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Copyright Infringement

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COMMENTS

COPYRIGHT INFRINGEMENT

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The decision of the Circuit Court of Appeals of the Second Circuit in the copyright infringement case of *Louis Shipman and another v. RKO Radio Pictures, Inc.*[1] placed in sharp relief the differences among courts and judges as to the tests to be used to identify copyright infringement. In that case all three judges were in accord in finding that the work complained of did not constitute an infringement of the copyright in question. The main opinion was written by Judge Manton. Judge Learned Hand said:

"I agree with the result and with the general reasoning by which it is reached as I understand it, but I do not agree with all that is said."

He also said:

"Since I am not sure that the opinion in the case at bar does not interpret Nichols v. Universal Pictures Company and Sheldon v. Metro-Goldwyn Pictures Corporation in another sense, I do not wish my concurrence to be understood as indicating any changes in my views."

Judge Swan concurred.

As one reads the various decisions of the different federal courts on copyright infringement and endeavors to codify the differences in importance attributed by different judges to theme, plot, sequence, story development, characters, dialogue, treatment, locale, denouement and other elements, one becomes very much confused.

Some of this confusion could be avoided by getting back to the fundamentals of copyright law. The Copyright Law was formulated with the purpose of preventing unauthorized *copying*. (We omit from this discussion all art other than literary property, and include all literary property regardless of the medium in which expressed, including books, plays and motion pictures, both silent and sound.[2] The primary and usually the only question therefore that arises in a copyright case is *whether or not there has been copying*,—whether or not the offending work was copied from the protected work.[3] In copyright cases one never finds a witness who saw the defendant copy the protected work. The factual questions involved must be answered solely and entirely from circumstantial evidence.

Did the defendant have opportunity to copy? Did the defendant have access

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1. 100 F. (2d) 533 (C. C. A. 2d, 1938).

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

3. "There are two prerequisites to relief. One is that a copyright shall exist, and the other is that copying shall have taken place." Davies v. Bowes, 209 Fed. 53, 55 (D. C. S. D. N. Y. 1913).

to the protected work? If there is no direct evidence either of access or opportunity, are the two works so similar that they could not have been independently produced?

Many judges, attempting to decide those questions of fact, lose themselves in a metaphysical discussion of the similarities or lack of similarities between the protected work and the offending work, with the ultimate result that they lose sight of the real problem that they are called upon to solve. The problem is similar in many ways to a question of fact in a personal injury suit or negligence case. When one attempts to decide (as courts and juries frequently are required to do) whether or not a certain accident was caused by defendant's negligence, the trier of the facts must reach a decision by considering all elements together. The mere fact that an automobile was moving at a given rate of speed taken alone is of little assistance.

Similarly in a copyright case, one judge in effect may say that the same general outlines of plot found in two works does not persuade him that one was copied from the other. Another judge seizes upon the statement as a definite legal holding that plot is not protected by copyright, or that one can take plot from a protected work with impunity. Of course, that was not the thought in the mind of the first judge, nor is there anything in the copyright law to justify it. It helps not at all to try to set down a fixed rule that plot can or cannot be taken from a copyrighted work.

In *Shipman v. RKO*,[4] the Court, speaking of the well-known case of *Daly v. Palmer*,[5] said:

"The court concluded that it was the idea or impression conveyed to the audience which was the determining factor, and since the impressions were the same, held there was an infringement. From this it would be expected the court would rule that it was the idea which the author intended to be conveyed which should be protected but the court held that ideas are not protected but only the sequence of events. From this case stemmed the modern law of copyright cases, with the result that it is now held that ideas are not copyrightable but that sequence of events is; the identity of impression must be capable of sensory perception by the audience."

Such fixed rules lead but to confusion. It is comparable to adopting as a legal principle a rule that unless an automobile were moving at a rate of speed of at least twenty-five miles per hour, the driver could not be guilty of negligence. Of course a driver driving as slowly as ten miles per hour might still be guilty of gross negligence. The opinion ascribes to the *Daly v. Palmer* case the origin of what it calls the "audience test." Like a jury verdict, the "audience test" is simply an answer to the question—are the two works sufficiently alike to make inevitable the conclusion that one is a copy of the other?

Common Property

The opinion in the *Shipman* case went on to quote from the case of *Serrana v.*

4. *Supra*, note 1, 535.
5. FED. CAS. 3552, 6 Blatchf. 256 (C. C. S. D. N. Y. 1892).

