PUBLICATIONS OF THE AMERICAN PUBLISHERS' COPYRIGHT LEAGUE

1. Opinions on Questions of Copyright

And on the Interpretation of the Copyright Statute of the United States

Secured for the information of the Members of The American Publishers' Copyright League *from the Solicitor General*, the Register of Copyrights, and the Counsel of the League, *1895–1902*. *Together with a list of the bills introduced during the same period for the Amendment of the Copyright Statute.*

Octavo, paper, 25 cents

2. Copyright Cases and Decisions

A Summary of the Leading American Decisions on the Law of Copyright, and on Literary Property, *from 1891 to* 1903, together with a selection of recent Copyright Decisions of the Courts of Great Britain and Canada, and the Text of the United States Copyright Statute.

Compiled by ARTHUR S. HAMLIN

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G. P. PUTNAM'S SONS

New York **London**

COPYRIGHT CASES

A Summary of Leading American Decisions on the Law of Copyright and on Literary Property, from 1891 to 1903; Together with the Text of the United States Copyright Statute, and a Selection of Recent Copyright Decisions of the Courts of Great Britain and Canada

COMPILED BY

ARTHUR S. HAMLIN

PUBLISHED FOR

THE AMERICAN PUBLISHERS' COPYRIGHT LEAGUE

BY

G. P. PUTNAM'S SONS

New York and London

1904

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G. P. PUTNAM'S SONS

Published, July, 1904

The Knickerbocker Press, New York

DEC 13 1933

Introduction.

The purpose of this compilation is to bring together, for convenient reference on the part of publishers, authors, and others interested in copyright property, a summary, as comprehensive as is practicable in a volume of such compass, of the issues that have arisen and the decisions that have been given under the statutes controlling copyright and literary property, since the enactment of the International Copyright Law of 1891.

The collection includes reports of all decisions rendered by American courts since that date, excepting those that related merely to matters of practice or of pleading. It has been the intention to group together a series of cases which, as summarized, present something more than a mere digest of the legal principles involved but which do not call for the space that it would have been necessary to devote to decisions reported in full. The book is addressed to the layman rather than to the lawyer; and it is on this ground that such cases or such portions of cases as have to do merely with the technicalities of procedure are omitted. For convenience of reference, the text of the United States' statutes on copyright in force on the 1st of January, 1904, has been included.

The compiler has also included a selection of certain English cases of recent date which present matters likely to prove of interest to American publishers and authors. The plan and scope of the compilation rendered it impracticable to include in it any general

collection of foreign cases. In addition to the court decisions, the volume presents a brief summary of the recent decisions of the Treasury Department bearing upon the importation under the copyright law, of books and works of art, as in the absence or in advance of judicial decisions, such rulings constitute the highest authority upon the questions with which they are concerned. The editor has not undertaken (except in one or two instances) to add to the conclusions arrived at or the principles laid down by the courts. It has seemed sufficient to connect together by references the various decisions that have relation to each other and to indicate any cases in which conflicts or inconsistencies might seem likely to result from the rulings of courts with different jurisdictions.

If the volume thus shaped may prove of any service in directing public opinion towards the inadequacies, the inequalities, and the incongruities which characterize the provisions of the present copyright law of the United States, the labor involved in its preparation will be well repaid.

The editor takes this opportunity of expressing his own cordial approval of a suggestion that has been made more than once by authors and others interested, in regard to the necessity for a thorough revision or reshaping of our copyright statute. He is in accord with the recommendation that the framing of a satisfactory copyright act which shall have for its purpose an equitable and adequate protection for the producers of intellectual property and which shall be so worded as to carry out that purpose effectively, should be entrusted to a commission of experts. Such a commission should comprise representatives of the several interests to be considered: producers of works of litera-

ture, of art, and of music, publishers of works of art, of books, and of newspapers. The commission should also include a skilled copyright lawyer and it might be in order to add some representative of the general public who would have no direct property interests in the results of such a bill as may be framed. As such a commission, possessing the requisite authority, would naturally be constituted under an Act of Congress, it would also, according to the usual routine, include representatives of the Senate and of the House of Representatives. All existing copyright statutes of the world, excepting that of the United States, have been the work of commissions of experts. The members of these commissions have had authority to summon witnesses and to take testimony, and after having devoted sufficient time to the mastery of the details of a subject which is of necessity complex and which certainly calls for expert training and for expert experience, they have presented their conclusions in the form of a report containing the specifications of the legislation recommended. The copyright laws of the states of Europe have, without an exception, been based upon such recommendations. With the co-operation of such a commission, it ought to prove practicable to secure a copyright statute which should give due consideration to all the interests involved and which should be sufficiently consistent in its provisions to obviate the necessity of the large proportion of copyright issues that have arisen from the unnecessary complexity of the provisions of the existing statute and from the difficulty, and in some cases the impracticability, of fulfilling the obligations imposed by this statute.

A. S. H.

New York, April 15, 1904.

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I.

The Copyright Law of the United States

In Force January, 1904

Being the Revised Statutes of the United States, Title 60, Chapter 3 (1874), as Amended by the Acts Approved June 18, 1874; August 1, 1882; March 3, 1891; March 3, 1893; March 2, 1895; January 6, 1897; February 19, 1897, and March 3, 1897

I.

The Copyright Law of the United States.*

§ 4948. All records and other things relating to copyrights and required by law to be preserved shall be under the control of the Librarian of Congress, and kept and preserved in the Library of Congress. [. . . .]

[The Appropriation Act approved February 19, 1897, provides for the appointment of a "Register of Copyrights, who shall, on and after July first, eighteen hundred and ninety-seven, under the direction and supervision of the Librarian of Congress, perform all the duties relating to copyrights, and shall make weekly deposits with the Secretary of the Treasury, and make monthly reports to the Secretary of the Treasury and to the Librarian of Congress, and shall, on and after July first, eighteen hundred and ninety-seven, give bond to the Librarian of Congress, in the sum of twenty thousand dollars, with approved sureties, for the faithful discharge of his duties."]

§ 4949. The seal provided for the office of the Librarian of Congress shall be the seal thereof, and by it all records and papers issued from the office, and to be used in evidence, shall be authenticated.

* The text of the United States copyright statutes is here reprinted from the compilation of the Revised Statutes relating to copyrights, with all subsequent enactments to 1904, as prepared by Mr. Thorvald Solberg, Register of Copyrights.

§ 4950. [.....] The Appropriation Act approved February 19, 1897, provides: "The Librarian of Congress shall, on and after July first, eighteen hundred and ninety-seven, give bond, payable to the United States, in the sum of twenty thousand dollars, with sureties approved by the Secretary of the Treasury, for the faithful discharge of his duties according to law."

§ 4951. The Librarian of Congress shall make an annual report to Congress of the number and description of copyright publications for which entries have been made during the year.

§ 4952. [.....] The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others. And authors or their assigns shall have exclusive right to dramatize or translate any of their works, for which copyright shall have been obtained under the laws of the United States. [.....]

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. [. . . . .]

§ 4953. Copyrights shall be granted for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed.

§ 4954. The author, inventor, or designer, if he be still living [. . . . .], or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term. And such persons shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more newspapers, printed in the United States, for the space of four weeks.

§ 4955. Copyrights shall be assignable in law by any instrument of writing, and such assignment shall be recorded in the office of the Librarian of Congress within sixty days after its execution; in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice.

§ 4956. No person shall be entitled to a copyright unless he shall, on or before the day of publication, in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail, within the

United States, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a description of the painting, drawing, statue, statuary, or a model or design, for a work of the fine arts, for which he desires a copyright; nor unless he shall also, not later than the day of the publication thereof, in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, District of Columbia, or deposit in the mail, within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same: 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. During the existence of such copyright the importation into the United States of any book, chromo, lithograph, or photograph, so copyrighted, or any edition or editions thereof, or any plates of the same not made from type set, negatives, or drawings on stone made within the limits of the United States, shall be and is hereby prohibited, except in the cases specified in paragraphs 512 to 516, inclusive, in section two of the act entitled, an act to reduce the revenue and equalize the duties on imports and for

other purposes, approved October 1, 1890; and except in the case of persons purchasing for use and not for sale, who import, subject to the duty thereon, not more than two copies of such book at any one time; and, except in the case of newspapers and magazines, not containing in whole or in part matter copyrighted under the provisions of this act, unauthorized by the author, which are hereby exempted from prohibition of importation:

Provided, nevertheless, That in the case of books in foreign languages, of which only translations in English are copyrighted, the prohibition of importation shall apply only to the translation of the same, and the importation of the books in the original language shall be permitted. [.....]

§ 4957. The Librarian of Congress shall record the name of such copyright book, or other article, forthwith in a book to be kept for that purpose, in the words following: "Library of Congress, to wit: Be it remembered that on the day of A. B., of hath deposited in this office the title of a book (map, chart, or otherwise, as the case may be, or description of the article), the title or description of which is in the following words, to wit: (here insert the title or description,) the right whereof he claims as author, (originator, or proprietor, as the case may be,) in conformity with the laws of the United States respecting copyrights. C. D., Librarian of Congress." And he shall give a copy of the title or description, under the seal of the Librarian of Congress, to the proprietor, whenever he shall require it.

§ 4958. The Librarian of Congress shall receive from the persons to whom the services designated are rendered, the following fees: 1. For recording the title or description of any copyright book or other article,

fifty cents. 2. For every copy under seal of such record actually given to the person claiming the copyright, or his assigns, fifty cents. [3. For recording and certifying any instrument of writing for the assignment of a copyright, one dollar. 4. For every copy of an assignment, one dollar.] All fees so received shall be paid into the treasury of the United States: Provided, That the charge for recording the title or description of any article entered for copyright, the production of a person not a citizen or a resident of the United States, shall be one dollar, to be paid as above into the treasury of the United States, to defray the expenses of lists of copyrighted articles as hereinafter provided for.

And it is hereby made the duty of the Librarian of Congress to furnish to the Secretary of the Treasury copies of the entries of titles of all books and other articles wherein the copyright has been completed by the deposit of two copies of such book printed from type set within the limits of the United States, in accordance with the provisions of this act, and by the deposit of two copies of such other article made or produced in the United States; and the Secretary of the Treasury is hereby directed to prepare and print, at intervals of not more than a week, catalogues of such title-entries for distribution to the collectors of customs of the United States and to the postmasters of all post offices receiving foreign mails, and such weekly lists, as they are issued, shall be furnished to all parties desiring them, at a sum not exceeding five dollars per annum; and the Secretary and the Postmaster General are hereby empowered and required to make and enforce such rules and regulations as shall prevent the importation into the United States, except upon the conditions above specified, of all articles prohibited by this act.

§ 4959. The proprietor of every copyright book or other article shall deliver at the office of the Librarian of Congress, or deposit in the mail, addressed to the Librarian of Congress, at Washington, District of Columbia [.....], a copy of every subsequent edition wherein any substantial changes shall be made: Provided, however, That the alterations, revisions, and additions made to books by foreign authors, heretofore published, of which new editions shall appear subsequently to the taking effect of this act, shall be held and deemed capable of being copyrighted as above provided for in this act, unless they form a part of the series in course of publication at the time this act shall take effect.

§ 4960. For every failure on the part of the proprietor of any copyright to deliver, or deposit in the mail, either of the published copies, or description, or photograph, required by sections 4956 and 4959, the proprietor of the copyright shall be liable to a penalty of twenty-five dollars, to be recovered by the Librarian of Congress, in the name of the United States, in an action in the nature of an action of debt, in any district court of the United States within the jurisdiction of which the delinquent may reside or be found.

The following act in relation to the deposit of copies was approved March 3, 1893: "That any author, inventor, designer, or proprietor of any book, or other article entitled to copyright, who has heretofore failed to deliver in the office of the Librarian of Congress, or in the mail addressed to the Librarian of Congress, two complete copies of such book, or description or photograph of such article, within the time limited by title sixty, chapter three, of the Revised Statutes relating to copyrights, and the acts in amendment thereof, and has

complied with all other provisions thereof, who has, before the first day of March, anno Domini eighteen hundred and ninety-three, delivered at the office of the Librarian of Congress, or deposited in the mail addressed to the Librarian of Congress, two complete printed copies of such book, or description or photograph of such article, shall be entitled to all the rights and privileges of said title sixty, chapter three, of the Revised Statutes and the acts in amendment thereof."

§ 4961. The postmaster to whom such copyright book, title, or other article is delivered, shall, if requested, give a receipt therefor; and when so delivered he shall mail it to its destination.

§ 4962. No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz: "Entered according to act o Congress, in the year ——, by A. B., in the office of the Librarian of Congress, at Washington"; or, at his option, the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18—, by A. B." [.....]

That manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright may put the copyright mark prescribed by section forty-nine hundred and sixty-two of

the Revised Statutes, and acts additional thereto, upon the back or bottom of such articles, or in such other place upon them as it has heretofore been usual for manufacturers of such articles to employ for the placing of manufacturers'-, merchants'-, and trade-marks thereon.

§ 4963. Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, dramatic or musical composition, print, cut, engraving or photograph, or other article, whether such article be subject to copyright or otherwise, for which he has not obtained a copyright, or shall knowingly issue or sell any article bearing a notice of a United States copyright which has not been copyrighted in this country; or shall import any book, photograph, chromo, or lithograph, or other article bearing such notice of copyright or words of the same purport, which is not copyrighted in this country, shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty and one-half to the use of the United States; and the importation into the United States of any book, chromo, lithograph, or photograph, or other article bearing such notice of copyright, when there is no existing copyright thereon in the United States, is prohibited; and the circuit courts of the United States sitting in equity are hereby authorized to enjoin the issuing, publishing, or selling of any article marked or imported in violation of the United States copyright laws, at the suit of any person complaining of such violation: Provided, That this Act shall not apply to any importation of or sale of such goods or articles brought into the United States prior to the passage hereof.

§ 4964. Every person who, after the recording of the

title of any book and the depositing of two copies of such book as provided by this act, shall, contrary to the provisions of this act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, dramatize, translate, or import, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose for sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction.

§ 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall, within the term iimited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose for sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one doliar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed

for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; Provided, however, That in case of any such infringement of the copyright of a photograph made from any object not a work of the fine arts, the sum to be recovered in any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand dollars, and: Provided, further, That in case of any such infringement of the copyright of a painting, drawing, statue engraving, etching, print, or model or design for a work of the fine arts, or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States.

§ 4966. Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just. If the unlawful performance and representation be willful and for profit, such person or persons shall be guilty of a misdemeanor and upon conviction be imprisoned for a period not exceeding one year. Any injunction that may be granted upon hearing after notice to the defendant by any circuit court in the United States, or by a judge thereof,

restraining and enjoining the performance or representation of any such dramatic or musical composition, may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative and may be enforced by proceedings to punish for contempt or otherwise by any other circuit court or judge in the United States; but the defendants in said action, or any or either of them, may make a motion, in any other circuit in which he or they may be engaged in performing or representing said dramatic or musical composition, to dissolve or set aside the said injunction upon such reasonable notice to the plaintiff as the circuit court or the judge before whom said motion shall be made shall deem proper; service of said motion to be made on the plaintiff in person or on his attorneys in the action. The circuit courts or judges thereof shall have jurisdiction to enforce said injunction and to hear and determine a motion to dissolve the same, as herein provided, as fully as if the action were pending or brought in the circuit in which said motion is made.

The clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to dissolve or enforce said injunction, transmit without delay to said court a certified copy of all the papers on which the said injunction was granted that are on file in his office.

§ 4967. Every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained [. . . . .] shall be liable to the author or proprietor for all damages occasioned by such injury.

§ 4968. No action shall be maintained in any case of forfeiture or penalty under the copyright laws, unless

the same is commenced within two years after the cause of action has arisen.

§ 4969. In all actions arising under the laws respecting copyrights the defendant may plead the general issue, and give the special matter in evidence.

§ 4970. The circuit courts, and district courts having the jurisdiction of circuit courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable.

§ 4971. [. . . . . .]

[Revised Statutes, title 13, THE JUDICIARY, provides as follows: Chap. 7 (sec. 629). The circuit courts shall have original jurisdiction as follows: . . . . . Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States. (Rev. Stat., 1878, pp. 110, 111.) Chap. 11 (sec. 699). A writ of error may be allowed to review any final judgment at law, and an appeal shall be allowed from any final decree in equity hereinafter mentioned, without regard to the sum or value in dispute: First. Any final judgment at law or final decree in equity of any circuit court or of any district court acting as a circuit court, or of the supreme court of the District of Columbia, or of any Territory, in any case touching patent-rights or copyrights. (Rev. Stat., 1878, p. 130.) Chap. 12 (sec. 711). The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: . . . . . .

Fifth. Of all cases arising under the patent-right or copyright laws of the United States. (Rev. Stat., 1878,

pp. 134, 135.) Chap. 18 (sec. 972). In all recoveries under the copyright laws, either for damages, forfeiture, or penalties, full costs shall be allowed thereon. (Rev. Stat., 1878, p. 183.)]

The act approved March 3, 1891 (51st Congress, 1st session, chap. 565: 26 Statutes at Large, pp. 1106-1110), in addition to the amendments, noted above, of sections 4952, 4954, 4956, 4958, 4959, 4963, 4964, 4965, and 4967, provides further as follows:

"That for the purpose of this act each volume of a book in two or more volumes, when such volumes are published separately, and the first one shall not have been issued before this act shall take effect, and each number of a periodical shall be considered an independent publication, subject to the form of copyrighting as above." (Sec. 11.)

"That this act shall go into effect on the first day of July, anno Domini eighteen hundred and ninety-one." (Sec. 12.)

"That 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 either 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." (Sec. 13.)

[An Act providing for the public printing and bind-

ing and the distribution of public documents, (January 12, 1895, 53d Congress, 3d session, chap. 23, sec. 52: 28 Statutes at Large, p. 608,) provides as follows: The Public Printer shall sell, under such regulations as the Joint Committee on Printing may prescribe, to any person or persons who may apply, additional or duplicate stereotype or electrotype plates from which any Government publication is printed, at a price not to exceed the cost of composition, the metal and making to the Government and ten per centum added: Provided, That the full amount of the price shall be paid when the order is filed: And provided, further, That no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted.]

II.

Decisions of American Courts.

II.

Decisions of American Courts.

Section 1.

Articles Entitled to Copyright.

Compilation. Trotting Records.

AMERICAN TROTTING REGISTER ASSOCIATION
v. GOCHER.

Circuit Court, Northern District of Ohio, January, 1895.

70 Fed. R. 237.

Motion for temporary injunction. Complainant published and copyrighted a list of trotters and pacers with records better than 2:30. The defendant used this list to assist himself in compiling a similar one. He admitted that he availed himself of complainant's industry; but urged that, as the information contained in such copyrighted list was obtainable elsewhere from independent sources, he had a right to use it.

It was held that mere compilation of facts was protected by the copyright law, as well as original matter showing invention, there being ample authority for holding that any compilation or any table of statistics which is the result of the author's industry, and which

is made at his expense, cannot be bodily used by an infringer.

A temporary injunction was granted restraining the defendant from publishing so much of his record as was shown to be pirated, with privilege to the defendant to publish books already printed upon giving bond to cover any damages suffered by the complainant.

Compilation. Racing Chart.

EGBERT *v.* GREENBERG.

Circuit Court, Northern District of California, February, 1900.

100 Fed. R. 447.

Complainant copyrighted an "official form chart" containing the names, records, ages, weights, etc., of certain race-horses. The chart formed part of the *Daily Racing News*, and was covered by a copyright obtained on that paper. On motion for an injunction to restrain defendant from publishing a copy of the chart, it was contended that the chart was not a proper subject for copyright, and that, as it was designed for gambling purposes, equity would not protect it although it was copyrighted.

Morrow, Circuit Judge, held that the chart came within the rule permitting compilations to be copyrighted; that the copyright was valid; and that, as it appeared that the paper was bought and read by others than those engaged in gambling on races, the fact that the chart might be employed by some in placing bets would not prevent equity protecting a valid copyright.

Injunction granted.

Compilation. Credit Ratings.

BURNELL *v.* CHOWN.

Circuit Court, Northern District of Ohio, October, 1895.

69 Fed. R. 993.

The complainant devised a method of collecting and imparting credit ratings which he put in practice in Toledo. The book containing the ratings was copyrighted.* The defendant, a former employee of the complainant, adopted the same method and completed a book by his own efforts relating to the credit of merchants in another county. In an action to restrain the publication of this book the defendant demurred to the complaint.

Ricks, District Judge, after deciding that the bill did not sufficiently allege that there had been the deposit of copies required by law to procure a copyright, held that on common-law principles there had been no wrong done. He said: "In this case the plaintiff has gone to original sources of information, and by great industry and by some originality has compiled this information and has conceived a plan by which it could be imparted in a very clear and speedy way for the information of those who purchased the right to use it. But it will hardly be contended that because John Smith gathered information as to the credit, business methods, standard for prompt payment of debts, etc., of all citizens of the city of Toledo, that therefore James Jones could not, by his own industry, research, and labor, gather similar information as to men in Cuyahoga County. . . . The latter cannot be said to have

* As to publication of books of credit ratings, see: Jewelers' Agency *v.* Jewelers' Pub. Co., 155 N. Y. 241.

copied the production of the former. . . . The defendants are not appropriating to any extent, or in any respect, the *result* of the labor, research, and industry of the plaintiff, by which the information for his publications or manuscript has been gathered. They have simply availed themselves of the plan by which this information was ascertained and imparted, and have shown just as much industry, have gone to sources of original information, and have at great expense compiled their information, and used it. Admitting that they have gathered this information and seek to impart it upon the same plan which the plaintiff has conceived and originated, that conception is not a matter which can be protected by either the copyright law or the common law."

Bill dismissed.

Annotated Statutes.

HOWELL *v.* MILLER.

Circuit Court of Appeals, Sixth Circuit, November, 1898.

91 Fed. Rep. 129.

Complainant compiled an edition of the laws of Michigan with annotations, index, citations, etc. He copyrighted this book and sold the same for his own profit. Miller, the defendant, by authority of the State legislature subsequently made a collection of the statutes similar in general character to the complainant's. The latter thereupon brought suit in equity for an injunction restraining the former from publishing his work. Defendant argued that he was not liable because he was acting under the authority of the State of Michigan and as its agent, and a suit against him was

a suit against the State, which a citizen had no right to bring under the United States Constitution (11th Amendment).

Harlan, Circuit Judge, said, "It cannot be held that the official character of the present defendants constitutes of itself a reason why they may not be enjoined from infringing the rights, if any, which the plaintiff has under the copyright laws of the United States. A state cannot authorize its agents to violate a citizen's right of property, and then invoke the Constitution of the United States to protect those agents against suit instituted by the owner for the protection of his rights against injury by such agents."

As to complainant's rights under the Copyright Law, he said: "It was suggested in argument that no one can obtain the exclusive right to publish the laws of a state in a book prepared by him. This general proposition cannot be doubted. And it may also be said that any person desiring to publish the statutes of a state may use any copy of such statues to be found in any printed book, whether such book be the property of the state or the property of an individual. If Miller had cut from Howell's books, delivered to him by the state, the general laws of Michigan as therein printed, and the pages so cut out had been used when his compilation was printed,—if this had been done, and nothing more—there would have been no ground of complaint. But it is said he did more than this, and that he appropriated such parts of Howell's books as were the result of the latter's labor and industry. . . . We are of opinion that Howell was entitled to have copyrighted his volumes of Annotated Statutes, and that such copyright covers all in his books that may fairly be deemed the result of his labor. Speaking

generally, this would include marginal references, notes, memoranda, table of contents, indexes, and digests of judicial decisions, prepared by him from original sources of information; also such headnotes as are clearly the result of his labors.* We do not perceive any difficulty in holding that his copyright would embrace all such matters, for they constitute no part of that which is public property, and are plainly produced by the compiler."

On reviewing the evidence it was held that the defendant had not made use of such parts of complainant's books as were fairly covered by his copyright.

Order denying injunction affirmed.

For other cases holding that compilations are entitled to copyright see: Trow v. Boyd, 97 Fed. R. 586; Williams v. Smythe, 110 Fed. R. 961; West Publishing Company v. Lawyers' Co-operative Publishing Company, 79 Fed. R. 756; Ladd v. Oxnard, 75 Fed. R. 703.

Photographs.

FALK *v.* BRETT LITHOGRAPHING COMPANY.

Circuit Court, Southern District of New York, December, 1891.

48 Fed. R. 678.

The complainant, a photographer, took a picture of a woman and child posed by him so as to produce what he considered an artistic effect. The child put its fingers in its mouth when the picture was taken, otherwise the

* As to use of books of reference, see—Simms *v.* Stanton, 75 Fed. R. 6; West Pub. Co. *v.* Lawyers' Pub. Co., 79 Fed. R. 756; Mead *v.* West Pub. Co., 80 Fed. R. 380; Lillard *v.* Sun Pub. Co., 87 Fed. R. 213; Edw. Thompson Co. *v.* Amer. Law B'k Co., 122 Fed. R. 922. As to use of law reports, see Wheaton *v.* Peters, 8 Pet. 591.

group was posed by the photographer. The defendant merely reversed the photograph and published it after the complainant had secured a copyright upon it. In a suit for the infringement of the copyright, Wheeler, District Judge, held "that a photograph may be the subject of a valid copyright for the photographer as the author of it is well shown and seems to be settled in Lithographic Company *v.* Sarony, 111 U. S. 53. The chief difference between that case and this, as to this point, is that the artist did not do so much in preparing the subject here as was done there. But enough was done here by placing the persons in position and using the position assumed by the child at the proper time to produce this photograph, and the plaintiff thereby produced it. Other photographs may have been or may be taken of some other woman and child, or of this woman and child in similar positions, or the same as near as may be, but none of them will be exactly like this. He is, and no one else can be, the author of this. The amount of labor or skill in the production does not seem to be material."

Decree for injunction.

Photographs of Natural Scenery.

CLELAND *v.* THAYER.

Circuit Court of Appeals, Eighth Circuit, February, 1903.

121 Fed. R. 71.

The suit was brought in equity to restrain the infringement of a copyright of a colored photograph entitled *Palisades-Alpine Pass in Colorado.* The defendant demurred, contending that the photograph was not entitled to copyright, being of natural scenery. The Circuit Court of Appeals, reversing the court below,

held that the picture was entitled to copyright on the authority of Bleistein *v.* Donaldson, 188 U. S. 239.

Demurrer overruled.

Alteration of a Published Photograph.

SNOW *v.* LAIRD.

Circuit Court of Appeals, Seventh Circuit, January, 1900.

98 Fed. R. 813.

Complainant made and published a photograph without copyrighting it. Thereafter she had a slight change made in it by etching on the negative a cane in the hand of one of the figures in the picture. This she copyrighted. Defendant bought a copy of the original photograph and sent it to his engraver to have a half-tone cut made. The engraver made the cut from a copy of the altered photograph and sent it to defendant, who published it without perceiving the change. Suit was brought to recover the penalty and a verdict was directed for the defendant.

On appeal Circuit Judge Woods said: "Having given the original photograph to the public, it was beyond the power of the plaintiff to obtain a valid copyright by so slight an alteration as that which was made. The change was colorable merely, was not made in good faith for the purpose of producing a new work of art, but in an attempt to reclaim what had been voluntarily and irrevocably surrendered. To declare that by such a change a photograph, engraving, or other style of picture which has become public property may be made a proper subject of copyright would be to encourage deceit and extortion in a manner impressively illustrated by the facts of this record."

The Court also held that there was a variance between the allegations and the proof; for, whereas the complainant alleged that she was the proprietor of a copyrighted photograph, the proof showed that the thing copyrighted was rather an etching—for the only part of the photograph which had not been published previously was the alteration made by etching on the negative.

Judgment below affirmed.

For other cases holding that photographs may be copyrighted, see Falk v. Donaldson Lith. Co., 57 Fed. R. 32; Snow v. Mast, 65 Fed. R. 995; Edison v. Lubin, 119 Fed. R. 993; Bolles v. Outing Co., 175 U. S. 262; Falk v. Curtis Pub. Co., 98 Fed. R. 989; Falk v. Gast, Lith. Co., 48 Fed. R. 262; Falk v. Heffron, 56 Fed. R. 299; Litho. Co. v. Sarony, 111 *U. S. 53; Press Pub. Co. v. Falk, 59 Fed. R. 324.*

Illustrations in Copyrighted Book Protected.

MILES *v.* AMERICAN NEWS COMPANY.

Circuit Court, Southern District of New York, November, 1898.

(*Not reported.*)

General Nelson A. Miles wrote and Frederick Remington illustrated a book entitled *Personal Recollections of General Nelson A. Miles; or from New England to the Golden Gate.* This was copyrighted. The defendant thereafter published a collection of prints under the title of *Remington's Frontier Sketches.* These were reproductions of the illustrations contained in the complainant's book. On motion for a preliminary injunction Judge Lacombe held that a *prima facie*

case had been made out, and granted the injunction pending suit. The case, however, was never pressed and no final decision was made.

Altered Copy of Uncopyrighted Painting.

MONARCH BOOK COMPANY *v.* NEIL.

Circuit Court, Northern District of Illinois, December, 1900.

(*Not reported.*)

The complainant was the proprietor of a copyright granted to Frank W. Gunsaulus, D.D., in a book entitled *The Man of Galilee*, which contained illustrations copied from famous foreign paintings. The pictures in the book published had been altered in certain particulars and were not exact reproductions of the original paintings. The defendant, in his book, *The Story of a Beautiful Life*, copied the pictures in the complainant's book. In a suit for an injunction the defendant contended that the copyright could not protect copies of such foreign paintings.

Judge Grosscup, held: That, as in the case of two of the pictures at least, considerable artistic work had been done in the way of changing them, as, for example, the omission of a spinning wheel from the picture *The Childhood Home of Jesus at Nazareth*, and as it appeared that the defendant had copied the picture in the book and not the original painting, the complainant was entitled to a preliminary injunction. The case never went to a final hearing.

Preliminary injunction granted.

See as to illustrations Bennett v. Boston Trav. Co., 101 Fed. R. 445; F. L. Mott Iron W'ks v. Clow, 72 Fed. R. 168; Miles v. Amer. News Co., p. 29 ante.

Shorthand System.

GRIGGS *v.* PERRIN.

Circuit Court, Northern District of New York, February, 1892.

49 Fed. R. 15.

The complainant bought the copyright of a book by one Cross entitled *Eclectic Shorthand.* The defendant wrote and published a book describing a system practically identical. There was a motion for an injunction and the master appointed to take proof found that there was no proof of any infringement. On motion to confirm the report of the master dismissing the bill it was held by Coxe, District Judge: "The only question decided by the master and discussed at the argument is whether or not the copyright of a book describing a new art or system of stenography protects the system, when considered simply as a system, apart from the language by which the system is explained, so that another who illustrates the same system in a different book, employing totally different language, can be treated as an infringer. It is thought, upon the authority of Baker *v.* Selden, 101 U. S. 99, that the master was right in the conclusion reached by him. A party may invent a new machine and write a book describing it for which he may obtain a copyright. This does not prevent another author from describing the same machine. He must not copy the copyrighted book, but he may write one of his own. So with a process, a system, or an art, the fact that one person has described it and obtained a copyright for his description does not prevent others from describing the same art in their own language. The copyright book is sacred, but not the subject of which it treats. If the defendants

have described the complainant's system they have not offended, for that reason only, against the copyright law. If they have copied complainant's book they have offended against that law."

Injunction denied.

Trading Stamp System.

MUTUAL ADVERTISING COMPANY *v.* REFO.

Circuit Court, District of South Carolina, May, 1896.

76 Fed. R. 961.

The complainant instituted a system of coupons or trading stamps among the merchants of Charleston whereby with each cash purchase the buyer received a certain number of coupons according to the amount of his purchase. These coupons could be used to obtain various articles from a premium list. A pamphlet describing this system was copyrighted. The defendants adopted a coupon system of similar nature except that the coupons could be applied on cash purchases made at certain stores as so much cash and were not restricted to use in obtaining articles from the premium list. The defendants issued a pamphlet similar to the complainant's, except that the method described therein was materially different.

