merely in his capacity of assignee. It is difficult to see how the proprietor of a work, not coming within the category of those in which a proprietor has renewal rights, can obtain any certainty of obtaining such renewal rights, by any form of contract he may make with the author. If the author be living when a copyright expires,

§ 954  
Rights to renewal are not assignable.

§ 955  
Effect of this rule, in connection with efforts to secure future renewal rights by contract with author.



he may, it seems,<sup>66</sup> be compelled, in a proper case, to assign the renewal copyright to the proprietor of the original copyright, if the contract between them so provided. But the difficulty is, that, while by proper contractual machinery, matters may, hence, be so arranged that renewal rights will ultimately vest in the proprietor of the original copyright, if the author be living at the end of the original copyright term, the author cannot bind his widow, children or next of kin, effectively, by contract.

The provision giving renewal rights to the author's executors, in certain contingencies, is obscure in that it is not made entirely clear, whether it was designed that such rights were to be for the benefit of testamentary legatees, although this seems more probable, or for the next of kin. It may be considered doubtful to what extent a contract to make a testamentary disposition in favor of the publishers could be enforced, specifically, and with what results, since, as pointed out, the inchoate rights of renewal are not assignable.<sup>67</sup> Such a contract could not give executors or legatees precedence over the author's widow, widower, or children, if living.

§ 956  
The question as to estoppel to claim renewal copyright discussed.

It has been suggested that by an "outright" sale of his manuscript, an author might estop himself and his family from claiming renewal rights.<sup>68</sup> The suggestion involves two questions, not necessarily the same, and of doubtful merit. While the nomenclature used in connection with the second copyright term, refers to "renewal" or "extension," what is, in reality, conferred is a new copyright.<sup>67</sup> This is shown by the provisions differentiating between the proprietor of the original copyright and the persons, other than he, who are entitled to the so-called

66—*Cowen v. Banks*, 24 How. Pr. 73.

67—*White-Smith Publishing Co. v. Goff*, 187 F. 247.

68—*Drone: Copyright*, p. 327.

renewal. "Renewals" of rights, in favor of persons, who did not have the rights so "renewed," would certainly be of a curious legal nature. By selling the rights which he had, an author cannot fairly be said, by implication, no matter how absolute his language, to dispose of rights he may never have, or which if he has, he cannot assign before he obtains them. Something more than a bare sale of existing rights, no matter how absolute, would appear necessary to divest him of future renewal rights. His behavior may undoubtedly be such that a Court of Equity will lend him no aid in enforcing a renewal copyright. But whatever his behavior, it is difficult to see how it can affect the statutory<sup>69</sup> rights of his family to a renewal, if he die, unless they actively participate in his inequitable behavior.

Mr. Drone<sup>70</sup> has expressed a view contrary to the foregoing, in his discussion of Section 4954 of the Revised Statutes. His argument is that, if an author has sold his work and all rights therein, he cannot thereafter obtain any rights in connection therewith, that the rights of his surviving family, if any, are dependent upon his rights and, hence, they cannot, in such a case, obtain any rights in connection with such work. It is not deemed, however, that this view, with the natural justice of which one would not be disposed to quarrel, will bear examination. The difficulty with this argument is that it fails to recognize that the rights involved are purely statutory, and hence dependent not on the ownership of a work, not on authorship, but on the statute. Authorship furnishes the foundation for the legislation under which copyrights are granted, but it does not furnish the measure of rights granted by the statutes. The distinction is between the occasion for, and the results of, legislation. He can only sell what he has, that is, the right to apply for

69—Rundell v. Murray, Jac. 311; Paige v. Banks, 7 Blatch. 153.

70—Drone: Copyright, p. 326.



rights, and if, as a result of such application, future rights arise in him, or in third persons, this is the result of machinery which comes into play, independently of his authorship. The buyer cannot complain. He has everything the author can sell. An author can only sell rights which he has. When he sells his work before publication, he has no right to renewal of a copyright as no copyright exists and, *non constat* that any ever will exist, to be renewed. When copyright does arise, it may not arise in the author at all. Since, if he were to attempt to assign his inchoate renewal right, the assignee, as Mr. Drone himself concedes<sup>71</sup> could not obtain it, as such assignee,<sup>72</sup> the author, it would seem, cannot be deemed to have assigned, or sold, something he does not have, may never have and which could not avail the purchaser if sold to him.

The greatest care should be exercised, in all contracts involving copyrights, to make definite provision,<sup>73</sup> as far as possible, with respect to renewal rights, to avoid the questions which may otherwise arise if the work has a permanent worth, giving value to the privilege of renewal.

§ 957  
Notices of  
renewal copy-  
right.

The Act is curiously defective, in making no definite requirements for notice of copyright in connection with renewals. It would seem that if the renewal term be deemed a mere continuation of the original term, the original copyright notice must continue to be published, subject to the rule as to substituting the assignee's name, where assignments of copyright are recorded. If on the other hand, the renewal and extension be deemed a separate and distinct copyright, it would seem a new notice of such new copyright would be essential. The original

71—See Drone, p. 261.

72—28 Opinions Attorney General 162. The dictum to the contrary in *Carnan v. Bowles*, 2 Brown's Ch. 65, would almost certainly not be followed.

