AMERICAN COPYRIGHT LAW

WITH

ESPECIAL REFERENCE TO THE PRESENT UNITED STATES COPYRIGHT ACT

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

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PREFACE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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PART ONE

INTRODUCTORY, HISTORICAL AND CONSTITUTIONAL

Law of Copyright

CHAPTER I

INTRODUCTORY

§ 1 Theoretical basis of property in matter subject to copyright.

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

§ 2 Physical expression essential.

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

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

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

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

property by the practice and law of all civilized peoples.

§ 3 General property characteristics of matter created by thought.

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

§ 4 Utilization of such property: copying.

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

§ 5 Public performance, etc.

however, the right to communicate the author's thoughts to third persons through their public performance, exhibition or representation became of

4—Millar v. Taylor, 4 Burr. 2311, 2346.

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

§ 6 Copyright and intellectual property defined.

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

§ 7 Development of copyright.

5—Drone, 533.

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

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

§ 8 Beginnings: economic, religious and political influences.

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

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

8—Birrell: Law & History of Literary Property.

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

§ 9 The Stationers Company.

9—See 1 Hallam Const. History, 258.

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

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

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

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

§ 10 The struggle for perpetual copyright.

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

§ 11 The great controversy on perpetual copyright and common law copyright after publication.

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

§ 12 The Star Chamber.

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

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

14—See § 248.

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

§ 13 The Licencing Act.

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

§ 14 Beginning of need for registration.

§ 15 Beginning claim property in exclusive right to publish.

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

§ 16 The Statute of Anne.

15—13, 14 Car. II, c. 33.
16—1556.
17—Birrell, 79, 81.

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

§ 17 The Battle of the Books.

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

§ 18 *Tonson v. Collins.*

§ 19 Millar v. Taylor.

§ 20 Perpetual copyright sustained.

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

18—8 Anne, c. 19.
19—See § 249.
20—1 W. Blackstone, 300, 321.
21—4 Burr. 2327.
22—4 Burr. 2303.

§ 21
Donaldson v. Becket.

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

§ 22
Final and decisive defeat of perpetual copyright.

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

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

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

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

23—17 Hans. Parl. Hist. 991; 4 Burr. 2408; 2 Brown's Parl. Cas. 129.

24—See § 249.

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

26—Donaldson v. Becket, 4 Burr. 2408; Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055.

27—Lord Kenyon, Ch. J., writing in 1798, in Beckford v. Hood, 7 Term. R. 620.

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

§ 24 Subject matter of Statutory copyright: published works.

In the United States, and in England up to the passage of the present "Copyright Act 1911," all legislation, save with respect to dramatic and similar works, presented, however, one fundamental distinction, that is, it dealt only with the rights of the creator of intellectual property on and after his making copies of his work public, that is, publishing it.

§ 25 Common law rights: unpublished works.

Prior to publication his rights were deemed to rest in the common law. A distinction was made between privacy and publicity.

§ 26 Publication: the dividing line.

A shadowy line existed between even a qualified privacy on the one hand, as, for example the circulation of copies of a work amongst the author's friends, and a qualified publicity on the other hand, as, for example, a single sale of a copy to a single member of the public. The line of demarcation was not easy to draw on specific states of fact, but its existence and fundamental character was, and is, of primary importance.

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

Copyright in the United States is twofold and distinct. Copyright before publication, in so far as it exists, and is enforcible, is a right created by the common law.[28] Copyright after publication is purely a matter of statute.

§ 28 Under statutes.

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

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

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

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

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

§ 29 Confusing terminology.

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

§ 30 Preponderating role of statutory copyright.

§ 31 Different meanings of term due to its sources.

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

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

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

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

§ 32 Misleading quotations and definitions.

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

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

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

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

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

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

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

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

§ 33 Nature and scope of present work.

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

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

CHAPTER II

THE HISTORY OF STATUTORY COPYRIGHT IN THE UNITED STATES

§ 34 Early state copyright legislation.

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

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

35—See § 104.

36—See § 115.

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

§ 35 The present Federal Copyright Act and its effect.

The present United States Copyright Act[37] is entitled "An Act to Amend and Consolidate the Acts Respecting Copyright."

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

§ 36 The First

The first English Copyright Act became a law in 1710.[40] The first Federal Copyright Law was

37—Act of March 4, 1909.
38—See § 1653.
39—See § 1660.
40—8 Anne, c. 19.

Federal Copyright Act.

passed in 1790 (Act of May 31st). It was closely modeled upon the English statute. It provided "for the encouragement of learning" by securing to the

§ 37 Its limited subject matter and duration.

authors or proprietors of printed or published maps, charts, and books, if citizens of the United States or resident therein, copyright for the term of fourteen years. The right given was merely the sole

§ 38 Limited nature of right conferred.

right and liberty of printing, reprinting, publishing and vending the same. No performing right or right of translation was conferred. Printing and publishing were apparently used largely as synonyms in it. The Act provided a penalty, half to

§ 39 Provisions as to penalties;

the author or proprietor of the copyrighted work, half to the United States, as to all copies of the work printed, reprinted, published, imported, sold or exposed for sale, without the prior consent in writing of the author or proprietor signed in the

§ 40 Assignments;

presence of two witnesses. This, and the similar provision in the English statute, accounts for the early cases holding on *a fortiori* reasoning, that an assignment or copyright was invalid unless in writ-

§ 41 Deposits;

ing.[41] Deposit of a printed copy of the title of the work was required to be made before publication, in the office of the clerk of the District Court in the district where the author or proprietor of the work resided. A copy of the record of the deposit was required to be published in a newspaper, and a copy of the work to be deposited in the office of the Secretary of State, within six months after publication.

§ 42 Renewals;

A renewal term of fourteen years was provided for the author, if living, and a citizen of the United States, or resident therein.

§ 43 Exclusion of works published abroad, from United States copyright;

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

41—See § 1513.

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

§ 44 Manuscripts.

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

§ 45 Subsequent legislation.

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

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

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

§ 47 Notice of copyright prescribed.

§ 48 1831: Musical compositions made copyrightable.

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

§ 49 Duration and renewal changed.

§ 50 Place of deposit altered.

§ 51 Manuscripts protected further.

§ 52 1834: Provision for written assignments.

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

§ 53 1846: Destination deposits altered.

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

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

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

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

§ 55
Effect of foregoing Act.

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

§ 56
1865: Photographs made copyrightable.

By the Act of March 3, 1865, photographs were added to the list of copyrightable matter "to the same extent and upon the same conditions" as in the case of prints and engravings.[44] The Act also provided for a demand by the Librarian of Congress, if the copy to be deposited with him was not deposited and for a forfeiture of the copyright on non-compliance with the demand. The Statute also

§ 57
"Book" defined by statute.

defined "book" to mean, for the purpose of the Act, every volume and part of a volume, together with all maps, prints, or other engravings belonging thereto and second or subsequent editions of the book, if containing additions to the first edition.

§ 58
1870: Works

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

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

43—See § 351.

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

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

of the fine arts made copyrightable.

§ 59 Scope of copyright under Act.

§ 60 Formalities required by it.

§ 61 Form of notice of copyright altered.

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

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

§ 62 Effect of its omission.

§ 63 False notice of copyright.

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

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

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

§ 64
1874: Form of notice of copyright altered.

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

§ 65
Labels and prints for utilitarian purposes to be registrable, but not copyrightable.

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

§ 66
Machinery for their registration.

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

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

§ 68
1882: Copyright notices on certain designs.

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

§ 69
1891: The Chace Act; scope of copyright enlarged.

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

§ 70
Translation and dramatization.

"that copies in the case of books, photographs,

46—See § 594.

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

§ 71 Domestic manufacture prescribed for certain printed matter.

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

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

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

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

47—77 F. 173.
48—77 F. 176.

upon which it was when these decisions were rendered.[49]

§ 74
1904: Louisiana Purchase Exhibition legislation.

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

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

The Act of March 3, 1905, was the first ad interim copyright law. It was designed to procure the proprietors of books in foreign languages, published abroad, to cause their publication in the United States, or in default thereof to facilitate their American translation. The Act provided that the author or proprietor of a book in a foreign language published in a foreign country, might, before publication in the United States, reserve copyright therein,

§ 76
Formalities.

for twelve months, by deposit of one complete copy, within thirty days after first publication of the work in that foreign country and by printing on the title page, or the one following, of that copy and all others sold or distributed in the United States of a notice reading:

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

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

49—See § 1350.
50—See § 745.

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

§ 77
1909: The statute now in force.

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

§ 78
Legislative history.

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

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

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

§ 80
Growth of rights comprising statutory copyright.

51—See § 535.

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

§ 80a
1913: The Panama Exposition Act.

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

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

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

CHAPTER III

THE CONSTITUTIONAL BASIS OF COPYRIGHT LEGISLATION IN THE UNITED STATES

Federal Constitution—Article 1—*Section* 8:—*The Congress Shall Have Power . . . to Promote the Progress of Science and Useful Arts, by Securing for Limited Times to Authors and Inventors the Exclusive Right to Their Respective Writings and Discoveries.*

§ 81
United States copyright, after publication, solely creature of Federal statutes.