Simonton, Circuit Judge, held that the alleged infringing pamphlet, except for the description of the coupon system, was nothing but a leaflet of advertisements. The publication of an advertisement even though in the same general manner as a copyrighted pamphlet, is not an infringement. As to the coupon system, it was not the same as that of the complainant, and not, in any case, the subject of copyright.

Bill dismissed.

Letter File Index System.

AMBERG FILE AND INDEX COMPANY *v.* SHEA, SMITH & CO.

Circuit Court of Appeals, Seventh Circuit, October, 1897.

82 Fed. R. 314.

The complainant entered for copyright a system of letter files and indices. On a bill for alleged infringement by the defendant the latter demurred on the ground that the articles were not subjects of copyright. The Circuit Court dismissed the complaint and the Circuit Court of Appeals, affirming that decree, held (opinion by Jenkins, Circuit Judge); "In this case there is no explanation accompanying the indexes. The arrangement of letters is the thought of the author. These indexes, or so-called books, are not made for explanation but for use. They do not convey information. They are of no possible service until subjected to use in the filing of letters. The copyright law embraces those things that are printed and published for information, and not for use in themselves. The device of the appellant is not within the law of copyright."

Decree affirmed.

As to copyright on a system or method see: Mutual Advt. Co. v. Refo, 76 Fed. R. 961; Burnell v. Chown, 69 Fed. R. 993; Colliery Eng. Co. v. United Corres. Schools, 94 Fed. R. 152; Barnes v. Miner, 122 Fed. R. 480. See also Bristol v. Equit. Life Assur. Soc., 132 N. Y. 264, where it was held that one who discloses a system of soliciting life insurance to a company without having any contract, whereby the company shall not adopt or disclose the system, has no protection under com-

mon law. The possessor of the idea or process, by imparting his information makes it public property, and any one may use it provided he infringes no contract obligations thereby.

Dance; Not a Dramatic Composition.

FULLER *v.* BEMIS.

Circuit Court, Southern District of New York, June, 1892.

50 Fed. R. 926.

Marie Louise Fuller filed for copyright a description of her skirt dance as a dramatic composition. The defendant produced the dance in public and an action was brought in equity to restrain an infringement. On a motion for an injunction Lacombe, Circuit Judge, held: "Whatever may be the language of the opinion in Daly *v.* Palmer, 6 Blatchf. 264, the decision is not authority for the proposition that complainant's performance is a dramatic composition, within the meaning of the copyright act. It is essential to such a composition that it should tell some story. The plot may be simple. It may be but the narrative or representation of a single transaction; but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary. And when it does, it is the ideas thus expressed which become the subject of copyright. An examination of the description of complainant's dance, as filed for copyright, shows that the end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights and shadows, telling no story, portraying no character, depicting no emotion. Such an idea may be pleasing, but it can hardly be called dramatic."

Injunction denied.

Vaudeville "Sketch."

BARNES *v.* MINER.

Circuit Court, Southern District of New York, March, 1903.

122 Fed. R. 480.

The complainant copyrighted the description of a sketch entitled *X-Rays of Society* which consists of a brief dialogue introducing several songs between which the actress retires from the stage and changes costume. During the time she is off the stage the process of changing costume is shown on a screen by moving pictures from a kinetoscope.

The defendant introduced a similar sketch in his theatre wherein Adolph Zink recited a monologue introducing songs which he sung imitating various actors. Between these songs changes of costume were shown on a screen in the same manner as in complainant's sketch, but neither the introduction, nor the songs, nor the pictures were at all like those used by the complainant. In a suit for infringement Ray, District Judge, held that the complainant had no valid copyright in her "sketch" because it was not a proper subject of copyright, as being a mere spectacular exhibition. The introductory part was very scant and did not tend to "promote science or the useful arts" and was therefore not a dramatic composition within the meaning of the copyright act. But even assuming that the copyright had been valid, there was no infringement. Defendant did not copy complainant's songs, pictures, or dialogue. The only thing he could have taken was the idea of representing by kinetoscope events, which were supposedly taking place in the dressing-room. Complainant had, and could have, no copyright on the use

of the kinetoscope. As long as the defendant used uncopyrighted pictures he infringed no copyright. And it is well settled that a system or mode of action is not a subject of copyright.

Bill dismissed.

As to what is a dramatic composition, see: Daly v. Webster, 56 Fed. R. 483; Henderson v. Tompkins, 60 Fed. R. 758; Harper v. Gaultiony (not reported, see p. 138 post); Bloom v. Nixon, 125 Fed. R. 977.

Blank Tax Forms.

CARLISLE *v.* COLUSA COUNTY.

Circuit Court, Northern District of California, April, 1893.

57 Fed. R. 979.

Bill for infringement of copyright. The complainant had entered for copyright a blank form of statement required by the California Code to be filed with Tax Assessors. Defendant published a blank form substantially like the complainant's. Demurrer to the complaint on the ground that the form was not a proper subject for copyright.

McKenna, Circuit Judge, said in substance: It is not contended by complainant that his form is a "book" in the common acceptation of the term, or that it has literary merit. His only claim is that he has put the requirements of the Code, which is claimed to be common material, in a convenient form "by skill, labor, and knowledge," to quote his language. That the form is convenient may be admitted, but whether more convenient than any other form is not stated, nor is it apparent how much skill and legal knowledge were

required.* But surely these are not so rare that they deserve to be encouraged by a monopoly.

But the materials are not common. The law requires the Board of Supervisors to furnish the blank forms, and if one convenient form can be copyrighted others can, and the Board placed in the position of being unable to perform lawfully their duties required by law. I do not think authors will be encouraged by such a copyright.

Demurrer sustained.

Blank Book.

UNITED STATES *ex. rel.* EVERSON *v.* YOUNG.

Supreme Court, District of Columbia, February, 1889.

(*Not reported.*)

A writ of mandamus was demanded to compel the Librarian of Congress to register a copyright. He had refused to register a blank book as not being entitled to copyright. The applicant contended that the Librarian's duty was merely ministerial, that he had no discretion and that it was not for him to judge whether an article was within the law.

Judge Cole held that the relator must show not only a clear legal right to a writ of mandamus, but also that if it were granted it would avail; and although the Librarian had no discretion, yet if he refused, the writ would not issue unless it appeared that the article was

* It would seem under the authority of Henderson *v.* Tompkins, 60 Fed. R. 758, and Bleistein *v.* Donaldson Lithographing Company, 188 U. S. 239, that the degree of literary merit of the composition would not affect the validity of this copyright, but although the subject thereof had very little value, it would still be entitled to protection. However, the fact that aside from the validity of the copyright, there had been no infringement of such right, was amply sufficient to sustain the decision.

entitled to copyright, and that its entry would be of use to the relator. Mandamus will not be used to order a vain thing to be done. It was held that a blank form book, containing not a single English sentence, was not entitled to copyright and no mandamus would be granted.*

Mandamus refused.

Advertisement. Bottle Label.

HIGGINS *v.* KEUFFEL.

United States Supreme Court, May, 1891.

140 U. S. 428.

The complainant was the inventor and maker of a certain variety of ink put up in glass bottles which bore a label containing the words "waterproof drawing ink." This label he entered for copyright. Suit was brought to enjoin the defendants from using such label on their ink bottles. The defendants contended that the label was not a proper subject for copyright, and, secondly, that even if it were entitled to copyright no valid copyright had been obtained, as no legal notice had been printed on the labels of the complainant. Mr. Justice Field, giving the opinion of the Court said with respect to the clause of the Constitution empowering Congress to pass copyright laws: "This provision evidently has reference to only such writings and discoveries as are the result of intellectual labor. . . . It does not have any reference to labels which simply designate or describe the articles to which they are attached, and which have no value separated from the articles; and no possible influence upon science or the useful arts. . . . It cannot, therefore, be held by any reasonable

* See also Amberg Co. *v.* Shea, 82 Fed. R. 314.

argument that the protection of mere labels is within the purpose of the clause in question. To be entitled to a copyright the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."

The Court also held that even had the label been a subject of copyright there would be no action maintainable because of complainant's failure to print on each label the required copyright notice.

Decree denying injunction affirmed.

Advertisement. Circus Posters.

Bleistein *v.* Donaldson Lithographing Company.

United States Supreme Court, February, 1903.

188 U. S. 239.

This was an action brought to recover the penalties prescribed for infringement of a copyright. The infringement consisted in copying three lithographs prepared by plaintiff for advertisements of a circus. One of the designs was of a ballet, one of a number of performers on bicycles, and one of groups of men and women whitened to represent statues.

Defendant contended: 1. That the copyright was invalid because taken out in the name of the Courier Lithographing Company, which was neither a person nor a corporation; 2. That engraving is not among the useful arts when not used for a mechanical end; 3. That being for use as advertisements, they were not works connected with the fine arts. A divided court held that the name under which the copyright was taken out was the trade name of the complainant and that was suffi-

cient *; that in order to be entitled to protection as promoting the useful arts, the subject-matter of a copyright need not be something that satisfied bodily needs; and that the adaptation of the posters to advertising did not destroy their copyright.

Mr. Justice Holmes said: "We assume that the construction of the Revised Statute § 4952, allowing a copyright to the 'author, inventor, designer, or proprietor . . . of any engraving, cut, print . . . (or) chromo' is affected by the act of 1874, c. 301, sec. 3. That section provides that '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.' We see no reason for taking the words 'connected with the fine arts' as qualifying anything except the word 'works,' but it would not change our decision if we should assume further that they also qualified 'pictorial illustrations' as the defendant contends.

"These chromo lithographs are 'pictorial illustrations.' The word 'illustrations' does not mean that they must illustrate the text of a book, and that the etchings of Rembrandt or Steinla's engraving of the Madonna di San Sisto could not be protected to-day if any man were able to produce them. Again, the act, however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to 'illustrations or works connected with the fine arts' is not works of little merit or humble degree, or illustrations addressed to the less educated classes †; it is 'prints or labels designed to be

* See also Scribner *v.* Allen, 49 Fed. R. 854; Werckmeister *v.* Springer Lith. Co., 63 Fed. R. 808.

† See as to the degree of artistic merit required, Falk *v.* Brett

used for any other articles of manufacture." Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use—if use means to increase trade and to help to make money. A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus."

*Decree reversed.**

Advertisement. Trade Catalogue.

J. L. MOTT IRON WORKS *v.* CLOW.

Circuit Court, Northern District of Illinois, February, 1896.

72 Fed. Rep. 168.

The complainants demanded an injunction for an infringement of a copyright. They were makers of bath tubs and published a catalogue containing illustrations of their wares. This they filed for copyright. The defendant copied the pictures for a catalogue of his own. He demurs to the bill on the ground that the matter set forth was not entitled to copyright. It was held (opinion by Judge Grosscup): "The cuts or prints shown in complainants' sheets, in connection with their

Lith Co., 48 Fed. R. 678; Cleland *v.* Thayer, 121 Fed. R. 71; Henderson *v.* Tompkins, 60 Fed. R. 758.

* This decision of the Supreme Court reversed the decree of the Circuit Court and of the Circuit Court of Appeals, in Bleistein *v.* Donaldson Lithographing Company, 98 Fed. R. 608, and the Courier Publishing Company *v.* Donaldson Lithographing Company, 104 Fed. R. 993. The decision holding that an illustration used incidentally for advertising may be copyrighted does not overrule Higgins *v.* Keuffel, 140 U. S. 428, which held that a label intended *solely* for advertising and consisting merely of a few printed words was not entitled to copyright.

ornamental settings, may have such artistic merit as would support a copyright if offered as a work of fine art. But the bill does not show that the author or designer intended or contemplated these cuts and prints as works of fine art. No copyright was asked upon them separately from the advertising sheet of which they are a part.* They are not offered to the public as illustrations or works connected with the fine arts, but are adjuncts simply to a publication connected with a useful art."

Demurrer sustained.

This decision was affirmed by the Circuit Court of Appeals (82 Fed. R. 316) on the ground that mere advertisements are not entitled to protection.*

Music. Topical Song.

HENDERSON *v.* TOMPKINS.

Circuit Court, District of Massachusetts, March, 1894.

60 Fed. R. 758.

The complainant was the proprietor of a copyrighted drama † entitled *Ali Baba*, which contained a comic song. In this song the line "I wonder if dreams come

* For right of advertisements to protection, see: Bleistein *v.* Donaldson, 188 U. S. 239; Higgins *v.* Keuffel, 140 U. S. 428; Mut. Adv. Co. *v.* Refo, 76 Fed. R. 961; D'Ole *v.* Kan. City Star, 94 Fed. R. 840. Under the rule laid down by the Supreme Court in Bleistein *v.* Donaldson, 188 U. S. 239, it is of no importance that the article is an advertisement. If it is otherwise entitled to copyright, its use in advertising will not prevent its securing protection. The copyright of the whole catalogue would be valid, and the cuts, as an essential part of the book, would be protected under this view of the law. But the book was only a catalogue. If it had been a literary composition, its being used for advertising purposes would not have prevented copyright.

† As to dramatic copyright, see: Barnes *v.* Miner, 122 Fed. R. 480; Daly *v.* Webster, 56 Fed. R. 483; Brady *v.* Daly, 175 U. S. 148; Fuller *v.* Bernis, 50 Fed. R. 926.

true" appeared two or three times in each verse, and there was a chorus. The defendant produced a song which contained the said line in each verse and which had a chorus almost identical with the complainant's. He contended in a suit for infringement of the complainant's copyright that the song was not entitled to copyright. On demurrer, Putnam, Circuit Judge, held that the fact that the song had no great literary merit did not prevent its being copyrighted, as in the case of Daly *v.* Webster, very slight dramatic or literary merit was held sufficient, and the appropriation of a substantial part of the song constituted an infringement. *

An injunction was denied, however, because it did not appear whether it was the words or the music or both that plaintiff alleged to be pirated. Leave was given to amend the complaint.

Validity of Copyright on Indecent Songs.

BRODER *v.* ZENO MAUVAIS MUSIC COMPANY.

Circuit Court, Northern District of California, June, 1898.

88 Fed. R. 74.

Complainant brought suit for infringement of a song *Dora Dean*, composed by his assignor; the defendant filed a cross-bill claiming that the song under the name *Ma Angeline* had been composed previously by the assignor of the defendant; defendant also contended that in any event complainant's copyright was invalid because the song *Dora Dean* contained obscene and indecent words.

* No great literary merit is requisite to entitle a work to copyright: Daly *v.* Webster, 56 Fed. R. 483; Bleistein *v.* Donaldson, 188 U. S. 239; Falk *v.* Brett Lith. Co., 48 Fed. R. 678.

Morrow, Circuit Judge, held on the evidence that the song was first composed by complainant's assignor and pirated by the person who sold his composition to the defendant. But as the song contained indecent words, the Court held that it was not entitled to protection under the copyright law. The Court stated: "This decision, however, will not prevent the complainants from republishing their song, and, by omitting the objectionable words, thus to secure a valid copyright therefor." *

Both bills dismissed.

Title of Novel.

HARPER *v.* RANOUS.

Circuit Court, Southern District of New York, May, 1895.

67 Fed. R. 904.

The complainant was the proprietor of the copyright on Du Maurier's novel *Trilby*. The defendants produced a play entitled *Trilby* which copied the plot, characters, and events of the story. On a motion for an injunction the defendants contended that there was no infringement by taking the title of a copyrighted book.

Lacombe, Circuit Judge, held: "Complainant's title to the copyright of the novel *Trilby*, as set forth

* The dictum of the Court that the complainant might obtain a valid copyright by republishing the song in question and omitting the objectionable words seems open to question. If the copyright was not valid at the time of the first entry it would seem that the right would have been lost by publication, and that a subsequent copyright omitting the objectionable part would be impossible on account of a prior publication. See Snow *v.* Laird, 98 Fed. R. 813.

See Egbert *v.* Greenberg, 110 Fed. R. 447, as to the effect of unlawful use on the validity of a copyright.

in the bill, is not seriously disputed; and the affidavits show quite plainly that defendant's drama or play called *Trilby* presents characters, plot, incidents, dramatic situations, and dialogue appropriated from the novel thus copyrighted. Complainant may take an injunction *pendente lite* restraining the defendant, his agents and servants, from producing or publicly performing any play or drama presenting the scenes, incidents, plot, or dialogue of said novel *Trilby* or any substantial part thereof, or any simulated or colorable imitation or adaptation thereof. The application, however, for an injunction against the mere use of the name *Trilby* as the title of any dramatic composition which does not present such scenes, incidents, plot, or dialogue, simulated or colorable imitation or adaptation thereof, is denied. It is the name in connection with the novel, not the name alone, which the copyright law protects." *

Injunction granted as stated in opinion.

Daily Newspaper.

TRIBUNE COMPANY *v.* THE ASSOCIATED PRESS.

Circuit Court, Northern District of Illinois, February, 1900.

116 Fed. R. 126.

The London *Times* entered into a contract with the Chicago *Tribune* whereby it was to cable, daily, war reports and editorials concerning the South African War to be published in the *Tribune* on the same day they appeared in the *Times*. The *Tribune* published

* The rule was re-affirmed under similar circumstances by Judge Lacombe in Corbett *v.* Purdy, 80 Fed. Rep. 901.

these selections and deposited the papers containing them for copyright. The Associated Press made similar selections from the *Times* and cabled them to its members. On motion for a temporary injunction the complainant argued that the publication by the defendant of these articles was an infringement.

Seaman, District Judge, held that the deposit and entry of a newspaper as an entirety gave no valid copyright. No special matter was indicated as a subject of copyright, but the newspaper was entered as an entirety. Since a large part of it was not entitled to copyright, there could be no general copyright in it. He further held that under the international copyright law, whatever rights vested in the *Times*, or through it in the *Tribune*, could be exercised only for matter distinctly set apart for the purpose and so distinguished in the publication, and that the publication in this country must be substantially identical with that in the foreign country to bring it within the intent of the statute.*

Injunction denied.

"Ticker Tapes."

NATIONAL TELEGRAPHIC NEWS COMPANY *v.* THE WESTERN UNION TELEGRAPH COMPANY.

Circuit Court of Appeals, Seventh Circuit, October, 1902.

119 Fed. R. 294.

The complainant established in Chicago a system of "tickers" in hotels and brokers' offices. It collected

* The statement by the Court that a general copyright on the newspaper would not cover a special article in it conflicts with the dicta in Bennett *v.* Boston Traveller Company, 101 Fed. R. 445. The better opinion would appear to be that a copyright on a book

news and published it at great expense in this manner. The defendants took the records of facts as they appeared upon the tape of the complainant's ticker and immediately distributed it over a system of their own, thereby avoiding the expense of collecting the same. In an action to restrain this appropriation, the defendants contended that it was impossible to copyright such material because it was published before it could be deposited for copyright. The Circuit Court of Appeals (opinion by Judge Grosscup), held that this did not infringe a copyright because the information so collected was not a proper subject for copyright, and no valid copyright could be obtained upon it. It was a matter of telegraphic service rather than authorship, and did not come within the class of subjects in the nature of directories and other compilations. But the court in its equity jurisdiction held that it was authorized to enjoin such copying from the complainant's tickers as unfair appropriation of its labors and as an unfair competition in the same business.

Decree for an injunction.

or paper covers everything in it which is entitled to copyright as a substantial and material part of the publication. The Bennett case and the case of Mifflin *v.* Dutton, 112 Fed. R. 1004, 190 U. S. 265, would indicate that a publisher is entitled to protection for everything in his publication which is a proper subject of copyright provided he has obtained a copyright on the magazine or paper as a whole, and had authority to copyright the articles. The same principle is upheld in Howell *v.* Miller, 91 Fed. R. 129, in respect to an edition of State Statutes with annotations by the proprietor of the copyright.

Section 2.

Formalities in Obtaining Copyright.

Deposit of Title. Variance. Protection for Drama.

DALY *v.* WEBSTER.

Circuit Court of Appeals, Second Circuit, October, 1892.

56 Fed. R. 483.

In this case Augustin Daly, the proprietor of a copyrighted play, brought suit for an infringement. The Circuit Court (47 Fed. R. 903) dismissed his bill, holding that he had no valid copyright for failure to deposit the title which the play bore when published. The title filed was "*Under the Gaslight:* A Romantic Panorama of the Streets and Homes of New York." The title which the play bore when published was "*Under the Gaslight*, a Totally Original Picturesque Drama of Life and Love in These Times." On appeal the Circuit Court of Appeals held that while there was a difference in the wording of the title-pages, it was only as to the description of the play set forth therein. The title itself was held to be merely the words "*Under the Gaslight*," which were published as deposited; the rest was merely descriptive matter and not to be included in the title. The Court found, therefore, that there was no variance.*

*As to variance, see: Black *v.* Allen, 56 Fed. R. 764; Patterson *v.* Ogilvie, 119 Fed. R. 451.

The infringement in this case consisted in the appropriation of a particular scene wherein a person is strapped to a railway track before an approaching train and is rescued at the last moment. There was little dialogue in this scene, but it was held to be a dramatic composition on the ground that a series of events so arranged and presented could tell a story quite as intelligible to the spectator as if it had been presented to him in a written narrative. While mere mechanical appliances are not entitled to copyright, a series of events dramatically represented are proper subjects of copyright and a play which appropriates a scene which is a substantial part of such a composition is an infringement. The Court stated that a scene omitting the rescuer would not be an infringement, since such situations where a person was in imminent danger by being tied to a railway track before an approaching train were common literary property long before the complainant's play was copyrighted. It was the introduction of the rescuer in his scene which was novel and entitled it to protection as a substantial part of his drama.*

Decree of Circuit Court reversed.

The United States Supreme Court refused to review this case on appeal as the appeal was taken from the decree of the Circuit Court entered on the order of the Circuit Court of Appeals. In cases of this nature the Supreme Court will review only decisions of the Circuit Court of Appeals. Webster *v.* Daly, 163 U. S. 155.

*For cases on infringement of part of a copyrighted work, see: Bennett *v.* The Boston Trav. Co., 101 Fed. R. 445; Henderson *v.* Tompkins, 60 Fed. R. 758.

Deposit of Title. Sale of Plates.

PATTERSON *v.* J. S. OGILVIE PUBLISHING COMPANY.

Circuit Court, Southern District of New York, November, 1902.

119 Fed. R. 451.

An action was brought to restrain infringement of a copyrighted book. The defendant contended that there was no valid copyright on account of a variance between the title as filed: "*The Captain of the Rajah.* By Howard Patterson. Illustrated by Warren Sheppard. A Thrilling and Realistic Sea Story from a Noted Sailor's Pen," and the title as published: "*The Captain of the Rajah:* A Story of the Sea by Howard Patterson. Illustrated by Warren Sheppard."

Judge Lacombe held this to be no variance in any substantial part of the title.* The objection was made that it was not shown that the book was printed from type set in the United States; but it was held immaterial, as the copyright was obtained in 1890 and the manufacturers' clause was not passed until 1891. The defendant also contended that the sale on execution of the plates from which the book was printed estopped the plaintiff from claiming copyright. The plates were sold by the sheriff on an execution against the plaintiff. It was held that this did not carry the copyright. The purchaser got so many pieces of metal, but no right to reproduce the books which could be printed from the plates. It was also held that the statute of limitations had not run against this right of action, for it was not for a penalty, but for damages under § 4964, and was therefore not barred in two years.

Decree for injunction.

*See Daly *v.* Webster, 56 Fed. R. 483; Black *v.* Allen, 56 Fed. R. 764.

For other cases referring to the deposit of titles and copies see Belford v. Scribner, 144 U. S. 488; Falk v. Donaldson Lithographing Company, 57 Fed. R. 32; Koppel v. Downing, 11 App. Dist. Col. 93; Falk v. Gast Lithographing Company, 48 Fed. R. 262.

Variance in Title. Entry by Publisher.*

BLACK *v.* H. G. ALLEN COMPANY.

Circuit Court, Southern District of New York, April, 1893.

56 Fed. R. 764.

This was an Encyclopædia Britannica case. Black published the encyclopædia in England. Volume xxiii contained an article by Francis A. Walker, which was copyrighted in his name. The defendant reprinted the encyclopædia, in which most of the articles were by foreigners and so not entitled at that time to copyright in the United States. The reprint also included the article which had been written by President Walker. In a suit for an infringement the defendant contended that there was a fatal variance between the title as deposited and the title of the article as published. And, further, that subsequent to the time of the first entry a different title had been entered. The title as filed read: "*An Outline of the Political and Economic History of the United States.* With Maps and Charts, Part I., History and Statutes, by Alexander Johnson; Part II., Population and Industry, by Francis A. Walker." The two copies deposited bore the title "*United States*, Part III., Politics, Geography and Statistics, Copyrighted 1888 by Francis A. Walker."

*For cases on entry by publisher, see: Mifflin *v.* Dutton, 112 Fed. R. 1004; Koppel *v.* Downing, 11 App. Dist. Col. 93.

Judge Townsend held in the Circuit Court that this did not constitute such a variance as to be fatal where the defendant did not claim that he himself or any one else had been deceived by the variance and that the title entered might be altered at any time prior to publication without prejudice to the author and that the copyright would still date from the time of the first entry. The defendant further contended that President Walker had assigned his entire interest in the article, by a parol agreement, to the Blacks and that they, as citizens of England, were not at that time able to take out a copyright in the United States, and consequently there was no valid copyright in the article. It was held on the evidence that the agreement between Walker and the Blacks did not operate to transfer anything more than a license to use the article in the encyclopædia because both parties intended hat a copyright should be taken out and they knew that the Blacks would not be able to take out a copyright. Consequently, it must be presumed that the copyright was reserved to Walker. The defendants also contended that as the Scribners acted as agents of the Blacks and entered Vol. xxiii of the encyclopædia (which contained the article) before Walker obtained his copyright, therefore, it was impossible for Walker to obtain a valid copyright, since there cannot be two in the same work. It was held that if such were the facts, that nevertheless, Walker's copyright was valid because the Scribners acting as agents for the Blacks, were bound by the agreement between the Blacks and Walker, and if they obtained any valid copyright at all, it was held in trust for Walker. The Court further held, contrary to the contention of the defendant, that the evidence was sufficient to prove the agreement be-

tween the Blacks and Walker and that two copies had been deposited in Washington within ten days of publication, as required by law.*

Decree for injunction.

Who May Procure a Copyright.

WERCKMEISTER *v.* SPRINGER LITHOGRAPHING CO.

Circuit Court, Southern District of New York, October, 1894.

63 Fed. R. 808.

Complainant sued for an injunction and accounting. Prior to 1892 E. Bisson painted a picture entitled *Floreal* which was exhibited in Paris in that year. He sold the painting while on exhibition, but reserved the right of reproduction. In July he transferred the copyright and right of reproduction to complainant. In June, 1892, he sold the replica to another person. The defendant, having made lithograph copies of the painting, was sued, and in defence contended that: 1. The copyright notice was insufficient, "Copyright, 1892, by Photographische Gesellschaft," because it did not give the name of the person taking out the copyright. 2. That the painter could not sell the picture to one and the copyright to another; 3. That the sale of the replica was a publication that destroyed any copyright; 4. That the printing of a cut in the exhibition catalogue was a publication.

Townsend, District Judge, held as to the first point

* This was under the old law, which provided that the two copies might be deposited at any time within ten days of publication. In this case they were deposited on the tenth day after publication. The present law requires deposit on or before the day of publication.

that the trade name under which a person does business is sufficient in the notice of copyright, as the object of the notice is to notify the public of the claim of copyright and to enable it to ascertain the party by whom it was taken out. One seeking information as to these points would more readily obtain it if told that the owner was the "Photographische Gesellschaft" than if told that he was Emil Werckmeister.*

As to the second contention of the defendant the Court said: "It is claimed by the defendant that a copyright can only be obtained by the proprietor of the painting, and that, after the author had parted with the right of property in the painting, he could have no right of copyright remaining; that until the copyright is actually taken out, the right of property in the painting and the right of copyright are inseparable; that after the sale of the painting, the purchaser was the only person who had the right to copyright it, or to transfer any right of reproduction or copyright.† This raises the question of the meaning of the word "proprietor." . . . It will not be denied that either the author or any unconditional purchaser of the painting might have originally copyrighted the painting, and then sold it, either retaining the copyright or selling it to another purchaser. The statute manifestly does not intend to vest the right to a copyright in two persons. When there is a "proprietor" of a painting, within the meaning of the statute, the right of the author must cease. Did the purchaser in this case become the "proprietor" within the meaning of the statute? I think not. I think by proprietor, in this

* See also Scribner *v.* Allen, 49 Fed. R. 854; Bleistein *v.* Donaldson, 188 U. S. 239.

† See Dielman *v.* White, 102 Fed. R. 892.

statute, is intended the person who not only obtains the right to physical possession of the painting, but the common-law rights of publication or preventing publication which belong to the author. . . . If, then, the purchaser of this painting, without the right of reproduction, did not become the owner of the right to copyright, the right was destroyed or remained in the author. According to the literal words of the statute, he still had this right. He was the author of the painting, and there was no proprietor or assign. He retained the common-law right to prevent publication, or he could give it to the public. He and he only could furnish the consideration—the publication—in return for which the public confers the right of copyright. Unless he could have a copyright, the right was destroyed and the benefit the public might receive from a duplication of the painting was lost. Such a limitation of the right of copyright would tend to defeat the liberal purposes of the statute. I can see no inconvenience and no violence of principle in allowing the author to sell his painting and retain the right to copyright."

On the third contention it was held that the replica was not a copy of the painting, but was made before it to assist in producing the painting. It differed in size and style and was itself an original painting. A publication of it would not be a publication of the painting.

Fourthly, the court held that a printing of a cut of the painting in a gallery catalogue was not a publication. It was not intended as a copy, or as a work of art. The purpose of the catalogue was merely to furnish information and identification of the paintings.

Decree for injunction.

Copyright in Firm Name.

SCRIBNER *v.* HENRY G. ALLEN COMPANY.

Circuit Court, Southern District of New York, March, 1892.

49 Fed. R. 857.

Charles Scribner, while the sole member of the firm of Charles Scribner's Sons, took out a copyright on Scribner's *Statistical Atlas of the United States*, in the name of Charles Scribner's Sons. Defendant infringed this copyright and in a suit for an infringement contended that under the statute there was no valid copyright because the entry was made under a fictitious name and not under the name of the proprietor of the copyright.

Shipman, District Judge, in overruling a demurrer to the bill said: "The main ground of the demurrer is that no valid copyright exists because Charles Scribner was engaged in business under a fictitious name, that no lawful justification for the use of said name is alleged, and that he should have caused the copyright to be taken in his individual name. It appears from the bill that the assignee and owner was, for a time, doing business under the name of Charles Scribner's Sons, and during this period he bought the right to obtain a copyright upon the book which he apparently proposed to publish, and did thereafter publish it, in said business. At common law individuals are permitted to "carry on business under any name or style which they may choose to adopt," and "if persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is as valid as if real names had been used." In some of the states of this country, the use of a conventional or fictitious name

is regulated or controlled by codes or statutes. I do not know whether the New York Statutes in regard to the filing of certificates apply to the circumstances of Mr. Scribner's case, but, assuming that they do, it was not necessary to aver in the bill that such certificates had been filed. An omission to file a certificate would have no effect upon the title of property which he had bought in the name of the firm. If he were the sole member, he became possessed of the title to the copyright."

Demurrer overruled.

Deposit of Copies.

Osgood *v.* The A. S. Aloe Instrument Company.

Circuit Court, Eastern District of Missouri, November, 1897.

83 Fed. R. 470.

The complainant alleged that she was the author of a book entitled *How to Apply Matt, Bronze, La Croix and Dresden Colors to China;* that she copyrighted the same and that the defendant had infringed her copyright. The defendant contended that complainant never acquired a valid copyright because: 1. She did not make the deposit of two copies before publication; 2. She did not inscribe the proper notice on the published book.