73—*Pierpont v. Fowle*, 3 Wood & Min. 23.

notice, especially if it bore the date of the original publication, would be quite misleading, after the expiration, by lapse of time, of the original copyright term. A careful reading<sup>74</sup> of Section 18 of the Act would seem to lead to the conclusion that, on the whole, a notice is requisite on copies published or sold under a renewal copyright, which should contain the name, in the first instance, of the original proprietor of the renewal copyright, and in addition, thereafter, be subject, as to names to be inserted therein, to the same rules as copyright notices generally. Since the only date required in a copyright notice is, in the cases where requisite, "the year in which the copyright was secured by publication," it may be thought questionable whether any date is requisite in notices in renewal cases, renewal copyrights *not* being obtained by publication. If any such date is requisite, the date when the original copyright was so secured would seem to be the date required. There are no adjudicated cases bearing upon this question, although the theory of *White-Smith Music Publishing Co. v. Goff*<sup>75</sup> would appear to sustain the view that, despite the apparent meaning of the language employed, if taken in its ordinary sense, the second copyright contemplated by the section under discussion, is an entity, separate and distinct, from the original copyright.

In view of the uncertainty as to how these questions will finally be adjudicated, and the necessarily fatal consequences of improper notice of copyright,<sup>76</sup> it is suggested that, if the original notice of copyright be printed on all copies, and in addition, a notice referring to the copyright renewal, thus "Copyright, 1909, by A. B., Copyright, Renewed, 1937, by C. D.," such notice would suffice, whatever view were taken of the pertinent statutory require-

74—See § 853.

75—180 F. 256, aff'd 187 F. 247.

76—See § 905.



ments. This discussion as to notices also applies to similar questions, in connection with renewals of copyright obtained under the following section.

§ 958  
Formalities  
necessary to  
secure renewal  
copyright.

The practice on renewal is simple. An application for renewal must be made to the Copyright Office within one year before the expiration of a subsisting copyright. If the person, or persons, entitled thereto apply, the right to renewal is absolute and the Copyright Office is vested with no discretion as to granting or refusing it. Similarly, the Copyright Office cannot confer a renewal copyright upon any one not entitled to receive it. Its function in respect to renewals is simply to act as a depository and recording office for renewal claims. No judicial or quasi judicial powers are conferred on that Office.<sup>77</sup> Such application must be filed and a mere deposit in the mails will not suffice, as in the case of original registrations.

There can be no renewal copyright, unless there be a subsisting copyright at the time when the renewal term accrues.

§ 959  
Renewal cer-  
tificates.

There is no provision made in the Act, apparently, for renewal certificates.

§ 960  
By whom ap-  
plication for  
renewal must  
be made.

Since, under certain contingencies, the rights of renewal may be in more than one person, interesting questions may arise, if such persons are averse to concerted harmonious action in connection with obtaining a renewal. The Act only contemplates one, and not several applications for renewal, in connection with any given copyright. But it does not seem absolutely essential that the application be made by all the persons entitled to the renewal: otherwise, very difficult and harsh situations might arise. Copyright renewals can only become effective on the termination of the original copyright. The persons entitled to such renewals appear to be those who would be entitled thereto at the time when the original copyright terminates. But applications for

77—See §§ 544, 1613.

renewal must be made before that time and there can be no certainty that the person or persons, apparently entitled to renewal at the time of application, will be living, at the time when the renewal would become effective.

If the application for renewal does not refer to the person, or persons, actually entitled to the renewal, it would probably be held a nullity. The same result would probably follow if the application were made by some one not authorized to make it on the claimant's behalf. If more than one person be entitled to the renewal, they would take as tenants in common.<sup>78</sup> The interesting complications which may arise if there is more than one proprietor of a copyright are discussed elsewhere.<sup>79</sup> Since, as shown elsewhere,<sup>80</sup> a copyright owned by several is practically worthless in the absence of harmonious action between the owners,<sup>80</sup> the fact that, apparently, if all persons entitled to a given renewal of copyright do not care to apply for it, personally or by agent, none of them can obtain renewal rights therein, is less severe than it appears. This however, would appear to be the law, since it is impossible to conceive of an individual portion of a copyright, as having fallen into the public domain, and the other portions continuing to exist as a monopoly, under a partial renewal.

The question as to whether the proprietor of a renewal copyright, could prevent the proprietor of the original copyright from continuing to publish the work, after the renewal, if the author have sold the work outright, is discussed by the lower Court in *White-Smith Music Publishing Co. v. Goff*.<sup>81</sup> That the proprietor would have the right to dispose of all copies printed by him during the lifetime of the

§ 961  
Unauthorized  
erroneous ap-  
plications.

§ 962  
Renewal where  
several en-  
titled to it,  
but one or  
more averse to  
securing it.

§ 963  
Rights of pro-  
prietor of  
original copy-  
right, after  
renewal copy-  
right by  
another.

78—Cf. *Carter v. Bailey*, 64 Me. 458.

79—See §§ 424, 693.

80—See § 693.

81—180 F. 216.



original copyright must be conceded.<sup>82</sup> His position would seem, however, to be in no way different, after the expiration of the original copyright, from that of any other person who was the possessor of lawful copies of the work<sup>83</sup> and his rights and liabilities after the termination of the initial copyright would appear to be the same as such persons would be, unless there be something in the contractual or other relation of the parties to work a different result.