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

§ 82
Construction of such statutes: as limited by their constitutional origin.

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

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

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

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

§ 83 Limitations on Congressional power as to copyrights.

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

§ 84 The effect of the general rule of broad construction of constitutional powers.

Nothing could be more futile, however, than to deem that the literal reading of this clause marks the limit of Congressional power, conceded or asserted, with respect to copyright legislation. There are relatively few cases which discuss this power but these show that the same amplification and extension of language by legislative and judicial construction has taken place with respect to this clause as has taken place with respect to other powers conferred by the Constitution, upon Congress. To a large extent, construction of the extent of the power, by scope of the legislation enacted, has prevailed.

§ 85 Importance of discussion of this neglected constitutional clause.

The dearth of judicial opinion on the subject is illustrated by the fact that there is no discussion of the clause in Drone or any subsequent text writer. The vast enlargement of the subject matter of copyright, and of the scope of copyrights when created, made by the present Act, as well as the considerations previously advanced, require a careful analysis of the power.

§ 86 Federal copyright can only be in writings.

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

§ 87 What are "writings."

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

"By writings in that clause," said the

§ 88
Inclusive definition.

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

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

§ 89
Photographs.

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

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

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

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

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

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

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

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

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

§ 91 "Writings" and rights therein distinguished.

§ 92 Writings which are not copyrightable.

All writings are not copyrightable, however.

58—Cleland v. Thayer, 121 F. 71.

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

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

61—See § 977.

62—See § 492.

§ 93
Works which cannot promote purposes of constitutional power.

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

§ 94
Works in public domain.

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

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

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

63—See § 736.
64—Section 4.

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

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

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

The term "useful arts" as used in the Constitution, includes the fine arts[66] as a result of popular acquiescence in the legislative construction of this power in so including them. This is so well settled that, curiously enough, the Copyright Office in its Rules shows it does not regard works of the useful arts as subject to copyright, in many instances, a somewhat astonishing result in view of the language of the Constitution and of the present statute.[67] As

§ 98
Effects of acquiescence in prior statutes.

a result of similar popular acquiescence, it may be deemed settled that music, the drama, literature of a non-scientific type and strictly utilitarian assemblages of printed facts "promote the progress of science and the useful arts." While it may safely be said that the inclusion of some of these works was undoubtedly the intention of the framers of the Constitution, as shown by the reasonable scope of the power, as read aside from its purpose, as expressed and while this is unquestionably the law, the result is far reaching. It may be questioned how a novel,

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

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

67—See § 81.

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

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

§ 99 Illogical and unexpected resultant condition of the law.

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

§ 100 Reasons underlying judicial approval of such popular acquiescence.

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

69—See § 112.

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

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

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

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

§ 102 "Public acquiescence" discussed.

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

71—4 H. L. C. 867.

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

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

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

§ 103 Grosscup, J., on the reasons underlying the enlargement of constitutional power with respect to works, not

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

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

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

logically satisfying, the expressed purposes of the constitutional proviso.

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

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

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

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

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

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

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

76—101 U. S. 99, 25 L. ed. 841.

In Higgins v. Keuffel,[77] the Court by Mr. Justice Field said, referring to the clause of the Constitution under discussion,

§ 105 Intellectual works.

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

§ 106 Labels.

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

§ 107 Photographs.

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

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

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

77—140 U. S. 428, 431, 35 L. ed. 470, 471.
78—111 U. S. 53, 28 L. ed. 349.

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

As late as 1902, Mr. E. J. Macgillivray in his work on Copyright [78] states that for a work to be copyrightable in the United States, "it must be an original literary or artistic work." In this opinion, he was undoubtedly largely influenced by an excellent opinion, rendered in Mott v. Clow,[80] from which he quotes largely in his work.[81]

§ 109 Mott v. Clow.

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

§ 110 Bleistein v. Donaldson.

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

79—P. 236.
80—82 F. 316.
81—See pp. 238, 239 of his work.
82—See, for example, Ladd v. Oxnard, 75 F. 703 (a directory case).
83—101 U. S. 99, 25 L. ed. 841.
84—188 U. S. 239, 47 L. ed. 460.

§ 111
Literary or artistic merit not essential to copyright.

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

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

§ 112
The minority view.

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

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

85—P. 250, 47 L. ed. 462.

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

§ 113
Effect of this decision.

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

§ 114
Discussion of dicta in the opinion.

86—*Supra*, § 104.
87—*Supra*, § 105.

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

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

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

§ 115 Result of the cases discussed.

From these opinions, it may be deduced:

(1) that neither literary or artistic merit, even

88—104 F. 993.

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

90—Cleland v. Thayer, 121 F. 71.

§ 116 Literary merit not essential to copyright.

§ 117 Intellectual labor beyond mere thought not necessary.

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

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

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

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

(4) that the degree of such originality may be "very moderate;"[91] and finally

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

However, as stated by Judge Grosscup,[93] obviously there is a point where judicial expansion of the conception of what is copyrightable must cease.

§ 119 Suggested limits upon what is copyrightable, even if original.

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

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

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

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

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

§ 120 The limit, in decision.

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

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

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

§ 121 Copyrights must be exclusive and limited in time.

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

§ 122 Private Copyright Acts.

There is no requirement in the Constitution that copyright laws shall be general laws, and Congress has in fact passed private copyright bills.[98]

§ 123 Copyright confined to authors.

Copyright can only, under the Constitution, be given to authors.[99] But, as will be shown, this word, for copyright purposes, is not used in its usual or normal sense, but includes composer, artist,

§ 124 Enlarged meaning of term.

photographer, compiler, draughtsman, sculptor,

94—Fournet v. Pearson Ltd., 14 L. T. N. S. 82.
95—188 U. S. 239, 47 L. ed. 460.
96—See § 473.
97—See § 150.
98—See Copyright Office Bulletin No. 3 (1906), p. 73, *et seq.*
99—Yuengling v. Schile, 12 F. 97.

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

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

§ 125 *Consequences of limitation.*

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

99—Yuengling v. Schile, 12 F. 97.

1—See § 406.

2—See § 680.

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

§ 126 Federal legislation may deal with unpublished works.

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

§ 127 General rules for construction of copyright acts.

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

§ 128 Reasonable construction, the rule.

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

§ 129 Literal meaning may be disregarded for this purpose.

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

§ 130 Liberal or strict construction.

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

3—See § 44.

4—See § 767.

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

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

7—Myers v. Callaghan, 5 F. 726.

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

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

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

§ 131 Penal provisions of copyright acts: strict construction.

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

§ 132 Different meaning same word in different sections of same Act.

§ 133 Purpose of copyright acts.

It has been pointed out that the Copyright Acts are intended to protect authors, not publishers.[13]

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

9—L. R. 21 Ch. D. 369.
10—See § 539.
11—Oliver Ditson Co. v. Littleton, 67 F. 905.
12—Hervieu v. Ogilvie, 169 F. 978.
13—Bobbs-Merrill Co. v. Straus, 15 L. R. A. (N. S.) 766, 147 F. 15; Scribner v. Straus, 147 F. 29.

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

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

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

PART TWO

THE GENERAL LAW OF COPYRIGHT IN THE UNITED STATES

On the Following Pages of this Work (Up to 585 Inclusive), the Matter Printed in Italics Consists of Provisions of the Present United States Copyright Act

CHAPTER IV

NATURE AND EXTENT OF RIGHTS CONSTITUTING STATUTORY COPYRIGHT

AN ACT TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT.

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

Section 1. *That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:*

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a non-dramatic work; to convert it into a novel or other non-dramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;

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

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

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

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

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

§ 135 Copyright: its general nature:

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

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

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

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

§ 136 Historically;

§ 137 At present.

§ 138 Distinction between copyright and the physical property necessary for its accrual.

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

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

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

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

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

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

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

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

§ 140 Copyright is a limited monopoly.

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

§ 141 Copyright defined, *temp.* Lord Mansfield.

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

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

It is not within the scope of this work to discuss

21—Jefferys v. Boosey, 4 H. L. C. 867 (Erle, J.).
22—Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055.
23—Lindley, L. J., in Hanfstaengl v. Empire Palace, [1894] 3 Ch. 109.

§ 142 Copyright after publication is solely statutory.

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

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

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

§ 144 Effects of its statutory origin.

24—See §§ 15-23.

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

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

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

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

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

§ 146 Effect of non-compliance.

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

§ 147 Substantial compliance, in detail, essential.

27—Beckford v. Hood, 7 Term. R. 620.

28—See § 8.

29—Section 1.

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

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

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

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

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

§ 148 Copyrights are exclusive in their nature.