Adams, District Judge, held: "Authors take their rights under and subject to the [copyright] law, and, when assailed, the burden is upon them to show literal compliance with each and every statutory requirement in the nature of conditions precedent. I shall first con-

sider the issue presented as to whether the complainant, prior to the date of publication of her work, delivered to the Librarian of Congress two copies of her book. With a disposition much in favor of upholding copyrights, and thus securing to authors what seems to be a natural right to the rewards of their own literary labors, I have studiously examined all the evidence bearing on this question, and am constrained to find that the complainant's book was offered for sale, sold, and given away, and therefore, within the meaning of the law "published," prior to the 20th day of November, 1891, the date of the delivery of the two copies to the Librarian of Congress.*

"Again I am constrained to find from the proof before me that complainant failed to insert in the several copies of her book, on the title-page, or on the page immediately following the same, notice of her copyright, as required by the provisions of the Act of March 3, 1891. She caused to be inserted on the page immediately following the title-page the words: 'Copyrighted, 1891. All rights reserved.' This is clearly not sufficient. She should have added by whom the book was copyrighted."

Bill dismissed.

For further examples of defective notice see Part II., Sec. 3, post.

* Examination of the evidence showed that she and her publisher thought the Revised Statutes, allowing ten days after publication for deposit of copies, were still in effect. Since 1891, the deposit must be made on or before the day of publication.

Deposit of Description of Painting.

BENNETT *v.* CARR.

Circuit Court of Appeals, Second Circuit, July, 1899.

96 Fed. R. 213.

Carr painted a picture of a coach and four, and called it *Four-in-hand*. He deposited the title and a photograph of the painting with the Librarian of Congress to obtain a copyright, but no description was filed. Defendant thereafter printed a cut of the picture in the New York *Herald*. In an action to recover the penalty under § 4965, it was held (Thomas, District Judge) that there could not be a recovery because the complainant had not fully complied with all the requirements to obtain a copyright. The statute clearly indicates that both a photograph and a description are required; and the photograph cannot be construed to serve as a description also, for the statute, being penal, must be strictly construed. Nor does the title constitute a description.

Judgment for complainant reversed.

Manufacturers' Clause. Sheet Music.

LITTLETON *v.* OLIVER DITSON COMPANY.

Circuit Court, District of Massachusetts, August, 1894.

62 Fed. Rep. 597.

In a suit for an injunction the complainant alleged that defendant infringed his copyright on three certain musical compositions. The defendant contended that there was no valid copyright because the two copies of the sheets of music deposited were not made from plates

engraved or type set in the United States, as required by § 4956 of the Revised Statutes.*

Colt, Circuit Judge, held that under the proviso in the act of 1891 that in case of a "book, photograph, chromo or lithograph" the two copies deposited with the Librarian of Congress shall be manufactured in this country, a musical composition is not a "book." "In the section which enumerates the things which may be copyrighted, 'musical composition' is mentioned as something different from 'book,' and we find this same distinction twice observed in the preceding part of the section which contains the proviso. It is as reasonable to suppose that 'book' and 'musical composition' were as much intended to refer to different subjects as 'map, chart, engraving' and other enumerated articles. If Congress, in the proviso, had intended to include a musical composition among those copyrighted things which must be manufactured in this country, it should have incorporated it in the list of things subject to this restriction. The omission in the proviso of 'musical composition' as well as of 'map, chart, and engraving,' and other things before enumerated, is very significant as indicating that Congress never intended to extend this provision to any of these articles. And so, with respect to 'lithograph,' if Congress had intended to cover by that work a musical composition made by the lithographic process it should have expressed its meaning in clear and unambiguous terms, in view of the language used in other portions of the statute."

Injunction granted.

This decision was affirmed on appeal by the Circuit

* See Patterson *v.* Ogilvie, 119 Fed. R. 451, Hills *v.* Austrich, 120 Fed. R. 862, with regard to manufacturers' clause.

Court of Appeals (67 Fed. R. 905), on the grounds stated by Judge Colt.

Manufacturers' Clause. Lithographs.

HILLS & CO. *v.* AUSTRICH.

Circuit Court, Southern District of New York, March, 1903.

120 Fed. R. 862.

On a motion for a preliminary injunction to restrain the infringement of a copyrighted picture, the defendant contended that under the manufacturers' clause it was not entitled to copyright as being a lithograph not made from a drawing on stone made in this country *; and secondly, that the notice of copyright inscribed on it was insufficient.

Lacombe, Circuit Judge, held that the pictures were evidently prints of some kind, for they were not painted or drawn or photographed. Therefore they were clearly "prints" and so entitled to copyright under § 4956; and, as it was proved by the production of the plates from which they were made that they had not been printed from drawings on stone, therefore they were not affected by the law requiring lithographs to be made from stones engraved in this country. The copyright notice in these words: "Copyrighted, 1902, published by Hills & Co., Ltd., London, England," was held sufficient.

Injunction granted.

* See Littleton *v.* Ditson, 62 Fed. R. 597, and Patterson *v.* Ogilvie, 119 Fed. R. 451.

Section 3.

Notice of Copyright.

Form of Notice. Date.

SNOW *v.* MAST.

Circuit Court, Southern District of Ohio, January, 1895.

65 Fed. R. 995

The complainant sued for penalties under § 4965 of the Revised Statutes. The defendant demurred to the complaint on the ground that the notice printed on the copyrighted photographs was not in the proper form. The notice was in the usual form except that it abbreviated the date thus—'94, for 1894. Sage, District Judge, held; "The demurrer will be overruled. The object of the statute is to give notice of the copyright to the public, and it would be too narrow a construction to hold that the abbreviation ''94' is insufficient. A substantial compliance is all that is necessary."

Demurrer overruled.

Form of Notice.* Extent of Penalties.

BOLLES *v.* OUTING COMPANY.

Supreme Court, December, 1899.

175 U. S. 262.

Circuit Court of Appeals, Second Circuit, January, 1897.

77 Fed. Rep. 966.

The complainant made and copyrighted a photo-

* As to the effect of using a trade name, or omitting a first name or the name of the proprietor entirely from the notice, see: Werckmeister *v.* Springer, 63 Fed. R. 808; Osgood *v.* Aloe Company, 83 Fed. R. 470; Scribner *v.* Allen, 49 Fed. R. 854; Hills *v.* Austrich, 120 Fed. R. 862.

graph of the yacht *Vigilant* under full sail. The Outing Company published a copy of this picture in its magazine without permission of the complainant. The latter sued for statutory penalties. On the first trial the bill was dismissed because the Court thought that the notice of copyright printed on the photograph was, as the defendant contended, insufficient; the notice read: "Copyright 93 by Bolles of Brooklyn." The trial court also held that the complainant could not give evidence as to the number of copies of the magazine containing the picture that could be traced to defendant. On these two grounds complainant appealed to the Circuit Court of Appeals, which held that the notice of copyright was sufficient although no first name was given, when it did not appear that there was any other photographer called Bolles or that the public was likely to be misled. On the second point the trial court was affirmed. On the appeal to the Supreme Court it was held, Justice Brown reading the opinion, that § 4965 of the Revised Statutes providing for a forfeiture of $1 for every infringing copy found in the defendant's possession, being penal, must be strictly construed. The language of the section is clear. It forfeits to the proprietor of the copyright $1 for every sheet found in the possession of the infringer. "While the forfeiture is not limited as to the number of the copies, it is limited to such as are found in, and not simply traced to, the possession of the defendant. Congress may have been perfectly willing to impose a forfeiture of one dollar for every such copy, and been reluctant to impose it upon the thousands of such copies that may have previously been put in circulation. The construction contended for would permit an author to lie by during the two years allowed him for bringing suit,

permit another to publish the work during that time, and then recover for every copy so published."

The Court refused to consider the defendant's contention that the Court below was in error in holding the notice of copyright sufficient, because the defendant had taken no appeal on that point. The decree of the Circuit Court reversing the judgment of the trial court was affirmed.

Form of Notice; Date Omitted.

HOERTEL *v.* RAPHAEL TUCK CO.

Circuit Court, Southern District of New York, June, 1899.

94 Fed. R. 844.

Defendant, in an action for penalties for printing a false notice of copyright on fancy cards, demurred to the bill. Judge Lacombe sustained the demurrer, holding that there was no false notice, because there was no notice at all, since the date was omitted. The penalty is only provided for a false notice of United States copyright, which means the same kind of a notice as that requir perfect a copyright. This was not such a notice.

Form of Notice. Date.

FALK *v.* SCHUMACHER.

Circuit Court, Southern District of New York, November, 1891.

48 Fed. R. 222.

The complainant brought a suit for infringement of his copyright on a photograph. On a demurrer to the bill the defendant argued that the copyright was invalid on account of failure to print the required notice in the

proper form.* Coxe, District Judge, held: "The complainant, as the proprietor of a photograph of Lillian Russell, prays for an injunction restraining the defendants from infringing his copyright. . . . The bill alleges that the notice inscribed on each copy of the photograph was '1889. Copyrighted by B. J. Falk of New York.' The notice required by the statute, if followed literally, was 'Copyright, 1889, by B. J. Falk.' Why, with this simple provision of the law before him, the complainant saw fit to inscribe his photograph with a notice which not only is a departure from the strict letter of the statute, but is less symmetrical and concise, is indeed amazing. However, under the decision in Callaghan *v.* Myers, 128 U. S. 617, the notice is sufficient. The statute was substantially complied with."

Demurrer overruled.

Form of Notice. Surplusage.

HEFEL *v.* WHITELY LAND COMPANY.

Circuit Court, District of Indiana, February, 1893.

54 Fed. R. 179.

Complainant brought an action for a penalty for the infringement of a copyrighted map. The defendant contended that the copyright was invalid for lack of sufficient notice. The notice read: "Copyright entered according to Act of Congress 1889, by T. C. Hefel, civil engineer." This, the defendant urged, failed to comply with § 4962 of the Revised Statutes of 1878 because it omitted the words "in the office of Librarian of Congress, at Washington." Judge Baker held that § 4962

* See also Hoertel *v.* Tuck, 94 Fed. R. 844; Snow *v.* Mast, 65 Fed. R. 995; Bolles *v.* Outing Co., 77 Fed. R. 966.

did not govern the case, but that the Act of June 18th, 1874, was controlling though passed prior to the Revised Statutes. Section 5601 of the Revised Statutes recites that all acts passed after December 1, 1873, control the revision of 1878; therefore the Act of 1874, not the original § 4962 of the Revised Statutes of 1878, is the law. This statute permits the use of this formula: "Copyrighted, 18—, by A. B."

Judge Baker said: "The notice alleged to have been inscribed on each copy of the map is in the following words: 'Copyright entered according to the Act of Congress, 1889, by T. C. Hefel, civil engineer.' The notice embodies the exact words required by the last formula prescribed in the statute, with the additional words: 'entered according to the Act of Congress,' and the words 'civil engineer' following the author's name. These additional words simply amplify the formula prescribed by the statute, without in any manner affecting its meaning. They are to be regarded as surplusage. The maxim, '*Utile per inutile non vitiatur*" is decisive.' *

Demurrer overruled.

Sufficiency of Notice.

EDISON *v.* LUBIN.

Circuit Court of Appeals, Third Circuit, April, 1903.

122 Fed. R. 240.

The complainant filed for copyright a series of photographs for a kinetoscope, illustrating the launching of

* The Act of 1874 is, in effect, an amendment to § 4962, although passed four years prior to the revision of the Statutes, because, as the Court points out, the revision itself provides that all acts passed after December 1, 1873, control the revision of 1878.

the *Meteor*, and in a suit for an infringement, the defendant objected on the ground that no valid copyright had been obtained because only one copyright had been taken out and only one notice of copyright printed on a celluloid sheet containing 4500 photographs, constituting the roll to be used in the kinetoscope. In the Circuit Court of Pennsylvania Judge Dallas held that it was requisite that every photograph should be separately registered and bear a separate notice of copyright, no matter how or for what purpose it might be joined to the others. On appeal to the Circuit Court of Appeals, his decision was reversed. Judge Buffington said: "To require each of numerous undistinguishable pictures to be individually copyrighted would, in effect, be to require the copyright of many pictures to protect a single one. . . . When we consider the positive sheet which was copyrighted we have a stronger case. What was thus copyrighted was a single celluloid sheet on which a number of objects had been photographically printed or reproduced. That these objects were there portrayed by light action or photography is unquestioned. How the negative was obtained, whether by numerous and successive exposures, is not here material. The statute provides for copyrighting negatives; but the present issue is not whether the negative in question was one covered by the statue, but whether, when the negative as a whole was photographically reproduced, the reproduction was a photograph. . . . From the standpoint of preparatory work in securing the negative, the latter consists of a number of different

In the text of the copyright law, on pp. 9–10, § 4962 is printed as amended by the Act of 1874. The original section omitted the second alternative form of notice. See also as to surplusage in notice, Hills *v.* Austrich, 120 Fed. R. 862.

views, but when the negative was secured, the article reproduced therefrom was a single photograph of the whole."

Judgment reversed.

Notice. When it Must be on the Photograph.

FALK *v.* GAST LITHOGRAPHING AND ENGRAVING COMPANY.

Circuit Court, Southern District of New York, November, 1891.

48 Fed. R. 262.

The complainant took and copyrighted a photograph of Julia Marlowe. The defendants copied the photograph and in a suit for the infringement alleged that the copyright was invalid on these grounds, 1. That no notice was on the photograph; 2. That the proof of the deposit of two copies required by law was insufficient; 3. That the publication was unduly delayed; 4. That the photograph was not a proper subject of copyright.

Judge Coxe, in the Circuit Court of New York, held: "The testimony for the complainant is to the effect that unusual care was taken with the photographs of Miss Marlowe for the reason that the complainant was under contract to issue none that were not copyrighted, and that none were issued from his establishment without the copyright notice. The difficulty with the defendant's testimony is that it may be true and still the complainant, in all respects, may have complied with the statute. In other words, it is not enough to show that the photograph was without the statutory notice when it entered the defendant's possession. It must

appear that it was without the notice when it left the complainant's possession. There is no evidence to show this. If copied afterwards or put upon a new mount the complainant should not suffer. . . . The evidence of mailing and delivery at the office of the Librarian of Congress, in the absence of any proof to the contrary, shows a sufficient compliance with the statute. The testimony of the complainant's business manager that he caused to be mailed to the Librarian two printed copies of the photograph in question (No. 94) is supplemented by the certificate of the Librarian that two printed copies of a photograph entitled 'Photograph No. 94 of Julia Marlowe' were delivered at his office. . . . The title was filed with the Librarian September 17th, and the copies were mailed to him on the day of publication, December 5, 1888, two months and eighteen days thereafter. No authority is cited holding this to be an unreasonable delay.

"The complainant testified that he arranged the pose and lighting of the photograph in question, worked up the expression, and decided upon the attitude; and the testimony of Miss Marlowe that he arranged the light, the background, and all other details, and finally posed her, when taken in connection with the picture itself, which certainly is artistic and unusually pleasing, is sufficient to sustain the copyright within the authority of Sarony's case, 111 U. S. 53."

Decree for injunction.

On appeal the decree was affirmed by the Circuit Court of Appeals (54 Fed. R. 890). The defendant raised the point of failure to attach the legal notice to published copies on these facts: Falk issued to dealers a sheet on which were mounted a hundred miniature

photographs, among them the one in suit. These were to serve as samples to aid dealers in placing orders, and the copyright notice was not affixed to such pictures. The defendant claimed this was a publication without the notice. In reference to that contention Judge Shipman said: "This card or sheet of miniature copies of photographs for the inspection of dealers is not one of the published editions of the photographs which it contained, within the meaning of the section [4962]. The statutes refer to a published edition, which is an edition offered to the public for sale or circulation. An exhibition of a card of miniature samples to the dealers alone, for the purpose of enabling them to give orders, is not a published edition within the meaning of the statute."

Decree affirmed.

Publication Without Notice.

PIERCE & BUSHNELL CO. *v.* WERCKMEISTER.

Circuit Court of Appeals, First Circuit, January, 1896.

72 Fed. R. 54.

The complainant purchased from G. Naujok the right to take out a copyright on his painting *Die Heilige Cäcilie*. In January, 1892, the painting was exhibited in a gallery in Berlin. In May, 1892, complainant took out a copyright. In the summer of 1892, the complainant made photographic copies of the painting. They bore the legal notice; but the painting itself never had the notice. Defendant made and sold photographs of the painting without complainant's consent. The defendant contended on appeal that there was no infringement because there was no valid copyright, and the copyright was invalid because the

painting was published before being copyrighted. Further he contended that the failure to place the legal notice on the painting when published prevented the maintaining of a suit for infringement if there had been a valid copyright originally.

The complainant contended that there was no "publication" by exhibiting in a public gallery; and that the notice need not be attached to the published original painting, but only to copies.

Colt, Circuit Judge, held; "That copyright, under the statute, is the exclusive right to publish a literary or artistic work. Such work may be a transcript or reproduction, as a book, engraving, or photograph, or may itself be an original, as a painting, statue, model, or design, and such work may or may not be published in multiple form. . . . If we confine ourselves to the subjects of copyright, and eliminate from our minds any distinction between 'copy' and 'original,' the meaning of section 4962 seems to be clear. It begins by declaring that 'no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published,' etc. The words 'several copies' are not used in the sense of a copy or a reproduction from some original, but are used in the sense of each individual copyrighted thing, whether a copy or an original, so-called. In Webster's Dictionary we find among the definitions of the word 'copy': 'An individual book, as a copy of the Bible'; and it is in this sense that the word is used in this section. We copyright a book under sections 4952 and 4956 and section 4962 then requires, that, in order to maintain an action for infringement, notice of copyright shall be inserted in each book (whatever may be the form of the book)

which is published. The fact that such book may be a copy from some original manuscript is immaterial and has nothing to do with the notice required by this section. It is the published book or the book which is made public by offering for sale or otherwise which must contain the notice. A book is published in multiple form, and no one particular book is any more entitled to be called an original than any other. . . . We copyright a painting and section 4962 requires notice of copyright upon the published painting, and upon each replica or reproduction which is published. Section 4962 does not deal with 'copies' as distinct from 'originals,' or with 'originals' as distinct from 'copies,' as those terms are commonly understood; but it deals with published copyrighted things, and it declares that no action for infringement will lie unless each copyrighted thing which is published or made public, be it a 'copy' so-called, or an 'original' so-called, or another edition or reproduction of such copy or original, has inscribed upon it the notice of copyright.

"The bill in this case alleges publication of the painting on or about September 15, 1892. The evidence shows that the painting was publicly exhibited in Berlin from January to March, 1892; and at Munich in the summer of 1892. Under these circumstances we hold that the alleged copyrighted painting has been "published" within the meaning of section 4962, and should have been inscribed with notice of copyright in order to entitle the plaintiff to maintain this action for infringement." *

Decree of Circuit Court reversed.

* See also Werckmeister *v.* Am. Lith. Co., 117 Fed. R. 360; Am. Press Ass'n *v.* Pub. Co., 120 Fed. R. 766; Higgins *v.* Keuffel, 140 U. S. 428; Falk *v.* Gast, 54 Fed. R. 890.

The case of Werckmeister *v.* Pierce & Bushnell Company, 63 Fed. R. 445, is reversed by this case.

Publication of a Painting without Notice of Copyright.

WERCKMEISTER *v.* AMERICAN LITHOGRAPHIC CO.

Circuit Court, Southern District of New York, August, 1902.

117 Fed. R. 360.

This case was on substantially the same facts as the foregoing case of Werckmeister *v.* Pierce & Bushnell Company except that here the painting was put on exhibition without a notice *after* copyright had been taken out and by the artist who had sold the copyright to the complainant, but retained the picture.

The complainant contended that as he could not control the use of the picture, he was not bound by the requirement of the statute as to notice. Judge Thomas held that this was no excuse. The proprietor of the copyright had only such rights as the owner of the painting assigned to him. The latter was not protected by the statute when he failed to give the required notice on the painting. His assignee was in no better position, if he failed to see to it that the notice was given.

Bill dismissed.

Publication without Copyright Notice.

AMERICAN PRESS ASSOCIATION *v.* DAILY STORY PUBLISHING COMPANY.

Circuit Court of Appeals, Seventh Circuit, October, 1902.

120 Fed. R. 766.

Defendant licensed the *Globe-Democrat* to publish a

copyrighted story, and the latter agreed to print the regular copyright notice. This, through an oversight, it failed to do. Complainant saw the story without a copyright notice and copied it in good faith, and distributed it to various newspapers, which published it. The defendant then demanded pay from such papers for the story. Complainant brought a suit to restrain defendant from demanding or collecting payment from such papers.

The Circuit Court of Appeals (opinion by Jenkins, Circuit Judge) held that the complainant's act was an infringement, although the story had been published without a notice. "The copyright of the appellee (the defendant) was property of which it could not be legally deprived without its consent. Title to copyright is no more lost by theft of the manuscript or practical publication of it than is one's title to a horse lost by the stealing of it, or by the unlawful sale of it to a stranger. . . . Here the appellee did not purport by its contract to make the *Globe-Democrat* its agent in any respect. It merely sold the paper the exclusive right of publication of the copyrighted story within a limited territory, and upon the express condition that it should be printed with the usual copyright notice. By oversight the *Globe-Democrat* in respect of this condition violated its contract, but we cannot comprehend why that breach of contract should be visited upon the appellee."

*Injunction restraining defendant from recovering from newspapers is denied.**

* This decision seems hard to reconcile with the case of Werckmeister *v.* American Lithographic Company, 117 Fed. R. 360. Although, as the Court intimates in part of its decision, the *Globe-Democrat* was not strictly an agent of the defendant, it was nevertheless responsible to the defendant to insert the proper copyright

Publication without Notice.

WERCKMEISTER *v.* AMERICAN LITHOGRAPH CO.

Circuit Court, Southern District of New York, December, 1903.

126 Fed. Rep. 244.

The complainant claimed to be proprietor of a copyright in a painting by one Sadler entitled *Chorus*. It was alleged that this copyright was obtained on April 16, 1894. In a suit for infringement the defendant put in a plea that there had been a publication of the painting during the summer of 1894 by exhibiting it to the public, and that no notice of copyright was inscribed on any part of the painting. This plea was traversed and the complainant, against the objection of the defendant, put in evidence of the exclusiveness of the exhibition referred to.

Judge Wheeler held that the evidence was admissible, but that the defendant by proving that an admission fee was charged to the exhibition had established the fact of publication, and there was no dispute as to the absence of the notice. Under § 4962 of the Revised Statutes such publication without notice defeats any action for infringement.

Bill dismissed.

notice. According to the Werckmeister case, it was the duty of the defendant to see that such notice was inserted on all copies of its story, and it reposed trust to that extent in the *Globe-Democrat* in making with it the contract whereby the latter agreed to insert such notice. Although it was not the fault of the defendant that the notice was not inserted, it was the fault of the company which it had trusted. It seems (according to the theory of the copyright law) that the complainant was justified in copying a story without a notice. See Daly *v.* Walrath, 40 App. Div. 220. See also as to the effect of failure to print notice, Higgins *v.* Keuffel, 140 U. S. 428.

False Notice of Copyright.*

McLAUGHLIN *v.* RAPHAEL TUCK, SONS, & COMPANY.

Circuit Court of Appeals, Second Circuit, April, 1902.

115 Fed. R. 85.

The defendant caused books to be printed with a false copyright notice in Germany, and imported them into this country in 1896. The statute then only imposed a penalty for *printing* a false notice. On March 3, 1897, an act was passed imposing a penalty on the sale of books bearing a false copyright notice, "provided that this act shall not apply to any importation of or *sale* of such goods or articles brought into the United States prior to the passage thereof." In an action to recover penalties for false notice it was held that defendant was not liable. The Circuit Court of Appeals affirmed this judgment, on the ground that as to the act of *printing* books bearing a false notice the United States law had no application. The act was done in Germany, and a penal statute has no extra-territorial effect. As to the *sale* of the books in this country, many of them were sold before March 3, 1900, and it was then lawful to *sell* books with false notices, though unlawful to *print* them. The sale of such books after that date would have been unlawful except for the proviso quoted above, which permitted their sale in case they had been imported before 1897.

Judgment affirmed.

* For cases relating to pleading where a false notice has been printed, see Rigney *v.* Tuck, 77 Fed. R. 173; Rigney *v.* Dutton, 77 Fed. R. 176; Ross *v.* Tuck, 91 Fed. R. 128; Hoertel *v.* Tuck, 94 Fed. R. 844.

False Notice; not on Title-Page.

RIGNEY *v.* RAPHAEL TUCK CO.

Circuit Court, Southern District of New York, November, 1896.

77 Fed. R. 173.

The defendant in an action for penalties for false notice demurred to the bill because it failed to allege that the false notice was on the title-page or the page next following. Judge Shipman overruled the demurrer, holding that a false notice was unlawful and covered by § 4963, even if it were not on the title-page or page following.

Section 4.

Publication and its Effects.

Effect of Publication.

JEWELLERS' MERCANTILE AGENCY *v.* JEWELLERS' WEEKLY PUB. CO.

New York Court of Appeals.

155 New York 241.

The plaintiff was a mercantile agency which printed a book of credit ratings. It deposited the title and two copies under the copyright act and printed the required notice in its book. The plaintiff claimed that no copyright was obtained as a matter of fact, because there was, as it alleges, no publication. The book was leased, not sold to subscribers. The defendant made use of the plaintiff's book and copied it in preparing one of its own The trial court granted an injunction restraining defendant from using or

publishing its books copied from the plaintiff's. The plaintiff contended that its common-law right of literary property had not been divested. It was held (opinion by Parker, Ch. J.) that: "No proposition is better settled than that a statutory copyright operates to divest a party of the common-law right. If, then, what the plaintiff did amounted to such a publication of the reference book as was requisite in connection with the other steps taken to perfect a copyright,* its common-law rights were divested and its remedy against violators of the rights thus secured would have been by suit in the United States Courts. But publication also operates to destroy the common-law rights, whether a copyright be secured or not. An invention, a painting, or a book is the property of its creator. He may keep it for his own exclusive use or enjoyment if he sees fit. The public has no greater right to it, however useful it may be, than it would have to any other part of his personal property. But if he once publishes it, his property right in it is gone and

*The question as to whether publication is necessary to complete the copyright has been variously answered. The statute is silent on the subject. But Drone says that "publication is made an essential prerequisite to securing copyright." In Ladd *v.* Oxnard (75 Fed. R. 703) Judge Putnam said that immediately on deposit of the two copies of the copyright accrued without any publication, and from then until actual publication, there were concurrent remedies under the statute and at common law. In the Jewellers' Age. *v.* Jewellers' Pub. Co. (155 N. Y. 241) four of the judges held that there was an actual publication by leasing of books of credit ratings, and three held that the mere deposit of the two copies in the Library of Congress, as required by law, irrespective of other publication, was sufficient publication to perfect the copyright. This last view is approved by Mr. MacGillivray in *The Law of Copyright*, p. 261. Although not finally determined, it is probably the rule that the copyright is perfected by deposit of title and copies without any publication. See also Callaghan *v.* Myers, 128 U. S. 617; Boucicault *v* Hart, 13 Blatch., 47; Falk *v.* Gast, 48 Fed. R. 262.

every one may make use of it. A person who writes a book may keep the manuscript without printing it, and prevent any one from seeing it. He may take a still further step and cause the book to be printed and then determine that it shall not be seen by the public and store all the printed copies away, and still he has not made a publication of it within the meaning of the law. It continues to be his property, as he has not yet offered it to the public. If, while the books are thus stored away, a copy should be obtained surreptitiously* and printed, or should the author loan one of the books to a friend to read and return, and in that manner a copy of the book should fall into the hands of some one who should attempt to print it, the author would be entitled to restrain publication, for the reason that he had not undertaken to put within the reach of the general public such thoughts or facts as he may have expressed or stated in the book. . . . It does not appear from this record but that every person in the United States was at liberty to become a subscriber of the plaintiff, and, as such, entitled to a reference book. Plaintiff's position, therefore, in effect is that a distinction should be drawn between selling or giving a book away and leasing it; that to offer to sell a book to the public or give it to public libraries, where all the public may have access to it, is to publish it; but to lease it to such of the public as care for it is not to publish it. The latter is certainly an effective method of putting the contents of the book in the possession of such portions of the public as desire it. By this method a party parts with the secret in such a way that the public may know it, provided the individuals composing such public are willing to become subscribers and

* See Press Pub. Co. *v.* Monroe, 73 Fed. R. 196.

lease the book. And, if leasing books to the public generally does not constitute a publication of them, then an author or publisher would have but to extend the period of leasing from one year to ninety-nine or nine hundred and ninety-nine years, as is the case in certain leasings of railroads, in order to secure almost as many lessees as there would be purchasers if the books were offered for sale. . . .

"It was the privilege of any and all persons who desired to become subscribers to obtain possession and use of the reference books. The fact that the publisher of the book undertook to place restrictions on the use which individual purchasers could make of it, the effect of which might be to increase rather than diminish the public demand for the book, does not constitute such a limitation as takes away from the act of the plaintiff its real character, which is that of publication." *

Judgment of the trial court reversed.

Publication; Effect of Restricted Use.†

LARROWE-LOISETTE *v.* O'LOUGHLIN.

Circuit Court, Southern District of New York, June, 1898.

88 Fed. R. 896.

Complainant's testator wrote a book entitled *Assimilative Memory*. This the complainant copy-

* As to what is publication, see also: Ladd *v.* Oxnard, 75 Fed. R. 703; Falk *v.* Gast, 54 Fed. R. 890; Rigney *v.* Dutton, 77 Fed. R. 176; D'Ole *v.* Star Co., 94 Fed. R. 840; Larrowe-Loisette *v.* O'Loughlin, 88 Fed. R. 896; French *v.* Kreling, 63 Fed. R. 621; N. J. Dental Ass'n *v.* Dentacura Co., 57 N. J. Eq. 593; Pierce & Bushnell *v.* Werckmeister, 72 Fed. R. 54; Werckmeister *v.* Amer. Lith. Co., 126 Fed. R. 244.

† With respect to publication with restrictions as to use see also Jewellers' Mercantile Agency *v.* Jewellers' Publishing Company, 155 N. Y. 241; Ladd *v.* Oxnard, 75 Fed. R. 703.

righted in the United States in 1896. The defendants published a book entitled *Memory* and advertised it as written by Professor Loisette. Complainant's testator, Loisette, had copyrighted his book in England in 1883. In 1886 he entered the title-pages of the book for copyright in Washington, but never deposited the two copies required by law. There was, therefore, no United States copyright until the complainant secured one in 1896. For many years Loisette sold his book in connection with a course of lectures on memory. With each sale the purchaser signed a contract agreeing, under penalty, not to communicate the system or contents of the book to any one. The complainant argued that on account of this contract there was no "publication" of the book; and that, therefore, the copyright of 1896 was good if the former one was not; and, secondly, that the defendant could not have obtained a copy of the book except by means of a breach of trust in violation of the contract by which it was sold, and, therefore, he should be enjoined in equity. In a suit for infringement Townsend, District Judge, held: "No literary work can be lawfully registered in England before it is published. It must therefore be assumed that the edition of 1883 was published in England. By this publication Loisette forfeited his claim to a subsequent copyright in this country of the matter therein contained. . . . From the agreed statement of facts it appears that Loisette advertised widely and furnished a copy of his book to any one who paid him $25. Those who chose to form classes of ten could obtain a book for $10. The books were sold absolutely; no restriction being placed upon the title or upon their use other than the contract not to communicate to any person any idea or part of Loisette's system

of memory, I think this distribution amounted to publication."

On complainant's second point the Court said: "The jurisdiction of this court is founded only on copyright, and there is no copyright. Complainant and the principal defendants are alleged to be citizens of New York, and if complainant has any cause of action founded on breach of trust, which the decision in the Jeweller's Agency case would seem to indicate she has not, her place to prosecute it is in the courts of New York, rather than in those of the United States."

Judgment for defendant.

Publication. Effect of Restriction as to Use.

Ladd *v.* Oxnard.

Circuit Court, District of Massachusetts, April, 1896.

75 Fed. R. 703.

Complainants were publishers of a copyrighted credit rating book in the stone, granite, and marble trade. They claimed defendants infringed their copyright by copying ratings from it into a similar book of their own. On application for temporary injunction, defendants contended: 1. That the court had no jurisdiction because there was no publication; the common-law right of property, and not the copyright under the statute, was in question, and as the parties were both citizens of Massachusetts, the state courts only had jurisdiction; 2. That works of this character were not entitled to copyright; 3. That there was no infringement according to the weight of evidence.

