Fordham Law Review

Volume 3 | Issue 2 Article 2

1917

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All the world owns an auto, a phonograph and a pianola; and nearly everybody owns a camera.

Much very beautiful work is done by both professional and amateur photographers; and there is a very natural desire to monopolize the right of disposal of a photograph which turns out particularly successful and beautiful. The photograph is the foster-child of copyright legislation; and though the Statute recognizes its equal right to protection, it has treated this particular classification most gingerly. I had occasion to discuss this in an article "Insufficiency of the Copyright Law is affecting Remedies" published in the August, 1914, number of CASE AND COMMENT.

Such protection as the Statute does afford, and the underlying principles for copyright rights of photographs, shall be considered here.

Very recently I had occasion to try an action to recover damages for the infringement of one of these copyrights in the U. S. District Court in this City. The subject of the photograph was the Sky-Line of New York City: a very well-known picture, which has been frequently taken by photographers, showing the long line of sky-scrapers at the lower end of Manhattan Island as they appear from a favoring point of exposure on the opposite New Jersey shore. The particular picture (which had been duly copyrighted pursuant to the requirements of the Statute), was an exceptionally beautiful one of this familiar subject; and the alleged infringement was a very ordinary electrotype of this photograph, which had been used as an illustration in an advertising pamphlet.

After the evidence of both sides had been submitted, the very capable and learned Judge, with an apologetic: "The Court must not hestitate to do its duty", directed judgment for the defendant upon the ground that, in his opinion, the photograph was not, as a matter of *law*, sufficiently original in conception and execution, to be entitled to the protection which Congress had the power to grant under the provisions of the Constitution.

A few days later I met one of the jurymen who had heard the evidence in the case and, very much as a man will rub a sore in order to be sure that it is there, asked him what would have happened to my case if the Court had let it go to the Jury, so that the Jury might pass upon the issues of copyrightibility and of infringement, as questions of *fact*. He said to me that those of his fellow-jurymen with whom he had talked had agreed with him that, so long as the Government had granted copyright for the picture, the plaintiff ought to have been protected against its use by others.

This was interesting, as emphasizing a point I made in the article above referred to, when I argued that Congress ought to make the practice in copyright analagous to that in patents, so that the issue of a copyright certificate would be "prima facie" proof of copyrightibility. It does not seem to be generally understood that, under the law as it now stands, the Register of Copyright exercises a purely clerical function; he receives and files a claim for copyright, and of copies of the subject; but his certificate means absolutely nothing, excepting an acknowledgment of due filing. There is no inherent difficulty in requiring the Register to pass, at first hand, on the question of copyrightibility; just as the Commissioner of Patents passes upon and decides, at first instance, the question of patentability. If that were done, then, a certificate of copyright once issued, the question of copyrightibility could not be raised collaterally by one who makes use of the particular subject thus copyrighted.

But so long as the law is as it now reads, every plaintiff in a photographic copyright infringement suit must be prepared to show affirmatively at the trial of his case, that the photograph is one which is entitled to copyright protection; because, in the last analysis, the picture is "accomplished" by mechanical means.

But whether a photograph is a mere manual or mechanical reproduction of a subject matter, in which case copyright is not available; or whether it is an original work of art, is a question of *fact*. This was held in the name *Bolles* v. *Outing, 77* Fed. Rep. p. 970.

That case was one of a photograph of a Yacht under Sail; and in sustaining the copyrightibility of the picture the Court uses this language:

> "There is certainly sufficient evidence in the present "record to justify, if not to compel, the conclusion that the "one in question embodies an exceptional degree of artistic

> "conception and expression. It required the photographer "to select and utilize the best effects of light, cloud, water "and general surroundings; and combine them under favor- "able conditions for depicting vividly and accurately the "view of a yacht under sail."

What difference, after all, is there, between a photographer in his studio posing an actress in front of his camera and arranging the lights and shadows in order to reproduce that artistic picture of her which he has conceived in his mind; and the same photographer taking his camera and selecting the position, the time when the lights and shadows, and the cloud and sky effects, and the surroundings produce his conception of the picture of a public building, a horse or other animal, a view of natural scenery or other natural object? The one photograph is as much the artistic conception of the photographer as the other; and the right of a photographer to copyright the photograph of an actress so taken is unquestioned.

That a photograph of natural scenery is the proper subject of copyright protection, was held in the case of *Cleveland et al.* v. *Thayer,* 121 Fed. Rep. 72.

In the recent case of *Pagano* v. *Baseler,* which is reported in 234 Fed. Rep. p. 963, and which involves a photograph of the Public Library at Fifth Avenue and 42nd Street, the Court, in sustaining its copyrightibility, said:

> "The question is not, as defendant suggests, whether "the photograph of a public building may properly be copy- "righted. Any one may take a photograph of a public "building and of the surrounding scene. It undoubtedly "requires originality to determine just when to take the "photograph, so as to bring out the proper setting for both "animate and inanimate objects, with the adjunctive fea- "tures of light, shade, position, etc. The photograph in "question is admirable. The photographer caught the men "and women in not merely lifelike, but artistic positions, "and this is especially true of the traffic policeman. The "background, taking in the building of the Engineers' Club "and the small trees on Forty-First Street, is most pleasing, "and the lights and shades are exceedingly well done."

The photograph of an elephant was held to be a proper subject of copyright. *Thornton* v. *Schreiber,* 17 F. R. p. 603 (reversed on another ground 124 U. S. 612); similarly, cuts of statuary produced by the employment of the photographer's skill in the art of properly modulating and diffusing the light, so as to

show the article as it appears in reality, are copyrightible. *De Prato Statuary Co.* v. *Guilani Statuary Co.,* 189 F. R. 90.

In *National Cloak and Suit Co.* v. *Kaufman,* 189 F. R. at p. 218 the Court said: "nor does it matter that the pictures represent visible actual persons *and things.*"

Of course no one has a monopoly of photographing any particular person, building or scene. But while every one may make his own photograph of any person or thing, yet he may not use the copyrighted photograph which another has made, without license; excepting under penalty of prosecution.

"Others are free to copy the original. *They are not free to copy the copy.*" *Bleistein* v. *Donaldson,* 188 U. S. 239 (citing: *Blunt* v. *Patten, a Paine,* 397, 400 Fed. Cas. No. 1580, See *Kelly* v. *Morris,* L. T. 1 Eq. 697; *Morris* v. *Wright,* L. R. 5 Ch. 279). See also to the same effect, *National Cloak and Suit Co.* v. *Kaufman, supra.*

Copyright (literally intended to mean the exclusive *right* to make *copies*) gives the copyright-owner control of publication and distribution. The Statute distinguishes between an author and a proprietor. But that only means, that the copyright belongs to an employer, as distinguished from a hired agent who is paid for his services to produce the particular picture for him.

It has been held, in the case of the photograph of individuals, that this exclusive right of reproduction vests in the subject of the picture when it is made for him for pay. But where a photographer makes a picture gratuitiously, or at some special professional rate (as is the custom with stage people), the "Copyright" (*i. e.* the sole right of publication) rests in the photographer. *Press Publishing Co.* v. *Falk,* 59 Fed. Rep. 324.

And so, when an infringement is published, it is the person who causes the publication to be made who is liable; and not the contractor who performs the physical labor in producing the publication. As a rule, however, the two are identical.

As to the redress to be had when an infringement is established, the subject is fully considered in the article in CASE AND COMMENT above referred to.