Each right conferred is an exclusive one. This is necessarily so under the express provisions of the Constitution. There have been few decisions defining or construing the words "exclusive right."[34] The prior Act used the words "sole liberty" in place of "exclusive right." This change in phraseology is not deemed important, as it is deemed under the Constitution, Congress having legislated, could give no more, and no less, than an exclusive right. The "exclusive right to writings" would seem necessarily to include an exclusive right to exercise in connection therewith, at least in the first instance,

§ 149 Nature of such exclusiveness.

the ordinary rights incident to the ownership of property. An exclusive title stripped of the usual incidents of title would be a mere mess of pottage. The fair meaning of "exclusive right," would appear to be the right to exclude persons not claiming under the copyright proprietor, from, during the continuance of the copyright, exercising any of his express, or reasonably to be implied, rights, as proprietor of such copyright. By "reasonably to be implied rights," are meant such rights as are comprehended in the express ones, as, for example, the right to lease, implied, *a fortiori,* from the right to

33—See § 874.
34—See § 81.

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

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

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

§ 151 History of these provisions.

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

35—See §§ 164, 167.

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

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

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

§ 152 Constitutionality of the provisions.

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

38—House Rep. 2222, p. 9.

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

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

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

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

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

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

41—See §§ 135, 136.

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

§ 153 The compulsory license clause deemed unconstitutional.

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

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

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

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

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

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

§ 155
The copyright monopoly is not in ideas.

42—Holmes v. Hurst, 174 U. S. 83, 43 L. ed. 904.
43—White Music Pub. Co. v. Apollo Co., 209 U. S. 1, 52 L. ed. 655.
44—Kalem Co. v. Harper Bros., 222 U. S. 55, 56 L. ed. 92.

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

§ 156 The fundamental difference between patent and copyright monopolies.

At present, a basic distinction between the patent and copyright laws is that the former, gives an actual, absolute, monopoly in the idea patented, largely through giving the patentee the right to the exclusive use of the patented article, while no such absolute monopoly is given, or attempted to be given, a copyright proprietor.[45] The United States Copyright Acts do not attempt to give a monopoly in ideas,[44] but only in particular cognate forms, or media for reproducing or communicating them.[43]

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

If any other author by original intellectual effort produce the same, or a similar, writing to that for which another has procured a copyright, he may have copyright therein, in spite of the other copyright.[46] Naturally in the case of such similarity, a high degree of proof is required to induce Courts to believe such identity, or similarity, is the result of coincidence or chance and not the result of copying.[47] In some classes of copyrightable works, such identity, or similarity, may be honest and natural. Thus two translations of an uncopyrighted foreign work may well be substantially identical and yet produced independently and each would be

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

46—See §§ 488, 998.

47—See §§ 998, 1207.

§ 158
The essential nature of copyright monopoly.

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

48—See § 992.
49—See § 998.
50—White-Smith Music Pub. Co. v. Apollo Co., 209 U. S. 1, 19, 52 L. ed. 655, 662.
51—See § 537.

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

§ 159 The rights constituting copyright.

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

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

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

§ 160 The right to reproduce in copies.

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

§ 161 The right to print and reprint.

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

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

53—Day, J., in American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 L. ed. 257, quoting from Bouvier's Law Dict., Rawle's Ed., Vol. 1, p. 436.

§ 162
The right to make copies.

make copies by means, not only of printing, but by writing, typewriting, shorthand, photography, electro and stereotyping, lithographing and, generally, reproducing the work by any other mechanical process.[54] The sole right to make copies is often given as the definition of copyright and

§ 163
What is a copy, in general.

"may be said to have been the main purpose of the copyright statutes."[55] A copy need not be an exact reproduction to be a copy.[56] This is necessarily so, as, owing to the fallibility of human means of reproduction, it is difficult to make absolute fac-similies. While copying is a phrase which bulks large in the law of infringement, and may there best be discussed,[57] it may be defined, at this time, as the reproduction, substantially, in the same, or any other media, either in whole, or in material part, of the copyrighted work.

§ 164
The right to sell copies.

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

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

54—McMillan v. King, 223 F. 862.

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

56—See §§ 1031, 1040.

57—See § 1023.

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

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

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

§ 166 The right to lease copies, etc.

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

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

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

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

61—See § 271.

62—See § 271.

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

§ 168
The right not to publish.

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

§ 169
The foregoing rights, applicable to all copyrighted works.

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

The second subdivision of the section confers the exclusive right:

64—Section 1, (a).
65—See § 130.

"To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a non-dramatic work; to convert it into a novel or other non-dramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art."

§ 170 The right to translate.

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

§ 171 Non-English works copyrightable.

§ 172 What is a translation.

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

§ 173 The right to make other versions.

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

66—Lauri v. Renard (1892), L. R. 3 Ch. 402.
67—Wood v. Chart, L. R. 10 Eq. 193.

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

§ 174 The right to abridge.

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

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

§ 176 What is a literary work.

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

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

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

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

70—See Drone: Copyright.

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

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

§ 177 The right to dramatize.

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

§ 178 What is a dramatization.

Dramatization means to turn into a drama.

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

§ 179 Dramatic composition defined.

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

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

73—Green v. Minzesheimer, 177 F. 286.

composition as if language or dialogue were used in it to convey some of the ideas."[74]

§ 180 Examples of dramatic works.

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

§ 181 All stage productions not copyrightable. "The Black Crook."

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

§ 182 Spectacular productions.

This decision,[76] save, possibly on its facts, although not overruled in terms, is doubtful law, in view of changed standards of public morality, and the broad interpretation now placed on the Constitution. Nevertheless, merely spectacular productions, or rather their scenarios, may be deemed on the extreme border-line of copyrightability. Whether, or not, such works may be copyrighted would seem to be a question of fact, in each instance.

§ 183 Immoral stage works.

So also, the fact that motion pictures represented an actress in the act of changing her dress, was deemed to militate against their being a drama,[75] but this decision, if sound, is sustainable on grounds of public policy rather than on any other point.

§ 184 Action: words, pantomimes, motion pictures.

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

74—Blatchford, J., in Daly v. Palmer, 6 Blatch. 256.
75—122 F. 480.
76—Martinetti v. Maguire, 1 Abb. U. S. R. 356.
77—Daly v. Webster, 56 F. 483.
78—Kalem Co. v. Harper Bros., 222 U. S. 55, 56 L. ed. 92.
79—Lee v. Simpson, 3 C. B. 871, 881.
80—Kalem Co. v. Harper Bros., 222 U. S. 55, 56 L. ed. 92.

mere action is not drama, as for example, a series of postures and movements constituting a dance.[81]

§ 185
Dances.

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

§ 186
Stage effects.

§ 187
Dramatic arrangement copyrightable.

On the other hand, a combination or series of dramatic events, apart from the dialogue, may be protected by copyright.[82] Thus a so-called railroad scene was protected,[83] consisting of the following: an individual was fastened to a railroad track. There was an approaching train and a rescue by a third person, who, surmounting obstacles, released him at the last moment. The language of the scene was not copied but the scene itself was.

§ 188
Stage effects, as incidents of a drama.

In such cases the scenic effects or action are said to be copyrightable and will be protected, provided the play, in which they are contained, has literary quality.[84] Daly v. Webster[82] contains a *dictum* that the mere exhibition of mechanical appliances to represent incidents would not be protected but that there must be a series of events dramatically presented by actors, in a certain sequence or order, for the doctrine to apply. This decision was rendered before the days of moving picture films and is not law, in

81—Fuller v. Bemis, 50 F. 926.
82—Daly v. Webster, 56 F. 483.
83—Daly v. Palmer, 6 Blatch. 256.
84—Chappell & Co. v. Fields, 210 F. 864.

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

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

§ 189 Sequence essential to drama.

To constitute a dramatic composition, a work must tell a connected story or series of events.[87]

§ 190 The drama of action: moving pictures.

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

§ 191 Songs, as dramas.

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

The English cases are interesting. In Russell v.

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

86—See § 981.

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

88—222 U. S. 55, 56 L. ed. 92.

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

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

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

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

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

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

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

89—12 Q. B. 217.
90—25 L. T. 908.
91—Roberts v. Bignell, 11 Q. B. D. 102.

§ 192
Costume not essential to drama.

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

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

This appears entirely sound. He said further:

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

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

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

§ 193
Acting, and possibly scenery, deemed essential to make song, drama.

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

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

92—(1895) 2 Q. B. 429.

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

§ 194 The foregoing view questioned.

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

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

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

93—MacGillivray: Copyright 125.

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

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

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

§ 197 The right to novelize, etc.

The right is given a copyright proprietor by the statute to convert dramatic works into novels or non-dramatic works. This is an innovation corresponding to changed conditions in the world of letters.

§ 198 Purely musical works defined.

This right corresponds, in the case of a musical composition, to the right to make any other version thereof if it be a literary work.

A musical composition has been defined as:

"a rational collocation of sounds, apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with, or without, continuous human intervention" (Holmes, J.).[95]

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

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

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

§ 199 Effect of holding songs non-dramatic.