Putnam, Circuit Judge, held: "It should be said in this connection that while the nature of the use of the complainant's book was sought to be limited in the

manner which we have explained, there was no limit placed by the complainants on the extent or number of persons to whom the book might be distributed under the conditions which they had provided. Though adapted specially for persons engaged in the trades of which we have spoken, yet even these are indefinite in number, and there is no evidence that the circulation was intended to be limited to them.* . . . We are satisfied that there has been a publication.

"On the second issue, the work of the complainants was, of course, mainly in the nature of a compilation, which they claim to have effected partly by interviews with gentlemen in the trade, but more largely by correspondence with attorneys and gentlemen of the trade at various points throughout the United States and Canada. It is well settled that compilations of this character are protected by the copyright statutes, even when they involve only industry, and no such degree of originality as is expected from authors of repute. Indeed, the quality and grade of original work required by the courts under the copyright statutes are very moderate. As to the third issue, on the matter of infringement, we are also satisfied that the complainants have made out a very striking and strong case on the proofs as they now stand, notwithstanding the sworn denial of the respondent."

The Court thought, however, that the complainant was not entitled to an unconditional interlocutory injunction, as there was no evidence that he would suffer irreparable damage if the defendants' book was published pending the suit and as there had been no attempt by the defendant to deceive the public as to the

*Judge Putnam here doubts that failure to publish and consequent remedy at common law prevents a remedy under statute.

identity of the two books. Therefore, it was ordered that injunction should be issued only in case defendant failed to file a bond for $2000 to cover damages that might be finally decreed complainants.

Publication; Cut in Trade Journal.

RIGNEY *v.* DUTTON.

Circuit Court, Southern District of New York, November, 1896.

77 Fed. R. 176.

In an action to recover penalties for a false notice of copyright the defendant contended that he was not liable, as the cut bearing the false notice was only printed in a trade journal, and that therefore there had been no publication. It was held that this was a publication because the paper might be bought by any one, although it was of course only of interest to a certain class. The complainant's demurrer to the answer was sustained on this point.

Effect of Publication in a Magazine.

HOLMES *v.* HURST.

U. S. Supreme Court, April, 1899.

174 U. S. 82.

The *Atlantic Monthly* published Oliver Wendell Holmes's *The Autocrat of the Breakfast Table* serially in twelve parts, ending with the October number of 1858. The magazine was not copyrighted. But in November, 1858, the author copyrighted the book as a whole. The defendant has published the same. Plaintiff sued as executor of Dr. Holmes for an infringement of copyright. The defendant argued that there had been a publication before November, 1858, which totally prevented copyright thereafter. Plaintiff con-

tended that publication of the book did not occur until it was published as a complete volume.

Mr. Justice Brown said in his opinion: "That there was a publication of the contents of the book in question and of the entire contents is beyond dispute. It follows from this that defendant might have republished in another magazine these same numbers as they originally appeared in the *Atlantic Monthly*. He might also, before the copyright was obtained, have published them together, paging them continuously, and bound them in a volume. Indeed, the learned counsel for the plaintiff admits that the defendant had the right to make copies of these several parts, and to sell them separately or collectively; but insists that he had no right to combine them in a single volume. The distinction between publishing these parts collectively and publishing them in a single volume appears to be somewhat shadowy; but assuming that he had no such right, it must be because the copyright protected the author, not against the republishing of his intellectual productions, or 'the order of his words,' but against the assembling of such productions in a single volume. The argument leads to the conclusion that the whole is greater than the sum of all the parts — a principle inadmissible in logic as well as in mathematics. . . .

If an author permit his intellectual production to be published either serially or collectively, his right to a copyright is lost as effectually as the right of an inventor to a patent upon an invention which he deliberately abandons to the public—and this, too, irrespective of his actual intention not to make such abandonment.* It is the intellectual production of the author which the copyright protects and not the particular form which

* See also Mifflin *v.* Dutton, 112 Fed. R. 1004; Holmes *v.* Donohue, 77 Fed. R. 179.

such production ultimately takes, and the word 'book' as used in the statute is not to be understood in its technical sense of a bound volume, but any species of publication which the author selects to embody his literary product. We are quite unable to appreciate the distinction between the publication of a 'book' and the publication of the contents of such book, whether such contents be published piecemeal or *en bloc*.

If, as contended by the plaintiff, the publication of a book be a wholly different affair from the publication of the several chapters serially, then such publication of the parts might be permitted to go indefinitely before a copyright for the book is applied for, and such copyright used to enjoin a sale of books which was perfectly lawful when the books were published."

Decree of Circuit Court of Appeals affirming decree of Circuit Court dismissing the bill of complaint was affirmed.

This case affirmed the decisions of the Circuit Court and of the Circuit Court of Appeals found in 76 Fed. R. 757; 80 Fed. R. 514. The case of Holmes *v.* Donohue, 77 Fed. R. 179, arose on substantially the same facts and was decided, following Holmes *v.* Hurst, by the Circuit Court, Northern District of Illinois.

Publication in Serial Form.

MIFFLIN *v.* DUTTON.

MIFFLIN *v.* R. H. WHITE COMPANY.

Circuit Court of Appeals, First Circuit, January, 1902.

112 Fed. R. 1004.

Affirming the Decision of the Circuit Court, District Massachusetts.

107 F. R. 708.

The complainant was the proprietor of *The Minister's Wooing* by Mrs. Stowe, and *The Professor at the*

Breakfast Table, by Oliver Wendell Holmes. These were published in the *Atlantic Monthly* in 1859. There was then no copyright taken by the publishers of the magazine. Beginning with the November number, copyright was taken out on the magazine by its publishers. Previous to that time twenty-nine out of the forty-two chapters of *The Minister's Wooing* had been published serially. In October of the same year, Mrs. Stowe took out a copyright on her book as a whole in her own name, but thereafter the remaining chapters were published in the *Atlantic Monthly* without any notice of copyright except the general notice on the whole magazine in the name of Ticknor & Fields, the publishers. In December, 1859, Dr. Holmes copyrighted in his own name *The Professor at the Breakfast Table*. The defendants in each case published the books without authority. In an action for infringement in the first case the question was whether, by allowing the *Atlantic Monthly* to publish the last thirteen chapters of her story without the notice of copyright which she had obtained in October, 1859, Mrs. Stowe lost her right to protection. It was held that she forfeited the copyright. It was valid as to the thirteen chapters not published at the time the copyright was taken out, but the subsequent publication of those chapters in the *Atlantic Monthly* without any notice of her copyright was fatal. Judge Putnam, in the Circuit Court of Appeals, said: "The Circuit Court found that the publication of the first 29 chapters without any copyright abandoned them to the public, in which it was undoubtedly correct. It also found, in substance, that, as the remaining thirteen chapters were published with no notice of the copyright except that which we have stated [as above] this, although giving informa-

tion that somebody had copyrighted something, was not a sufficient notice of a copyright by Mrs. Stowe. . . . We agree with this proposition. But the case goes farther. The notice given by the publishers of the *Atlantic Monthly* was clearly a notice of a supposed copyright secured by themselves, and it contained nothing to indicate that it was a notice of one taken out by Mrs. Stowe. The presumption, therefore, is that it was a notice of a copyright of so much of the *Atlantic Monthly* as the publishers were entitled to copyright in their own behalf. They could not then copyright *The Minister's Wooing* because it had already been copyrighted, and there cannot be two successive copyrights in the same publication. To permit this would render possible an extension of the statutory period through which a copyright runs, which, of course, the law will not allow. Therefore, on the whole, the just conclusion is that Ticknor & Fields published the November and December numbers of the *Atlantic Monthly*, not only without any notice of Mrs. Stowe's copyright which was sufficient in law, but only with one which was presumably a notice of a copyright of their own."

In the second of the cases the question was whether the copyright of Ticknor & Fields, publishers of the *Monthly*, on the last two numbers of 1859 did not secure a valid copyright. The complainant contended that the publishers acted as agents of the author in securing copyright for Dr. Holmes. The Court held, however, that there was nothing to show that they had authority to take out a copyright. The fact that the book was subsequently copyrighted in the name of Oliver Wendell Holmes and not in the name of Ticknor & Fields would indicate that the author did not intend to trans-

fer the copyright, but to take it out himself. But even if they had authority to secure copyright, the entry of a book called *Atlantic Monthly* by Ticknor & Fields would not create a valid copyright on a book published subsequently under the title *The Professor at the Breakfast Table* by Oliver Wendell Holmes.

The decision of the Circuit Court of Appeals was affirmed in the Supreme Court (190 U. S. 260) upon the same grounds, in both cases. With regard to the second case Mr. Justice Brown said that it was "impossible to say that entry of a book under one title by the publishers can validate the entry of another book of a different title by another person." *

Effect of Publication.

WAGNER *v.* CONRIED.

Circuit Court, Southern District of New York, November, 1903.

125 Fed. R. 798.

In 1881 Richard Wagner transferred to the firm of B. Schotts Sons the exclusive right of publication for the musical-dramatic work *Parsifal.* The absolute possession of the composition and the libretto had been

* This case does not hold that if Ticknor & Fields had authority to take out copyright their copyright would not protect the articles published serially, but that the copyright notice on the magazine purported to give notice of a copyright belonging to them, whereas the notice in the book published subsequently indicated that the copyright belonged to Dr. Holmes. If the former copyright was valid originally, the subsequent publication without the same notice was fatal to the copyright, and the copyright in the name of the author could not be valid because there had been a prior publication in the magazine.

previously transferred to the same firm. For this contract the publishers paid 75,000 marks. The contract reserved the acting right of *Parsifal* in regard to theatres to Richard Wagner. In 1902, the publishers printed a duodecimo edition in three volumes and sent a number of copies to their New York agent, by whom they were put on sale. This edition was never copyrighted. Thereafter, the defendant being about to produce the work upon the stage, the plaintiff brought an action to restrain him, and, on motion for a preliminary injunction, Judge Lacombe held that the contract between Wagner and his publishers transferred the exclusive right of publication to the latter for all countries and not merely a right to introduce his "musical-dramatic work" to the world as his agent; and that although he reserved in the contract the acting right in regard to theatres and although a notice was printed in the published work, declaring such reservation (which, under German law, would be sufficient to protect the author in his stage rights) nevertheless, the effect of publication of the whole work, accompanied by such reservation in some country other than Germany, has to be determined by the law of that country, and that it is the well-settled law of the United States that no such notice is effective to reserve the stage right which such publication dedicates to the public. The plaintiff contended that the 12mo. edition was incomplete, but Judge Lacombe held that the evidence was plainly to the contrary and that although there was some condensation, the three volumes contained the full score, with no bar, measure, stage directions, or explanations omitted, and in view of such publication, the performance could not be enjoined.

Motion for preliminary injunction denied.

Publication of Architect's Plans.

WRIGHT *v.* EISLE.

New York Supreme Court, Appellate Division, July, 1903.

86 App. Div. 356.

The plaintiff, who was an architect, drew plans for the house of a client. These were filed in the Building Inspector's Office and the house was built from them. Thereafter, the defendant, who saw and liked the house, offered to buy the plans, which had already been used once, but rejected the architect's price as exorbitant, and had his house built by another architect. The plaintiff sued for the value of his plans, alleging that the defendant had had them copied from the records in the Inspector's Office. This he contended was an unlawful appropriation of his artistic composition. The Appellate Division of the Supreme Court held, Justice Woodward writing the opinion, first, that the sale and filing of the plans in a public office constituted a publication, whereby they were dedicated to the public, and whatever right plaintiff had to control the first publication did not extend to the multiplication of subsequent copies, since no copyright had been obtained; second, that whatever property rights there might be after publication were vested in the owner of the building who first purchased the plans; and third, that there was no evidence beyond the similarity of the two houses that the plans had been copied.

Complaint dismissed.

Effect of Publication on Copyright.

D'Ole *v.* Kansas City Star Company.

Circuit Court, Western District of Missouri, June, 1899.

94 Fed. R. 840.

The complainant, a photographer, published a pamphlet entitled *The Answer*, which was used for advertising his business. He entered it for copyright on March 15, 1897, and in November of that year the defendant published in its newspaper several paragraphs copied from it. In an action for damages it was shown that, in December, 1896, the complainant had an edition printed, as he stated at the time, "for use in the holiday trade," and that this edition had been distributed in hotels and public places as an advertisement. Two persons testified to receiving copies so distributed prior to the date of the alleged copyright. In the copyrighted edition the first words of the preface were "since we issued the last edition of this pamphlet," etc. On these facts Phillips, District Judge, held that there was sufficient evidence of a publication previous to the date of filing for copyright, and, as a matter of law, no copyright had ever been obtained. In a dictum on the question of damages the Court said that where a copyrighted pamphlet was distributed gratis as an advertisement and had never been sold or offered for sale, no substantial damages could be awarded. In view of the decision on the validity of the copyright, this point was not decided.

Bill dismissed.

Author's Control over Published Works.

Kipling *v.* Fenno.

Circuit Court, Southern District of New York, December, 1900.

106 Fed. R. 692.

The complainant moved for a temporary injunction to restrain the defendant from publishing and selling certain of his stories except in such collections and under such titles as he should authorize. The stories had never been copyrighted, but they had been published.

Lacombe, Circuit Judge, *held*: "Baldly stated, the proposition advanced is that an author, whose mental productions, prose, verse, and title, have been given to the world by publication without copyright, so that any one is free to reprint and sell the whole or any part of them, may nevertheless regulate the manner in which such reprinted matter may be grouped and entitled, and may restrain any application of the title he selected otherwise than as he used or uses it. No authority is cited which supports any such proposition, and, in the absence of authority, the question of its adoption by the courts had better be reserved for final hearing. It would seem that the measure of relief which authors may obtain against unauthorized publication of their works must be found in the copyright statutes, which, when availed of, are an abundant protection against such publication."

Injunction denied.

The Effect of Publishing Uncopyrighted Drama.

DALY *v.* WALRATH.

New York Supreme Court, Appellate Division, May, 1899.

40 App. Div. 220.

In 1889, Herman Sudermann, a citizen of Germany, sold to Lederer the manuscript and stage rights of a play entitled *Die Ehre*. Thereafter, it was assigned to the plaintiff who put it on the stage. The defendant prepared to produce the same play in 1895 under the title *Honor*. The plaintiff brought an action to restrain her. Plaintiff argued that he by two assignments had acquired the common-law right to protect his manuscript play and the stage rights therein. The defendant contended that the common-law right of property had been lost by reason of the play having been published. This question of fact was the chief issue in the case.

The trial court found that there had been a publication of the play in book form in Germany, and that such publication was with the consent of the author. On appeal it was held, Judge Bartlett reading the opinion, that the publication of the drama in print by authority destroyed the common-law rights therein. The composition became public property, since a valid copyright had not been secured. When Sudermann transferred to Lederer and Lederer transferred to the plaintiff the exclusive right to produce and perform *Die Ehre* in English in the United States, the plaintiff held the author's common-law right of presenting the play in this country; but that right became the property of any one who chose to exercise it when the original play was

subsequently published and sold in book form with Sudermann's authority, if it was, in effect, so published and sold. To justify the use of the play, the defendant had to show that Sudermann consented to the publication. It was held that the evidence established that fact. Although Sudermann violated his contract with Lederer not to publish the play, the breach of his covenant prevented Lederer or his assignee from enjoining the defendant from producing the play which Sudermann had seen fit to make common property by publishing is in disregard of his agreement.

Decree denying injunction affirmed.

For further cases on the effect of publication, see Osgood v. Aloe Company, 83 Fed. R. 470; Snow v. Laird, 98 Fed. R. 813. As to delay in publication, see Falk v. Gast, 48 Fed. R. 262. As to unauthorized publication of manuscript, see Press Publishing Company v. Monroe, 73 Fed. R. 196. As to what is publication, see Rigney v. Dutton, 77 Fed. R. 176; Pierce v. Werckmeister, 72 Fed. R. 54; Werckmeister v. Springer, 63 Fed. R. 808; Werckmeister v. American Lithographing Company, 117 Fed. R. 360; what is not publication, see Falk v. Gast, 54 Fed. R. 890; Ladd v. Oxnard, 75 Fed. R. 703; Jewellers' Mer. Agency v. Jewellers' Pub. Co., 155 N. Y. 241; Larrowe v. O'Loughlin, 88 Fed. R. 896.

Section 5.

Property Rights and their Transfer.

Unauthorized Publication of Manuscript.

PRESS PUBLISHING COMPANY *v.* MONROE.

Circuit Court of Appeals, Second Circuit, March, 1896.

73 Fed. R. 196.

Complainant, Harriet Monroe, wrote a poem for the dedicatory ceremonies at the World's Fair for which she received $1000, and she licensed the Columbian Exposition to present the same at the dedication, to furnish copies to the press and publish the same in the dedicatory history; but subject to these concessions, she reserved her copyright. The New York *World* obtained a copy of the ode before it had been published by the author or the Exposition Committee and without consent of either. No copyright had been obtained, but the plaintiff sued for damages on the ground that she had a common-law property in the poem until it was published by her authority. Complainant received a verdict for $3,000. On appeal, the defendant (New York *World*) contended that the license to the Exposition carried with it the common-law right of property as there was an express reservation of the copyright only; that if it did not pass by the license it was of no importance because the copyright laws had abrogated the common-law right of an author in unpublished manuscript; that in any case, as she had not

proved any actual damages, she was not entitled to exemplary or punitive damages allowed by the trial court.

The Circuit Court of Appeals (opinion by Judge Lacombe) held: "That the license was not intended to transfer the common-law property right in the ode; all that was intended to be conveyed and all that was conveyed was the right to use the ode for the peculiar purposes of the dedicatory ceremonies. That was all the committee needed and all the concession imported. Upon exercising its right to publish, the committee would put an end to the complainant's property right, but until publication that right survived in the author. Any unauthorized publication would be a trespass upon that right of property, and the right of action would still be in the author.

The contention of the plaintiff in error that the passage by Congress of the Copyright Statutes has abrogated the common-law right of an author to his unpublished manuscript is unsupported by authority.* These statutes secure and regulate the exclusive property in the future publication of the work after the author shall have published it to the world. But this is a very different right from the ownership and control of the manuscript before publication. And that common-law right may be enforced in the federal courts whenever diversity of citizenship gives those courts jurisdiction of the parties." . . .

It was held well settled in the federal courts that in certain classes of cases juries may give punitive damages to punish a wrong-doer; and that, in such cases,

* Ladd *v.* Oxnard, 75 Fed. R. 703; Jewellers' Agc. *v.* Pub. Co. 155 N. Y. 241; N. J. Dent. Soc. *v.* Dentacura Co., 57 N. J. Eq. 593; French *v.* Kreling, 63 Fed. R. 621.

damages may be given in addition to what may be proved to be the actual money loss of the plaintiff.

Decree affirmed.

The Supreme Court refused to review this decision of the Circuit Court of Appeals because the suit was brought in the federal courts on the ground of the diversity of citizenship. It was not a suit under the copyright laws, but upon the common-law right of literary property. The only fact which gave the Circuit Court jurisdiction was that the parties were citizens of different States. In such case the right of appeal stops at the Circuit Court of Appeals. (164 U. S. 105.)

Unpublished Manuscript of Drama.

FRENCH *v.* KRELING.

Circuit Court, Northern District of California, August, 1894.

63 Fed. R. 621.

Complainant was the owner of the unpublished manuscript of the opera *Falka*, which was written by one Farnie. Although to a certain extent an adaptation of an earlier French work entitled *Le Droit d'Ainessi*, the songs, dialogue, and situations, as well as the title, of the English opera were original. The musical score had been published, but the libretto containing the words of the opera was still unpublished. The defendants obtained a copy of the libretto in some way unknown and performed the opera in California. In a suit for an accounting of profits, defendant attempted to show publication of the work; but the evidence showed that all that had been done was to print

the book for the use of actors in learning their parts. It had never been put in circulation. The copies used by the actors were handed to them only for such purpose.

Hawley, District Judge, held that this was no publication and the complainant's right to an accounting was established, there having been no dedication of the property rights to the public.

Decree for an injunction.

Rights in Unpublished Essay.

NEW JERSEY STATE DENTAL SOCIETY *v.* DENTACURA COMPANY.

Court of Errors, New Jersey, October, 1898.

57 N. J. Eq. 593.

An original uncopyrighted essay on the care of the teeth was read before the complainant society and, after the meeting, deposited with the chairman to become a part of the records of the society. It was thereafter, handed to the representative of a dental magazine, but never published. The defendant company procured a copy from some one connected with the magazine and proceeded to use extracts from it as an advertisement for its tooth powder. In a suit to restrain such use of the essay, defendant contended that it had been published and was therefore common property. Stevens, Vice-Chancellor, held that the reading at the meeting did not constitute a publication. The manuscript was originally the exclusive property of the complainant, and as the defendant did not claim under a private transfer to itself, it must show a dedication to the public. This it could not do. Although several strangers

were present at the meeting of the society where the report including the essay was read, it did not appear that they had paid admittance fees. The meeting in any case was not open to the general public. The report was not read for the benefit of the world at large. It was not presented to the public nor accepted by the public, but was presented to and accepted by the society. The audience had no more right to appropriate it than if it had been a drama or a lecture they had paid to hear. There was no publication.*

Injunction granted.

Licensee's Use of Unpublished Drama.

HERNE *v.* LIEBLER.

New York Supreme Court, Appellate Division, June, 1902.

73 App. Div. 194.

The plaintiff licensed the defendants to present an unpublished drama the manuscript of which belonged to the plaintiff, and the defendants agreed not to lease the manuscript to any stock company and not to allow any more than one company at a time to produce it. There was then granted to the defendants the exclusive right to produce the play in the United States and Canada for four years. It was agreed that the play should not be published or in any manner dedicated to the public, but should remain in manuscript. The defendants thereafter granted to certain play agents the right to lease the play to stock companies. On appeal the Appellate Division held that the plaintiff

* For other cases on common-law literary property, see Herne *v.* Liebler, 73 App. Div. 194; Belford *v.* Scribner, 144 U. S. 488; Maxwell *v.* Goodwin, 93 Fed. R. 665; Kipling *v.* Putnam, 120 Fed. R. 631; Press Pub. Co. *v.* Monroe, 73 Fed. R. 196.

was entitled to an injunction. Justice Ingraham said: "I do not think that this contract gave to the defendants the right to license this play to be produced in any theatres except where it was produced by a company to be organized by them.* The agreement recited that the parties thereto were prepared to enter into an agreement 'which shall be limited, however, exclusively to matters in connection with the production, management, and exhibition of said play on the terms and conditions hereinafter stated.' The defendants were not granted the right to license others to produce the play, but the right that they had was to produce the play themselves, and the defendants agreed that during that period the said play should not be published, but should remain in manuscript form 'and be used only for the stage production by the said parties of the first part.' There was nothing in the contract that gave the defendants any right, except to produce the play, and it was to be used only for the stage production by them. It was agreed that the defendants would continue to produce the play continuously during the regular theatrical seasons during the time that the contract was in force. This clearly contemplated a production of the play by the defendants, not by stock

* The production without authority of an unpublished drama renders the producer liable in damages; and under the New York Statute is made a misdemeanor.

"Any person who causes to be publicly performed or represented for profit any unpublished, undedicated or copyrighted dramatic composition, or musical composition known as an opera, without the consent of its owner or proprietor, or who, knowing that such dramatic or musical composition is unpublished, undedicated or copyrighted and without the consent of its owner, or proprietor, permits, aids or takes part in such a performance or representation, shall be guilty of a misdemeanor." Pen. Code, § 729, added L. 1899, c. 475.

companies that they should license to produce it. . . . The agreement clearly contemplated such a restriction of the use of this play by the defendants. Thus, it was provided that, if it was mutually deemed advisable, the defendants were authorized to form another theatrical company for the production of the play. Certainly, if the defendants had the right to license other theatres to use this play, and to deliver the manuscript to such other theatres for that purpose, this clause would be entirely meaningless."

Order denying injunction reversed.

Licensee's Rights in an Unpublished Play.

Koppel *v.* Downing.

Court of Appeals, District of Columbia, May, 1897.

11 App. Dist. Col. 93.

One Pope obtained an Italian version of the tragedy *Samson*. This he had translated and, in 1874, filed the title for copyright, but never deposited the two copies of the book. He thereafter played the drama several times. In 1889, he licensed one Palmer to use the play during Salvini's tour in this country. Palmer employed the plaintiff to print the play. Pope had made it a condition of his license that no edition of the play should be published without being copyrighted. When plaintiff printed the play, he copyrighted it in his own name. Defendant acted the play in St. Louis over thirty times. In a suit by the plaintiff for the infringement of a copyright, defendant objected: 1. That the plaintiff never was the proprietor of the play and could not acquire a copyright; 2. That Pope's copyright was invalid for failure to deposit the two copies.

Alvey, Chief Justice, held that plaintiff had no proprietary interest in the play; when Pope gave the license to Palmer to use the play he did not intend to part with the ownership of the manuscript, and he thought then that he had a valid copyright himself. The plaintiff has no greater right than Palmer, through whom he acquired title, and that was a mere license to use. Nor can the plaintiff be regarded a trustee suing in behalf of Pope. The courts will recognize no such evasion in support of an invalid copyright; and moreover, if he were suing as trustee, it must be on the assumption that Pope's copyright was valid in its inception. This was not so; Pope had failed to perfect his copyright. "And if Pope had failed and neglected to perfect his copyright as originally claimed, and by such failure and neglect abandoned such right, that right could not be revived by authorizing somebody else to apply for and obtain a copyright in a name different from that of the real proprietor, sixteen years after the filing of the title-page by the proprietor himself."

Judgment for defendant affirmed.

Extent of Licensee's Right.*

GABRIEL *v.* MCCABE.

Circuit Court, Northern District of Illinois, June, 1896.

74 Fed. R. 743.

Bill for injunction. Complainant licensed defendant to publish a song called *When the Roll is Called up*

* For extent of a licensee's interest in an unpublished manuscript, see Press Publishing Company *v.* Monroe, 73 Fed. R. 196; Herne *v.* Liebler, 73 App. Div. 194.

Yonder, which he had copyrighted. The license permitted the publication in a collection of religious songs entitled *The Finest of the Wheat, No. 2.* Defendant exercised the license and also published the song in an abridged edition of this collection, and also in a combined edition composed of the above book and another collection.

Judge Grosscup dismissed the bill, holding that the publication as above stated was within the reasonable intention of the license; although had the collection been so abridged as to result in the publication of the song alone as sheet music it would have been an unfair use under the license, yet such was by no means the case here. Future editions of a book may contain a composition published in an earlier edition by license, even though parts of the earlier edition are omitted from the latter. To hold otherwise would practically forbid any new editions of books of compilations, for the consent of all the authors contributing could not, in many instances, be obtained.

Injunction denied.

Photographer's Rights in Photographs.

Press Publishing Company *v.* Falk.

Circuit Court, Southern District of New York, January, 1894.

59 Fed. R. 324.

The defendant photographed Marie Jansen. No charge was made. She was to have as many copies of the picture as she desired and the photographer was to have the copyright. The plaintiff (The New York *World*) published her picture from one of such photo-

graphs with Miss Jansen's consent. The defendant in this suit had brought suit at law for the statutory penalties for an infringement. The *World* then filed a bill to restrain the suit at law, alleging that it had Miss Jansen's permission to publish the picture and that she was equitably the joint owner of the copyright.

Wheeler, District Judge, held: "When a person has a negative taken and photograph made, for pay, in the usual course, the work is done for the person so procuring it to be done, and the negative, so far as it is a picture, or capable of producing pictures, of that person, and all photographs made from it, belong to that person; and neither the artist nor any one else has any right to make pictures from the negative or copy the photographs, if not otherwise published, for any one else. But when a person submits himself or herself as a public character to a photographer for the taking of a negative, and the making of photographs therefrom for the photographer, the negative and the right to make photographs from it belong to him. He is the author and proprietor of the photograph, and may perfect the exclusive right to make copies by copyright. Obviously on these pleadings, and proofs, the negative was not made for Miss Jansen, and she was not, and is not claimed to have been a customer of the former class. That she was the subject of the picture would not, alone, make it hers. The right to it would depend upon for whom the work was done, and the evidence shows that what Mr. Falk did was done for himself. That she was to have as many of the photographs as she wanted to do with as she pleased did not affect his exclusive right to make other copies. The owner of a copyrighted book would have the same right to it that she had to these photographs, which would not in either

case extend to making copies, and, more clearly, not to giving others the right to make them."

Even had she been an equitable owner of a part interest, Falk was also a proprietor, and no consent in writing as required by law from the proprietor was shown to authorize the reproduction.*

Injunction to restrain suit for damages denied.

Control of Copyrighted Books for Sale.†

HARRISON *v.* MAYNARD, MERRILL, & COMPANY.

Circuit Court of Appeals, Second Circuit, May, 1894.

61 Fed. R. 689.

The complainant had stored unbound sheets of books with George W. Alexander. While so held they were injured by fire. Thereafter they were sold to one Fitzgerald, who in turn disposed of them to certain Italian dealers in waste paper, providing in the contract with such dealers: "all paper taken out of the buildings to be utilized as paper stock and all books to be sold as paper stock only." The defendant came into possession of some of the unbound sheets, which he bound and sold. Suit was brought for an infringement of the copyright on such books. In an appeal from a temporary injunction the Circuit Court of Appeals, opinion by Judge Shipman, held: "The question is: Can the owner of a copyright restrain, by virtue of the copyright statutes, the sale of a copy of the copyrighted book, the title to which he has transferred, but

* See U. S. Rev. Stat., § 4964.

† As to other cases relating to control over copyrighted works, see Doan *v.* American Book Company, 105 Fed. R. 772; Kipling *v.* Putnam, 120 Fed. R. 631; Straus *v.* Am. Pub. Ass'n, 177 N. Y. 473.

which is being sold in violation of an agreement entered into between himself and the purchaser; or are the remedies of the original owner confined to remedies for a breach of contract? So long as the owner of a copyright retains the title to the copies of the book which he has the exclusive right to vend by virtue of the copyright, he can impose restrictions upon the manner in which and upon the persons to whom the copies can be sold. Having the exclusive right to vend, he has the right to appoint to whom the copies can be sold. If his agents to whom he has entrusted the possession of his books violate his instructions and fraudulently sell to a person, with knowledge or notice of the fraud, such fraud will be an infringement of the copyright, with which the original owner has never parted, and can be restrained by virtue of the statutes of the United States.*

* On this point a recent case (Victor Talking Machine Company *v.* The Fair, 123 Fed. R. 424) decided by the Circuit Court of Appeals for the Seventh Circuit is relevant, though arising in regard to a patent right. The defendant bought from a jobber graphophones bearing a notice that they must not be sold for less than the price stated in the notice. It was held that the defendant had no right to cut the price and could be enjoined. The Court said:

"The owner of a patent who manufactures and sells the patented article may reserve to himself, as an ungranted part of his monopoly, the right to fix and control the prices at which jobbers or dealers buying from him may sell to the public, and a dealer who buys from a jobber with knowledge of such reservation, and sells in violation of it, is an infringer of the patent. . . .

"The field of sale is as much within the monopoly as the others, and so it has been decided. The holdings were that a patentee may reserve to himself as an ungranted part of his monopoly of sale the right to fix and control the prices at which jobbers and dealers may sell the patented article to the public, and that whoever without permission enters the reserved portion is an infringer."

These principles would seem to apply to copyrights to the same extent as to patent rights; and to go far towards preventing price cutting on copyrighted books.