Jefferson,[6] " . . . there is no infringement of the copyright if the scene is considered by the court to be lacking in novelty so as to be regarded 'the common property of all playwrights.' "

The idea that "common property" cannot be the subject matter of a protected work is a delusion and a snare, and novelty or lack of novelty has led many judges into confusion. There is nothing in the Copyright Law that says that material to be entitled to protection must possess novelty.[7] On the contrary, the Copyright Law expressly provides that "compilations or abridgements, adaptations, arrangements, dramatizations, translations or other versions of works in the public domain" may be copyrighted.[8] The only originality necessary to entitle a work to copyright is "in the sense that the author has created it by his own skill, labor and judgment without directly copying or evasively imitating the work of another."[9]

There is scarcely any knowledge in the world that is not common property. All experiences in life become common property. The events of history are common property, and remain common property even though the works in which they are recorded may be fully protected by copyright. Theodore Dreiser based his *American Tragedy* on an actual murder that took place in the State of New York, and which at the time occupied the front page of nearly every newspaper in the country. Yet Dreiser copyrighted his novel and a play and a picture were both made from it.

The play *The Barretts of Wimpole Street* was copyrighted although it was based upon actual incidents in the lives of Elizabeth Barrett and Robert Browning. A picture was later made from it and was copyrighted. Drinkwater copyrighted a play that was no more than rearranged scenes from the life of Abraham Lincoln. Bernard Shaw copyrighted his *Man of Destiny*, a one-act play based on a fictional incident in the life of Napoleon Bonaparte. All biographies are in the main nothing but the recording of history. Yet the authors of all of these are entitled to copyright protection—entitled to the monopoly of making copies.

The United States Supreme Court expressly stated: " . . . the news of current events may be regarded as common property."[10] But the court also held that a news article is subject to copyright.

The validity of a copyright under the law does not depend at all on the subject matter,—original or trite; nor the story,—fresh or faded; nor the ideas, the setting or any other single characteristic of element.[11] The author is

6. 33 Fed. 347 (C. C. S. D. N. Y. 1888).

7. Callaghan v. Myers, 128 U. S. 617, 659, 660 (1888).

8. 35 STAT. 1077, 17 U. S. C. A. sec. 6 (1909).

9. Hoffman v. LeTraunik, 209 Fed. 375 (D. C. N. D. N. Y. 1913); Blackburn v. So. Cal. Gas Co., 14 F. Supp. 553 (D. C. S. D. Cal. 1936); Yale University Press v. Row, Peterson & Co., 40 F. (2d) 290 (D. C. S. D. N. Y. 1930); Gerlack v. Morris, 23 F. (2d) 159 (C. C. A. 2d, 1927).

10. International News Service v. Associated Press, 248 U. S. 215, 235 (1918).

11. See American Code Co. v. Bensinger, 282 Fed. 829 at 834 (C. C. A. 2d, 1922).

entitled to protect his literary composition if it is his own expression, regardless of whether that expression contains literary merit.[12]

The point is perhaps illustrated by the fact that the Copyright Law affords the same protection to maps and directories that it does to literary material, that is, the prohibition against copying.[13] Today excellent highway maps can be had from any of the service stations or oil companies. The highways and information as to their location and condition are common property. But a person making a map thereof is entitled to copyright. Another wishing to make a map thereof cannot copy the protected work. The lack of novelty or the fact that it is "common property" does not defeat copyright.[14] A directory is entitled to copyright. But that does not prevent another from making a similar directory in exactly the same territory. Again the material to be had is "common property". The new maker can gather for himself the available "common property", but he cannot copy the protected work[15]

Facts in themselves are not protected by copyright.[16] In other words, facts are common property. But a copyrighted article, including facts, is entitled to protection from "copying", just as a news article containing news is entitled to protection from copying.[17] To take "facts" from a protected work may or may not be copying, just as in the negligence case, to drive an automobile at twenty-five miles per hour may or may not be negligence.

The inclusion of common or public property in a copyrighted work does not give another a right to "copy". Let the individual wishing to use particular "facts" take them from the common source, not "copy" the protected work. In directory cases there is generally nothing but "facts" involved. It may seem an anomaly that the element that usually convicts the defendant of having "copied" is the inclusion in the offending work of errors that appeared in the protected work.[18]

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12. Ladd v. Oxnard, 75 Fed. 703 (C. C. Mass. 1896); National Cloak & Suit Co. v. Kaufman, 189 Fed. 215 (C. C. Pa. 1911).

13. Woodman v. Lydiard-Peterson Co., 192 Fed. 67 (C. C. Minn. 1912), *aff'd* 204 Fed. 921 (C. C. A. 8th, 1913).

14. General Drafting Inc. v. Andrews, 37 F. (2d) 54 (C. C. A. 2d, 1930); Woodman v. Lydiard-Peterson Co., 192 Fed. 67 (C. C. A. Minn. 1912).