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

§ 200 Gratuitous public performance of songs.

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

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

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

§ 202 Works of architecture.

96—Herbert v. Shanley Co., 229 F. 340, reversed, — U. S. — (N. Y. Law Journal, Feb. 2, 1917).

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

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

§ 203 Scope of copyright in works of art.

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

§ 204 Design patents.

§ 205 Patents may supplement copyrights

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

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

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

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

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

§ 207 Poems.

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

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

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

§ 209
Mechanical deliveries.

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

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

The exclusive right is further given a copyright proprietor:

> *"To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever."*

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

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

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

1—See §§ 767, 788.

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

§ 211 What are such manuscripts.

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

§ 212 What are such records.

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

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

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

2—See § 781.

§ 214 Meaning of exclusive right of performance.

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

§ 215 What is such performance.

What is a public performance is a question of fact.

§ 216 Need not be for profit.

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

§ 217 When a performance is public.

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

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

§ 218 Test as to when a performance is public.

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

§ 219 Place of performance unimportant.

4—Duck v. Bates, 13 Q. B. D. 843.
5—3 & 4 Will. IV, c. 15, § 1.

§ 220 Absence of scenery, etc., unimportant.

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

§ 221 The right to reproduce dramatic works, mechanically.

The balance of subdivision 1 (d) is intended to confer, in as inclusive fashion as possible, the exclusive right, upon proprietors of copyrighted dramatic works, to reproduce such works mechanically, in whole or in part, in any manner, and, exclusively, to present such reproductions. It is to be noted this right of representation or mechanical reproductions of dramatic works is not, in terms, limited to public representations. Whether it would be deemed so limited, by construing the subdivision as an entirety, must be deemed an open question.

§ 222 Limit of the right.

This right is conferred in language broad enough to cover reproductions in media, or by processes, not now known or discovered. There appears to be only one limit, that the records, or transcriptions, must, under the Constitution, be in the form of "writings."

§ 223 Mechanical adjuncts for visualizing writings.

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

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

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

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

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

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

The right is also conferred upon a copyright proprietor:

> *"(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the*

7—209 U. S. 1, 52 L. ed. 655.

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

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

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

§ 226 What is "profit."

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

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

8—Section 1 (e).

9—See § 217.

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

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

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

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

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

§ 227 Public performance of songs.

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

§ 228 Gratuitous performance.

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

§ 229 The exclusive right to reproduce music mechanically.

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

§ 230 "Writings" not addressed to the eye.

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

§ 231 Such writings may be copyrighted constitutionally.

§ 232 Effect, if any, of possible unconstitutionality of compulsory license system on right.

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

13—209 U. S. 1, 52 L. ed. 655.
14—See § 152.

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

§ 233 The compulsory licensing clause discussed.

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

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

§ 234 Limitations on compulsory licenses.

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

§ 235 Nature of such licenses.

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

§ 236 The royalty system.

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

15—See § 25, e.

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

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

§ 237 Reports.

The royalty provided, two cents, is the same, whatever the merit, or popularity, of the musical composition. Monthly reports are provided for but no penalty for failing to make the reports.

§ 238 Time of payment.

Payments are to be "due" on the 20th of the month succeeding the month of manufacture. On the royalties being paid, "the articles or devices" in question, are to be free "from further contribution to the copyright except in case of public performance for profit." If this is to be deemed to render the proprietors of such articles liable for infringement in the case of public performance of mechanical music for profit, it would seem to impose a rather onerous examination of the manufacturer's business dealings upon their owners, before they can safely render such performances, or even purchase them.

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

Provision is made for the filing of notice by copyright proprietors if they use, or license, the musical composition "for the manufacture" of such parts, and a failure to file such notice is to be a complete defense to suit for any "infringement of the copyright." No time is provided for filing the notice, so that, apparently, it may be filed at any time before suit.

§ 240 Effect of failure to file notice.

While the language used with reference to this defense is broad, it is deemed it will be construed to apply only to infringements of musical copyright by mechanical reproduction, both because of its situation in the Act and its evident purpose. The application of this clause was considered in a recent decision where it was held [17] that a license

17—F. A. Mills v. Standard Music Roll Co., 223 F. 849.

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

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

§ 241 Mechanical slot machines.

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

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

It is to be further observed that this right of reproduction for representation by mechanical agencies is conferred only upon compositions published and copyrighted after July 1, 1909, and does not include the works of any foreign author or composer, whether resident in the United States or not, unless the country of which he is a citizen or subject grants similar rights to American citizens.

§ 243 Presidential proclamations.

While the right given the President [19] under Section 8 (b) to determine by proclamation the existence of the reciprocal conditions under which foreigners may become entitled to copyright strictly speaking applies only to Section 9, it has been assumed to apply to Section 1 also, and as this establishes a convenient form of procedure, the Courts, if the matter comes before them, will probably construe the two sections together in this respect.

18—See § 1310.
19—See § 678.

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

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

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

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

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

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

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

20—See §§ 504, 971.
21—See §§ 1476, 1507.
22—See §§ 453, 611.
23—Cumberland v. Planché, 1 Ad. & El. 580.

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

23—Cumberland v. Planché, 1 Ad. & El. 580.
24—See § 946.
25—221 F. 376.
26—See § 1655.

CHAPTER V

COMMON LAW COPYRIGHT, PUBLICATION AND AUTHORSHIP

§ 246
Common Law Copyright.

Section 2. That nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

§ 247
Nature of early statutory copyright.

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

§ 248
The Statute of Anne: text.

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

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

of 14 years, to commence from the day of the first publishing the same and no longer."[28]

§ 249 The first United States Act.

The first American Copyright Act[29] was modeled on the Statute of Anne and also dealt only with published works.

§ 250 The controversy as to the effect of the statutes on common law copyright.

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

§ 251 Millar v. Taylor.

§ 252 Donaldson v. Becket.

(1) Whether, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale and might bring an action against any person who printed, published and sold the same without his consent? Yes, 10. No, 1.

(2) If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition? And might any person afterwards reprint and sell, for his own benefit, such book or literary composition, against the will of the author? No, 8. Yes, 3.

28—8 Anne cap. 19.
29—First Congress, 2nd Session, Ch. 15.
30—See § 17.
31—4 Burr. 2311.
32—17 Hans. Parl. Hist. 954 (4 Burr. 2408).

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

(4) Whether the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity by the common law? Yes, 7. No, 4.

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

§ 253 Judicial end of the controversy in England.

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

§ 254 Judicial end in the United States.

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

33—4 Burr. 2408.

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

35—8 Peters 591, 8 L. ed. 1055.

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

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

§ 255 No common law copyright exists in published works.

§ 256 Common law copyright exists in unpublished works.

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

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

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

§ 258 Illogical resultant condition of the law.

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

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

39—See Birrell: Law & History of Copyright.

eloquence and learning by text book writers, such as Mr. Drone.[40]

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

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

§ 260 The foregoing view, not law.

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

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

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

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

43—See Woolsey v. Judd, 4 Duer 379.

44—8 Peters 591, 8 L. ed. 1055.

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

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

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

With reference to the doctrine of publication, it should again be repeated that the Statute of Anne and the original United States Act, only referred to published books.[46] Therefore, unless a work were published, no statutory rights, could be obtained, under this legislation. If it was published, since its owner could have obtained statutory rights, if he did not obtain such rights, he was deemed, by force of the statute, to have lost his rights at common law, whatever they were, and if he did obtain such statutory rights, the common law rights which they superseded, were not revived by the expiration of the statutory rights.[44] Publication, therefore,

§ 263
Reason for the boundary line.

became the line between so-called common law copyright and statutory copyright, not because of any theoretical basis of distinction but solely because

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

45—4 Burr. 2408.

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

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

§ 264 Publication essential to initiate statutory copyright.

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

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

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

§ 266 Attachments not permissible in actions respecting statutory copyright.

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

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

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

48—See § 28.

49—214 F. 418.

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

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

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

§ 268
In what works common law copyright exists.

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

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

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

§ 269 Common law and statutory copyrights complementary.

Common law copyright is perpetual,[52] unless terminated by the act of its proprietor: statutory copyright is always limited as to duration.

§ 270 Common law copyright perpetual.

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

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

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

Or, as said by Townsend, J., in Bobbs-Merrill Co. v. Straus,[54]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"It is not denied and it cannot in the present

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

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

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

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

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

"At common law the exclusive right to copy existed in the author until he permitted a general publication. * * * At common law, an author had a property in his manuscript and might have an action against anyone who undertook to publish it without authority."[62]

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

This right is presumed to be the law "of all civilized countries so far as not derogated from by the municipal law of any particular country."[64]

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

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

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

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

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

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

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

He added:[66]

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

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

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

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

65—144 F. 491, 492.

66—*Idem*, p. 492.

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

§ 274 Common law copyright by adverse possession.

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

§ 275 The actual scope of common law copyright.

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

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

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

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

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

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

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

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

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

§ 276 Examples of legitimate exercise of the right: positive and negative.