Thus, if the owner of a copyrighted book entrusts copies of the book to an agent or employee for sale only by subscription and for delivery to the subscribers and the agent fraudulently sells to non-subscribers, who have knowledge or notice of the fraud, such sale is an infringement of the original owner's copyright, who can disregard the pretended sale and have the benefit of all the remedies which the statutes or the law furnish. This right to enjoy the benefit of the copyright statutes results from the fact that the owner has never parted with the title to the book or the copyright, although he parted with the possession of the book. But the right to restrain the sale of a particular copy of a book by virtue of the copyright statutes has gone when the owner of the copyright and of that copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser, although with an agreement for a restricted use. The exclusive right to vend the particular copy no longer remains in the owner of the copyright by the copyright statutes. The new purchaser cannot reprint the copy. He cannot print or publish a new edition of the book; but the copy having been absolutely sold to him, the ordinary incidents of ownership in personal property, among which is the right of alienation, attach to it. If he has agreed that he will not sell it for certain purposes or to certain persons, and violates his agreement and sells to an innocent purchaser, he can be punished for a violation of his agreement; but neither is guilty, under the copyright statutes, of an infringement."

Order for injunction reversed.

Agreement to Maintain Prices.

Straus *v.* American Publishers' Association.

Court of Appeals, February, 1904.

177 N. Y. 473.

The American Publishers' Association, the defendant in this action, was formed by the leading book publishers in this country for the purpose of maintaining the selling prices of the books published by the several members of the association. The plaintiff, the proprietor of a department store in the city of New York, brought an action to obtain an injunction against this association, alleging that it was in violation of the statute of New York, (Laws of 1899 Chap. 690), which prohibits combinations and monopolies in the manufacture and sale of any articles in common use. The defendants demurred to the complaint on the ground that it did not state a cause of action, and the demurrer was sustained at the trial; but the Appellate Division of the First Department (85 App. Div. 446) reversed the order of the Special Term and on appeal the Court of Appeals affirmed the judgment of the Appellate Division by a divided court. It was held, Chief Judge Parker writing the opinion, that the agreement entered into by the defendants was a violation of the statute. The Court recognized the fact that so far as the copyrighted books controlled by the members of the Association were concerned, an agreement to maintain rates and to prescribe conditions under which they might be sold, was not unlawful, since the constitution recognized the right in Congress to create a monopoly for the purpose of promoting the progress of science and the useful arts. While the leading object of the association

was stated to be the securing to the publisher of copyrighted books that protection, which the copyright law permits, it did not stop there; it also affected the right of a dealer, if he failed to comply with the rules of the association, in regard to copyrighted books, to purchase for sale books not copyrighted, although on these latter the association did not undertake to restrict the selling price. A combination creating a monopoly not protected by copyright was held to offend against the law of the State as much as if it related to bluestone or envelopes, and according to the complaint, which had to be accepted as true on the demurrer, such an outcome was not only possible, but probable. The association endeavored to exclude from the business of selling books not protected by copyright all who refuse to be bound by its rules, and practically the members of the association were bound to exclude any dealer who might be *suspected* of selling copyrighted books at less than the arbitrary net price. Although the agreement did not state that it was the object of the association to control the sale of uncopyrighted books and seemed to be merely for the purpose of protecting copyrighted books, yet the effect was to exclude dealers from selling books of *any* description if they refused to be bound by the rules. The complaint alleged that, as part of the combination, the members of the association agreed that such net copyright books and all other books, whether copyrighted or not, should be sold by them to those booksellers only who had maintained the net retail prices of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books (the word "copyrighted" was omitted in this connection) at wholesale to no one known to them to cut or

sell at a lower figure than such retail prices, or whose name should be given to them by the association as one who cut such prices. While the leading object of this portion of the agreement was to maintain the retail net prices of copyrighted books, it operated in fact so as to prevent the sale of books to dealers who sold books of any kind to one who retailed copyrighted books at less than the retail price. The complaint further alleged that, under the agreement, neither the Publishers' Association nor the American Booksellers' Association nor any of the members of either would sell or supply books at any price to any dealer, whether a member of said association or not, or whether such books were copyrighted or not, who resold or was suspected of reselling such copyrighted books at less than the arbitrary price fixed by the combination, and that the association or its members would not sell or supply any books whatever to any one who resold or was suspected of reselling such copyrighted books to any dealer who sold the same at less than the arbitrary net price. As to the result of this agreement Judge Parker said:

"The intended effect of this is to prevent any dealer who is even suspected of reselling copyrighted books at less than their net price from obtaining books at any price or on any terms, whether copyrighted or not. And it does not stop there, for the members of the association agree not to supply him *any* books at *any* price, whether he resells copyrighted books or not at less than the arbitrary net price, provided he is suspected of selling to any dealer who thereafter sells the same at less than such arbitrary net price. And this means—inasmuch as the members represent ninety-five per cent. of the publishers and ninety per cent. of the business done in the book trade—that he may be

practically driven out of the business if any one chooses to suspect that a dealer to whom he has sold books has resold them at less than the price fixed."

Order of the Appellate Division affirmed. Gray and Bartlett, J. J., dissenting.*

Enforcing Trade Agreement.

MURPHY *v.* CHRISTIAN PRESS ASSOCIATION.

New York Supreme Court, Appellate Division, March, 1899.

38 App. Div. 426.

The plaintiff and the Catholic Publication Company entered into a contract whereby the company, which was the owner of a copyright on a prayer book and had several sets of plates of the book, sold one of the sets to the plaintiff. It was further agreed that the book should not be sold at less than a stated price. The company was dissolved in 1895 and the receiver sold the other sets of plates of this prayer book to defendant, who had notice of the agreement as to maintenance of price, but nevertheless proceeded to sell under the

* This decision of the Court of Appeals indicates how far a combination to maintain prices is lawful. The opinion of the Court recognizes the right of persons who are entitled to a monopoly to prescribe terms on which the articles controlled by them may be sold. The weakness of the defendants' case was very evidently in their failure to restrict their agreement to copyrighted books solely. Had the rules of the association related solely to fixing the prices on copyrighted books, and to prohibiting the members from selling copyrighted books to such dealers as violated the rules, there would have been no ground for objecting. It was the failure to exclude uncopyrighted books from the effect of the agreement which made the combination illegal. The rules of the association have since this decision been amended so as to cover the case of copyrighted books only.

stated rate. An action to restrain such sale resulted in an injunction for the plaintiff. On appeal the Appellate Division held: "That this action can be maintained against the appellant, and that it is bound by the agreement of the Catholic Publication Society Company, from which it acquired the copyright and electrotype plates. The agreement on the part of the defendant's predecessor in title, though technically a personal one, related to the use of its property, the copyrights, and the plates, and obligated all who might acquire that property with notice of the agreement."

Judgment granting injunction affirmed.

Use of Electrotypes Restricted by Contract.

STANLEY-BRADLEY COMPANY *v.* LESLIE.

New York Supreme Court, January, 1895.

(*Not reported.*)

The plaintiff was the assignee of certain electrotypes which had been acquired by a publishing house from the defendant Leslie. By the terms of the contract under which plaintiff's assignor had purchased the plates, the defendant, it was alleged, agreed not to use or reproduce the illustrations made from them. But in violation of the contract so made, the same prints or reproductions of them were subsequently used to illustrate a work published by the defendant. An action was begun to restrain the defendant and a motion made for an injunction pending suit. Justice Barrett denied the motion upon the defendant stipulating to keep an account of profits realized from the sale of the book containing the illustrations in question. The action was never pressed to a final judgment.

Right in Works Done Under Commission.

Dielman *v.* White.

Circuit Court, District of Massachusetts, May, 1900.

102 Fed. R. 892.

Complainant was commissioned by the government to design a mosaic panel for the Congressional Library. The contract was contained in letters. Complainant submitted sketches and thereafter painted a cartoon which he had copyrighted. This was sent to Venice and reproduced in mosaic. Both cartoon and mosaic bore the regular copyright notice. After the mosaic was set in place defendant photographed it. This action was brought to enjoin the publication of photographs so taken.

Defendant contended that there was no right in the complainant to copyright such design, because the right to do so belonged to the government. There was no mention of copyright in the correspondence embodying the contract.

Lowell, District Judge, held: "Taken by itself, the contract seems to me plainly inconsistent with any reservation of copyright on the part of the artist. In general, when an artist is commissioned to execute a work of art not in existence at the time the commission is given, the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commission rests heavily upon the artist himself. If a patron gives a commission to an artist there appears to me a very strong implication that the work of art commissioned is to belong unreservedly and without limitation to the patron.* . . . The un-

* See Coll. En. Co. *v.* U. C. Schools, 94 Fed. R. 152; Mallory *v.* Mackaye, 92 Fed. R. 479.

restricted right to reproduce a work of art thus commissioned is implied in a sale to a nation or a municipality as well as to an individual. . . . While, however, an accepted commission to paint a picture ordinarily imports an unrestricted right of reproduction in the patron, it is doubtless possible by apt expressions in the contract for the artist to retain the copyright for himself.* Here it is urged with much force by the complainant that the patron, the United States, has acquiesced in this, the complainant's construction of the contract."

[The evidence of this was that the government architect did not object to the copyright when it was called to his attention, and that the government put the mosaic in place bearing the copyright notice.]

"Upon the whole, considering the nature of governments and the habits of governmental officers, which are matters of common knowledge, I do not deem the evidence of acquiescence strong enough to overthrow what appears to me the plain and necessary meaning of the original contract."

Bill dismissed.

Alteration of Paintings Restrained.

Dodge *v.* Allied Arts Company.

New York Supreme Court, October, 1903.

(*Not reported.*)

The plaintiff painted under contract four pictures for the lobby of the King Edward Hotel, Toronto. He did the work for, and his own contract was with, the defendant company. The proprietors of the hotel, however,

* See as to right to retain copyright on sale of painting, Werckmeister *v.* Springer, 63 Fed. R. 808.

demanded that certain changes be made in the paintings on the ground that their effect was too sombre; as, for example, that the background of sky in one of the paintings be changed from black to blue. These alterations the artist declined to make for the reason that in several cases they would render the pictures historically inaccurate and would also violate artistic standards. The defendant being about to execute by other artists the changes suggested, plaintiff brought suit to enjoin the same. On motion for a preliminary injunction the plaintiff contended that if the alterations were permitted, it would ruin his professional reputation and that the proprietors of the paintings had no right to alter materially works of art exhibited in a public place as the creation of the plaintiff, whereby he might be made ridiculous before all persons of artistic taste. The defendant contended that the paintings were the property of the hotel people, and that they could do as they liked with their own property in altering, improving, injuring it, or destroying it, since after the title passed from the artist he had no further control over the finished works. Justice McCall granted the motion for an injunction pending suit, but as yet (April, 1904) no final decision has been reached.

Works Compiled by an Employee.

COLLIERY ENGINEER COMPANY *v.* UNITED CORRESPONDENCE SCHOOLS CO.

Circuit Court, Southern District of New York, April, 1899.

94 Fed. R. 152.

While in the employ of complainant one Ewald was engaged to compile and revise instruction papers.

Thereafter he became connected with defendant company and complainant alleged that pamphlets issued by defendant infringed their copyrighted sheets. On motion for preliminary injunction Judge Lacombe held that the articles compiled by Ewald during his employment by complainant became the latter's property and Ewald had no right to copy the same even from memory for the use of defendant. On the question of fact as to whether defendant's pamphlets were copied from complainant's, it was held that there was not sufficient evidence thereof considering the nature of the subject matter,—questions and instructions in mathematics,—in which the compilations must necessarily be very similar. The system of instruction pursued was not a subject of copyright and the evidence of piracy of the sheets and pamphlets was not such as to warrant a preliminary injunction.

Motion denied.

Play Written by an Employee.

MALLORY *v.* MACKAYE.

Circuit Court, Southern District of New York, March, 1898.

86 Fed. R. 122.

Mackaye made a contract with Mallory for ten years; the former to receive a salary of $5000 and all inventions or plays he should create to belong to Mallory. He wrote the play *Hazel Kirke*, which was copyrighted and put on the stage. It was a great success under Mackaye's management. After a year and a half, Mackaye claimed that Mallory had violated the contract and accordingly he rescinded the contract and began to present the play *Hazel Kirke* on his own

account. Complainant brought suit to restrain this presentation, and a preliminary injunction was granted.

Wheeler, District Judge, held that the defendant had no good ground for rescission, as complainant's acts did not amount to a violation of the contract. Therefore the defendant was not justified in breaking the contract and taking the play with him. It was the property of the complainant under the contract and he was entitled to the copyright; and also to an injunction restraining the defendant from presenting the play.

Perpetual injunction granted.

The Circuit Court of Appeals affirmed this decree in Mallory *v.* Mackaye, 92 Fed. R. 749.

Transfer of Right to Obtain Copyright.

BELFORD *v.* SCRIBNER.

U. S. Supreme Court, April, 1892.

144 U. S. 488.

The complainants published, by agreement, a book entitled *Common Sense in the Household*, by Mrs. Terhune (Marion Harland) and took out a copyright in their own name. The defendants appropriated a large part of this book in publishing a new one of the same nature, which they sold at a less price. A decree in favor of the complainant was made by the Circuit Court, 50 Fed. R. 473, and the United States Supreme Court affirmed the same. Mr. Justice Blatchford said: "It is contended that the plaintiff is not the owner of the two copyrights in question, because the authoress of the book was a married woman, residing with her husband in New Jersey, when the agreement

between her and Charles Scribner & Company was made, on April 1, 1871; that at common law a married woman has no interest in personal property acquired by her during marriage, but it belongs absolutely to her husband; that no proof was introduced of the provisions of the laws of New York, or those of New Jersey, or those of Massachusetts, in which latter state the bill averred that the authoress resided at the time the bill was filed, and no proof was offered that the laws of any of those states differed from the common law, and the presumption was that the common law was in force in those different states. . . ."

On this point the Circuit Court said in its opinion that, as the proof showed that the authoress from time to time settled with the owners of the copyright, the Court would presume that her legal title as the author of the books was in some due and proper manner conveyed to and vested in the persons who secured the copyright thereof; and that acquiescence for so many years, by all the parties, in that claim of proprietorship in the copyright, was enough to answer the suggestion of the husband's possible marital interest in his wife's earnings. This is, we think, a sound view.

The opinion of the Circuit Court further correctly said: "It is certain that, if there is any ownership in this work by copyright at all, it is in the complainant, in whose name the copyright was taken, and now stands, so far as is shown by the proof in this case. If the law of the domicile of Mrs. Terhune entitles her husband to any part of her earnings, that is a matter to be settled between her husband and the complainant, and which the defendants cannot interpose as a defence to a trespass upon the complainant's property rights in this copyrighted book."

Objection is also made that . . . a printed copy of the title-page of the book first published was delivered at the office of the Librarian of Congress at Washington, May 26, 1871; that § 4956 of the Revised Statutes required that two copies should be delivered at the office of said Librarian or deposited in the mail addressed to him "within ten days from the publication" of the book; that the testimony shows that the books were published May 27, 1871; and that, therefore, the two printed copies of it were deposited one day *before* the publication, and the law was not complied with.

But we are of opinion that the statute was substantially complied with. The two copies were deposited before the expiration of ten days after the publication, and that was all that was necessary.* . . .

It is also contended that the copyright of 1880 was invalid, because no sufficient proof appeared that two copies of that book were duly deposited. We are of opinion that the certificate of the Librarian of Congress, set forth in the margin, as printed in the record, that two copies of the new edition of the plaintiff's copyrighted book were received by him, November 15, 1880, which was within ten days after the publication, was competent evidence, although the certificate was not under seal.

It is urged that the decree ought to have been entered for the sum of $1902 against the defendant corporation alone, and that it was error to decree the other two defendants to pay any part of that amount; that those two defendants manufactured the books complained of, and did not sell them or offer them for

* Under the present statute the deposit of two copies must be made "on or before the day of publication," R. S. § 4956.

sale; that the corporation defendant published and sold the books and was the only defendant which received any part of the profits arising from their sale; and that it was from the books of account of the corporation defendant that the account of profits was stated on which the decree for damages in the case was based. . . .

To this view it is replied by the plaintiff that, as the defendants Donohue and Henneberry printed the books by contract with the corporation defendant, and as, under the copyright law, Revised Statutes, § 4964, both the printer and the publisher are equally liable to the owner of the copyright for an infringement, and as it is to be inferred that Donohue and Henneberry made a profit from printing the piratical books, they were, therefore, sharers in the profits realized from the sale of the books, and were *participes criminis* with the defendant corporation in the infringement; that the two sets of defendants together printed and published the books, and were practically partners in doing it, the corporation doing one part and the other defendants the other part of the printing and publishing; and that all the parties concerned ought to be held to an account to the owner of the copyright in respect to the profits derived from the printing, publishing, and selling, without all of which combined there could have been no infringement. We think these views are sound.

It is contended by the defendants that the decree ought to have been only for that proportion of the profits realized from the sale of the books which was derived from the matter which had been copied from the copyrighted books. . . .

The rule is well settled, that, although the entire copyrighted work be not copied in an infringement, but

only portions thereof, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendants will be given to the plaintiff."

Decree affirmed.

Transfer of Rights by Foreign Author, prior to 1891.

FRASER *v.* YACK.

Circuit Court of Appeals, Seventh Circuit, May, 1902.

116 Fed. R. 285.

In 1890 J. M. Barrie was engaged in writing *The Little Minister* for serial publication in an English magazine. On May 8, 1890, he assigned to J. W. Lovell the sole right to publish the story from advance sheets in the United States and Canada, and contracted to deliver the text to him two months before the appearance of the last number in England. The contract was assigned to the United States Book Company, and in October, 1891, it took out a copyright. The defendants put a dramatization of the story on the stage. Complainant, an assignee of the book company, sued for an injunction. The defendant contended that the book company had no right to take out a copyright, all their interest being derived from a contract executed before the International Copyright Act went into effect and that, as at the time of such contract it was not possible to give them the power to secure the copyright, they could not acquire it when the law did come into effect.

Jenkins, Circuit Judge, held that at the time of the

contract, which was before the passage of the International Copyright Law, Mr. Barrie had no right to take out a copyright in the United States; nor could he, a foreigner, confer on a citizen of this country any such right to obtain a copyright in his work. Therefore it could not have been within the intent of the parties to the contract to assign a power to copyright. Unless Lovell became the owner and proprietor of the manuscript so as to acquire the whole property in the same, he could not subsequently, upon the passage of the law of 1891, take advantage of the international copyright. The Court held that the only right transferred by the contract was that to have the advance sheets before the completion of the serial in England. This would give Lovell the power to get his book on the market first, and that was the only thing it was possible for him to acquire from the British author which would be of any advantage to him prior to the International Copyright Act. Therefore neither Lovell, nor his assignee, the book company, could acquire a valid copyright in the book.

Decree dismissing bill affirmed.

For cases relating to the transfer of property rights in literary works see Hoyt v. Bates, 81 Fed. R. 641; Patterson v. Ogilvie, 119 Fed. R. 451; Press Publishing Company v. Monroe, 73 Fed. R. 196; Fraser v. Yack, 116 Fed. R. 285; Belford v. Scribner, 144 U. S. 488; Black v. Allen, 56 Fed. R. 764; Dielman v. White, 102 Fed. R. 892; Doan v. American Book Co., 105 Fed. R. 772; Gabriel v. McCabe, 74 Fed. R. 743; Harrison v. Maynard, 61 Fed. R. 689; Herne v. Liebler, 73 App. Div. 194; Murphy v. Press Ass'n, 38 App. Div. 426.

Section 6.

Infringements and Unfair Use.

Infringement; Effect of Slight Alterations.

FISHEL *v.* LUECKEL.

Circuit Court, Southern District of New York, December, 1892.

53 Fed. R. 499.

The Brooklyn Photogravure Company made copies of certain etchings and engravings copyrighted by complainants. It omitted the tints, title, and plate mark and shipped the pictures to London to defendants. The defendants claimed these were not "copies" under the copyright act, because they lacked such characteristics of the original. The defendant also contended that they were not liable because the Photogravure Company was not their agent and because they had no intention of infringing a copyright.

Townsend, District Judge, held: "The evidence shows that, although it is unusual to tint and mark such pictures, yet incomplete copies such as were produced by the photogravure company would have some market value. This fact alone would seem to be sufficient to establish the infringement. But the suit is brought under § 4952 of the Revised Statutes, which secured to the complainants the 'sole liberty of printing, reprinting, publishing, completing, and copying,' etc., these engravings. The object of this law is to protect the results of the creative genius of the composer or designer. The appropriation of a part of the

work is no less an infringement than the appropriation of the whole, provided 'the alleged infringing part contains any substantial repetitions of any material parts which are original and distinctive.' Here the defendants had the whole picture copied except the plate mark and title. They omitted the mere work of the artisan; they appropriated the genius of the artist. The question is not whether a copy is marketable; but whether it is piratical.*

There is no equity in this claim of the defendants. The copyright has been infringed. The allegation of the defendants that they had no intention to infringe the copyright is no defence in this case. Where the infring ment is otherwise established, the intention is immaterial.

The defendants further claim that they are not liable for infringement, because the photogravure company was not their agent, but was an independent contractor, and agreed to take the risk of infringement. The evidence shows that the defendants bought the pictures from the complainants, furnished them to the photogravure company, ordered the copies made, and gave general directions as to how the work should be done. The defendants procured the infringing act; they are therefore liable as joint tort-feasors. . . .

The infringement having been established, the appropriate relief in a court of equity is by an injunction and account of profits. And 'the court will grant an injunction without proof of actual damage.' The right to an account of profits is incident to the right to an injunction in copyright cases."

Decree for injunction.

* Falk *v.* Donaldson, 57 Fed. R. 32; Springer *v.* Falk, 59 Fed. R. 707.

Infringement. Effect of Alterations.

FALK *v.* DONALDSON LITHOGRAPHING CO.

Circuit Court, Southern District of New York, July, 1893.

57 Fed. R. 32.

The complainant posed and photographed Julia Marlowe as "Parthenia" in the play of *Ingomar the Barbarian*. The defendants copied this photograph. In a suit for an injunction the defendants contended: 1. The copyright was not properly secured by reason of failure to deposit copies within ten days after publication; 2. That the picture was not entitled to copyright; 3. That the lithograph was not a copy of the photograph and did not infringe the same. Judge Townsend, held: 1. That the law was complied with as to depositing the two copies within ten days of publication. "It is not necessary that the copies should be mailed *after* publication. If mailed *before*, they are mailed within ten days of publication." *

On the second point of defendants it was held that the artistic skill in posing a subject was sufficient to entitle the photographer to a copyright on his picture.†

On the third point of defendants Judge Townsend held: "The question presented here is whether the defendants have so far copied the design of complainant as to appropriate his manifestation of his conception, or a substantial part thereof. The lithograph is not strictly a copy of the photograph. It differs from it in various

* See Belford *v.* Scribner, 144 U. S. 505. The law in this respect has been changed by the present statute. It is necessary now to make the deposit on or before the date of publication.

†As to photographs being entitled to copyright, see Lithographing Company *v.* Sarony, 111 U. S. 60; Falk *v.* Engraving Company, 48 Fed. R. 262; Bolles *v.* Outing Co., 175 U. S. 262; Cleland *v.* Thayer, 121 Fed. R. 71.

ways. Some forty differences have been suggested by experts introduced by defendants. . . . The lithograph lacks the artistic excellencies of the photograph, but I cannot understand how the fact that an attempted appropriation has been inartistically accomplished can help the infringer. If a painter originates and copyrights a work of art, can a chromo manufacturer copy the design, to advertise the wares of a merchant, and defend against an action on the ground that the mechanic has not caught the spirit of the artist, or mixed the pigments in the same tones of color? Is the sculptor compelled to see his life work in marble appropriated and modelled in soap or sugar, because, forsooth, 'the dimples are lacking,' or 'the one is three or four times larger than the other'? And yet these are among the reasons assigned by the experts for the defendants why there is no similarity between the photograph and the lithograph. (See Falk *v.* Lithographing Company, 48 Fed. R. 678.) . . . Imperfect and comparatively lifeless as the lithograph is, yet it needs no expert to show that, although varying somewhat in design, it is a copy of the conception of complainant. . . . Defendants claim that the value of the photograph has not been impaired by the publication of the lithograph, and there is no infringement because the photograph and the lithograph are not rivals and are not in competition in any way. This fact does not affect the question of infringement, but only the measure of damages. The measure of complainant's rights is not limited by the mere fact that the lithograph would not displace the photograph in the market. He is entitled to any lawful use of his property whereby he may get a profit out of it."

Decree for injunction and accounting.

Infringement. Slight Alteration.

SPRINGER LITHOGRAPHING COMPANY *v.* FALK.

Circuit Court of Appeals, Second Circuit, February, 1894.

59 Fed. R. 707.

The complainant Falk had copyrighted a photograph of Lillian Russell. By combining this picture with one of Pauline Hall, another actress, the defendant made a composite photograph. A suit for infringing a copyrighted photograph was brought and the complainant at the trial recovered $3000. The defendant appealed from the judgment on four grounds: 1. That the Court refused to charge that to be an infringement of the complainant's picture the defendant's picture must be substantially a copy of it. That is, the two pictures must be substantially identical. The Court charged "it is not necessary that the copies should be exact copies; it is necessary that the infringer should appropriate a substantial portion of the distinguishing ideas and characteristic features of the original photograph to make up a lithograph." The Circuit Court of Appeals held (Judge Lacombe writing the opinion) that this charge was correct and there was evidence that a substantial portion of the copyrighted picture had been appropriated. 2. The defendant objected because a photograph of Pauline Hall was admitted in evidence, though no infringement of it was alleged. This was held no ground for reversal, as it could not have prejudiced the defendant with the jury, though it might have been irrelevant. 3. It was objected that the trial judge excluded the question "Has the production of this lithograph interfered with the sale of the photographs?" This ruling was held correct because the

action was for a penalty which could be recovered, although no actual damage was sustained. 4. The defendant objected also that the copyrighted photograph did not bear the proper notice. This point was not considered on appeal because it had not been raised at the trial.

Judgment affirmed.

For other cases as to infringement see Henderson v. Tompkins, 60 Fed. R. 758; American Publishing Association v. Daily Story Publishing Company, 120 Fed. R. 766; Amer. Trot. Reg. Ass'n v. Gocher, 70 Fed. R. 237; Brady v. Daly, 175 U. S. 148; Falk v. Brett, 48 Fed. R. 678; Harper v. Ranous, 67 Fed. R. 904; Howell v. Miller, 91 Fed. R. 129; Kipling v. Putnam, 120 Fed. R. 631; Champney v. Haag, 121 Fed. R. 944; Stern v. Rosey, 17 App. D. C. 562.

Infringement. One Scene of a Copyrighted Play.

BRADY *v.* DALY.

United States Supreme Court, November, 1899.

175 U. S. 148.

After obtaining an injunction against W. A. Brady, one of the defendants in Daly *v.* Webster, in an equity suit restraining the production of the railroad scene, (see page 48), Augustin Daly brought an action at law to recover the statutory damages. (Daly *v.* Brady, 69 Fed. R. 285.) The Circuit Court held that the defendant was liable under § 4966 for $6300 (126 performances at $50.00). The Circuit Court of Appeals (83 Fed. R. 1007) affirmed the judgment and an appeal was taken to the Supreme Court. The appellant contended that the § 4966 provided for a penalty and not

for damages, and therefore that the Circuit Court had no jurisdiction in the case, as the district courts have exclusive jurisdiction of actions for penalties; and that § 4966 only applied when substantially the whole of a copyrighted play was taken, and not when merely a single incident was produced.

Mr. Justice Peckham held that the statute in using the word "damages" did not mean a forfeiture or penalty, as it is difficult to prove the exact amount which the proprietor of a play may suffer by reason of an infringement. It is probable that Congress intended to provide a remedy so that the proprietor could recover a certain amount of damages without proof of what his actual loss had been. In the face of the difficulty of determining the amount of damages, a minimum sum is provided in any case, with the possibility of recovering a larger amount on proof of greater damage. The idea of punishment is not so much suggested as the desire to provide for compensation to the proprietor. Consequently the Circuit Court had jurisdiction, this not being an action for the recovery of a penalty. As to the second contention, it was held that the judgment in the prior equity suit which was put in evidence was conclusive between these parties, and the fact was established by that record that the railroad scene was a dramatic composition and was a substantial part of a copyright play.* Upon the question whether the appropriation of a *part* of a copyrighted play constituted an infringement, the Court approving the ruling in Daly *v.* Webster, 56 Fed. R. 483, held that any taking of a substantial part, though less than the whole work,

* As to protection against infringement of a part of a copyrighted drama, see also: Henderson *v.* Tompkins, 60 Fed. R. 758; Daly *v.* Webster, 56 Fed. R. 483.

was piracy. It was also held that by bringing a suit for an injunction and an accounting of profits, and recovering judgment therein, the complainant had not made such an election as would bar him from maintaining this suit.

Judgment affirmed.

Infringement. City Directory.

MALONEY *v.* FOOTE.

Circuit Court, Northern District of Georgia, April, 1900.

101 Fed. R. 264.

Complainant and defendant agreed to work together in publishing their respective directories of Atlanta. They were to collect the facts, set the type, etc., jointly. Complainant was to have the right to take the first impressions from the type and defendant was not to publish certain names that appeared in the first edition. This last restriction defendant disregarded. After defendant's edition was printed and ready for publication complainant obtained a copyright on the directory. He then brought suit for an injunction on the ground that defendant had infringed his copyright.

Pardee, Circuit Judge, held that there was no infringement on these facts, because all acts said to constitute the infringement were done before the copyright was obtained; whatever violation of the contract there may have been, there was no violation of the copyright, and it is only in the latter case that the Circuit Court has jurisdiction.

Temporary injunction denied.

Infringement. Copy of a Copy on Infringement.

CHAMPNEY *v.* HAAG.

Circuit Court, Eastern District of Pennsylvania, March, 1903.

121 Fed. R. 944.

Complainant had a copyright on a painting which was photographed by Curtis and Cameron, who copyrighted their photograph. Defendants copied the photograph.

Held, that the defendants' reproduction was not a copy of complainant's painting, but of the photograph; that the owners of the photograph might have an action for infringement, but that complainant had none.*

Judgment for defendant.

Infringement. Reproduction by Phonograph.

STERN *v.* ROSEY.

Court of Appeals, District of Columbia, February, 1901.

17 App. Dist. Col. 562.

Plaintiff was the proprietor of two copyrighted songs: *Take Back your Gold*, and *Whisper your Mother's Name*. Defendant took these songs and had them

* The principle involved in the decision in this case seems inconsistent with the provisions of the copyright law. That the photograph was copied from another taken of the original painting makes it no less a copy of the original. This decision apparently indicates an absolutely safe way to pirate copyrighted paintings. The doctrine of the case is contrary to the principles of the English courts. In Lucas *v.* Williams (1892), 2 Q. B. 113, where it appeared that the photograph, which was alleged to infringe a painting, was directly taken from an engraving which was an exact copy of the painting, upon which the plaintiff had a copyright, it was held that this was evidence to prove the infringement and that the jury might infer that the photographs sold by the defendants were copies of the original picture.

sung into a phonograph, thereby obtaining a "master-record," from which other records were made. In a suit for infringement of the copyright, plaintiff contended that this was "copying" his song under the copyright law.

Judge Shepard held that the records did not "copy" the sheet music. "It is not pretended that the marks upon the wax cylinders can be made out by the eye, or that they can be utilized in any other way than as parts of the mechanism of the phonograph. Conveying no meaning, then, to the eye of even an expert musician, and wholly incapable of use save in and as part of a machine specially adapted to make them give up the records which they contain, these prepared wax cylinders can neither constitute the copyrighted sheets of music nor serve any purpose which is within their scope. In these respects there would seem to be no substantial difference between them and the metal cylinder of the old and familiar music box; and this, though in use at and before the passage of the copyright act, has never been regarded as infringing upon the copyrights of authors and publishers."

Decree dismissing bill affirmed.

Acts not an Infringement.

KIPLING *v.* G. P. PUTNAM'S SONS.

Circuit Court of Appeals, Second Circuit, January, 1903.

120 Fed. R. 631.

An action for infringement and unfair competition. The defendants purchased in 1899 from complainant's authorized publishers two hundred copies of the unbound sheets of his works. Half of these were for

themselves and half for E. P. Dutton & Company. Their portion of these sheets was bound up by defendants in a twelve volume edition, to which were added three other volumes consisting of uncopyrighted works, sheets purchased from authorized publishers, and original matter. The books were bound uniformly, some sets in leather and some in buckram. Fifteen of the sets so bound had stamped on one cover an elephant's head. This was called the "Brushwood" edition.