This result may arise as where,<sup>84</sup> the plaintiff had given the defendant, a publisher, a book of cookery receipts, as a free gift. He copyrighted and published it, and it proved profitable. At the end of the copyright term, she attempted to take out a renewal copyright and to enjoin him from continuing to publish it. The Court refused her an injunction on the ground that, even if she had a renewal copyright, a point upon which the Court did not pass, Equity would refuse her aid, under the circumstances in evidence in the case.

In another case,<sup>85</sup> it was held that where an author sold the rights to publish a work, without binding the purchasers to take out statutory copyright, he could not, on taking out a renewal of the copyright taken out by them, prevent their selling the work during such renewal term.

These decisions simply apply ordinary doctrines of equity to special facts, and are not, necessarily, authorities which bear on the legal rights of the proprietors of renewal copyrights.

§ 964  
Renewal of  
copyrights  
obtained  
under prior  
Acts.

*Section 24. That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for*

82—See § 41.

83—See § 1476 *et seq.*

84—Rundell v. Murray, Jac. 311.

85—Paige v. Banks, 7 Blatch. 153.

*under existing law, be renewed and extended by the author of such work if still living, or the widow, widower or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period; Provided, however, That if the work be a composite work upon which the copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this Section; Provided, That application for such renewal and extension shall be made to the Copyright Office and duly registered therein within one year prior to the expiration of the existing term.*

This Section applies to copyrights obtained prior to the passage of the present Act. It limits renewal copyright in cases covered by it entirely to an author, or designated persons, other than the mere proprietor of the original copyright. Even the proprietors of copyrights in periodicals, posthumous, cyclopaedic or other composite works (unless "authors," by virtue of being employers, in the case of works made for hire<sup>86</sup>) cannot obtain renewal, by virtue of ownership of the original work and original copyright, if this was obtained under Acts prior to the present one.<sup>87</sup> With this exception, the discussion of Section 23 applies to Section 24.

It is to be noted that the copyright terms provided in R. S. 4953-4, as in earlier statutes, were 28 years with renewal of 14 years. Under this Section it has been considered by the Copyright Office,—

§ 965  
Who may obtain such renewals.

§ 966  
Renewals of previously renewed copyrights.

<sup>86</sup>—See § 1634 *et seq.*

<sup>87</sup>—White-Smith Music Pub. Co. v. Goff, 180 F. 256, *aff'd* 187 F. 247.



correctly, it seems,—that even where a renewal had been taken out under prior Acts for 14 years, if these had not expired, proceedings could be taken under this Section to make the total renewal term 28 years.

§ 967  
Duration of  
protection of  
commercial  
prints and  
labels.

It may be noted at this place that the Patent Office has deemed, probably also correctly, that the periods of protection of prints or labels, designed to be used for other articles of manufacture, conform to those of the then prevailing Copyright Law.

## CHAPTER XVII

### INFRINGEMENT AND THE REMEDIES PROVIDED IN CONNECTION THEREWITH

*Section 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable,*

§ 968  
Infringement and remedies when it occurs.

to the various civil proceedings enumerated in heavy type, in succeeding paragraphs of this work.<sup>88</sup>

§ 969  
Exclusiveness of remedies.

Such remedies are exclusive, and where such statutory remedies are insufficient, this does not permit a resort to common law procedure to vindicate rights under the statute.<sup>89</sup>

Before proceeding however to a discussion of such remedies, the question as to what constitutes infringement requires consideration. A great and underlying difficulty with this branch of the law is its intimate inter-relation with questions as to the nature and scope of copyright, both in general and as applicable to different media of expression. It is essential, therefore, before proceeding to a detailed examination of the authorities and to the exposition of the rules of law which peculiarly pertain to questions of infringement, that certain general observations be made, introductory to the consideration of the problems there presented, when these are considered as entireties, in connection with related branches of the law of copyright. The particular authorities which bear on these questions will be found on subsequent pages of this work.<sup>90</sup> A

§ 970  
General observations on law of infringement.

88—See § 1227 *et seq.*

89—Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096.

90—See §§ 987-1226.



proper realization of the subject, however, requires a constant understanding of general and underlying principles, which are best discussed in the abstract, before proceeding to detail. Unless these are kept in mind, the decisions often will appear irreconcilable, and the quasi-metaphysical statements found in the authorities render frequent error almost certain.

§ 971

The nature of copyright, from the point of view of infringement.

Every copyright proprietor is the owner of certain general, and more or less well defined, rights.<sup>91</sup> These depend partly on the language of the statute under which they have been secured, and, partly, upon what he has actually copyrighted, that is, the original portion of the specific work involved.<sup>92</sup> In the course of the exercise, or in connection with the accrual of such rights, he makes, or has made for him, one or more copies, concrete replicas or physical reproductions of the copyrighted work. By the very act of publication, which initiates his statutory rights, he parts with the possession of one or more of such copies.<sup>93</sup> The copies are intended for, and are capable of, use. Use alone gives them value and the producer of the copies may, and, theoretically at least, does, obtain value for every reasonable use of which they are capable. The nature of a given work largely determines the use which may be made of its copies. Thus dictionaries and novels, for example, obviously stand on a different practical basis. The nature of the copies may also be significant in this connection. A design for a work of art, for example, a book of legal forms, or a moving picture film, stand on quite a different basis from a volume of original poems. It is elementary that every man is presumed to intend the necessary consequences of his acts. He cannot close his eyes, nor attempt to ignore known and established business or social usages. If he sells a copy of a book, he cannot

§ 972  
The effect of reproduction of copies.