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

72—See § 1089.
73—43 N. J. Eq. 365, 367.
74—Mansell v. Valley Printing Co., (1908) 2 Ch. 441.
75—Prince Albert v. Strange, 2 De G. & Sm. 652; Duke of Queensbury v. Shebbeare, 2 Eden 329.
76—Prince Albert v. Strange, 2 De G. & Mac. 693.
77—Press Publishing Co. v. Monroe, 51 L. R. A. 353, 73 F. 196.
78—Palmer v. DeWitt, 47 N. Y. 532.

abroad, as was held in the case of Suderman's, "Die Ehre."[79]

§ 277 Who is entitled to common law copyright.

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

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

Only the author[80] of a work, or one claiming under him by assignment or license, is entitled to common law copyright.[81] Mere consent will not take the place of an assignment by the author, of his right to copyright[82] nor will the conferring of contractual rights falling short of such assignment. Thus in Fraser v. Mack,[83] it appeared Barrie had contracted to give the sole and exclusive right to publish his novel, "The Little Minister," in the United States, from the advance sheets, these to be delivered two months prior to the completion of the British publication, which was proceeding serially. Barrie was to get £20 on the American publication. This contract was held to confer a mere right to use the advance sheets and no property in the novel, especially as, at this time, neither aliens, nor their assigns, could obtain copyright in the United States.

§ 279 Oral transfers and licenses.

Such assignment, or license, may be oral,[84] whatever the rule in the case of statutory copyright,[85] and

§ 280 Implied assignments.

need not be accompanied by a transfer of any material object,[86] although, prima facie, a transfer of the manuscript or work of art will be deemed to be intended to carry the common law copyright with it,[87] unless a contrary intention be manifested.[88]

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

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

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

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

83—116 F. 285.

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

85—See § 1508.

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

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

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

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

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

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

§ 282 The doctrine of publication discussed.

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

§ 283 Historical development of doctrine and meaning of term.

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

89—3 Cliff. at 550.
90—Aronson v. Baker, 43 N. J. Eq. 365.
91—See Birrell: Law and History of Copyright.

be said to be published, in the mercantile or non-technical sense of the word. But by this time the doctrine of publication was too essential a feature of copyright law to be ignored. The term was still used in the statutes. It had, hence, to be considered and fitted to the various media in which there might, or might not, be copyright. Here, however, important practical considerations intervened, viz:—

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

firstly, the features of such works which give them pecuniary value and, secondly, where the author of a book published his work, he could obtain statutory copyright in place of the common law right, but, where the author, expressing himself in other forms of media, published, he could not, under the earlier statutes, obtain statutory copyright as these did not cover such media, or if he could obtain it, the rights obtained were so limited as to destroy his protection, from a practical point of view. These considerations

§ 286 Results of foregoing conditions.

led to two important results. Such media were, if not covered or adequately protected, by statute, whether consciously or not, protected according to their essence, by the simple device of holding the exercise of acts utilizing such an essence were not a publication, a conclusion which was undoubtedly facilitated by the other result, a judicial disinclination to hold any debatable act, a publication in the case of any works, where the result of a contrary ruling would be so finally and definitely fatal to their creator. It was during this period of incomplete statutory protection that the leading cases on what was not the publication of dramatic compositions and works of art were decided.

§ 287 Leading cases decided during the foregoing period.

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

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

92—3 & 4 Will. 4, c. 15.

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

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

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

§ 290 Reasons for its statutory rule.

§ 291 Doctrine of publication no longer important in England.

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

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

93—45 & 46 Vict. c. 40.
94—2 George V, c. 46.
95—Cf. § 1, subd. (d).

the 3 & 4 Will, 4 c. 15, manuscript plays could not be copyrighted, for any purpose, in the United States, before the passage of the present Act.[96]

§ 293 Publication still of fundamental importance in United States.

The present United States, Copyright Law, no less than its predecessors, fixes publication as the beginning of the term of copyright for which it provides.[97] It will thus be noted that publication, since it marks the inception of the stipulated copyright term, retains its fundamental importance in United States copyright law.

§ 294 Absence of statutory definition in United States.

It should also be noted that there is no statutory definition in the present Act as to what is, or what is not, a publication in the case of manuscript dramas, etc. That is to say, that the present Statute, while it follows the 3 & 4 Will. 4 c. 15, to which reference has been made, in permitting the copyright of manuscript dramas, does not follow it in the express enactment of pertinent statutory definitions.

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

In the midst of this growth and change of statutory provisions, it is not perhaps strange that many of the cases decided under the earlier statutes have furnished precedents which are constantly acted upon, without consideration of the reasons underlying such decisions, or the statutory changes which have been made.[98]

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

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

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

97—Section 23.

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

99—See § 262.

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

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

§ 297 Publication, without copyright, is a dedication.

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

§ 298 But publication to procure copyright is not.

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

2—See § 252.
3—See § 254.
4—Holmes v. Hurst, 174 U. S. 83, 85, 43 L. ed. 904, 905.
5—Carte v. Ford, 15 F. 439; Keene v. Clark, 5 Robert (N. Y.) 38

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

§ 300
Abandonment.

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

7—See § 1.

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

9—Bouccicault v. Wood, 2 Biss. 34.

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

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

§ 301 Limited publication and general publication.

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

§ 302 What is called a "limited" publication.

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

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

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

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

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

§ 304 Essential nature of publication.

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

11—Werckmeister v. American Lithographic Co., 68 L. R. A. 591, 134 F. 321 at p. 324.

§ 305 Application of the doctrine of implied contracts.

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

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

§ 307 Publication not measured by size of public involved.

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

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

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

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

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

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

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

§ 309 Intent not necessary to publication.

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

§ 310 A limited publication is no publication.

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

§ 311 Statutory definition of publication.

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

§ 312
Its declaratory nature.

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

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

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

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

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

16—See § 317, and following.

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

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

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

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

§ 317 A single sale.

A single sale of a copy of a book is a publication.[19]

§ 318 A public offer to sell.

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

§ 319 The gift of copies, indiscriminately.

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

§ 320 The lease or loan of copies to the public.

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

§ 321 Delivery to a carrier is not a publication.

18—See § 23.

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

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

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

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

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

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

25—Ladd v. Oxnard, 75 F. 705.

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

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

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

§ 323 Where a newspaper is published.

In a non-copyright case,[27] Cozens-Hardy, J., deemed a newspaper published when, and where, it was offered to the public by the proprietor.

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

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

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

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

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

30—Rees v. Peltzer, 75 Ill. 475.

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

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

§ 325 Deposit of building plans.

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

§ 326 Deposit for censorship.

§ 327 Permissive retention of samples.

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

§ 328 Serial publication.

Printing and distributing "The Autocrat of the Breakfast Table," serially, in installments, in the Atlantic Monthly, was held a publication of the whole, when all the numbers were published, and of each part, as printed and distributed.[35]

31—Copinger: Copyright, p. 189.
32—Wright v. Eisle, 86 A. D. 350.
33—O'Neill v. General Film Co., N. Y. Law Journal, April 9, 1915.
34—Gottesberger v. Aldine Book Publishing Co., 33 F. 281.
35—Holmes v. Hurst, 80 F. 641, aff'd 174 U. S. 83; Mifflin v. Dutton, 61 L. R. A. 134, 112 F. 1004.

§ 329 The effect of acts constituting publication cannot be qualified by notice or private agreement.

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

§ 330 Partial publication.

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

§ 331 Effect of partial publication.

§ 332 Posters, not a

The putting out of pictorial posters depicting

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

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

38—Tabor v. Hoffman, 118 N. Y. 30.

39—Low v. Ward, L. R. 6 Eq. 415.

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

41—Aronson v. Fleckenstein, 28 F. 76.

many scenes of a play, is not a publication of the play.[42]

publication of a play.

§ 333 Private circulation of copies.

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

§ 334 Permissive making of private copies.

§ 335 Distinction between private and public circulation.

§ 336 Writing letters.

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

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

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

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

45—Thompson v. Stanhope, Amb. 737.

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

47—Copinger, Copyright (117)

§ 337 Transmission of news by ticker.

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

§ 338 Protection of ticker news on non-copyright grounds.

§ 339 Letters in the law of copyright.

Letters may be copyrighted[52] and are protected, at common law, prior to publication.[53] The purpose of a letter is to communicate information. Its contents are analogous to publications containing news.

§ 340 Rights of recipient.

The receiver of the letter, accordingly, may make any use he chooses of the letter, provided he does not publish it in copies, in the literary form in which he received it.[54] He may keep it, or destroy it, or dispose of it in any other way, save by publication.[55]

§ 341 Rights of writer.

The common law copyright in letters remains in the sender.[56] The property in the paper on which it is written is in the receiver and he may enforce his rights in this even against the sender, it seems, if

48—See §§ 339-344.

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

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

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

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

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

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

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

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

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

§ 342 In what letters copyright subsists.

§ 343 Further rights of recipient.