The complainant had previously published through the Scribners the "Outward Bound" edition in twelve volumes. These books were larger, wider, and thicker than the "Brushwood" edition; but they also carried a gilt elephant's head. There was no evidence of anything constituting notice to defendants that this head was a trade mark. Other editions had been published without it. The complainant sued on the grounds that: 1. The Brushwood edition infringed his copyright; 2. The use of the elephant's head infringed his trade-mark; 3. The whole edition was in unfair competition with the "Outward Bound" edition. At the trial the Court directed a verdict for the defendant, and the judgment was affirmed in the Circuit Court of Appeals.

Coxe, Circuit Judge, said on these points: 1. "There is no matter published in the 'Brushwood' edition secured to the plaintiff under the copyright law of the United States, which was not purchased by the defendants of publishers duly authorized by the plaintiff to sell. . . . Upon what theory, then, have the plaintiff's copyrights been infringed? Each one of them, whether valid or invalid, was respected by the defendants. That the defendants, having purchased

unbound copyrighted volumes, were at liberty, so far as the copyright statute is concerned, to bind and resell them, is a well-recognized principle of law. It is of no moment that each volume of the 'Outward Bound' edition authorized by the plaintiff and published by Charles Scribner's Sons, in 1897–98, was copyrighted. This new copyright protected only what was original in the 'Outward Bound' edition. It did not operate to extend or enlarge prior copyrights or remove from the public domain the author's works which, by his own act, he had dedicated to the public. . . . We have no difficulty in agreeing with the Circuit Court that the plaintiff, has failed utterly in establishing a cause of action under the copyright law."

2. With regard to the alleged infringement of a trade-mark the Court said: "The proposition that an author can protect his writings by a trade-mark is unique and, at first blush, seems somewhat startling. It is certainly offensive to the æsthetic and poetic taste to place such poems as the *Recessional* and *The Last Chantey* in the same category with pills and soap to be dealt in as so much merchandise. We do not intend to decide that such a trade-mark is sanctioned by law, but even if it were, it is manifest that the mark does not lose its characteristics because used to designate an unusual variety of 'goods.' In other words, the author, assuming that he may have such protection, must comply with the law if he would have a valid trade-mark." The elephant's head had never been registered as a trade-mark; and in the only case (aside from the "Outward Bound" edition) in which it had been used on plaintiff's books it was surrounded by the name of the publishers so as to indicate it was their mark and not his. The Court held, therefore, that there was no

proof of any common-law trade-mark; and it was conceded that there was no registered mark.

3. In reference to the charge of unfair competition it was held that an action on this theory is based on fraud, which must be proved. No fraud was here shown. There was no chance of the "Brushwood" and the "Outward Bound" editions being confused. They differed in size, shape, binding, color, and typography. The defendants did not attempt to make the public believe their edition was the same as the "Outward Bound," but that it was more complete than that or any other edition. There was no proof of unfair dealing or of direct damage.*

Judgment affirmed.

Imitations when not Infringements.

BLOOM *v.* NIXON.

Circuit Court, Eastern District of Pennsylvania, November, 1903.

125 Fed. R. 977.

The complainant, the proprietor of the copyright of a song entitled *Sammy*, was the manager of a comic opera in which Miss Lotta Faust sang this song. Miss Fay Templeton, playing in *The Runaways*, gave an imitation of Miss Faust singing the *Sammy* song, and suit was brought to restrain her on the ground that she was violating the copyright. The complainant relied on § 4966 of the Revised Statutes: "Any per-

* For other cases where it was held that there was no infringement, see Griggs *v.* Perrin, 49 Fed. R. 15; Harper *v.* Ranous, 67 Fed. R. 904; Corbett *v.* Purdy, 80 Fed. R. 901; Barnes *v.* Miner, 122 Fed. R. 480; Howell *v.* Miller, 91 Fed. R. 129; Champney *v.* Haag, 121 Fed. R. 944; Stern *v.* Rosey, 17 App. D. C. 562: Burnell *v.* Chown, 69 Fed. R. 993.

son publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor . . . shall be liable for damages therefor, etc." On a motion for a preliminary injunction Judge McPherson held that the question at issue was whether the song was being performed or represented. He decided that it was not, saying in his opinion:

"What is being represented are the peculiar actions, gestures, and tones of Miss Faust, and these were not copyrighted by the complainant Bloom, and could not be, since they were the subsequent device of other minds. It is the personality imitated that is the subject of Miss Templeton's act, modified, of course, by her own individuality, and it seems to me that the chorus of the song is a mere vehicle for carrying the imitation along. Surely a parody would not infringe the copyright of the work parodied merely because a few lines of the original might be textually reproduced. No doubt the good faith of such mimicry is an essential element, and if it appeared that the imitation was a mere attempt to evade the owners' copyright, the singer would properly be prohibited from doing in a roundabout way what could not be done directly. But where, as here, it is clearly established that the imitation is in good faith, and that the repetition of the chorus is an incident that is due solely to the fact that the stage business and the characteristics imitated are inseparably connected with the particular words and music, I do not believe that the performance is forbidden either by the letter or the spirit of the Act of 1897. The owner of the copyright is entitled (upon the assumption heretofore stated) to be protected from unauthorized public performance or representation of

the song, in order that whoever might desire to hear *Sammy* sung in public would be obliged to attend a performance of the *Wizard of Oz;* and, as it seems to me, he still has that protection. The song is sung publicly only in that extravaganza. Fay Templeton does not sing it; she merely imitates the singer, and the interest in her own performance is due, not to the song, but to the degree of excellence of the imitation. This is a distinct and different variety of the histrionic art from the singing of songs, dramatic or otherwise, and I do not think that the example now before the Court has in any way interferred with the legal rights of the complainants."

Injunction denied.

Infringement of Stage Rights.

HARPER *v.* GANTHONY.

Circuit Court, Southern District of New York, April, 1895.

(*Not reported.*)

The complainant Harper acquired from Du Maurier the right to copyright in the United States the latter's story of *Trilby*. Copyright was duly obtained on the book, and thereafter the dramatic rights were assigned to another of the complainants, Palmer, who caused the novel to be dramatized and produced upon the stage. The defendant, Miss Ganthony, constructed a distinct and independent dramatization of the story without the consent of the proprietors of the copyright or of the stage right; and this she proceeded to perform at the Eden Musée, in New York. The representation consisted of a series of monologues in costume, in which Miss Ganthony depicted the plot of the story, as well as the more important characters and scenes

therein. On a motion for a preliminary injunction Judge Lacombe held that the acts of the defendant constituted a public performance of a dramatic composition within the meaning of the copyright law.

Preliminary injunction granted.

Unfair Use. Scope of Injunction.

WEST PUBLISHING COMPANY *v.* THE LAWYERS' PUBLISHING COMPANY.

Circuit Court of Appeals, Second Circuit, April, 1897, reversing Circuit Court, Northern District of New York, 64 Fed. R. 360.

79 Fed. R. 756.

The West Company published a system of law reports in connection with which they printed monthly digests. Both were copyrighted. The defendant published a collection of selected cases and a digest of cases in the United States. The complainant alleged that defendant made unfair use of its publication and appropriated the labors of complainant's editors. Much of the defendant's digest was made from publications not copyrighted, viz.: United States Supreme Court, Canadian, and other reports. The Circuit Court found that there were 303 proved instances of piracy and granted an injunction as to those particular paragraphs held to infringe.

Judge Coxe said: "Where the pirated portions can be separated from the portions not subject to criticism the injunction should not go against the entire work, but against the infringing portions. . . . The defendants had a right to copy the opinion, decisions, and syllabi prepared by the court from the complainant's publications or from any other source, and use them precisely as any other matter which is free to the

public. The defendant could lawfully prepare notes, abstracts, and paragraphs from these free sources of information, collect them, and publish them in a digest of its own. In doing this editors had no right to avail themselves of the complainant's original work. They were forbidden not only from copying the work of the complainant's editors, but also from using that work in any way to give them suggestions or to lighten their labors. . . . In case of an index or digest the compiler is not guilty of bad faith in using the book he is digesting. He must use the book. Not only should a digest tell in brief what was been decided, but it should also inform the reader where the decision is to be found in full. This of necessity requires an examination of the reports. A digest prepared only from the manuscripts of the judges would be a ludicrous excrescence which would not be harbored in any library." * The Court held, however, that in 303 instances at least piracy was proved, and therefore an injunction should be granted; but that as a digest, like a directory or index, is composed of separate and distinct paragraphs, each of which can be removed without affecting the remainder, the injunction should not decree the suppression of the entire work.

On appeal to the Circuit Court of Appeals (Judge Lacombe writing the opinion), it was held that the decree of the Circuit Court should be reversed on the ground that the injunction was too limited in its scope. The rule as to what is entitled to copyright was approved as stated by the Circuit Court. Judge Lacombe said: "The main criticism advanced upon this appeal is that the court erred in treating the case as if com-

* See Howell *v.* Miller, 91 Fed. R. 129; Mead *v.* West Co., 80 Fed. R. 380; Ed. Thompson Co. *v.* Am. L. B'k Co., 122 Fed. R. 922.

plainant had been unable or unwilling to prove more than 303 instances of piracy. It is apparent that the Circuit Court and the master have treated each separate 'point' in a syllabus as the subject of a separate copyright, and have acted upon the principle that no alleged infringing paragraph could be shown to be pirated unless it showed upon its face, independently of all other proof, language unmistakably borrowed from a copyrighted paragraph. To such an extent has this segregation been carried, that there are several instances where the master has reported that there was no infringement of one paragraph in the head-note of a particular case, although he has found infringements of the other paragraphs of the same head-note; and the Circuit Court has so held. . . . It is thought, on the contrary, that in such a case, where unfair use of any part of a syllabus is proved, the burden would be upon the unfair user to show, if he can, that nevertheless there were parts of the same syllabus that he did not so use. As a result of this method of examination there seems to have been no attempt made to deal with the question presented by the pleadings, namely, whether, taking each copyrighted work as a whole, and considering the evidence, as a whole, the preponderance of proof shows that, in preparing defendant's publication, its editors, or any of them, have substantially made an unfair use of such copyrighted work." Upon an examination of the evidence it was held that there was an unfair use of copyrighted material and that complainant was entitled to an injunction against defendant's digest, except so much as related to English, Canadian, and United States Supreme Court reports and other uncopyrighted reports.

Decree reversed.

Unfair Use. Citations in Text-Books.

MEAD *v.* WEST PUBLISHING COMPANY.

Circuit Court, District Minnesota, May, 1896.

80 Fed. R. 380.

Complainant and defendant each published an edition of *Stephen on Evidence*, with notes and citations. Defendant's editor clipped part of the text of Stephen from complainant's book; but did not copy his notes. He admitted that he got certain ideas as to additional subjects for notes from complainant's notes, but he did not copy or appropriate such notes. It appeared that there were certain errors in citations common to both books. The complainant argued that this fact established the infringement.

Lochren, District Judge, held that the use made of the complainant's book by defendant was lawful. The text of Stephen was not protected and defendant might extract clippings from it wherever printed. Putting the text in his copyrighted book did not give complainant any exclusive right to it. Defendant might copy it from such book or any other. As to the notes, it was held that there had been no unlawful appropriation. The defendant's notes were no more like complainant's than a set of notes treating on the same point must inevitably be. The terms were like, but there was no evidence from the form or the expression of any piracy. The fact that defendant acquired certain ideas from complainant's book, which he incorporated into additional notes, is immaterial. The new notes were his own original work. The few errors in citations were immaterial,* since it appeared that

* See also for unfair use: Chicago Dollar Directory Company *v.* Chicago Directory Company, 66 Fed. R. 977; where it appeared

there were many new citations and that the work on the whole showed that it was the result of original research.

Injunction denied.

Unfair Use of Scientific Work.*

SIMMS *v.* STANTON.

Circuit Court, Northern District of California, June, 1896.

75 Fed. R. 6.

Complainant copyrighted two books on physiognomy. These books the defendant used in writing a book on the same subject. The complainant contended that defendant had made an unfair use of his works and infringed the copyrights and demanded an injunction.

Judge Morrow held that while a person might make use of a reference work (which defendant admitted she did) it was not lawful to appropriate it. Copying is not confined to literal repetition. The law prohibits the use of any copyrighted book, *animo furandi*, with intent to save oneself labor. But the defendant was privileged to make a "fair use" of complainant's books. She had the right to refer to them, and to use the same system used by them, and to treat of the same subjects. A copyright obtained by an author does not protect him in the use of material already published by

that the defendant's directory contained sixty-seven errors which had occurred in the complainant's directory, it was held sufficient evidence of unfair use.

See also Williams *v.* Smythe, 110 Fed. R. 961; Chicago Directory *v.* United States Directory, 122 Fed. R. 189; Trow Directory Company *v.* United States Directory Company, 122 Fed. R. 191; Colliery Co. *v.* Correspondence Schools, 94 Fed. R. 152.

* See also Lillard *v.* Sun Pub. Co., 87 Fed. R. 213, on use of prior scientific works.

an earlier author. Having a right to use the system, it was natural that the description should be similar. Had complainant been the first to use the system, he would have been protected. But the description was not so similar as to indicate piracy. Both parties were writing on the same subject. Both had studied it for years. It was natural, therefore, that the descriptions and definitions in their books should be similar. But the complainant on whom the burden of proof lay failed to show substantial piracy.

Bill dismissed.

Infringement. Unfair Use.

LILLARD *v.* SUN PRINTING AND PUBLISHING CO.

Circuit Court, Southern District of New York, May, 1898.

87 Fed. R. 213.

An action was brought by the complainant to enjoin the *Sun* from publishing an article alleged to be pirated. The complainant was the proprietor of a periodical called *Popular Science*, and in the number for January, 1897, he published a copyrighted article, illustrated, on an extinct animal, the "brontosaurus." The defendant subsequently printed an article on the same animal and illustrated it with a cut closely resembling that in the complainant's magazine. There was a demurrer to the bill, and Lacombe, Circuit Judge, held that the article in the *Sun* was within what was a fair use of the copyrighted description, especially since such description was presumably not original with the complainant. The animal was one which no human being ever saw, and whose anatomy was worked out by geologists. The description of it was contained in

many works in this country and abroad. But as to the cut used to illustrate the newspaper article, it was held that was too close an imitation of complainant's illustration to be a fair use.*

Demurrer overruled as to cut.

Use of Scientific Works.

COLLIERY ENGINEER CO. *v.* EWALD.

Circuit Court, Southern District of New York, August, 1903.

126 Fed. R. 843.

On a motion to punish for contempt in violating an injunction, complainant showed that it had compiled a series of text-books by its employees. These books were taken chiefly from earlier works, with some little new matter added in the shape of illustrations and examples. This was copied bodily by defendant without independent research. Suit was brought and an injunction obtained. (See Colliery Eng. Co. *v.* United Cor. Schools, 94 Fed. R. 152.) The defendant took the infringing books and compared them with the authorities from which the complainant's original book was compiled. Where the text was found in the earlier books it was marked for retention; all else was struck out, and what was left was the publication alleged to violate the injunction. Judge Lacombe held that this was not a violation. The defendant was entitled to make such use of complainant's work under the rule in Edw. Thompson Co. *v.* American Law Bk. Co., 122 Fed. R. 922.

Motion denied.

* It was also held that an allegation th the complainant was the proprietor of a copyrighted magazine in which the article appeared was sufficient, and the bill need not aver that he was the author, inventor, designer, or proprietor of the cut or article.

Unfair Use. City Directories.

TROW DIRECTORY COMPANY *v.* BOYD.

Circuit Court, Southern District of New York, October, 1899.

97 Fed. R. 586.

On motion for preliminary injunction restraining publication of a directory alleged to infringe complainant's copyright, Lacombe, Circuit Judge, held that it appeared that defendant's agents had copied from the Trow Directory rather than looked up the facts independently; and a failure to produce the canvasser in each case of an alleged infringement made the presumption against the defendant. But as an injunction might work irreparable injury to the defendant, it was granted only in case defendant should fail to file a bond for $10,000 to pay whatever damages complainant might recover; together with a sworn statement of sales each month.

Unfair Use of Unpublished Manuscript.

MAXWELL *v.* GOODWIN.

Circuit Court, Northern District of Illinois, April, 1899.

93 Fed. R. 665.

Complainant was the author of a play entitled *Congress*, which was never copyrighted or published. He presented it to defendant in the spring of 1895 and it was rejected. In the following fall, defendant brought out a play called *Ambition*, which, like the former play, dealt with scenes in Washington. The complainant brought an action for damages, alleging a violation of his common-law stage-right; and the jury gave him a verdict. On motion to set aside the verdict,

defendant contended that there was no stage right under the common law; and that there was no inherent property right in ideas or creations of the imagination apart from the manuscript in which they are contained or the language in which they are clothed.

Seaman, Circuit Judge, held that neither of these contentions was correct.* But the case was decided on another ground, that the evidence did not support the verdict. The Court held that neither internal nor external evidence indicated any copying. The plot, scenes, dialogue, characters, and situations of the two plays were not at all alike. The only resemblance was that both related to Congressional life. The only fact of external evidence that supported the verdict was that defendant had had complainant's manuscript in his possession for some time, and might have read and copied it. The defendant testified he never had read it and that the alleged pirated play was in fact written by one Carleton two years before complainant's play. This was corroborated by the testimony of Carleton and Charles Frohman, to whom the play had been read before the complainant's play was written.

Verdict set aside and new trial granted.

Unfair Use of Law Encyclopædia.

EDWARD THOMPSON COMPANY *v.* AMERICAN LAW BOOK COMPANY.

Circuit Court of Appeals, Second Circuit, July, 1903.

122 Fed. R. 922.

In an action for infringement of a copyrighted encyclopædia, defendant showed that much of the material

* See French *v.* Kreling, 63 Fed. R. 621; N. J. State Den. Soc. *v.* Denta. Co., 57 N. J. Eq. 593.

taken by it from complainant's book had been pirated by complainant from other copyrighted books. The defendant took lists of all the cases bearing upon a given subject, including cases found in complainant's books. These were put in the hands of an editor, who examined them, and if the cases were applicable, cited them in support of his article. There was no claim that a word of the text was copied. The only use of the lists of cases was to guide the editor to the reports. The lists themselves were not printed by defendant. It was held that this was no infringement.* Every author of a law book may take a list of authorities cited in a previous work and make an independent examination of them. It was also held that the complainant was not entitled to relief because it appeared that in compiling its book, it had pursued a similar method in its use of earlier works, and if the defendant was guilty of piracy, so was the complainant; and equity will not protect a pirate from infringements of his piratical work.

The order of the Circuit Court granting a temporary injunction reversed.

Unfair Competition. Reprinting Dictionary.†

MERRIAM *v.* FAMOUS SHOE COMPANY.

Circuit Court, Eastern District of Missouri, September, 1891.

47 Fed. R. 411.

Bill to restrain a publication of Webster's Dictionary. Complainant's were publishers of Webster's Dictionary.

*The decision of the Circuit Court here reversed is found in 121 Fed. R. 907.

† As to unfair competition, see also Kipling *v.* Putnam, 120 Fed. R. 631; National Telegraphic News Company *v.* The Western Union Telegraph Company, 119 Fed. R. 294.

The edition of 1847 was copyrighted. This copyright expired in 1889. The edition being published at the time of this suit was that of 1864, a revision copyrighted in that year. The defendant made a reprint of the edition of 1847, but omitted all features thereof which distinguished it from the edition of 1864.

Thayer, District Judge, held that while the defendant had a perfect right to reprint the edition of 1847 as it had become public property by the expiration of the copyright, and while he could call his book "Webster's Dictionary," yet equity would restrain him from publishing a reprint of the edition which cut out its distinguishing characteristics so as to deceive the public into believing it was the revised edition of 1864. Wrongs of this kind are subjects of equitable relief. It was an attempt by one person to confuse the public mind and make it believe that his goods were the goods of another.

*Injunction granted.**

Unfair Competition. Use of Similar Titles.

HARPER *v.* HOLMAN.

Circuit Court, Eastern District of Pennsylvania, December, 1897.

84 Fed. R. 224.

LARE *v.* HARPER.

Circuit Court of Appeals, Third Circuit, March, 1898.

86 Fed. R. 481.

Complainants (the Harpers) brought a bill in equity to enjoin the defendants from publishing a book alleged

*See to the same effect Merriam *v.* Holloway Publishing Company, 43 Fed. R. 450, and Merriam *v.* Texas Siftings Company, 49 Fed. R. 411.

to infringe a copyright and from using on any book the title *The Fram Expedition: Nansen in the Frozen World.* The complainants' book was entitled *Farthest North. Nansen.* The defendants' book bore the title *The Fram Expedition: Nansen in the Frozen World.* The complainants on the motion for a temporary injunction contended that the book infringed a copyright, and the title was intended to deceive the public.

Dallas, Circuit Judge, held that there was not sufficient evidence to show that the materials in the book in question were not taken from sources lawfully open to the defendants; and therefore no infringement of copyright was shown. On the second issue of unfair competition he held that there was a manifest attempt on the part of the defendants to imitate the title of the prior book; that the title was not aptly descriptive of defendant's book, and that it was unfair competition.

On the appeal the Circuit Court of Appeals reversed the Circuit Court on the ground that there was not sufficient proof of unfair competition. The defendants had determined to publish a book on the Fram Expedition months before Dr. Nansen began writing his account. Nor did it appear that the two books were so similar as to cause confusion. The complainants' book was in two volumes bound in brown cloth and entitled *Farthest North. Nansen.* It sold for $10. The defendant's book was in one volume, bound in blue and entitled *The Fram Expedition: Nansen in the Frozen World. Including Earlier Arctic Explorations.* It sold for $2.

Bradford, District Judge, writing the opinion, said: "It is evident that the two works are calculated respec-

tively to meet the demands of different classes of purchasers. There is nothing deceptive in the cover, outside title, or title-page of the defendants' book. Those titles taken in conjunction are fairly descriptive of the subject-matter of the volume. They radically differ from the outside title and title-page of the complainants' book. Comparing the two works, we are unable to perceive that any ordinary customer of such books possessing common intelligence should, in the absence of actual fraud practised upon him, mistake the one for the other, without gross carelessness on his part."

Order for preliminary injunction reversed.

Unfair Competition. Stage Rights.

FROHMAN *v.* WEBER.

New York Supreme Court, November, 1903.

(*Not reported.*)

Charles Frohman, the proprietor of the stage rights in the play *Sherlock Holmes*, brought suit to enjoin the defendant from presenting *The Sign of the Four*, in which the leading character is Sherlock Holmes. On motion for a preliminary injunction pending suit, the plaintiff urged that the advertising of Sherlock Holmes as the central figure of the rival play was unfair competition with his play and tended to mislead the public who might go to the *Sign of the Four* expecting to see the prominent actor who was playing the title rôle in the plaintiff's drama, as well as to see that drama. The defendant responded that his play was a dramatization of an uncopyrighted story, which, by publication, had become dedicated to the public, and as

Sherlock Holmes was the leading character of the story, he could lawfully be made leading character in the play. Moreover, the title of the defendant's play bore no resemblance to that of the plaintiff. The defendant did nothing to confuse the public as to the two plays or the actors who appeared in them. Justice Clarke held that the plaintiff had not made out a case and denied the injunction.

The case has not (January, 1904) reached a final decision.

Unfair Competition. Cheap Edition Rebound.

Dodd *v* Smith.

Supreme Court of Pennsylvania, October, 1891.

144 Pa. St. 340.

The plaintiffs, Dodd, Mead & Company, held the copyright on E. P. Roe's novels and published two editions, a cheap paper-covered one, selling at fifty cents a volume, and a more elaborate cloth bound edition at $1.50 a volume. The defendant bought a large lot of the cheap edition, rebound the books in cloth so as to resemble the better edition and sold them at sixty cents a volume. This brought the inferior books into competition with the better edition. The plaintiffs sought an injunction restraining the sale and an accounting for profits. The Court of Common Pleas of Philadelphia refused to grant such relief, and on appeal the Supreme Court (*per curiam*) affirmed the decree without opinion.*

* See Doan *v.* Am. Bk. Co., 105 Fed. R. 772.

Unfair Competition. Trade-Mark.

Social Register Association *v.* Howard.

Circuit Court, District of New Jersey, February, 1894.

60 Fed. R. 270.

The complainant was the publisher of the *Social Register*, a book containing the names, residences, etc., of persons of a certain social standing in New York City and Orange, New Jersey. The defendant thereafter published a work of similar character relating to Orange and called it *Howard's Social Register*. The complainant served notice on him to abandon the use of the phrase "Social Register" claiming a trade-mark. The defendant disregarding the demand, a bill was filed for an injunction to restrain him.

Green, District Judge, held that the injunction should be granted. He said: "These words, 'Social Register,' are clearly settled arbitrarily to designate the publication of the complainant, and cannot be properly called descriptive, in any sense. Hence, the words, when chosen, associated together, and applied to a list of persons selected at will by the compiler, as in the case at bar, become a trade-mark, and are entitled to protection as such. . . . Now it can scarcely be doubted that to permit the defendant to use the same words to designate a similar publication which is admittedly a rival, so far, at least, as the town of Orange may be concerned, would be to give the defendant the advantage of the prestige which has already crowned the complainant's publication, and while thus benefited the defendant, would, in equal degree, inflict damage, pecuniary in character, upon the complainant.

"This a court of equity should refuse to do. It should

be its purpose and object in matters of this sort to prevent one from stealing away unfairly the business and good will which have been acquired by another. While fair competition promotes the public good and is to be encouraged, unfair competition, based upon unlawful tactics, should be enjoined." *

Injunction granted.

Unfair Competition. Jurisdiction.

TILTON *v.* JORDAN.

Circuit Court, District of Massachusetts, October, 1898.

(*Not reported*)

In 1855 Thomas Bulfinch published a book entitled *The Age of Fable, or Stories of Gods and Heroes.* This was a collection of stories which he had previously written for a magazine and which had been serially published without copyright. The book of 1855 was apparently copyrighted, but the copyright was never renewed and expired in 1883. The complainant, claiming to be the successor of Bulfinch's rights, copyrighted and published in 1891 a new edition edited by Dr. Edward Everett Hale. In 1898, the defendant put on sale an edition based on the original text of Bulfinch to which certain new matter had been added. A bill was filed to restrain this new edition. The complainant's case was founded not upon infringement of copyright, but upon unfair competition. He argued that the defendant's book deceived the public into the belief that it was the one edited by Dr. Hale. The defendant contended: 1. That the court had no jurisdiction as the case did not involve the infringement of copy-

* See also as to trade-mark, Kipling *v.* Putnam, 120 Fed. R. 631.

right, but merely a question of trade competition and the parties were citizens of the same state; 2. That the book was not calculated to deceive the public, as it differed in form, binding, illustration, and general appearance from Dr. Hale's edition. There were fewer pages and different type in the defendant's book.

The Circuit Court denied a motion for a preliminary injunction, stating orally that the complainant had failed to sustain his contentions.

Unfair Competition. Reports of Lectures.

DRUMMOND *v.* ALTEMUS.

Circuit Court, Eastern District of Pennsylvania, January, 1894.

60 Fed. R. 338.

Plaintiff delivered a series of lectures in Boston in 1893, on which all rights of publication were expressly reserved. Defendant published an unauthorized edition of a book purporting to contain the lectures precisely as delivered, but which was made up from incomplete and fragmentary newspaper reports. The plaintiff, a British subject, brought suit for an injunction, alleging violation of his common-law right of property.

Dallas, Circuit Judge, held that the subject of copyright was not involved. The claim was for protection against having any literary matter published as the plaintiff's which was not actually his creation, and to prevent fraud on purchasers. That such right exists is well settled, although of course an author may, by dedication of his works to the public, abandon his title. Here the defendant failed to prove such dedication. It appeared that plaintiff sent to a journal called *The British Weekly*, reports of eight of the twelve lectures. But these did not give a full and exact account of those

lectures, and no report at all was published of the other four. The defendant's book was based on the account in the *Weekly;* and had he copied it literally the plaintiff would have no remedy. But the fatal weakness of his case is that, under color of editing the author's work, he represented a part as the whole, and even as to that portion materially departed from the newspapers' reports. While adopting the title of the head-lines of the reports, he altered their text so as to make it appear, contrary to the tenor of the reports themselves, that his book contained the precise language of the lectures.

Injunction granted.

In another suit brought by Potts & Company against Altemus (60 Fed. R. 339) a temporary injunction was denied because it was unnecessary, as the plaintiff was Professor Drummond's publisher and the injunction granted him was sufficient to protect both until a final hearing.

Unfair Competition. Answers to Copyrighted Letters.

LORIMER *v.* BOSTON HERALD COMPANY.

Massachusetts Supreme Court, June, 1903.

(*Not reported*)

Plaintiff was the author of *Letters from a Self-Made Merchant to his Son;* these were copyrighted. Defendant published a series of letters entitled *Letters from a Son to his Self-Made Father*, written by W. D. Quint and G. T. Richardson, under the pseudonym, "Charles Eustace Merriman," and purporting to be answers to the letters by the plaintiff. A bill was filed alleging unfair competition, the plaintiff contending that defendants had appropriated the results of his labors and that the public was deceived.

Judge Morton held that the case did not involve infringement of plaintiff's copyright, and if it had it would have been under the jurisdiction of the United States courts, and not of a state court. On the issue of unfair competition, it was held that there was no proof that the letters were published as the work of Lorimer. They purported to be the work of "Merriman"; and in the advertisements of them there was nothing to indicate that they were being published as plaintiff's work. Nor was there any evidence that the public was deceived into so believing. The only evidence bearing on this was that of a newsdealer, who was asked by a customer if the *Letters from a Son to his Self-Made Father* were by Lorimer, and who responded that he did not know. The fact that they were written over another name after the first series had made a reputation under Lorimer's name would tend to show that they were not held out as written by the same author.

Bill dismissed.

Unfair Competion. School Books.

DOAN *v.* AMERICAN BOOK COMPANY.

Circuit Court of Appeals, Seventh Circuit, January, 1901.

105 Fed. R. 772.

The defendant purchased second-hand school books published by the American Book Company. He then cleaned, rebound and resold the same at a reduced price. The book company brought suit for an infringement of their copyright and obtained a temporary injunction.

On appeal the Circuit Court of Appeals held that there was no infringement of a copyright. The sale of the books by the proprietor of the copyright carried with it

the ordinary incidents of ownership in personal property. The defendant had the right to sell them and also to clean, repair, and rebind them. Under the claim of unfair competition the Court held that in order to protect the American Book Company from unlawful interference with its trade, and the public from deception, that if the defendant rebound the books so as to resemble the original edition of the plaintiff, he must stamp the covers conspicuously with the words to indicate that the books were second-hand. The defendant had the right to rebind a copyrighted book and it was not an infringement of the copyright; but it was unfair competition to rebind second-hand books for resale in such a manner that they might pass for new books and so enter into competition with the books published by the proprietor of the copyright, unless the person so rebinding marked the cover so as to distinguish the second-hand edition from the new.

Order granting temporary injunction reversed.

Section 7.

Remedies and Penalties.

Corporation Infringes. Officer's Liability.

STUART *v.* SMITH.

Circuit Court, Southern District of New York, April, 1895.

68 Fed. R. 189.

Complainant sold her right to publish her story, *Carlotta di Carlo*, to the *Lippincott's Magazine*, but

the contract did not (according to the dictum of Judge Townsend) carry the copyright. Mrs. Stuart afterwards copyrighted the story. Previously the Lippincotts had assigned the right to publish it to the American Press Association, of which the defendant is president, and it published the same. On suit for infringement defendant contended that he was not personally liable for the wrongs of the corporation.