91—See § 134.

92—See § 484.

93—See §§ 729, 766.

say he did not expect it to be read:—if he sells a motion picture film, he cannot say he did not expect it to be publicly “run off” or presented. But, on the other hand, he may fairly say, he did not expect either to be copied, nor the book to be dramatized nor the film, if a play, to be turned into a novel, merely because he had sold a copy of it. The use that he necessarily intends to be made of copies of the work, is called “fair use:” the use that cannot be made, is called infringement. The former deals, primarily, with individual copies, with the possession of which the owner has voluntarily parted; the latter involves the wrongful utilization of one or more of the general rights which exist, not in mere copies, but which arise under the statute in connection with the work of which copies are made.

Fundamentally, then, the question of infringement partly depends on the question, also discussed elsewhere,<sup>94</sup> as to what is really copyrighted, viz: given intellectual concepts formulated, for convenience, in one or more media of expression, or the forms of expression themselves. To illustrate: an author may express given ideas in verse, or prose, in the form of a drama, a novel, a moving picture scenario, a moving picture, a drawing or series of drawings or a song. If he copyrights his work in one of these forms, what does he copyright in essence: the work or the form, and—for the question is not necessarily the same—in which does his copyright, as measured by his rights, subsist after it is taken out?

Classical language descriptive of copyright is that “the subject of property is in the order of words in the author’s composition, not in 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 are not capable of

§ 973  
Permissible  
use of copies,  
as opposed to  
infringing use.

§ 974  
General na-  
ture of in-  
fringement.

§ 975  
Infringement  
depends on the  
true subject  
matter of  
copyright.

§ 976  
Classical defi-  
nition of early  
copyright.

94—See § 504.



§ 977  
Copyright exists in order of ideas.

§ 978  
Infringing adaptations.

§ 979  
Verbal alterations.

§ 980  
The expression of ideas measures copyright therein.

appropriation.”<sup>95</sup> This language, while technically correct, is readily misunderstood. Its inadequacy to cover many cases of modern copyright is patent. No one could, for example, question the accuracy of these remarks as applied to dictionaries, translations, compilations, or, *mutatis mutandis*, to a portrait or other graphic representation of existing objects or beings. But except in these cases, which rest upon the mental effort expended in selection, arrangement, or exemplification, while the “subject of the property” may be as stated, the property itself, as measured by the rights of which it consists, is, as will be shown, not so much in the “order of words,” as in the “order of ideas.” Since there cannot be copyright in a simple idea or thought, save in combination, this really means the property is in the group or aggregate of copyrightable ideas which make up the work. That this is true appears from the numerous cases which hold that copying need not be literal, to be infringing.<sup>96</sup>

It is further illustrated by various decisions<sup>97</sup> where it was held that an unauthorized adaptation that contains the plot or theme of a copyrighted story, if this was original, is an infringement. Thus, also, the mere alteration of words in a piratical version of a play was held<sup>98</sup> no defence to a charge of infringement, where there was a substantial use of one play, in the composition of another.

It is necessary that words, or other media of expression, be used to formulate ideas before the latter can be appropriated.<sup>99</sup> It is necessary that such expressions be reduced to tangible form before the ideas embodied therein can become the subject

95—Mr. Justice Erle in *Jefferys v. Boosey*, 4 H. L. C. 867; quoted with approval in *Holmes v. Hurst*, 174 U. S. 83, 43 L. ed. 904.

96—See § 1024 *et seq.*

97—*Dam v. Kirk La Shelle Co.*, 41 L. R. A. (N. S.) 1002, 175 F. 902.

98—*Bouccicault v. Wood*, 2 Biss. 34.

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

of property rights.<sup>1</sup> Ordinary considerations of public and private necessity require this result. But the expression of the ideas must never be confused with the ideas themselves: the title deeds are not comparable to the property to which they refer. Each serves its proper purpose. The tangible expression of an author's ideas fixes the boundaries of his property and marks it off from other properties. Just as deeds must be recorded, so copies of the work are required to be deposited but no one would claim because of such record of a deed that the rights of an owner existed in the language of the deed or were limited to it, nor can any similar claim be made in all cases of copyright.

§ 981  
The distinction between rights constituting copyright and its subject matter.

Similarly, the "subject matter of copyright" must not be confounded with the rights which constitute copyright.<sup>1a</sup> The rights which arise on compliance with the statute, are wholly distinct from the material object copyrighted.<sup>2</sup> These rights, once they come into existence, necessarily are self-measuring and define and mark the limits of the so-called property created by the statute.<sup>1</sup> To a limited extent, they, apparently, differ according to the form of the copyrighted work but the actual differences will be found to exist according to the essential nature of a work and not according to its form. That the copyright is not merely in words or the order of their expression, is best shown by cases which involve the violation of copyright, and which will be discussed on the following pages of this work.

§ 982  
Such rights measure a given copyright.

It should also be borne steadfastly in mind, that if a work is not entirely original, there is no copyright in the unoriginal part, which will prevent its use, separately, or in combination, with matter not covered by copyright.<sup>3</sup> Hence, of course, any inquiry

§ 983  
Permissible reproduction of non-original portions of a work.

1—See §§ 138, 505.

1a—See *Holmes v. Hurst*, 174 U. S. 83, 85, 43 L. ed. 904, 905.

2—Section 41.

3—See §§ 460, 504, 612.