15. Williams v. Smythe, 110 Fed. 961 (C. C. Pa. 1901); Trow Directory Co. v. U. S. Directory Co., 122 Fed. 191 (C. C. S. D. N. Y. 1903).

16. Davies v. Bower, 209 Fed. 53 (D. C. S. D. N. Y. 1913).

17. "Of course, a statement of facts may be protected by copyright against any piracy of the form of statement, because such form may, and often does, display literary effort of merit." Davies v. Bower, 209 Fed. 53, at 55 (D. C. S. D. N. Y. 1913).

18. General Drafting Co. v. Andrews, 37 F. (2d) 54 (C. C. A. 2d, 1930); Lawrence v. Dana, 15 FED. CAS. No. 8136 (C. C. Mass. 1869); Jeweler's Circular Pub. Co. v. Keystone Pub Co., 281 Fed. 83 (C. C. A. 2d, 1922); Callaghan v. Meyers, 128 U. S. 617, 9 Sup. Ct. 177 (1888); Frank Shephard Co. v. Zachary Taylor Pub. Fed. Co., 193 Fed. 991 (C. C. A. 2d, 1912); American Code Co., Inc. v. Bensinger, 282 Fed. 829 (C. C. A. 2d, 1922).

Ideas

Again in *Shipman v. RKO*,[19] the opinion read:

"The same play before the court in Daly v. Palmer . . . was considered by this court in Daly v. Webster . . . at which time (1892) the test was developed that the various incidents or devices, used by the author to convey his ideas to an audience, were invariably 'common literary property'; hence what is really protected is their peculiar arrangement. 'Sequence' is given importance and varying the sequence varies liability. The more material the variations, the lower the probability that the infringer will be called an infringer. This authority gives at least lip service to the doctrine that ideas are not protected."

Once more we are in danger of not seeing the forest because of the trees. Let us keep in mind the question involved,—was the work complained of *copied* from the protected work? Copyright does not give a monopoly on sequence, subject matter, thought, theme, idea, style or content. Copyright does give a monopoly of the right to make *copies* of the protected work.[20] To express it differently,—if it were possible to conceive of two writers acting wholly independently of each other, and producing identical literary compositions, both works would be entitled to separate and independent copyrights and neither would infringe upon the other.[21]

The confusion that inevitably results in trying to set down different tests to arrive at a decision of whether or not one work is *copied* from another is illustrated by the following from the *Shipman* opinion:

"Clearly though, it would seem an impossible task to separate the author's idea of having a heroine rescuer from actually having a rescuer. To label the former an idea and the latter an incident or event is not helpful in determining what is protected by copyright and what is not." (p. 536)

It is worse than "not helpful" to attempt to divide the content of a copyrighted work between protected and not protected material. It loses sight of the fact that the copyright law permits the copyrighting of abridgments, adaptations, new versions, etc., of works in the public domain.[22] Yet the law definitely provides that there is no copyright in the original text of works in the public domain.[23]

Public Domain

Much of the confusion that exists in copyright decisions is due to a somewhat loose and inaccurate use of the terms "public domain" and "private domain". The term "public domain" can be found in only two places in the Copyright statute, and in each instance it is used it refers to *works* that can be copied.

19. *Supra*, note 1, at p. 536.

20. Baker v. Selden, 101 U. S. 99 (1879); Dellar v. Goldwyn, 104 F. (2d) 661 (C. C. A. 2d, 1939); Carr v. National Capital Press, 71 F. (2d) 220 (C. A. D. C. 1934).

21. Harold Lloyd Corp. v. Witwer, 65 F. (2d) 1 (C. C. A. 9th, 1933).

22. 35 STAT. 1077, 17 U. S. C. A. sec. 6 (1909).

23. 35 STAT. 1077, 17 U. S. C. A. sec. 7 (1909).

Public domain as used in this statute includes:

1. All literary works that have been published without copyright protection; and

2. All literary works upon which the term of copyright protection has expired. Public domain so used means simply *unprotected literary works.*

But the term "public domain" as used in many copyright decisions is not restricted to unprotected literary works. It includes many things besides literary works. It is used interchangeably with *common property* or *public property,* or what might more properly be called *publici juris.* If a judge wants to hold that a particular feature of a literary composition is not entitled to copyright, he sometimes classifies it as being in the "public domain". For instance, frequently an opinion will state that a plot is in the public domain when it means nothing more than that the plot is an old one. As the term "public domain" is used in many decisions, it means anything that belongs to the public at large—historical events, current news, ideas, thoughts, situations, even basic plots and such like the term has come to be a judicial scrap heap into which have been thrown the dead and useless bones of what purported to be literature.