Townsend, District Judge, held: "The answer alleges and the evidence shows that said American Press Association, of which the defendant is president, is a corporation. There is no question as to its financial responsibility. It has not been joined as a party defendant in this suit. The evidence shows that the alleged infringing acts were committed by said corporation, contrary to the express instructions of defendant, and without his knowledge, and that the first intimation he had that said story had been published by said corporation was when he was served with the papers in this case. In these circumstances it would be contrary to the well-settled rules of equity to hold this defendant alone personally liable for such wrongful acts merely because he was an officer of said corporation."

Bill dismissed.

Liability of a Corporation. Extent of Penalty.

FALK *v.* CURTIS PUBLISHING COMPANY.

Circuit Court, Eastern District of Pennsylvania, January, 1900.

98 Fed. R. 989.

Circuit Court, Eastern District of Pennsylvania, February, 1900.

100 Fed. R. 77.

The complainant brought suit against the Curtis Publishing Company for the statutory penalty for the

infringment of a copyright of a photograph. The latter demurred on several grounds, only two of which were important. These were, 1. That the penalty was only incurred by a natural person and not by a corporation; 2. That the penalty was limited to copies actually found in the possession of the defendant and did not extend to those traced to it, and the complaint failed to state that these copies were found in the possession of the defendant.

Dallas, Circuit Judge, held: "The real question is whether the Congress intended in using the words 'any person' to discriminate between two sets of persons (natural and artificial) equally well known, and both recognized by law. No reason has been suggested which could have induced such an intent, and to me it seems that to ascribe to Congress a purpose to exempt corporations from, while subjecting natural persons to, the penalties imposed by this section would be to assume that it purposed a manifestly unreasonable consequence; and of this the Court should not be persuaded, except by clear and unequivocal expression. But Congress has distinctly declared its intent to the contrary; for the first section of the Revised Statutes prescribes that: 'In determining the meaning of the Revised Statutes . . . the word "person" may extend and be applied to partnerships and corporations, unless the context shows that such words were intended to be used in a more limited sense."

On the second point, he sustained the demurrer because the penalty related only to those sheets actually found in the possession of the defendant, and it was not alleged that the sheets had been so found. This was on the authority of Bolles *v.* Outing Company, 175 U. S. 262.

On a second demurrer to the amended bill, Judge

Dallas held it sufficient. The chief question was whether the Circuit Court had jurisdiction to recover a penalty. Actions for penalties in general are in the exclusive jurisdiction of the district courts, but when arising under the copyright law they may be brought in the Circuit Court.* The other points were questions of technical pleading.

Demurrer overruled.

The case was tried and a verdict of $3000 given for the plaintiff subject to a reservation of law upon the question whether an action could be maintained to recover penalties for infringing sheets found in the possession of the defendant before such sheets have been actually found in possession of such person on the service of a writ of replevin.†

The Circuit Court of Appeals (Judge Buffington writing the opinion, 107 Fed. R. 126), affirming the Circuit Court held, that where an action to recover the penalty and an action in replevin to seize the sheets were started at the same time, the former was premature. The statute only allows a penalty on sheets found in the possession of the defendant, and when the action for the penalty was begun, the sheets had not been found, because the action of replevin was started at the same time. Hence there was no cause of action for the penalty yet accrued within the meaning of the statute.‡

Decree affirmed.

* See Patterson *v.* Ogilvie, 119 Fed. R. 451, as to damages under R. S. § 4964, and McDonald *v.* Hearst, 95 Fed. R. 656, as to penalty under § 4965.

† See also Child *v.* Times Company, 110 Fed. R. 527, holding that the penalty only relates to copies actually found in the possession of an infringer.

‡ As to the proper form of remedy, it has been held in Pennsyl-

Principal's Liability for Infringement by Agent.

McDONALD *v.* HEARST.

Circuit Court, Northern District of California, July, 1899.

95 Fed. R. 656.

Complainant was the proprietor of a copyrighted map which the defendant published without his consent in the *Examiner*, a San Francisco newspaper; defendant in answer to the complaint in the action brought under R. S. § 4965 to recover the penalty alleged that he was not in the State at the time of the publication of the map in his paper; and that it was done by his agents without his knowledge, orders, or consent. On demurrer to this answer, the defendant urged that as the action under § 4965 was to recover a penalty, the defendant as principal was not liable for a penalty for an act done by an agent without his knowledge or consent.

De Haven, District Judge, upheld this contention, saying: "The action authorized by this section in so far as the action relates to the recovery of money, is one to enforce a penalty. This seems too clear to admit of argument. That the money judgment which may be recovered therein is not intended solely to compensate

vania that replevin will not lie, because in an action of replevin the defendant might give bond so as to restrain possession of the goods in question and consequently forfeiture would thereupon be barred. Rinehardt *v.* Smith, 121 Fed. R. 148.

The Circuit Court of Appeals in New York has held that the action to recover forfeited sheets was not one of replevin, but was merely an action under the statute and therefore no demand need be made prior to bringing suit, because the right to the forfeited sheets depends upon the statute and not upon a demand as in replevin. Hegeman *v.* Springer, 110 Fed. R. 374.

The Circuit Court of Illinois, on the other hand, held that replevin will lie to enforce a forfeiture under the copyright law. Morrison *v.* Pettibone, 87 Fed. R. 330.

a plaintiff for the damage which he may have suffered by reason of the infringement of his copyright could not be made clearer than it has been by the declaration of the statute that one half of the money recovered shall go to the plaintiff, 'and the other half to the use of the United States.' . . . The action being, then, penal, the same principle which exempts the master from the payment of exemplary or punitive damages for the wrongful act of his servant, when he did not himself participate in such act, is applicable here; and if the defendant was not himself guilty of some misconduct, which in the eye of the law would make him a participant in the act of his servant, in violating the plaintiff's copyright, and such act was done without his authority, knowledge, or consent, he is not subject to the penalty provided by the statute and sued for in this action."

Demurrer to answer overruled.

Condition Precedent to Suit.*

EDWARD THOMPSON COMPANY *v.* AMERICAN LAW BOOK COMPANY.

Circuit Court, Southern District of New York, October, 1902.

119 Fed. R. 217.

In an action for infringement, the defendant demurred to the complaint on the grounds, 1. That it did not show that the title deposited with the Librarian had actually been recorded. 2. That the plaintiff being a corporation cannot be an author, and 3. That it shows no source of title, although it alleges that the

* See also as to condition precedent to suit Hegeman *v.* Springer, 110 Fed. R. 374.

complainant is the proprietor as well as the author. Judge Townsend sustained the demurrer on the first ground, holding that it was necessary to show actual recording as well as mere deposit for record. He overruled the other causes of demurrer, as it was not necessary to show a source of title when proprietorship is alleged and it was immaterial whether the corporation could be an author since it was alleged that it was the proprietor.

Demurrer sustained.

Jurisdiction in Cases of Copyright.*

HOYT *v.* BATES.

Circuit Court, District of Massachusetts, July, 1897.

81 Fed. R. 641.

Complainant was the author of a play (*A Black Sheep*) which contained a song, *Sweet Daisy Stokes*. The defendants were licensed to print such song. Without complainant's knowledge or consent defendant copyrighted the song. The complainant brought an action in equity to force defendant to assign the copyright. This was brought in the state court, and defendant had it removed to the United States Court. The complainant moved to remand it. The defendant contended that as the subject-matter was a copyright under the United States statute, it was for the federal courts.

* For other cases relating to jurisdiction in copyright cases see Jewellers' Agency *v.* Jewellers' Publishing Company, 155 N. Y. 241; Falk *v.* Curtis, 100 Fed. R. 77; Larrowe–Loisette *v.* O'Loughlin, 88 Fed. R. 896; Brady *v.* Daly, 175 U. S. 148; Press Publishing Company *v.* Monroe, 73 Fed. R. 196; Lorimer *v.* Boston Herald Co. (not reported).

Putnam, Circuit Judge, held: "We are of the opinion that, within the purview of the decisions of the Supreme Court, the case is not one arising under the copyright laws of the United States, and that it presents no federal question; and that therefore, the state court had full jurisdiction over it, and it must be remanded. . . . This bill assumes that the copyright is valid, and it alleges no infringement, nor anything which can raise any question as to its scope or liability. On this statement of the pleadings, the only issue presented by the bill is one of title, depending upon the rules of the common law, and in no way on any statute of the United States."

Suit remanded to state court.

Action for a Penalty. Statute of Limitations.

WHEELER *v.* COBBEY.

Circuit Court, District of Nebraska, November, 1895.

70 Fed. R. 487.

Action to recover damages under § 4964 of the Revised Statutes for violating a copyright of a compilation and annotation of the laws of Nebraska. The defendant demurred and set up the statute of limitations (see Revised Statutes § 4968), alleging that the recovery sought was in the nature of a forfeiture and was barred because two years had passed since the acts complained of were done.

Section 4964 provides that every person who shall infringe a copyright of a book "shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action." Section 4968 provides that "no action shall be

maintained in any case of forfeiture or penalty under the copyright laws unless the same is commenced within two years after the cause of action has arisen."

Shiras, District Judge, held that the damages recovered under this section were a forfeiture as the statute read.* The copies of the book admittedly were not subject to forfeiture after two years, and the use of the same word "forfeit" with respect to the damages indicated that the same should be true of them. If they were not a forfeiture or penalty the language should have been different. The complainant treated the section as if it read "shall be liable also for damages" instead of "shall forfeit and pay such damages." Being a forfeiture, the action was barred.

Demurrer sustained.

Action for Penalties. Cut in Newspaper.

BENNETT *v.* BOSTON TRAVELER COMPANY.

Circuit Court of Appeals, First Circuit, March, 1900.

101 Fed. R. 445.

Complainant brought this action to recover the penalty imposed by § 4965 for the infringement of a copyrighted engraving. In 1898 he published in the New York *Herald* a cut entitled, *William, Keep off the Grass*. The issue of the paper in which it appeared was copyrighted, but the cut was not. About a week later defendant printed a similar cut in the Boston *Traveler*.

Colt, Circuit Judge, held: "The plaintiff contends

* See to the contrary Patterson *v.* Ogilvie, 119 Fed. R. 451; where Judge Lacombe holds that § 4964 provides for damages and not for a penalty or forfeiture, and that the period of limitation in § 4968 does not apply.

that a newspaper is a book within the meaning of the copyright law; and, assuming this to be true, it is admitted that he could have brought an action for infringement under § 4964, claiming that the cut in question was a material part of the subject-matter of his copyright. But this is not the plaintiff's case. He has brought suit under § 4965 for infringement of his copyrighted cut, and not under § 4964 for infringement of his copyrighted paper. . . . The Court below said: 'I hold with respect to the provisions of § 4965 that the Revised Statutes require that the copyright of an engraving as such shall be taken out separately and apart from the newspaper in which the engraving is contained; and that, if a party desires to copyright an engraving separately and apart from the newspaper in which it is contained, he must send a separate description of it to the Librarian of Congress, he must take out a separate copyright for it, and he must mark each separate engraving "Copyrighted, 1898," etc. That, it is admitted, has not been done in this case. I hold, therefore, that the copyright of the plaintiff in this case is only the copyright of the paper as a whole, and that if he, under these circumstances, desires to proceed for an infringement of copyright, he must proceed for the infringement of the copyright of the paper. This he would be entitled to do, for the copyright of the whole paper is infringed by reproducing any substantial part of it. But there are special provisions for the copyright of engravings as such; and the provisions of the law as to the copyright of engravings as such I hold have not been carried out in this case.'

"We agree with this ruling of the court below. . . .

"The plaintiff asks us to construe § 4965 as if a

book was included among the enumerated articles. This cannot be done, especially as the preceding section gives a specific remedy in the case of books. The fact is the plaintiff has sought to take out a copyright on his paper alone, and he has not seen fit to take out a separate copyright on his cut. He may be entitled to the remedy provided by statute for the infringement of the thing which he has copyrighted. He is not entitled to another remedy provided by statute for the infringement of another thing which he has not copyrighted."

Judgment affirmed.

For other cases relating to suits for penalties, see Brady v. Daly, 175 U. S. 148; Morrison v. Pettibone, 87 Fed. R. 330; Child v. Times, 110 Fed. R. 527; Patterson v. Ogilvie, 119 Fed. R. 451; Falk v. Curtis Pub. Co., 107 Fed. R. 126; McDonald v. Hearst, 95 Fed. R. 656; Bolles v. Outing Co., 175 U. S. 262; Trow v. Boyd, 97 Fed. R. 586.

Enforcing a Forfeiture.* Replevin.†

MORRISON *v.* PETTIBONE.

Circuit Court, Northern District of Illinois, May, 1897.

87 Fed. R. 330.

Complainant brought an action of replevin to enforce a forfeiture of infringing plates and sheets found in the possession of the defendants, and obtained a verdict.

*For cases relating to remedies, see also Rinehardt *v.* Smith, 121 Fed. R. 148; Hegeman *v.* Springer, 110 Fed. R. 374; Falk *v.* Curtis Pub. Co., 107 Fed. R. 126.

With regard to remedy by mandamus, see United States *v.* Young, 26 W. L. R. 546.

For cases relating to damages, see D'Ole *v.* Kansas City Star

† For cases on enforcing forfeiture by replevin see p. 161, note.

On a motion for a new trial, two points were at issue: 1. Was replevin the proper form of action? 2. Were the sheets containing the first or outline impression only, and not completed as a copy, within the provision of § 4965?

Seaman, District Judge, held: "I conclude for the purposes of this motion, at least, that any doubt as to the proper remedy may be resolved in favor of this form of action, and that such ruling may be based upon the hypothesis that the term 'forfeit,' as used in the statute, is not to be taken in its strict ordinary sense; that the act of Congress clearly intending to give to the proprietor an exclusive right of property in that which has been produced by his mind and skill confers as well an ownership in all copies which are made by infringers; that through the act of piracy the title to the imitation vests in the proprietor of the copyright, in that sense only being forfeited; and, so regarded, replevin would lie to obtain possession.

"The claim, however, that the bare outline printed upon the sheets in evidence constitutes a copy, within the purview of the statute, is, in my opinion, untenable. It is well settled that the provisions of this statute must be strictly construed. . . . It is probably true, as remarked in Fishel *v.* Lueckel, that substantial imitation, and not marketable value and quality, is the test of infringement; but the imitation must be of a substantial part, must have essence, and be so far

Company, 94 Fed. R. 840; Belford *v.* Scribner, 144 U. S. 488; Press Publishing Company *v.* Monroe, 73 Fed. R. 196.

For cases relating to scope of injunctions, see West Pub. Co. *v.* Lawyers' Pub. Co., 79 Fed. R. 756; Harper *v.* Ranous, 67 Fed. R. 904; Ladd *v.* Oxnard, 75 Fed. R. 703; Doan *v.* The Book Co., 105 Fed. R. 772; American T. Reg. Ass'n *v.* Gocher, 70 Fed. R. 237; Stanley-Bradley Co. *v.* Leslie (not reported, see p. 113.)

perfected as to establish the identity. In other words, infringement, for the purposes of forfeiture, must be an accomplished fact, must appear from the face of the production, and not be inferred from what was intended if it had been completed. . . . In this case the sheets were seized in the defendant's possession when the first impression only had been taken, presenting merely the initial color and exterior lines of the intended lithograph, without the features or any substantial embodiment of the copyright photograph. Several plates or stones were required to make the copy, being in actual readiness for the purpose, but one only had been used, making this outline color. I am satisfied that no copy was produced within the meaning of the statute."

Motion for a new trial granted.

Action to Recover Penalty.

CHILD *v.* NEW YORK TIMES CO.

Circuit Court, Southern District of New York, May, 1901.

110 Fed. R. 527.

In an action under § 4965 of the Revised Statutes for an infringement of a photograph the complainant sought to recover a penalty of one dollar for each of a number of copies of the *Times* purchased by him containing the alleged infringing act. On a motion for a new trial, Hazel, District Judge, held that as these sheets had not been seized for purposes of forfeiture and condemnation, the right of action to recover the forfeited penalties had not accrued. No papers had been "found in the possession" of the defendant within the meaning of the statute.*

Motion for new trial granted.

* See Falk *v.* Publishing Co., 107 Fed. R. 126.

Action for a Penalty. Infringement of a Photograph.

FALK *v.* HEFFRON.

Circuit Court, Eastern District of New York, May, 1893.

56 Fed. R. 299.

The plaintiff had a copyright on a photograph of Lillian Russell. Defendants made 2400 lithograph copies without permission; these were printed 21 or 22 on a sheet, and there were 115 sheets. In an action to recover a penalty the jury found that there were 115 sheets and a verdict of $115 ($1 penalty on each sheet) was awarded. Plaintiff moved for a new trial, contending that he should recover $1 for each of the 2400 photographs.

Wheeler, District Judge, held that the verdict was proper, as the statute provides a penalty for each "sheet," irrespective of what is printed thereon. This being a penalty, the law must be strictly construed, and the number of sheets, not the number of photographs, taken into account.

Motion for a new trial denied.

III.

Decisions of the Treasury Department on Questions of Importation.

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TREASURY DEPARTMENT; O. L. SPAULDING, ASSISTANT SECRETARY. TREAS. DEC. NO. 21,012. APRIL 17, 1899.

The question was whether a musical composition copyrighted in the United States and printed abroad could be imported without complying with the proviso as to being made from type set, or from negatives or drawings on stone, made in the United States. Under the rule as laid down in Littleton *v.* Oliver Ditson Co., 62 Fed. R. 597, it was held that these requirements do not apply to musical compositions. Therefore, their importation was not prohibited * by reason of failure to comply with the provision that books, chromos, etc., must be made from type set or drawings on stone made within this country.

* It appears from the decision that the importation was made by the proprietors of the copyright. Had any other person sought to import the music without the consent of the proprietors, its importation would have been prohibited, not for failure to comply with the manufacturers' clause, but by force of the penal clause of the statute (§. 4965). See Treas. Dec. No. 23,225, post, p. 177.

TREASURY DEPARTMENT; O. L. SPAULDING, ASSISTANT SECRETARY. TREAS. DEC. NO. 22,751. JANUARY 26, 1901.

The question was submitted to the Treasury Department whether if a book is published abroad and copyright is duly obtained in the United States in the original tongue, it is lawful to import the same book in the same language into this country. *L'Aiglon* was published in Paris by E. Fasquelle, who also secured a copyright for it in the United States, which copyright was assigned to Brentano in New York. An attempt was made by the French publisher thereafter to import a French edition of *L'Aiglon* into the United States. The Department ruled, on the basis of an opinion by the Attorney-General, that such importation was prohibited. The provision in § 4956, Revised Statutes, that "in the case of books in foreign languages, of which *only* translations in English are copyrighted, the prohibition of importation shall apply only to the translation of the same, and the importation of the books in the original language shall be permitted," does not cover this case. Here the original French edition was copyrighted. Hence the exception quoted whereby importation is permitted to works in foreign languages is inapplicable. Otherwise a book in a foreign language could not be effectively copyrighted in this country under the Act of 1891. Importation of this book was, therefore, prohibited.

TREASURY DEPARTMENT; O. L. SPAULDING, ASSISTANT SECRETARY. TREAS. DEC. NO. 22,781. FEBRUARY 5, 1901.

The American Book Compa[illegible] the publishers of Liddell & Scott's Greek-Engl[illegible]exicon, asked the

Department to rule on the question whether importation of their Lexicon, which was copyrighted in this country in 1882, was prohibited by the Act of 1891. The statute reads: "During the existence of such copyright, the importation into the United States of any book . . . so copyrighted, or any edition thereof . . . shall be and it hereby is prohibited." Upon the opinion of the Attorney-General, the Department ruled that books copyrighted prior to the Act of 1891 are not prohibited importation by that act. It was thought that the law in general is prospective in its effect; and, while the Attorney General recognized that the clause against importation, being remedial, might affect prior copyrights, yet, as it particularly states that it is books "so copyrighted" which are not to be imported, during the existence of "such copyright," and the copyright referred to is that secured by the Act of 1891, the inference is that only books obtaining copyright under that act are prohibited importation. The Department so ruled.

TREASURY DEPARTMENT: O. L. SPAULDING, ASSISTANT SECRETARY. TREAS. DEC. NO. 23,225. AUGUST 10, 1901.

In response to the question as to whether copyrighted music may be imported the Department ruled that it cannot be lawfully imported. The decision was based on the opinion of the Attorney-General, who held that two questions were involved; first, whether the copyright law prohibits the importation of copyrighted music; second, if it does, whether the free list of the tariff of 1897 constitutes an exception to the copyright law. The Act of 1891 provides (§ 4956) that certain articles expressly stated may be copyrighted; among

these are musical compositions. In another section it provides that during the life of the copyright the importation of any "book, chromo, lithograph, or photograph" is prohibited; but does not include musical composition in this list. If this were the only prohibition in the act music might be imported; but §§ 4964–5 make it a penal offence to import any of the articles enumerated in § 4956. This includes musical compositions. This can mean nothing less than the prohibition of what is made penal.

As to the free list in the tariff of 1897 the Attorney-General held that it had no effect to authorize importation contrary to the terms of the express prohibition of the copyright law. The tariff is to prescribe certain duties on importations; it is not designed to authorize importation. It simply provides when and under what circumstances certain articles are exempt from duty. Accordingly copyrighted musical compositions are not taken out of the effect of the copyright law. They are prohibited importation. They do not fall within § 4956, as they are not "books, chromos, lithographs, or photographs," and they are not prohibited by that section; but by force of the penal section of the law their importation is prohibited; and by reason of not falling within the class of articles just named they do not get the benefit of the exemption embodied in that section permitting the importation of "not more than two copies of such book at any one time" by persons who import for use and not for sale.

TREASURY DEPARTMENT; ROBERT B. ARMSTRONG, ASSISTANT SECRETARY. TREAS. DEC. NO. 24,742. OCTOBER 26, 1903.

The Register of Copyrights submitted this question to the Treasury Department for a ruling: Are books

copyrighted in the United States and printed abroad from plates made from type set in the United States prohibited importation? The Department answered that the Revised Statutes (§ 4956) provide that to obtain copyright two copies of the book must be deposited with the Librarian of Congress, which copies must be "printed from type set within the limits of the United States, or from plates made therefrom," and that during the existence of such copyright the importation of any edition of such books or any plates of the same not made from type set in the United States is prohibited. In this case there are books printed abroad from type set here, or from plates made therefrom. The law does not require that the books be *printed* in the United States. It merely states that the article shall be produced from type *set* within the limits of the United States or from plates made therefrom. Hence the Department holds that the importation of books so printed abroad is not prohibited.

IV.

Decisions of English and Canadian Courts.

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Section 1.

Articles Entitled to Copyright.

Reports of Public Speeches.

WALTER *v.* LANE.

House of Lords, August, 1900.

(1900) A. C. 539.

During 1896 and 1898, the Earl of Rosebery delivered several speeches on subjects of public interest. Reporters were present from various newspapers, including the *Times*. A reporter for the *Times* took down the speeches in shorthand, wrote out his notes, corrected and revised the same for publication and the reports were published in the *Times*, the speeches being given verbatim as delivered. In 1899 the respondent published a book called *Appreciations and Addresses: Lord Rosebery*. It consisted of reports of the speeches of Lord Rosebery which were taken from the *Times*. The reporters of the *Times* assigned their copyright in the articles to the appellant, who brought this action

against the respondent and sought an injunction and damages. Justice North granted an injunction restraining the respondent until judgment in the action from publishing copies of the book. In the Court of Appeal on the agreement that the decision on appeal should be taken as a decision on trial North, J., was reversed and the action dismissed. On these facts it was held by the House of Lords reversing the Court of Appeal that the reporter who makes notes of a speech delivered in public is the "author" of the report within the meaning of the copyright act and is entitled to the copyright in the report and can assign the same.

Decree of Court of Appeal reversed.

Newspaper Articles Protected.

WALTER *v.* STEINKOPFF.

Chancery Division, May, 1892.

(1892) 3 Ch. 489.

The plaintiffs were proprietors of the *Times* and the defendants were proprietors of the *St. James's Gazette*. On the 13th day of April, 1892, an article by Rudyard Kipling entitled "In Sight of Monadnock" was published in the *Times*. From this article the *St. James's Gazette* copied a half-dozen passages. It was stated in the same paper that the article had been written expressly for the *Times*. The *Times* had been previously registered as a periodical publication and the copyright upon the article by Kipling had been purchased and paid for before publication. An action was brought to restrain the publication of the article in the *St. James's Gazette*. Justice North, on the above facts, held that the plaintiffs had a clear copyright in the Kipling article and that the de-

fendants, having deliberately reprinted a large part of the article in which the plaintiffs had a copyright, should be enjoined from further publication of the same. The acts of the defendants were not mere quotations, for they had appropriated about two fifths of the whole article. It was further held that the custom of newspapers to copy from other newspapers was no defense to an action on copyright, and although it is sometimes said that there is no copyright in news, the Court thought that there could be copyright in the particular form of language or mode of expression by which information is conveyed.

Injunction granted.

Advertising Poster Not Part of a Periodical.

STRONG *v.* WORSKETT.

Queen's Bench Division, July, 1896.

12 T. L. R. 532.

An action was brought by T. V. Strong, the proprietor of *Dorothy's Home Journal* against the defendant for infringement of copyright in that periodical and for an injunction. The plaintiff alleged that the defendant had copied from the journal and printed a sketch of a lady in evening dress and had published the sketch in the *Ludgate Monthly* in December, 1895. The defendant contended that the sketch had been first published as a poster and not in *Dorothy's Home Journal*, and was not drawn for and had not been copied from that magazine, but from a poster, which was not a part thereof. Wells, J., held that the poster was not a part of the periodical, it was a mere advertisement, which could not be purchased with the *Journal*. The poster

was published before the *Journal* and not published in it, and plaintiff was not, therefore, within the protection of the Copyright Act.

Judgment for the defendant.

Catalogue May be Copyrighted.

COLLIS *v.* CATER.

Chancery Division, June, 1898.

78 L. T. (N. S.) 613.

The plaintiff was a chemist doing business at Bath and annually prepared and registered a catalogue, entitled *The Bath Drug Company Price Current*, of articles and drugs sold by him, which were arranged under various headings. This catalogue was published annually, beginning in 1894, the later numbers being, revisions of the earlier ones, with some additions. The defendants were a company carrying on the business of grocers, wine merchants, etc., and upon adding a drug department, they published a catalogue for the quarter ending June, 1898, of goods sold by them. As far as this related to their drug trade they copied plaintiff's catalogue and the list of goods comprised therein, with the prices at which they were sold. This copying was admitted. North, J., held that it was an infringement. The Court recognized that where two persons were carrying on the same kind of a business, their catalogues would naturally resemble each other and it would be difficult to make them differ substantially, but in this case the defendants have adopted the course of simply and solely copying from the plaintiff. It was contended that the catalogue was not a subject of copyright, and a distinction was attempted between a large catalogue by

a clever author, which gives a great deal of information and is interesting to readers, and a catalogue like the plaintiff's, which is nothing whatever but a simple list of useful articles. The Court thought, however, that it must be admitted that there was a direct advantage in having such catalogues and that a man carrying on business without them would be at a disadvantage and that if one man prepares a true catalogue of the articles he deals in, a man who has not a catalogue has no right to appropriate the labor of his neighbor. This throws all the burden of all the expense and trouble of making the catalogue directly upon one man and permits another to obtain equal benefit without any of the expense. The Court thought this was piracy and an injunction was granted restraining the defendants from publishing their catalogue.

Injunction granted.

Copyright in Time-Tables.

LESLIE *v.* YOUNG & SONS.

House of Lords, June, 1894.

(1894) A. C. 335.

This was an appeal from the Court of Sessions in Scotland in an action for an injunction for an alleged infringement of the appellant's copyright in certain railway time-tables. The appellant's time-tables were compiled first in 1875 and included details as to railway, coach, steamer, and mail service. The information contained in these time-tables was collected at great expense and as the result of great labor. They were revised monthly with extreme accuracy and had gained a high reputation. In them selections from official

time-tables were made. The respondent copied bodily from the appellant's time-tables. One particular feature of the appellant's work was the compilation of certain tours or excursions in the neighborhood of the city of Perth.

The House of Lords held on appeal that the appellant was entitled to an injunction against the reproduction of his compilation of these circular tours, since it was information of a useful sort condensed and put into convenient form by the individual skill and labor of the appellant, but so far as the respondent had merely copied the official time-tables included in the appellant's book, it was no infringement and no injunction to restrain the publication of that part of the respondent's books should be granted.

Judgment reversed.

Copyright in Trade Directory.

LAMB *v.* EVANS.

Court of Appeal, November, 1892.

(1893.) 1 Ch. 218.

The plaintiff was the publisher of *The International Guide to British and Foreign Merchants and Manufacturers*, which had gone through several editions and was registered. It contained advertisements for the insertion of which the various traders paid and which were arranged under headings describing the nature of the various businesses. In some cases only names and addresses were given, in other cases, more elaborate advertisements. The defendants were employed by the plaintiff to canvass for advertisements on the Continent and were paid commissions. When they ceased to be employed by the plaintiff they entered the

service of a rival directory company, and, as the plaintiff alleged, used materials acquired in his employ. The plaintiff applied for an injunction against these ex-employees and the publishers of the Commercial Directory.

Mr. Justice Chitty held that the plaintiff had a copyright in the headings, although he had no copyright in the advertisements, and this decision was affirmed by the Court of Appeal, which also added that it seemed that although the plaintiff might not have a copyright in a single advertisement since the advertiser must be at liberty to insert it in other publications, the plaintiff nevertheless had copyright in the arrangement of the advertisements; and it was also held, affirming the lower court, that the defendants had no right to use for the purpose of any other publication materials which they had obtained while they were in the employment of the plaintiff.

Judgment affirmed.

Copyright in Commercial Circulars.

CHURCH *v.* LINTON.

Chancery Division, Province of Ontario, April, 1894.

25 Ont. Rep. 131

The plaintiff was the proprietor of a school for the cure of stammering and obtained copyright on four publications called *Applicant's Blank*, *Information for Stammerers*, etc. The defendant, who had been a pupil of the plaintiff, subsequently started another school with the same object and issued two publications, which the plaintiff alleged were infringements. The defendant

contended that the circulars of the plaintiff were not of such a nature as to be entitled to copyright.

The Court held that the circulars came within the protection of the copyright law. The purely commercial or business character of the composition or compilation does not oust the right to protection if time, labor, and expense had been devoted to its production and the fact that the defendant was anxious to make use of the same would indicate that the papers were of some merit and utility.

Injunction granted.

Section 2.

Who are Entitled to Copyright.

Proprietorship of Encyclopædia Articles.

LAWRENCE & BULLEN *v.* AFLALO & COOK.

House of Lords, November, 1903.

(1904) A. C. 17.

This was an action to restrain Messrs. Lawrence and Bullen from publishing and selling a book called *The Young Sportsman*, containing articles written by the plaintiffs for the *Encyclopædia of Sport*, a work published by the defendants. The contention of the plaintiffs was that they sold to the publishers the right to use the articles in question in the encyclopædia, but that they retained for themselves the copyright therein.

In this they were upheld by the trial court and also by the Court of Appeal. The publishers carried the case to the House of Lords, where it came before the Lord Chancellor and Lords Shand, Davey, and Robertson. The publishers contended that under § 18 of the Copyright Act of 1842 the previous consent in writing of the author of an article written by him was only required to be obtained where the article was part of or first published in a magazine or other periodical, but the articles in question being part of an encyclopædia, did not fall within the class to which such requirements applied. They also contended that the implied terms of the employment were that the copyright should belong to them as proprietors of the encyclopædia. The Lord Chancellor held that it must be inferred from the facts that the right to obtain copyright was intended to pass to the publishers, otherwise the result would be that he would get nothing from his bargain and unless they held that the publishers and proprietors of the encyclopædia stood in the shoes of the actual writer and was the proprietor of the copyright, he would have nothing for his money because the articles might be published by others and he would have no remedy, not having the copyright. Under the circumstances it was unreasonable to suppose that the appellants would have expended a very large sum in a project attended with great risk if they had not understood that they had, by their agreement, acquired a complete control of the copyright.

Judgment of the Court of Appeal reversed.

Proprietorship in Photographic Copyright.

ELLIS *v.* OGDEN.

Queen's Bench Division, November, 1894.