§ 984  
Originality  
measures  
scope of  
copyright.

as to infringement must exclude permissible reproduction of such non-original matter.<sup>4</sup> If the originality is merely in the order of words, "that is, in the method or manner of expression," copyright in that work is only in the thought manifested in creating such order of words. If, on the other hand, there are truly original thoughts embodied in the word,—not merely in the expression of thought, but in the thought so expressed, then copyright exists in such intellectual creation throughout. The scope of copyright is, then, always measured by the extent of, and nature of, the original work embodied in a creation.

§ 985  
Nature of  
rights con-  
stituting  
copyright.

A right may consist either in the power to exclude others from a given field of activity, or it may consist in the sole liberty of utilization of something, tangible or intangible. A right may, but need not necessarily, comprehend both of such ordinary manifestations of its essence. Thus under the statute it will be found that, at various places, copyright takes either one or the other or both of such typical forms of right. The right to vary the form of the copyrighted work will be found everywhere in the Act, although at places, subject to possibly unintentional limitations. This right of variation, of re-birth, although it may necessitate a new copyright to protect the result of the exercise of such right,<sup>5</sup> is only consistent with the conception that copyright is in ideas rather than in their expression. This is further shown in that where such a new copyright is necessary, no one can obtain it except the proprietor of the original copyright or one claiming under him.<sup>6</sup>

§ 986  
Theoretical  
copyright in  
order of ideas,

But the fact that copyright exists in the intellectual conceptions embodied in a given work and that

4—Lillard v. Sun Printing & Publishing Co., 87 F. 213. Cf. Henderson v. Tompkins, 60 F. 758; De Berenger v. Wheble, 2 Stark. 548.

5—See §§ 464, 610, 662.

6—See § 646.

these, in certain cases, will be protected according to their essence, can only be a source of misunderstanding, unless properly understood. For the rights which we call copyright are themselves limited rights<sup>7</sup> and they, in turn, limit, qualify and define the boundaries of the property in the ideas so copyrighted. The measure of these limitations, in many instances, are such that the fundamental conception of copyright property may be overlooked, if attention is concentrated only on such limitations; and, conversely, if the nature of the right be regarded without noticing how partial its protection is, as a result of its statutory birth, equal confusion of mind is certain.

Thus, in one instance,<sup>8</sup> a pattern, consisting of a mosaic of small colored squares, for making woolwork reproductions of a painting, was held not to be a copy of a copyrighted engraving of the painting, although concededly made from the engraving, as it did not copy or imitate anything which was the work of the engraver. Similarly, it has been held that although engravings are made from a painting, this does not render other engravings, made from the same painting, a piracy of the first engravings.<sup>9</sup>

In another case,<sup>10</sup> it appeared that *A* had been employed by *B* to engrave plates from drawings belonging to *B*. He took off a number of impressions from such plates and sold them. This was held no violation of the statute then in force as this only applied to impressions of engravings pirated from other engravings, and not to prints taken from lawful plates.

An early English case,<sup>11</sup> furnishes a further illustration of the point under discussion. The first English statute referring to sculpture,<sup>12</sup> forbade the

limited by partial nature of statutory rights therein.

§ 987  
Examples of limited nature of copyrights.

§ 988  
Pattern for woolwork reproduction of painting.

§ 989  
Engravings, severally made from same painting.

§ 990  
Cases not infringing rights under particular statutes.

7—See § 140.

8—*Dicks v. Brooks*, L. R. 15 Ch. D. 22.

9—*De Berenger v. Wheble*, 2 Stark. 548.

10—*Murray v. Heath*, 1 Barn. & Ad. 804.

11—*Gahagan v. Cooper*, 3 Camp. 111.

12—38 Geo. 3, c. 71, § 2.



making of casts of copyrighted sculpture with additions or changes and also the selling of unchanged copies. It did not specifically mention the sale of changed copies. It was held that, under this statute, a case of infringement was not made out by merely proving that defendant sold a cast of a copyrighted work, with changes in it, without proof as to who made the cast. The two decisions last cited are no longer law, but this is only because the statutes involved have been broadened.

§ 991  
Use of similar system or contrivance for city maps.

In another decision,<sup>13</sup> it was held that 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 the territory in question, was not infringed by a similar map of Philadelphia. This result followed since the copyright was in the map of New York, not in the system or contrivance used to facilitate its use and while the latter was copied, the former was not.

§ 992  
Independent translations of common work.

In a case involving,<sup>14</sup> "The Two Orphans," it was held copyrightable in the form of a translation from the French, but the copyright therein was held not to be infringed by the performance of an independently made translation.

§ 993  
Repetition of facts.

In another case,<sup>15</sup> it was held not to be infringement for defendants to communicate the contents of letters to the world, in their own way, where they did not reproduce the language of such letters. The facts in the letters were not subject to copyright, although the language in which they were expressed was.

§ 994  
Exhibition of pirated work of art.

In an English case, it appeared,<sup>16</sup> a poster was made from a reproduction of a copyrighted photo-

13—Perris v. Hexamer, 99 U. S. 675, 25 L. ed. 308.

14—Shook v. Rankin, 6 Biss. 477.

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

16—Bolton v. London Exhibitions, 14 T. L. R. 550.

graph. It was held this was infringement but the subsequent exhibition of the posters by one who did not know of or authorize the copyright was not infringement, as there was nothing in the statute involved which gave sole rights of exhibition to the copyright proprietor.