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

§ 344 Publication for vindication or judicial purposes.

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

§ 345 Duplicate letters.

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

§ 346 Instances of protection of recipient, on principles of

57—Oliver v. Oliver, 11 C. B. N. S. 139.
58—Woolsey v. Judd, 4 Duer 379.
59—Folsom v. Marsh, 2 Story 100.
60—Lytton v. Devey, 54 L. J. Ch. 293.
61—Widdemer v. Hubbard, 19 Phila. 263.
62—Percival v. Phipps, 2 Ves. & B. 19; Widdemer v. Hubbard, 19 Phila. 263.
63—Denis v. LeClerc, 1 Mart. (La.) 159.
64—Hopkinson v. Lord Burghley, L. R. 2 Ch. App. 447.
65—McMillan & Co. v. Dent, (1907) 1 Ch. 107.
66—Thurston v. Charles, 21 T. L. R. 659.

general non-copyright law.

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

§ 347 Cases of copyright in letters collected.

Other cases involving common law and statutory copyright in letters are collected in a foot note.[69]

§ 348 Performance is not, under the decided cases, publication.

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

§ 349 Palmer v. DeWitt.

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

67—Dock v. Dock, 180 Pa. St. 14.

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

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

70—47 N. Y. 542.

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

And:

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

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

made legal because the plaintiff had permitted it to be publicly performed.[70]

§ 350 Discussion of opinion.

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

§ 351 Statutory dramatic and literary copyright in England at time of decision.

§ 352 No common law dramatic rights in England.

§ 353 Discussion of early American and English decisions bearing upon question.

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

71—Chappell v. Boosey, 21 Ch. D. 232.

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

73—Toole v. Young, L. R. 9 Q. B. 523.

74—Macklin v. Richardson, Amb. 694.

75—4 Burr. 2408.

76—4 Burr. 2303.

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

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

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

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

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

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

§ 354 Reproduction

Thus in Tompkins v. Halleck,[80] overruling Keene

77—4 Phila. 157.

78—5 Robert (N. Y.) 38.

79—Keene v. Kimball, 82 Mass. 545.

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

of copies of play from memory unlawful.

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

§ 355 Ferris v. Frohman.

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

§ 356 The doctrine that public performance, not publication under prior Acts, confirmed.

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

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

81—238 Ill. R. 430, aff'd 223 U. S. 424, 56 L. ed. 492.
82—3 & 4 Wm. IV, c. 15.
83—133 Mass. 32; see § 354.
84—2 Biss. at p. 212.

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

§ 358 United States statutory copyright under prior Acts only possible in published plays.

Mr. Justice Hughes, in writing for a unanimous Court, in Ferris v. Frohman,[81] *supra,* says of the United States Copyright Acts up to and including the Act of March 3, 1891, with reference to performing right, that their object was to secure to the author of a published[86] play, the right of public performance after it had been printed;[87] that dramatic compositions cannot be reproduced from memory;[88] and that there was a common law right of sole representation.[89] While it may well be doubted how far the latter statement could be proven historically,[90] and while it seems that any book could in a proper case be copyrighted, if reproduced in copies, although not printed,[91] these statements almost certainly represent the result of the American law at the present time, unless this has been changed in effect, by the present Act. The other cases involving the same points will be found either cited, or discussed, in the cases cited in the text.

§ 359 Reproduction from memory prohibited.

§ 360 Common law performing rights in United States.

In connection with Ferris v. Frohman,[92] as has

§ 361 Common law

85—Gross v. Seligmann, 212 F. 930. See Frank v. Connelly, 1 N. Y. Wkly. Dig. 196.

86—47 N. Y. 538.

87—P. 435.

88—P. 436.

89—P. 436.

90—See Chappell v. Boosey, 21 Ch. D. 232, dictum of Cotton, L. J., in Ex parte Hutchins & Romer, L. R. 4 Q. B. 483, that the right of public performance of music is purely statutory; remarks of Cockburn, C. J., in Toole v. Young, L. R. 9 Q. B. 523, 527; and Marsh v. Conquest, 17 C. B. N. S. 418 at p. 426.

91—Roberts v. Myers, 20 F. C. 11906.

92—238 Ill. R. 430, aff'd 223 U. S. 424, 56 L. ed. 492.

copyright abolished in England.

been stated, the present English Copyright Statute excludes representation of a play in England from the acts constituting a publication [93] but on the other hand,[94] *abolishes common law copyright.* All copyright in England whether before, or after, publication is by that section made purely statutory. This raises an interesting question.

§ 362 International common law copyright.

One of the few American cases which discussed some of the principles which underlie international common law copyright is Palmer v. De Witt,[95] *supra.* As we have seen, copyright is an incorporeal property right. The Court in that case said:

> "It (i. e., this property) is personal as other movable property, personal in legal contemplation, following the person of the owner and is governed by the law of his domicile. That which is regarded and protected as property by the law of the owner's domicile as well as by the laws of this State, must be equally within the protection of the law, whether the owner be a citizen or an alien (Story Conf. Law, Secs. 376, 379, 380). If the character of property was impressed upon the fruits of mental labor solely by statute it might be otherwise as the statutes could have no extra territorial force."

§ 363 Resident aliens entitled to common law copyright.

Aliens resident in England can have, it seems, common law copyright.[96] All the judges who rendered opinions in that great case, however, appear to have been quite clear that a non-resident alien could not have common law copyright.[97] In Palmer v. DeWitt,[95] the further step was taken of holding

93—2 George V, c. 46, Part I, 1.

94—Idem, § 31.

95—47 N. Y. 532, 538.

96—Jefferys v. Boosey, 4 H. L. C. 815. It should be noted that the present British statutory substitute for common law copyright now enures only to one who at the "date of the making of the work" is a British subject or domiciled at that time within the British dominions. Copyright Act 1911, Part I, 1 b.

97—This is now the rule in England by statute.

that the resident assignee of a non-resident alien could obtain a general territorial "license," under a common law copyright. It appears what was really conferred was an assignment of the common law rights for the United States. If the alien had no such rights, it is difficult to see how his assignee could have had them. However, in view of the decision of Ferris v. Frohman,[98] this point must be deemed settled in accordance with the rule of Palmer v. DeWitt.[98a]

§ 364 Resident assignees of non-resident aliens entitled to common law copyright in the United States.

Since, in view of the present English Statute, "the character of property" is "impressed upon the fruits of mental labor,"[98a] in England, solely by statute, it would seem doubtful to what extent an English playwright who does not obtain statutory copyright in the United States can obtain any protection for his works there, if composed since the passage of the present British Act.

§ 365 Possible effects of statutory abolition of English common law copyright, on United States law.

It seems to be recognized that this peculiar common law property has its origin in the creation of the work by the author. Just as one who takes material objects, not subject to previous individual ownership, and fashions them into such forms as he pleases, would obtain a property therein, so, it is deemed, he who takes ideas and thoughts and by his mental labor reduces them to a concrete form also obtains a property therein. Such a property from its nature must arise on the act of creation. If, however, on its birth, it receives the stamp of property, by statute, that statute as pointed out in Palmer v. DeWitt,[98a] defines its territorial limits once and for all, at birth. This seems necessarily to follow from the fact that the theoretical nature of the property rights which have been called copyright, after publication, and common law copyright, before publication are essentially the same and no one has pretended that copyright after publication

98—223 U. S. 424, 56 L. ed. 492.
98a—Palmer v. DeWitt, 47 N. Y. 532.

have any extra-territorial force.[99] That point was not discussed in Frohman v. Ferris,[1] but that case cannot be deemed an authority to the contrary, as it did not involve the situation created by the present English Statute. The authority of Ferris v. Frohman [1] and of Palmer v. DeWitt [2] and Thompkins v. Halleck [3] as bearing upon questions which may arise under the present United States Copyright Act, may be deemed further doubtful, since the existing statute is not limited to printed dramatic compositions, as prior statutes, according to the Frohman case, were; and thus one of the main supports of those decisions is rendered inapplicable for the future.

§ 366 Neither public nor private performance of a drama is a publication thereof.

The modern American cases have all held, then, that the public representation or performance of a play, which has not been published in book form, is not a publication. *A fortiori,* a private performance would not be a publication.[4] The cases use the word "printed" instead of "published in book form" but this is believed to be inaccurate. A book need not be printed to be copyrighted, even where copyright involves a publicaton [5] and, as the essence of the distinction made with reference to representation not being publication, lies in the fact that plays can be published as books, it is not deemed that there is any valid distinction between what would be a publication in the case of a book which did not contain a dramatic composition or one which did. No one has ever doubted that the public distribution of manuscript, or typewritten, or photographic, copies of a book would be a publication, while limited circu-

§ 367 Private circulation of printed copies of play, for purpose of performance not a publication.

99—Jefferys v. Boosey, 4 H. L. C. 815, 847.

1—223 U. S. 424, 56 L. ed. 492.

2—47 N. Y. 532.