11 T. L. R. 50.

The plaintiff photographed an actress, Miss Mary Moore, who sat for her picture on his invitation. No payment was made, asked, or expected but copies were presented to Miss Moore as a present. Thereafter the *Ludgate Monthly* published a copy without permission of the plaintiff, and the question arose on trial whether he or Miss Moore was the proprietor and entitled to the copyright. It was held by Charles, J., that the plaintiff took the photograph, bestowed his skill upon it, and was undoubtedly the author; that Miss Moore paid no price for it and that the mere consent to sit did not constitute a valuable consideration which would make her the proprietor of the picture.

Judgment for the plaintiff.

Proprietorship of Photographic Copyright.

ELLIS *v.* MARSHALL.

Queen's Bench Division, July, 1895.

11 T. L. R. 522.

The plaintiff was a photographer and invited two actors to his studio to be photographed. Their pictures were taken in costume and also in plain clothes. Copies of both kinds of photographs were sent to them gratis, but they subsequently bought copies of the plain clothes

picture. Mr. Nichols, one of the actors, sent one of these photographs to the *Ludgate Monthly* and it was published in connection with an article concerning him. On the trial the actors both testified that they intended to pay and did pay for the photographs of themselves taken in plain clothes. The plaintiff contended that both kinds of photographs were his and that he was entitled to the copyright on them. Collins, J., held that it was not material whether the actors or the photographer first suggested that they should sit in plain clothes. The gentlemen went to the studio intending to be photographed in plain clothes; they were so photographed, received the proof, and paid for the copies. Nothing was said or done to give the plaintiff the copyright in the picture.

Judgment for the defendant.

Registry Must be in Proprietor's Name.

PETTY *v.* TAYLOR.

Chancery Division, November, 1896.

(1897.) 1 Ch. 465.

The plaintiffs in this action were Petty & Sons, a printing company, and Wesley Petty, the manager of the company. An action was brought against Taylor & Winterbottom, a firm of printers, claiming an injunction to restrain defendants from publishing a trade catalogue called the *Art and Virtue of Dressing Well*. The plaintiffs alleged that Petty & Sons were beneficially interested in the copyright in this circular and that the plaintiff, Wesley Petty, was registered as proprietor thereof for and on behalf of Petty & Sons. The chief

point in the case was whether the registration in the name of Wesley Petty was sufficient under the copyright act. The statute provides that there shall be entered on the register the name and place of abode of the proprietor of the copyright. In each entry Wesley Petty was alone described as the proprietor of the copyright.

Mr. Justice Kekewich held that this registration was not sufficient. If Wesley Petty was not the proprietor, then there was no registration, and it was held upon the evidence submitted in the case that he was no more than an agent, the manager for the firm. The plaintiff contended that he was a trustee, but the Court held that a mere agent of an incorporated company cannot be regarded as a trustee for such company within the meaning of the copyright act, and that as the name and place of abode of the person in whom the copyright was vested were not in fact stated on the register, the plaintiff's case must fail.

Injunction denied.

Right to Copyright in Works of Employees.

FROWDE *v.* PARRISH.

Chancery Division, Province of Ontario, April, 1896.

27 Ont. Rep. 526.

The plaintiff was the manager of the *Oxford University Press* of London, and the proprietor of a copyright in a book called *Help to the Study of the Bible.* This book was published in Canada from stereotype plates made in England, and the defendants imported reprints of this copyrighted book made in the United

States. The defendant contended that the plaintiff had no valid copyright in the work. The Court held that, as it was admitted by both parties that the book was compiled for the plaintiff by persons who were employed and paid for that purpose, this worked a transfer of the right to obtain a copyright. Since no reserve was made by the author of the compilation, the person for whom the work was done was entitled to the proprietorship of the copyright as assignee or legal representative of the author; and under the Canadian statute it was held sufficient if the book was printed from stereotype plates in Canada and although no typographical work was done there in the preparation of the copies. It was held further that the importation of American reprints of the book which were added as an appendix to the American reprints of the Bible constituted an infringement of the plaintiff's right.

Injunction granted.

Proprietorship Under International Copyright.

GEISSENDÖRFER *v.* MENDELSSOHN.

Queen's Bench Division, December, 1896.

13 T. L. R. 91.

This was an action to expunge an entry in the Register at Stationers' Hall. The defendant employed an artist, Fraulein Clara Schuberg, a resident of Germany and a German subject, to paint a certain floral border for cards designed by himself. This he entered in the register. The plaintiff moved to have the entry expunged on the ground that the author of the painting

was not entitled to copyright within § 1 of the Copyright Act of 1862, which provides that "the author being a British subject or resident within the dominions of the Crown, of every original painting . . . which shall be or shall have been made either in the British dominions or elsewhere, shall have the sole right of copyrighting such painting and the design thereof." Under this section Charles, J., held that in order to acquire the copyright, the author must be a British subject or resident within the dominions of the Crown. As Fraulein Schuberg, the author, was not a British subject and was resident in Germany, this section did not apply and the entry in the register was, therefore, expunged.

Judgment for plaintiff.

Proprietor After Assignment.

MORANG & COMPANY *v.* PUBLISHERS' SYNDICATE.

Chancery Division, December, 1900.

32 Ont. Rep. 393.

This case arose over the copyright of Parkman's *A Half Century of Conflict*. At the time of his death Francis Parkman was entitled to a copyright in the book within the British dominions, including Canada. After his death the copyright had been assigned to the plaintiffs in this action. The defendants imported copies of the book into Canada and sold them there. The Court held that the imperial "Act to amend the Copyright Act" was in force in Canada so as to prohibit the importation of reprints from abroad by any person other than the proprietor of the copyright, but

it was further held that this action could not be maintained for failure of the assignee, the plaintiff in this action, to comply with the law of requiring an entry to be made in the book of registry of the Stationers' Company. Francis Parkman made such an entry on the 16th of June, 1892, but at the time of bringing the action the proprietor of the copyright under the act was not Francis Parkman, but the plaintiff, and the plaintiff had never made entry in the registry.

Injunction denied.

International Copyright: Conflict of Laws.

Hanfstaengl *v.* The American Tobacco Company.

Court of Appeal, December, 1894.

(1895) 1 Q. B. 347.

This action was brought to restrain the defendants from publishing or selling copies of the plaintiff's copyrighted work, *The Love Letter*. The picture was painted in Italy by an Italian artist and sold to a dealer at Munich, and the copyright was assigned to the plaintiff at Munich, and it appeared that in Germany no registration of works was required to protect the owner of the copyright. The defendants were wholesale dealers of tobacco in America doing business with retail dealers in England; and copies of the picture were printed in New York and distributed in England as an advertisement. The plaintiff argued that the picture was first published in Germany and that the copyright should be governed by the German law, while the defendants contended that the copyright had been taken in Italy, where registration is required for works of art, and

should be governed by Italian law. The International Copyright Act of Great Britain of 1886 provides "Where an order (in council) respecting any foreign company is made under the International Copyright Acts the provisions of those acts in respect to the registry and delivery of copies of works shall not apply to works produced in such country except so far as provided by the order." The order of 1887 adopting the Berne Convention contained no provision with respect to registry, and it was held by the Court that registration under the Fine Arts Copyright Law was not necessary to entitle the owner of an English copyright in a foreign painting to sue for infringement, but that if they complied with the law of the country of origin they are entitled to protection in England and without regard to whether they have complied with the English law. A new trial was granted to determine whether the country of origin was Germany, as contended by the plaintiff, or Italy, as contended by the defendant. Under the terms of the Convention of Berne it was thought that the country in which the painting was first published, and not that in which it was made, should control with respect to the law of registration.

New trial granted.

International Copyright: Vested Interests.

SCHAUER *v.* FIELD.

Chancery Division, March, 1892.

(1893) 1 Ch. 35.

The plaintiff, a German subject, had a copyright in a painting called *Lisette*, produced in Germany prior to

December, 1885, and also a copyright in a photograph of the painting as a distinct work of art. In 1887, the defendants registered in London as a trade-mark a photograph of *Liselte* on a small scale, and this trade-mark was used by the defendants on their goods and for advertising purposes. Later, in 1887, by an order in council, the benefit of the International Copyright Act was extended to Germany and in 1892 the plaintiff registered as the proprietor of the copyright in the painting *Lisette* in England and thereafter brought an action to restrain the defendants from an alleged infringement of his copyright by continuing to use their trade-mark.

Justice Chitty held that the defendants became proprietors of the trade-mark before December, 1887, and had acquired lawfully an interest therein; that this interest arose in connection with the trade-mark itself and was protected by the clause in § 6 of the International Copyright Act, which provides that such act shall not operate so as to divest any rights existing prior to its taking effect.

Injunction denied.

Section 3.

Property Rights and Their Transfer.

Common-Law Property in Drama.

GILBERT *v.* THE STAR NEWSPAPER.

Chancery Division, October, 1894.

11 T. L. R. 4.

On motion for an interim injunction, the plaintiff showed that he was the proprietor of a comic opera called *His Excellency* which had been in course of rehearsal for about six weeks and had been advertised to be publicly performed at the Lyric Theatre on October 27, 1894. The plot of the opera was original and had never been produced in public. While the rehearsals were going on, the defendant published an outline of the play, and it was this which the plaintiff sought to enjoin. The plaintiff contended that it was impossible for any account to have been obtained except by breach of confidence on the part of some actor or employee of the theatre, and that he had never authorized any of the actors or employees to give out any information to the press, and that it was essential that the new play should not be disclosed before the first performance, as the plot and incidents of the play might be telegraphed to the United States with a view of anticipating the first production. Chitty, J., said that the ground upon which the application for an injunction was made was that the information had been

obtained by means of a breach of confidence on the part of some person who was bound to silence. He, therefore, granted the injunction asked for.

Motion granted.

Common-Law Rights; Unfair Use.

LOUIS *v.* SMELLIE.

Court of Appeal, July, 1895.

11 T. L. R. 515.

The plaintiff was a process-server and brought an action to restrain the defendant from appropriating the forms which the plaintiff used in process serving. It appeared that the plaintiff kept a register and index of his agents, "of whom he had as many as a thousand," and that he also compiled many special forms of documents differing from those previously in use. In the year 1886, the defendant entered his service as a clerk and was for some time employed by the plaintiff in the business of process serving. The plaintiff contended that the defendant had availed himself of his position to make extracts from the plaintiff's register and index of agents and copies of the plaintiff's forms and that he thereafter set up a business of his own. At the trial, it did not appear that the defendant was representing himself as carrying on the plaintiff's business and an injunction was refused, but five pounds damages awarded to the plaintiff.

On appeal, Lindley, Lopes, and Rigby, J. J., held that the plaintiff was entitled to an injunction. The defendant had no right to make unfair use of any information which he had acquired while acting as clerk. The good

faith that existed between employer and employed rendered it improper for the latter to use information acquired during the period of the confidential relationship. Although he was at liberty to carry on his business as he saw fit, he did not have the right to use such documents as the plaintiff alleged that he had in his possession. On the evidence, the Court thought that the defendant actually had copied the plaintiff's register of agents and probably had a good deal more in the shape of memoranda and that there was evidence to justify the Court in granting an injunction against him. The terms of the injunction were to restrain the defendant from making use of any copies or extracts from the plaintiff's register or index, or any memoranda made or obtained by the defendant when in the plaintiff's employ. This was as far as the Court could go.

Judgment denying injunction reversed.

Property in Telegraphic Reports.

EXCHANGE TELEGRAPH COMPANY *v.* GREGORY & COMPANY.

Court of Appeal, October, 1895.

(1896) 1 Q. B. D. 147.

The plaintiff company was a telegraphic news agency carrying on business in the City of London. By an agreement between the plaintiff company and the Stock Exchange, the former had the privilege for many years of obtaining quotations in stock from the floor of the Exchange. Information as to buying and selling prices was collected by it and transmitted to the company's offices, and was from there distributed among

the various subscribers by electric tapes. Each subscriber agreed that the intelligence supplied him should not be sold or communicated to unknown subscribers. The defendant was an "outside broker," and having been a former subscriber to the plaintiff company, he knew the terms of their contract. In 1894, the plaintiff refused to accept a subscription from him, and thereafter the defendant obtained the prices from the company's tape from one of its subscribers and posted it on boards and other places in his office. It was unanimously held in the Court of Appeal that the plaintiff was entitled to an injunction to prevent the defendant from appropriating unpublished matter before it appeared in the newspaper published by the plaintiff and secondly from appropriating the same matter after it appeared in such paper and had been copyrighted, and thirdly, from an unfair competition in business.

Injunction granted.

Property in Telegraphic Reports.

EXCHANGE TELEGRAPH COMPANY *v.* CENTRAL NEWS AND OTHERS.

Chancery Division, March, 1897.

(1897.) 2 Ch. Div. 48.

The plaintiff was a telegraphic news agency, which collected news of various sorts, including information as to horse races, which it communicated by telegraph to subscribers. Each subscriber agreed that the news supplied by the company was to be used only in the newspaper, or posted only in the club, office, or other place to which it was delivered and no copy of it was to be communicated or delivered to any other party. Certain of the defendants copied racing information

which had been obtained by the plaintiff. This was proved by the repetition of mistakes made in the plaintiff's news in the information printed by certain of the defendants. The defendants contended that information as to horse racing was public property, and that as soon as it was transmitted to the London clubs and hotels, it must be treated as published in London. Sterling, J., held that as the information was not made known to the whole world, although it was known to a large number of persons, and as, by the expenditure of labor and money the plaintiffs had acquired this information, it was valuable property in their hands. They were at liberty to communicate that information upon such terms as they saw fit, and if a subscriber communicated it to third persons contrary to those terms, he would commit a breach of contract and might be restrained by an injunction from so doing, and a third person who might endeavor to induce a subscriber to break his contract and in that way acquire and publish information might also be restrained by an injunction. The Court thought that the evidence, however, was not sufficient as against the defendant, the Central News, but it granted an injunction against the defendant, the Column Printing Telegraph Syndicate.

Injunction granted.

License; Extent of Use Permitted.

NEALE *v.* HARMER.

Chancery Division, February, 1897.

13 T. L. R. 209.

The plaintiff, an architect, was the author of a work entitled *The Abbey Church of St. Alban.* This was pub-

lished in 1887 and contained about two hundred drawings of the details of the Abbey in its original state before restoration. The work was duly copyrighted. The defendant, the editor of a magazine entitled, *Architecture*, applied to the plaintiff for permission to copy certain parts of his work. Neale gave permission to the editor to copy the ground plan of the Abbey from his work, but declined to allow him to use any of the rest of his work unless he, the plaintiff, wrote the accompanying article. The defendant, however, in a subsequent number of the magazine published a long article upon the Abbey illustrated not only with the ground plan, but also with three reduced drawings from the plaintiff's work. On a motion for an interim injunction Kekewich, J., held that the defendant had no right to take these drawings and incorporate them in a work of his own. The defendant was availing himself of the plaintiff's industry and knowledge, and although he had a license to use the ground plan, that did not cover the three drawings.

An injunction granted, but not as to the ground plan.

Use Unauthorized by License.

GUGGENHEIM *v.* LENG & CO.

Queen's Bench Division, June, 1896.

12 T. L. R. 491.

The plaintiff took a photograph of a well-known football team and registered the same for copyright. The defendants, the editors of *Sports*, a penny paper, applied to the plaintiff for a photograph to be published in their paper. The plaintiff supplied them with a print for the sum of one guinea. The defendants

decided that the photograph would look better on a separate sheet than in the body of the paper, and therefore published it on a single sheet, blank on the back, as a supplement with the paper of Saturday. On an appeal from the County Court, Cave and Wills, J. J., held that there was no valid ground of complaint in the fact of the supplement being published on a separate sheet and being sold *with* the paper; but the defendants had gone beyond what they were entitled to do when they sold the supplement with the picture as a distinct thing separate from the paper. That gave them an opportunity of selling many more pictures than they would otherwise have done. It was much easier to multiply and distribute the single sheets than the papers.

Judgment for the defendant reversed.

Use Unauthorized by License.

NICHOLLS *v.* PARKER.

King's Bench Division, May, 1901.

17 T. L. R. 482.

The plaintiff was the proprietor of a registered photograph. He was a photographer in business in Johannesburg, and supplied the defendants, who were the proprietors of *The Daily Graphic* and *The Golden Penny*, with photographs from time to time. With the photograph in question he gave a written license under which the defendants were permitted to reproduce it in the *Graphic*, but not in the other paper. The photograph appeared in *The Golden Penny*. Wright, J., gave judgment for the plaintiff and said that he was the registered proprietor of the photograph and gave the defendant the right to use it. The defendant published

it in the paper mentioned in the license and also in another paper belonging to him without the plaintiff's consent. The defendant was held liable to pay damages, which were assessed at one farthing each for the 82,000 copies. Although the defendant argued that the plaintiff had acquiesced in the use made of the photographs in contravention of the license, the evidence failed to sustain this contention.

Judgment for plaintiff.

Assignment of Copyright.

DENNISON *v.* ASHDOWN.

Queen's Bench Division, February, 1897.

13 T. L. R. 226.

Plaintiff claimed that she had obtained a copyright upon an English translation of the opera *The Huguenots* by an assignment of one Wall, who derived it from the executors of Romer, the translator. The defendant proved at the trial that the firm of which he was a member purchased the copyright at an auction sale in 1872. At this sale Romer was present and told the defendant Ashdown that he paid too much for the copyright. From 1872 to 1889, when he died, Romer never objected to the defendant's publishing and controlling the translation. The Court held on the evidence that the copyright had been assigned to the defendant, although there was no proof in writing.

Bruce, J., said: "Having regard to these facts, I cannot doubt that Mr. Romer in his lifetime parted with his right of copyright in the words of his translation, and that the persons, whom I have mentioned, became the successive purchasers of the copyright and sold the

sheet music with the English words for a long course of years without any interruption or claim on behalf of Mr. Romer or any one on his behalf. The point is made on behalf of the plaintiff that the copyright could not pass without an assignment in writing, and there is no evidence to prove any assignment in writing was ever made. The question is whether after a long course of dealing, such as I have described, I ought not to draw the inference that everything was regularly done to carry out what I am satisfied was the intention of the parties. . . . I think that I am bound to draw the inference that Mr. Romer assigned his copyright in a proper and legitimate way."

Judgment for defendant.

Sale of Plates Not a Transfer of Copyright.

COOPER *v.* STEPHENS.

Chancery Division, February, 1895.

(1895) 1 Ch. Div. 567.

This action was brought to restrain the defendant from printing and selling any print copied from any illustrations in the plaintiffs' catalogues of carriages. Plaintiffs drew designs for carriages, which they supplied to persons in the trade for advertisements and other purposes. Occasionally where their customers wished to print the designs themselves, they supplied electrotypes of the illustrations to be used. In this manner they supplied two electrotypes to one S. J. Lilley, a carriage builder, who used the types for his own advertisements, and afterwards allowed the defendant to print from them. There was no written license from

the plaintiffs to Lilley or from him to the defendants. The defendants contended that the sale of the plates to Lilley conferred the copyright in them upon him and was not merely a license to use them, and also that no substantial part of the plaintiffs' book had been taken by the defendants. Romer, J., held that the sale of the electrotypes could not have the effect of an assignment of a copyright, and that the intent of the transaction between the plaintiff and Lilley was merely to authorize the latter to print from such electrotypes for the purpose of his advertising in the trade and was only a license. As to the other ground of defence it was held that the defendants by using the drawings complained of for the very purpose for which the originals were made by the plaintiffs, and so as to escape making any payment in respect to them, infringed the copyright, and if they were allowed to do so with impunity, the plaintiff's copyright would be practically valueless.

Injunction granted.

Section 4.

Infringement.

Infringement of Copyright in Text-Book.

MOFFATT *v.* GILL.

Court of Appeal, April, 1902.

18 T. L. R. 547.

The plaintiffs published in 1893 an edition of *As You Like It* for school use. The defendant, Gill, published

an edition of *As You Like It* in 1898, which was annotated by the defendant, Marshall. An action was brought for an injunction in which it was alleged that the defendants' edition of the play was an infringement of the plaintiffs'. The defendants in this first suit consented to the entry of an order directing them to pay damages and destroy the edition published by them. The defendant, Marshall, then wrote a second edition, which was published by the defendant publishers. The plaintiffs complained that this too was an imitation of their book. It appeared on the trial that the second edition by Marshall was prepared for press by merely marking the places in the first edition which were to be omitted in the second edition. At the trial the Court thought that it was not permissible to look at the first edition or take into consideration as to whether or not that was an infringement, and consequently the evidence of the method in which the second edition was prepared had no effect in determining that case. On appeal to the Court of Appeal, it was held that the Court was at liberty to take into consideration all the evidence showing in what way the defendant Marshall had composed the work, and that it was apparent that the second edition was practically a repetition of the first, omitting certain points, and that there was ample evidence that the first edition was an imitation; the second edition did not change the general arrangement nor the sketches of character nor the literary notes included in the original book to any material extent. The Court of Appeal held that the plaintiffs were entitled to injunction and the appeal was allowed with costs.

Injunction granted.

Infringement of Photographic Copyright.

BOLTON *v.* ALDIN, *et al.*

Queen's Bench Division, May, 1895.

63 L. J. Q. B. 120.

The plaintiff was the proprietor of a copyright of an original photograph of a tiger. The defendant, Aldin, copied the plaintiff's photograph by making a drawing thereof, which he sold to the other defendants, who printed it in a weekly paper called the *Sketch*. The plaintiff sued for an injunction and damages against both Aldin and the publishers. The defendants contended that the drawing was not an infringement because it was not of exactly the same size as the plaintiff's photograph. It was held by Grantham, J., that the picture in the *Sketch* was a pure copy of the plaintiff's photograph and that the artist had no right to take the picture and produce it as his own. The Court drew the distinction between reproducing an idea which an artist may obtain from some copyrighted work or which is suggested by the production of another, and a mere copy of the work itself.

Judgment for plaintiff.

Living Pictures Not Infringing Copies.

HANFSTAENGL *v.* BAINES & COMPANY.

House of Lords, December, 1894.

(1895.) A. C. 20.

The appellant was the owner of a copyright in certain pictures painted in Germany. At the Empire

Palace in London, representations were given of these pictures by groups of living persons, and sketches of these living pictures were published by the respondent, the *Daily Graphic*, with explanations thereof. On a motion for an injunction against the Empire Palace the Court of Appeal, affirming the decision of Sterling, J., held that the living pictures were not an infringement. On motion for an injunction against the proprietors of the *Graphic* Mr. Justice Sterling granted an interim injunction, which was discharged by the Court of Appeal, and from that decision of the Court of Appeal the plaintiff appealed. The House of Lords held that the sketches made for the newspaper and published therein did not constitute an infringement of the "design" as that term is used in the English statute. The plaintiff contended that the living pictures in the theatre were copies of the painting of which he held the copyright, and the sketches published in the paper were copies of these copies. The Court thought that on the evidence it was not accurate to call the pictures copies of the paintings. The instance most favorable to the plaintiff's case was the painting entitled *Courtship*, where there was a resemblance between the sketch and the painting. In each case a young man and a young woman were standing alongside one another, close to a stile over a fence, but the faces were different in the painting and in the sketch and the mode in which the woman's hair was arranged, the dress of both figures, their pose, and the background were different. In all these particulars the artist's design was not copied by the living pictures, or by the sketch in the paper. It was held that there was no infringement.

Decision of Court of Appeal discharging injunction affirmed.

Unauthorized Use of License.

GREEN *v.* THE IRISH INDEPENDENT.

Court of Appeals, February, 1899.

(1899.) 1 R. 386.

The plaintiff was a printer doing business at Leeds as a publisher of pictorial advertisements. An artist in his employ made the design in question and the plaintiff registered the copyright as proprietor. This design appeared on a large poster which the plaintiff prepared for Todd–Burns & Company of Dublin. Subsequently the plaintiff also prepared for them a sketch for a small handbill which was a reduced copy of the poster. The manager of this firm, without the plaintiff's consent, sent the sketch prepared for the smaller handbill to the office of the defendant, with an order to publish it as an advertisement, which the newspaper did in complete ignorance of the plaintiff's rights. The plaintiff made a claim for the infringement of his copyright against the newspaper and against Todd–Burns & Company. The defendant newspaper contended that it was not liable because it acted in good faith and without knowledge of the plaintiff's rights. On appeal it was held, reversing the decision of the lower court and with one justice dissenting, that the defendant's act constituted an infringement and that the plaintiff was entitled to a penalty in respect to each copy of the newspaper containing the reproduction of the design. Under the statute it was not a question as to the bad or good faith of the defendant, and the license to Todd–Burns & Company did not include the right to reproduce the poster in newspapers.

Judgment for plaintiff.

Infringement. Substantial Appropriation.

BOLTON *v.* LONDON EXHIBITION COMPANY.

Queen's Bench Division, July, 1898.

14 T. L. R. 550.

The defendant ordered from a lithographer a poster to advertise his exhibitions at Earl's Court. He gave the lithographer a general idea of what was required and told him to do his best. The latter copied a photograph of a lion on which the plaintiff had a copyright. The attitude and almost all of the peculiar characteristics of the photograph were reproduced in the poster. The defendant contended that he had only taken the outlines, and that the details of the poster were filled in from pictures in a natural history.

Mathew, J., held that there had been a reproduction of the photograph and that a work of art had been "vulgarized" unlawfully, but the defendant, the London Exhibition, was not held liable as it was thought that under the statute it had not "caused or procured" the infringement.

Judgment for defendant.

Perforated Rolls of Æolian Not Infringements.

BOOSEY *v.* WHIGHT.

Court of Appeal, December, 1899.

(1899.) 1 Ch., 836; (1900) 1 Ch. 122.

This was an action by the proprietors of the copyright in the words and music of three songs for an injunction to restrain the defendants from infringing.

The infringement alleged was that the defendant sold for use in a mechanical wind instrument, called an aolian, perforated rolls of paper, which represented the instrumental music of the songs referred to. These rolls were inserted in the instrument and were unrolled by its action, and the passage of air through the slots in the roll into the pipes of the instrument produced musical sounds, the pitch and duration of which were determined by the position and length of the slots. In the margin of some of the rolls were printed directions as to time and expression, which were also to be found in the plaintiff's songs. At the trial Sterling, J., held that this was not an infringement since it was impossible to read these rolls in the same way as an ordinary sheet of music and they conveyed no idea of music even to persons able to read musical notation, and although it might be possible to learn the scheme according to which the perforations were made so as to be able to read the notes so expressed, it is not shown that that had been done. The trial judge thought, however, that in taking the words from the plaintiff's music sheets for the purpose of indicating to the player on the instrument the pace and expression at and with which music ought to be played, the defendants had gone beyond their rights, and that to that extent they had infringed the copyright.

On appeal this decision was upheld by the Court so far as it related to the question whether the music roll was a copy of a sheet of music. It was thought that the word "copy" would not include such a mechanical device whereby the music might be played or that a perforated sheet could be a copy of a sheet of music within the meaning of the copyright act. The opinion of the lower court was overruled, however, with respect

to the directions copied from the plaintiff's sheets of music. These directions were held not to be "a sheet of music" nor "a sheet of letter press separately published"; they were mere words, not sentences forming a literary composition in which copyright could be acquired.

Judgment of trial court modified.

Infringement of Stage Rights.

DUCK *v.* MAYER.

Queen's Bench Division, February, 1892.

8 T. L. R. 339.

The defendant, an actress, was engaged by the Rev. F. Wills to play a certain drama, *Our Boys*, for the benefit of a cadet corps. She went to the agent of the plaintiff, who held the copyright on the play, and asked permission to produce the same, stating that she was to play in music halls in London. Permission was given her on condition that she pay one guinea. Mr. Wills agreed to pay this sum, but for some reason omitted to do so. The play was given for the benefit of the charity, and the plaintiff then learned that it was not produced in music halls and demanded five guineas. An action was brought for the statutory penalty. Day, J., gave judgment for the plaintiff and said that people who play without paying must take the consequences. The defendant had represented and caused to be represented the play, and, according to the law, each and every one who took part in the performance came within the statute. The license granted did not cover the use made of the play, and the copyright was therefore infringed.

Judgment for plaintiff.

Section 5.

Remedies.

Importation Under International Copyright.

PITT PITTS *v.* GEORGE & COMPANY.

Chancery Division, July, 1896.

(1896.) 2 Ch. D. 866.

The plaintiff in this case applied for an injunction to restrain the defendant from importing into England copies of a piece of music printed in Leipzig, where the original publication took place. The plaintiff had the British international copyright, and the copies were printed by a person who held the German copyright. One F. Ries of Dresden, who was entitled to the copyright in the composition called *La Fileuse*, assigned to a London firm his copyright in England. The work was entered and registered at Stationers' Hall in the name of the assignee, to whose business the plaintiffs had succeeded. The defendant, who was carrying on business under the name of George & Company, sold in England various copies of this music,which had been printed in Leipzig by the successors of Ries. The Court of Appeal, reversing a decision of Justice Kekewich, held that the plaintiff was entitled to an injunction. Section 10 of the International Copyright Act prohibits importation into Great Britain, without the consent of the proprietor, of copies printed in any foreign country except that in which the book was first published. This section, therefore, does not form a complete regulation as to the importation of copies, and the Court held that

section 3 of the International Act, which provides that the enactment of the Copyright Act of 1842, which has no reference to international copyright, shall apply to books in which there is a British international copyright in the same way as if such books had been published in England, and that this section, therefore, made sections 15 and 17 of the English Copyright Act applicable. These sections prohibit the importation for sale of any copyrighted book and are practically incorporated in the International Act by reference in section 3 of the latter.

Judgment of trial court reversed.

Author's Rights After Sale of Copyright.

Lee *v.* Gibbings.

Chancery Division, August, 1892.

8 T. L. R. 773.

The defendant published a condensed edition of the work of the plaintiff, of which he, the defendant, owned the copyright. The question at issue was whether an author who has sold his copyright in a work can restrain the purchaser from publishing it in a condensed form without stating that it is in fact a condensation of such original work. The plaintiff at the request of the publisher and at an agreed price prepared an edition of *The Autobiography of Edward, Lord Herbert of Cherbury*, together with introduction and notes. A number of copies were issued, but the book did not sell well. The defendant, Gibbings, published a smaller edition of the work, omitting the introduction and other material supplied by the plaintiff, but giving his name on the title-page as the author. The plaintiff applied for an interim

injunction to restrain the publisher on the ground that it was an injury to his reputation. Mr. Justice Kekewich held that the plaintiff's remedy, if he had any, was an action for libel and that the Court would not grant an injunction before the question whether this was actually a libel was settled.

Judgment for defendant.

Injunction Protecting Future Editions.

BRADBURY *v.* SHARP.

Chancery Division, July, 1891.

(1891. W. N. 143.

On a motion for a temporary injunction the plaintiffs, the publishers of *Punch*, showed that the defendants, who published the *Ludgate Monthly*, had printed under the heading "Advertisements" an illustration taken from *Punch* of a little boy with a dog. It appeared that only one number (the first of *Punch*) had been registered under the copyright act. Kekewich, J., granted the injunction and said that he saw no objection to the injunction extending to the protection of future numbers of *Punch*.

Injunction granted.

Against Whom Injunction Lies.

FRENCH *v.* DAY, GREGORY, *et al.*

Queen's Bench Division, June, 1893.

9 T. L. R. 548.

An action for injunction was brought to restrain the defendant from infringing the plaintiff's rights in a

drama called *Lost in London*. It was alleged that a piece called *The Miner's Wife* was produced in Birmingham, which was a copy or an imitation of the plaintiff's drama. The defendant, Day, was the proprietor and Gregory was the manager of the theatre in which the infringing piece was produced. Day consented to an injunction against him, but Gregory, the manager, pleaded that he was not liable since he only received instructions to produce the play and he could not, under the terms of his engagement, hire or dismiss actors for the performance. He received no commission or other advantage from the production. Kennedy, J., in giving judgment said: "I think that I ought not to hold that a person in Gregory's position represented or caused to be represented the piece. The whole thing was carried on by Day, who merely used Gregory as his mouthpiece."

Judgment against the defendants, except Gregory.

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