In a case involving an unusual English Statute,<sup>17</sup> the plaintiff had made a fine line drawing for an advertisement and sold it to the defendants. They had it copyrighted and then had it enlarged and colored and reproduced it in copies, in poster form, with the artist's name on them, but without his special consent. It was held this was a violation of the Fine Arts Copyright Act (1862) Sections 7, 4, as an unlawful alteration of the work. There are no corresponding provisions in the United States Statute and the decision is not law here.

The cases instanced in the preceding paragraphs illustrate that although the subject matter of copyright may be in ideas expressed, the nature of that expression, its sources, and the extent of the rights constituting copyright under a given statute, limit or define the scope of the proprietor's property rights in connection with such subject matter.

As has been previously pointed out,<sup>18</sup> statutory copyright does not give a *monopoly* in ideas, however expressed, but merely protection against their unlawful reproduction.<sup>19</sup> Thus, a booklet entitled "Opera Stories," in which the author gave a brief sketch of the scenario of various operas was held<sup>20</sup> not to be an infringement of the copyrights on the librettos, as neither an abridgment, a copy nor "other version thereof," although, of course, the ideas constituting the original plots were outlined

§ 995  
Copyright, not  
monopoly in  
ideas.

17—Carlton Illustrations v. Coleman & Co., (1911) 1 K. B. 771.

18—See § 499 *et seq.*

19—See Corelli v. Gray, 29 T. L. R. 570 (1913, Ch. D.). See also Johnson v. Donaldson, 3 F. 22.

20—G. Riccordi Co. v. Mason, 201 F. 182, 184, *aff'd* 210 F. 277.



§ 996  
Limited  
monopoly in  
use of ex-  
pression of  
ideas.

§ 997  
Reasons for  
limited nature  
of monopoly.

§ 998  
Identical  
works not  
copied from  
one another.

in the booklet. That is to say, the property, *such as it is*, is in the ideas but the monopoly conferred is not in the ideas, but rather in certain uses which may, or may not, be made of the author's expression of the ideas. This is because, despite perversions necessarily incident to a commercial civilization, as reflected in inadequate statutes, copyright remains founded on the conception that thought is labor which creates ideas, which, in turn, when reduced to tangible form, may become property. Thought is individual. Every laborer in the vineyard is entitled equally to a reward for his labor but not to a reward for another's labor. This last phrase is no denial that he may use, in a proper case, the results of another's labor in facilitating his own thought, if it be his own thought, and not another's, just as wares made with another's tools do not lose their characteristics of property because made with tools fashioned by another.<sup>21</sup> The copyright laws give no monopoly of use and no absolute monopoly based on preemption, as the patent laws do.<sup>22</sup> If *A* produce identically the same work as *B*, by independent thought, in good faith, without hearing of, or seeing, *B*'s work, both *A* and *B* would be entitled to individual copyrights in their individual works. Such cases of substantial duplication are, of course, out of the ordinary, although asserveration of such claims is not unusual. The Courts justly look upon such contentions with well founded suspicion,<sup>23</sup> and require rigid proof before sustaining them, but instances of such successful proof are not unknown.<sup>24</sup> Recognition of this situation is occasionally found in connection with media, where

21—See § 2.

22—See § 156. See also *Bachman v. Belasco*, 224 F. 815.

23—See *Lawrence v. Dana*, 4 Cliff. 1.

24—*Robl v. Palace Theatre, Ltd.*, 28 L. T. R. 69 (K. B. Div. 1911); *Reichardt v. Sapte*, (1893) 2 Q. B. 308; *Glaser v. St. Elmo, Inc.*, 175 F. 276; *Bachman v. Belasco*, 224 F. 815.

independent duplication might not ordinarily be expected. Thus in one case,<sup>25</sup> Fry, L. J., said:

“I must also bear in mind the fertility of the human mind in the production of designs. We constantly in life meet with coincidences which suggest a common origin, but which, when investigated are found to be nothing but coincidences.”

§ 999  
Duplicate un-  
copied  
designs.

Independent, or accidental, duplication is further discussed under the heading of proof of infringement.<sup>26</sup> The point which is involved at this place is that the monopoly given by the Act is subject to definite limitations and that there can be no violation of a copyright proprietor's rights where no forbidden use is made of the copyrighted work. Thus, maps made by drawing from the verbal descriptions in a book of roads were not infringements of it.<sup>27</sup> And it was said that a design made from reading letter-press could not be a piracy of a print illustrating this, where the print was not copied.<sup>28</sup>

§ 1000  
No infringe-  
ment where no  
forbidden use.

§ 1001  
Drawings  
from verbal  
descriptions.

The protection to be afforded a right is necessarily measured by the scope of the right itself. So in the original draft of the Act, infringement was defined as “doing or causing to be done,” without the consent of the copyright proprietor first obtained in writing, any act the exclusive right to do or authorize which, was by the copyright law, reserved to such proprietor.”<sup>29</sup> This comprehensive definition which, save for the requirement of written authority, was declaratory, but not especially helpful, was stricken out before the Act was enacted. There is a similar provision, with numerous exceptions, however, in the British statute.<sup>30</sup> As is well

§ 1002  
Statutory de-  
finitions of  
infringement,  
proposed and  
enacted.

25—Lucas v. Cooke, L. R. 13 Ch. D. 872, 879.