3—133 Mass. 32.

4—The reading of a paper before an incorporated dental society was held not a publication. Dentacura Co. v. N. J. Dental Society, 58 N. J. Eq. 582.

5—Roberts v. Myers, 20 F. C. 11906.

lation of printed copies of a play privately, even to members of a company of actors, to enable them to perform the play, by committing it to memory, has been held not a publication.[6] So the decisions in various cases[7] necessarily involve the proposition that the sale of manuscript copies by the proprietor, either in connection with a sale of copyright, or for the purpose of enabling exclusive territorial licenses to be utilized, is not a publication. Whether such a sale made in connection with a non-exclusive license would be deemed a publication has not yet been determined. It would seem that the bare fact of such sale should, on the whole, be deemed a publication, for all purposes. A sale of the original work is not a publication.[8] But in the case of non-exclusive licenses, the sale is a sale of a copy. If sold, any restrictions on the sale would be ineffectual, as against subsequent purchasers without notice, who could use it for any lawful purpose. Such copy may thus be resold, theoretically, an unlimited number of times. If the so-called license were exclusive, it might amount to an assignment of the copyright and a different result might follow. No case has yet held the grant of licenses a publication. In the case of a dramatic composition, not a mere "closet drama," its chief value lies in the right of representation. A sale imports a price but where a performing license is given, it would seem unusual to exact a separate price for a copy of the play sold, but normally a copy would be furnished for the purpose of enabling the license to be beneficially utilized. On the whole, since a sale is only consistent with publication,[9] it would seem as if such a sale, if established, might be deemed a publication.

§ 368 The sale of manuscript copies in connection with exclusive and non-exclusive licenses.

6—French v. Krehling, 63 F. 621.

7—Cf., for example, Ferris v. Frohman, 223 U. S. 424, 56 L. ed. 492.

8—White v. Geroch, 2 B. & Ald. 298.

9—Little v. Gould, 2 Blatch. 362

§ 369
True basis for holding performance is not a publication.

Where a dramatic composition is performed, the performance can in no proper sense be said to be a copy of such composition. But although it does violence to the etymological meaning of the word, the right to prevent its public representation by others, without his consent, is part of a copyright in a dramatic composition. What, however, does an author or proprietor of a dramatic work reasonably purpose when he permits its public performance, and for what do the audience who attend such performance pay? That they pay for the privilege of seeing and hearing the performance and for nothing more and that that is all the play's owner purposes they shall have, merely requires to be stated to be admitted, as this is a long established and customary matter. They never see a copy of the work, performance being no copy, nor, as the human mind is constituted, do the overwhelming majority retain anything except a general impression of the action and general recollection of the plot, as differentiated from a detailed knowledge of the ideas composing it. Since then, no copy is seen nor facilities offered for making one, nor any payment made for seeing a copy, no right to make a copy can be implied but on the contrary every implication exists that no such right is granted to auditors at a public performance. This is true whether there be payment, or not, and applies equally to all classes of works capable of representation, performance, rendition, or presentation, including musical compositions, sermons, moving pictures, etc. The result rests in the implied understanding of the parties and not merely in the intention of one party. Since it rests in both parties' understanding, it rests on principles akin to quasi-contract. In the case of lectures [10] any member of the audience may make notes of what he hears for his own use. This may

§ 370
Lectures.

10—Caird v. Sime, 12 A. C. 326; Bartlett v. Crittenden, 4 McLean 300, 5 McLean 32.

mean making a copy if these are made in shorthand and are voluminous. The fact that lectures are not deemed published under such circumstances, it is deemed, can only be explained on the ground that this is the understanding between the parties.[10]

Public performance or presentation is, hence, not a publication in a copyright sense. Whether or not gratuitous public performance or presentation may, or may not, be a dedication of the right of public performance or representation, as distinguished from the right to copy, if the copyright provided by statute, for works not produced in copies, be not taken out, is a different question and will be discussed elsewhere.[11]

§ 371 Public performance of musical compositions is not a publication.

Musical compositions are like dramatic compositions in that they are capable both of reproduction, in physical form, for sale, and of performance. The rules as to what is, or is not, a publication of dramatic works, therefore, it seems, apply to musical compositions.[12]

§ 372 What may be effect of public sale by proprietor of uncopyrighted versions of copyrighted matter: musical arrangements.

In one instance,[13] the Court refused a preliminary injunction against a musical composition, which was practically a reproduction of plaintiff's copyrighted arrangement of his own music, where it appeared plaintiff had issued uncopyrighted arrangements of the composition for other instruments, from which defendant had made his version. The Court held dedication would be a defense but that whether there had been dedication was a question of fact, to be determined on the trial of the action. On the other hand, a license by the proprietor of an unpublished play to another, to reproduce it in motion pictures and to copyright the resultant films is not a publication of the play.[14] The distinction between these

§ 373 Motion pictures based on play.

11—See §§ 398–400.

12—Cf. Monaghan v. Taylor, 2 L. T. 685, 686.

13—Littleton v. Fischer, 137 F. 684.

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

two cases appears to be that in the first mentioned case, the works involved were the same,[15] with colorable variations, but in the other case, that the works, though based on the same theme, were independent and distinct.

§ 374 Sketches of paintings.

The question of fact involved in such cases was further illustrated in another case[16] where it was held that the printing of a superficial crayon sketch of a painting in an art exhibit catalogue was not a publication of the painting.

§ 375 Miniature samples of photographs.

In a third instance,[17] it was held that since publication meant the offering of a work to the public for sale or circulation, the distribution of catalogues intended as sample lists, containing miniature photographs of photographs, which it was desired to sell, was not a publication of the photographs which required notice of copyright to be affixed. This decision was based entirely on the language of the statute in force at the time of its rendition and does not affect the question as to whether the distribution of such a catalogue, without having first obtained a statutory copyright, would not have been a publication. It would appear entirely a question of fact in a case like the latter, whether the distribution of the catalogue would work a publication. The fidelity of the miniatures as copies of the originals, not their size or purpose, would appear to control.

§ 376 Vocal scores of operettas.

The libretto and vocal score, with piano accompaniment, of "Iolanthe," were printed and sold, without being copyrighted. The orchestral score was kept in manuscript. This was held[18] a publication, enabling defendant publicly to perform the libretto, vocal score and an orchestral score, which

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

16—Werckmeister v. Springer, 63 F. 808.

17—Falk v. Gast Lithograph & Engraving Co., 54 F. 890.

18—Carte v. Ford, 15 F. 439.

he had made from the printed piano score.[19] The decision in an earlier case,[20] which appears contrary to the above cases, does not appear to be good law, unless it be deemed an unfair competition case.[21]

§ 377 Miscellaneous instances of publication, or not, in the case of music lectures, etc.

The proprietor of a music hall[22] composed songs and gave away copies to attract custom. This was held a publication.

On the other hand, by analogy with the dramatic composition cases, public performance, for profit, of a musical composition or its performance before an invited, limited audience, would not be a publication. Whether public performance of music, not for profit, but for whoever chose to hear it, would be a dedication, if not a publication, is doubtful.

§ 378 Taking notes of lectures.

The same rules[23] apply to lectures, sermons, addresses and similar productions orally delivered. This has been held true even where the auditors were allowed to make copies, for their personal use and for the instruction of others.[24] The latter result also seems explainable only on the theory of quasi-contract.

§ 379 The publication of works of art.

"It is not perceived how the legal status of a right of copyright in a painting or statue, so far as concerns their publication, can be distinguished from that of lectures or dramatic compositions,"

said Mr. Circuit Judge Townsend, in an elaborate and instructive discussion of this subject.[25]

§ 380 The decisions collated. The effect of public exhibition of such works.

It was held, at a relatively early date, that the public exhibition of a painting, for the purpose of

19—To the same effect see Carte v. Duff, 25 F. 183, "The Mikado" case.

20—Thomas v. Lennon, 14 F. 849.

21—Carte v. Ford, 15 F. 439.

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

23—Bartlett v. Crittenden, 5 McLean 32; Nichols v. Pitman, L. R. 26 Ch. D. 374; Caird v. Sime, L. R. 12 A. C. 326.

24—Bartlett v. Crittenden, 5 McLean 32.

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

obtaining subscribers for engraved copies thereof, copying being forbidden, was not a publication thereof.[26] The opinion contained a *dictum*, that public, unrestricted exhibition of a painting would be a publication thereof. In an early English case,[27] the question as to whether the public exhibition of a design on paper was a publication of it, was deemed so doubtful that a preliminary injunction was refused.

In American Tobacco Co. v. Werckmeister,[28] it was held exhibition of a painting in a gallery where copying was forbidden by the by-laws of the association controlling it, which were strictly enforced, was not a publication thereof, even though the exhibition was open to the general public. The Court did not pass on the question as to whether such exhibition would not have been a publication, if copying had not been forbidden. It has, however, been said[29] that in the absence of direct evidence, permission to the public to make copies, at their pleasure, of a work of art on public exhibition, will not be assumed.