To illustrate, an historical event is doubless common property, or *publici juris.* But as the term "public domain" is used in the statute (applying only to unprotected literary works), an historical event cannot be in the public domain unless it has been reduced to written or printed narrative or description. In other words, it cannot be "copied" as contemplated in the Copyright statute until it is reduced to some form of literature, and when it is reduced to writing, if it constitutes the author's individual literary expression, regardless of the dramatic or literary merit therein, it is entitled to copyright and to protection from copying during the statutory period.

No man's literary expression is identical with another's. Just as faces, fingerprints, signatures and other characteristics differ with individuals, so also the method and means of expressing verbally a simple idea will differ.

"Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright unless there is a restriction in the words of the act."[24]

The same idea was expressed by Judge Rogers in *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*:[25]

"The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris,* or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of

24. Justice Holmes in Bleistein v. Donaldson, 188 U. S. 239, 250 (1903).

25. 281 Fed. 83, 88 (1922).

each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work."

The Copyright Law forbids all *copying* except by the copyright owner. If we admit that there has been copying, then we admit that there has been infringement, and it is not fair use. Whether or not the copying is serious enough or extensive enough to merit the attention of a court of equity is a separate and distinct question.

What is Fair Use?

The restriction against making copies or copying, contained in the Copyright Law, of course does not mean that the contents of the protected work are to be kept secret.[26] On the contrary, it is contemplated that the protected work shall be made available to the public through printed copies, if a published work; through performance on the stage if an unpublished dramatic composition, or through exhibition on the screen if a motion picture. But the privilege of thus reproducing it, all of which comes under the idea of *copying,* belongs to the copyright owner.

It is always contemplated necessarily that the person who buys a copy of a protected work and reads it will get therefrom certain ideas, and possibly certain information and knowledge that may theretofore have been unknown to him. No one would argue that the individual thus acquiring information, knowledge, ideas or other elements from the protected work is not free to use those ideas, that information or that knowledge in any way he sees fit to use it. The Copyright statute does not contemplate any such prohibition. The reader is free to use the ideas, the knowledge or the information. He is prohibited only from *copying* the protected work either in whole or in part and the question of whether he has copied the protected work, as we said in the beginning, remains at all times solely a question of fact.

Some decisions would seem to indicate that there are certain elements of a protected work that may be "copied", and others that cannot be copied.[27] The Copyright Law makes no such distinction. It prohibits "copying" a protected work. While one may take information, ideas, knowledge and what-not from a protected work, clearly that falls short of "copying" and comes within the realm of fair use.[28]

Imitation

Imitation of a protected work has not been and cannot be prevented. But

26. Baker v. Selden, 101 U. S. 99 (1879).

27. See Nichols v. Universal Pictures Corp., 45 F. (2d) 119 (C. C. A. 2d, 1930).

28. Baker v. Selden, 101 U. S. 99 (1879); Echevarria v. Warner Bros. Pictures, Inc., 12 F. Supp. 632 (D. C. S. D. Cal. 1935); Dorsey v. Old Surety Life Ins. Co., 98 F. (2d) 872 (C. C. A. 10th, 1938).

there is a point at which imitation approaches copying. It is a question of fact for the court to determine whether the offending work is a copy of the protected work or simply created after the general pattern of the protected work, thereby coming under the definition of imitation. An outstanding illustration of imitation was the case of *Nichols v. Universal Pictures Corp.*[29] Miss Nichols was the author and copyright owner of the very successful play known as *Abie's Irish Rose.* The defendant had been anxious to procure the motion picture rights of *Abie's Irish Rose,* and having failed to do so, it acquired other literary property and proceeded to make a picture on the same general theme under the name of *The Cohens and the Kellys.* It even had the script of *Abie's Irish Rose* on the "lot" while it was "shooting" *The Cohens and the Kellys,* and consulted it on a number of occasions. Defendant's explanation of so doing was that it did so to enable it to avoid "copying" *Abie's Irish Rose.* The effect of the decision was to hold that *The Cohens and the Kellys* was not "copied" from *Abie's Irish Rose,* although admittedly it was an imitation thereof.

It is the contention of the writer that less confusing opinions on copyright infringement would result if the authors of those opinions would keep steadily in mind:

1. That any subject may be reduced to writing, and the author thereof is entitled to copyright, that is, protection from copying, regardless of the merit thereof.

2. That public domain includes only literary *works* upon which there is no copyright protection.

3. That no copyright matter nor any part thereof can be assigned to the judicial scrapheap, or to "public domain" solely because it is matter that has often been used.

4. That the question of infringement is in its last analysis, a question of fact and the solution of the problem must always be the answer to the question "Has there been copying?"

29. 45 F. (2d) 119 (C. C. A. 2d, 1930).