26—See §§ 154, 488, 1117, 1151, 1207.

27—Carnan v. Bowles, 2 Brown's Ch. R. 65.

28—Rowarth v. Wilkes, 1 Camp. 94.

29—Copyright Office Bulletin No. 12, p. 41.

30—See Appendix.



§ 1003  
Judicial refusal to define infringement.

known, the Courts have steadfastly refused to define fraud lest human ingenuity should devise fraudulent schemes which would not fall within such definition. Influenced doubtless by similar considerations, as well as the impracticability of framing a comprehensive definition, the Courts have refused to attempt to define infringement,<sup>31</sup> but have instead dealt with each case that has arisen, on its own facts. The rules of law involved appear often to hover on the metaphysical; the facts frequently are of the utmost difficulty.

§ 1004  
General nature of rights comprised in present United States copyright.

Generally speaking, a copyright proprietor's rights are to prevent unlawful reproduction of his work either in its original form or in those forms of expression enumerated or covered by the Act,<sup>32</sup> or, if the nature of the work be such that it is capable of public performance, exhibition or presentation, to prevent unauthorized performances, exhibitions or presentations, to the extent forbidden by statute.<sup>33</sup> A more exact statement of these rights is found elsewhere in this work.<sup>34</sup> While certain general rights inhere in the proprietor of every work copyrighted under the present statute, by virtue of its provisions, special rights may, or may not, inhere in him, according to the nature of the copyrighted work. Rights are only of value if their exercise is undisturbed. Every disturbance of a right is, however, no just cause for setting judicial machinery in motion.<sup>35</sup> The maxim "*de minimis lex non curat*," may apply if the injury is trifling.<sup>36</sup> The invasion of the right may be the result of an active or passive attitude on a third person's part. It may be actual

§ 1005  
Every violation of such right not subject to redress.

31—Chilton v. Progress Printing & Pub. Co., L. R. (1894) 2 Ch. 29. (Lord Halsbury.)

32—See Dicks v. Brooks, L. R. 15 Ch. D. 22.

33—See § 134.

34—See §§ 159-244.

35—Lawrence v. Dana, 4 Cliff. 1, 83.

36—Chatterton v. Cave, 3 A. C. 483; Webb v. Powers, 2 Wood & M. 497.

or threatened. It may be permissive or arise from the necessary results of a train of events set in motion, in the very first instance, by the owner of the right himself. It is readily apparent that the legal situation of the owner of a given right would not be the same under such varying circumstances, yet each disturbance of his right, each infraction thereof, in a broad sense, infringes upon it. Infringement in the law of copyright, however, is limited to substantial invasions, actual or threatened, of the right or rights of a copyright proprietor, without his permission, express or implied.

First and foremost, in every case of asserted infringement, the right alleged to have been violated must be measured, before it can be determined whether it has been violated. This can only be done by an examination of the statute under which it is claimed to have arisen, and of the work itself, if its copyrightability in whole or part, is attacked. Thus in a case decided under prior Acts,<sup>37</sup> the question arose whether the rights of the owner of a copyright in a musical composition were violated by one who made a paper roll which, when inserted in an instrument designed for that purpose, played the musical composition. It appeared that while experts might be able to read the perforations on the roll, only exceptional persons could do so and that the perforations were not made in any form of recognized musical notation. The rights of the copyright proprietor under the then existing statute prevented copying but not reproduction save by copying, nor performance public or private. It was, accordingly, held, that there was no infringement. While the case has been overruled by statute,<sup>38</sup> on the point actually decided, the general doctrine underlying the decision has never been questioned.

§ 1006  
Infringement involves substantial violation of copyright.

§ 1007  
Infringement determined by measuring right alleged to be infringed: method of measurement.

§ 1008  
Examples of method.

§ 1009  
Mechanical music, under prior Act.

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

38—Section 1.



§ 1010  
Songs copy-  
righted under  
prior Statute;  
effect of pres-  
ent Act.

It appears, however, recently to have been mis-  
understood. In *M. Witmark & Sons v. Standard  
Music Roll Co.*,<sup>39</sup> it appeared two songs had been  
copyrighted, the one under the Act of 1909, the  
other under the prior statute. Each song consisted  
of words and music. The music was reproduced  
mechanically by the defendant, who also enclosed a  
printed copy of the words of the composition, with  
each music roll containing the songs. The Court  
held there was no infringement of the earlier copy-  
right involved.

§ 1011  
The foregoing  
decision  
criticised.

This view of the law was sustained on appeal.<sup>40</sup>  
The appellate court commented on the ruling of  
the Copyright Office, under the prior Act, that a  
“musical composition” covered words and music  
and that the words of a song could be copyrighted  
either as part of a musical composition, or alone, as  
a “book.” It deemed that since the copyright pro-  
prietor had chosen to copyright the work as a  
“musical composition,” he had precluded himself  
from asserting that his rights had been infringed by  
reproduction of the words without the music. A  
copyright in a musical composition and in a book  
were identical under the statute in question. Hence,  
the Court’s view appears to involve the proposition  
that since the copyright proprietor protected the  
whole work and not only a part of it, his rights  
could only be infringed by copying the whole  
and not part of the work, which would seem to be  
indefensible.<sup>41</sup> In *Boosey v. Whight*,<sup>42</sup> the English  
mechanical music case, it was held that printed  
directions of a composer of music as to how to use it,  
were not subject to copyright, except in connection  
with the use of the musical scores. There is nothing

§ 1012  
Directions for  
use of music.

39—213 F. 532.

40—221 F. 376.

41—See *Ager v. Peninsula; Oriental S. S. Co.*, 26 Ch. D. 641;  
*Belford v. Scribner*, 144 U. S. 488, 36 L. ed. 514.

42—(1900) 1 Ch. 122.

in that decision or in *White-Smith Music Publishing Co. v. Apollo Co.*,<sup>43</sup> which justifies the decision of the Court in the *Witmark* case. Directions for use of a work, as mere directions, stand on a very different basis from the words of a song, since there can be no suggestion that such words could not be copyrighted. The decision in the *Apollo* case did not deal with the reproduction of words of a song but went on the ground that a mechanical music record, which could not be read by the ordinary reader, was not a copy of a work in musical notation, which could be so read. The decision in the *Witmark* case appears palpably erroneous and it may well be doubted if it would be followed in Circuits, other than that in which it was decided. The Court was probably led into its apparent error by a view that the pertinent portion of Section 3 of the present Act represented an innovation in copyright law, instead of realizing that it was really declaratory of the rules of case law which have always been deemed to control partial copying.<sup>44</sup>

Two instructive English cases may be here considered. Copyright existed in certain paintings. Under the statute involved, it included the exclusive right of "copying or reproducing by any means" but no right of performance. The proprietor of a theatre caused tableaux vivants to be performed which were supposed to represent the paintings. The actors were dressed and postured as in the pictures. There was held to be no infringement.<sup>45</sup>

Mr. Lord Justice Kay<sup>46</sup> pointed out that there was a difference between reproduction and actionable reproduction, the latter apparently implying something capable of forfeiture, that is, something tangible and reasonably permanent. The Court fur-

§ 1013  
Further illustrations of method of determining infringement.

§ 1014  
Living pictures.

43—209 U. S. 1, 52 L. ed. 655.

44—See §§ 1023-1029, 1031.

45—*Hanfstaengl v. Empire Palace*, (1894) 2 Ch. 1.

46—*Hanfstaengl v. Empire Palace*, (1894) 2 Ch. 1.



ther deemed the object of Copyright Acts to be "to restrain people from producing something which would compete in the market with the originals or with authorized copies" and that this object rendered proper the construction of the statute involved, which resulted in the finding that plaintiff's rights were not violated.

§ 1015  
Sketches of  
living pic-  
tures.

The proprietor of a periodical made sketches of the tableaux vivants and published them. In an action brought against him the lower court (Lindley, L. J.) held there was no infringement as the sketches were not intended to be copies or reproductions of the paintings but of the stage scenes and in fact copied and reproduced the latter and not the former.<sup>47</sup> This case was affirmed by the House of Lords<sup>48</sup> upon the ground, however, that owing to differences in detail the drawings were not copies, or reproductions, of the originals. It was pointed out that the copyrighted paintings treated general subjects, such as "Courtship" for example, and that there could be no copyright in the conceptions, which were not novel, but were utilized as the basis for the paintings. The proprietor of the theater had a perfect right therefore to represent a similar conception of "Courtship" by human actors even though this was suggested by the copyrighted work. The facial differences, those of dress and fore and background were also enlarged upon. The Court also deemed the defendants' intent in the special case was a circumstance which, while not controlling, was entitled to consideration. It may well have influenced the decision, as the situation presented serious logical difficulties to doing apparent justice.

It has been deemed law that copying need not be direct<sup>49</sup> and need not be exact duplication.<sup>50</sup> It

47—Hanfstaengl v. Empire Palace, (1894) 3 Ch. 109.

48—Hanfstaengl v. Baines & Co., (1895) A. C. 20.

49—See § 1045.

50—See §§ 1028, 1040.

appears impossible to escape the conclusion that the sketches were copies of the paintings and the decision is only sustainable, if at all, on the theory that the copyright proprietors' rights were so limited under the statute there involved, that their scope was not invaded by the defendant. The decision may be compared with advantage to that in an American case.<sup>51</sup> There a sketch or study had been made for a painting. The latter was produced and copyrighted. Publication of copies of the sketch was, thereafter, restrained at the instance of the copyright proprietor, for since such differences as existed between the two were only as to details, the Court deemed the sketch and painting were not different and independent, but were the same work.

§ 1016  
Publication of preliminary study for subsequently copyrighted painting.

It is to be noted that so-called "living pictures," since they are entirely devoid of action, lack dramatic quality, although under the statute involved in the cases cited, the presence of action would have made no difference, as the copyright proprietor had no dramatic rights. The difficulty of calling such tableaux "copies" is obvious and the doctrine of the first cited cases would probably be followed under the present American Act. In England, the first decision is overruled by statute.<sup>52</sup> The importance of these three cases is to illustrate that it by no means followed necessarily that because the tableaux vivants were not infringements of the paintings that sketches copied from the stage representation might not infringe.

§ 1017  
Living pictures under present Act.

Under the present statute the right to dramatize non-dramatic works is conferred.<sup>53</sup> The question as to whether such right is limited to literary non-dramatic works is discussed elsewhere. Cases where a painting of musical composition could be dramatized would of course, from the nature of

§ 1018  
Dramatic compositions, etc., based on subject matter of songs.

51—Beifeld v. Dodge, 198 F. 658.

52—See Appendix.

53—Section 1(b).