§ 381 Leaving designs with prospective customers.

It has been held that showing a design to prospective customers with a view of ascertaining if they would give orders for goods to be made from it and obtaining orders therefrom, after leaving copies of the design with such customers while they determine whether, or not, to order, was a publication.[30] The Court said this would be so, even though no orders were obtained, or samples left in the physical possession of the customers, as they had been given an unrestricted opportunity to copy the designs.

26—Turner v. Robinson, 10 Ir. Ch. 121, 510.

27—Dalglish v. Jarvie, 2 H. & T. 437; s. c., 2 Mac. & Gor. 213.

28—207 U. S. 384, 52 L. ed. 257. See also Werckmeister v. American Lithographic Co., 68 L. R. A. 591, 134 F. 321.

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

30—Blauk v. Footman, Pretty & Co., 39 Ch. D. 678.

§ 382 Filing building plans.

§ 383 Construction of a building.

Where an architect who had been paid for plans he drew, filed them in the Building Department of the City of New York, as required by law, this was held[31] a publication. The designing and construction of a building was held a publication of the designs therefor.[32]

§ 384 Gifts of private copies of prints.

It has been held that to make copies of copper-plates and give them to personal friends, under special circumstances showing a desire to keep them private, was not a publication.[33]

§ 385 What was held insufficient to prove absence of publication of a painting.

In an instructive opinion,[34] it was said that the Courts have not yet determined what constitutes the publication of a painting; but it was held that where statutory copyright in a painting had not been taken out until thirty years after it was painted, and until after its author was dead, proof that it had not been published prior to statutory copyright, was not sufficiently supplied by the testimony of two witnesses that they did not know of the author's ever having exhibited it outside of his parlor or having given permission for it to be copied, during the 30 years it had hung in his parlor.

§ 386 Reasons for difficulty in determining what is publication of a painting.

The underlying difficulty with the question of what constitutes publication of a painting seems to be that for an artist to make manual copies of his work is almost unheard of, save amongst the humblest perpetrators of pot boilers. On the other hand the greatest paintings are those owned by the various states, or nations, or their agencies, and hung in public galleries where all are free to copy. It is considered such works may be deemed dedicated to the public[35] and that even though copies of paint-

31—Wright v. Eisle, 86 N. Y. A. D. 356.

32—Gendell v. Orr, 13 Phila. 191.

33—Prince Albert v. Strange, 2 De G. & S. M. 652.

34—Bosselman v. Richardson, 174 F. 622.

35—In Gendell v. Orr, 13 Phila. 191, the Court deemed there could be copyright in a portico or porch, in a proper case, but that such work was published by being made part of a house on a public highway and left there three years.

ings be not produced, if they can be produced, such potential capacity points the way as to what may be deemed publication of a painting.

§ 387 Suggested rule as to what may constitute publication.

It would seem from the foregoing cases with reference to paintings, designs, etc., that the rule to be drawn therefrom is that if there be an unrestricted opportunity afforded the public or any fraction thereof to copy the work, this amounts to the equivalent of a publication, in the nature of a dedication thereof to the public. It is deemed that works of art are at least as akin to books in their nature as to dramatic or musical compositions. The characteristics of the latter are their capacity for public representation or performance, by means either of human or mechanical agencies, and also that they are capable of reproduction in printed or written copies. While a work of plastic, or pictorial, art is primarily designed to be seen and is, hence, capable of exhibition, no exclusive right to its public exhibition is given by statute. While it is true, as pointed out in one of the cases cited,[36] that often an artist's chief object "is to secure the profit arising from the sale of the original work," it may be suggested that an author's object in connection with any disposition of his work is of no controlling importance, save in so far as it squares with rules of positive law, or rests in contract, express or implied, before publication. If the original manuscript of a book were voluntarily put by the author in a position where the public were afforded the means of copying it without restriction, it is deemed that an assertion that this was done to procure a purchaser for it, would be no answer to a claim that this was a publication or a dedication.

§ 388 Publication of photographs and motion pictures.

Photographs, other than motion picture films, are sufficiently like books for it to appear that what is a publication in one case should be deemed a publica-

36—Werckmeister v. American Lithographic Co., 134 F. 321.

tion in the other. Motion picture films occupy an intermediate ground between books (both being reproduced in considerable numbers of copies by "printing") and dramatic compositions, as they are also designed for representation or performance. While, it is deemed, the public representation, or running off, of a film would not be a publication, by analogy with the cases governing dramatic compositions, it is by the analogy of the cases governing other printed matter, deemed that even a single public sale of one copy would constitute a publication.[37]

§ 389 Judicial definitions of publication.

It has been said by Learned Hand, J.,[38] that publication occurs when a work is made public in any way, unrestrictedly, and further, that it did not involve an effort at commercial exploitation or putting on the market. On the other hand, any offering or disposal of a work to the general public, upon a commercial basis, is a publication.[39]

If the Court, in using the word "unrestrictedly," in the case first cited,[38] had in mind implied, as well as express, restrictions, this definition appears important. In the Werckmeister case,[40] the following language from Slater: Copyright,[41] is approved:

"It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such book common property."[42]

37—See § 317.

38—Stern v. Jerome R. Remick Co., 175 F. 272.

39—Vernon Abstract Co. v. Waggoner Title Co., 49 Tex. Civ. App. 144.

40—207 U. S. 384, 52 L. ed. 257.

41—P. 92.

42—Also quoted by Hough, J., in Universal Film Mfg. Co. v. Copperman, 212 F. 301, 303.

§ 390 English statutory definition.

In the British Copyright Act of 1911,[43] publication is defined as the issue of copies of the work to the public and it is said not to include the performance, in public, of a lecture, the exhibition, in public, of an artistic work, or the construction of an architectural work of art. The issue of photographs or engravings of architectural works or sculpture is not to be deemed a publication of the works so photographed. While this definition is confined, by its terms, to the Act itself, it is to be noted that it repeals the previous British *statutory* rule with reference to performance of a play being publication and appears to make a finding of publication conditional (a) on a previous multiplication of physical copies of the original, and (b) on some of such copies coming into the possession, temporary or permanent, of members of the public, with the consent, or by the act, of the proprietor of the copyright.

§ 391 Comparison of the English and American statutory definitions.

As has been seen, the definition contained in the present United States Act is limited to the case of works of which copies are reproduced for sale or distribution. Issuing copies of a work to the public and placing copies on sale or selling or publicly distributing them are not very different, especially when the terms are construed in the light of the case law existing at the time the respective statutes in question were passed.

§ 392 Definition of publication as to works reproduced, or capable of being reproduced, in copies.

On the other hand, the fact that the definition contained in the American Act is limited, makes it necessary to consider further and to attempt to define what would be a publication in the case of works not reproduced in copies for sale or distribution. Having in mind the language of the present Act and the adjudicated cases, it may be said that it would seem that if works are capable of reproduction in copies, but are not reproduced in copies for sale or public distribution, the sale, offer for sale, or

43—I section, 1 sub., 3.

public distribution, of copies, for whatever purpose the copies were made, is a publication.

§ 393 Summary of law as to what is a publication:

To sum up this branch of the subject: there is only one publication recognized by the Act, to wit, general publication. A limited publication is a contradiction in terms, either meaning a private communication, which is no publication, or one where the rights of the immediate parties rest in contract, governed by principles other than that of the law of copyright. Under the authorities, it is deemed there can be no publication for the purpose of enabling statutory copyright to vest, which does not involve the sale, or offering for sale, or public distribution of a copy, or copies, of a work by the author or proprietor thereof, gratuitously, or for a price, nor can there be a publication for the pupose of preventing statutory copyright which does not involve acts which from their nature, and having regard to the rights of the proprietor, existing or possible, does not necessarily imply such a dedication, or free gift of such rights, in a work or its subject matter, to the public, as is inconsistent with any claim to the retention of any such private rights therein by the author or former owner.

§ 394 (a) To secure statutory copyright:

§ 395 (b) To prevent statutory copyright.

§ 396 The question discussed as to whether the present Act has changed the effect of performance without copyright.

The interesting and difficult question may now be considered whether the present Act, through enlarging the subject matter and scope of statutory copyright,[44] has or has not, changed the previous law with respect to common law rights in dramatic compositions.

It has been noted that the Supreme Court has said[45] that there was a right of public performance of a dramatic composition at common law. The Court did not, however, either hold, or say, that such right existed as a separate right, as distinguished from a mere right resultant from the general common law copyright. If it were the Court's view that

44—Cf. § 1 (d).

45—Ferris v. Frohman, 223 U. S. 424, 56 L. ed. 492.

there was such a separate independent right, and this were sound, it would seem to follow that publication of a play in book form, could not affect this asserted common law right of performance, a proposition for which there is no authority.[46] Previous cases [47] had gone no further than to hold that there was a right to prevent others from copying, or performing, an unpublished play and that this right was not, in the absence of statute permitting statutory performing right in an unpublished play, lost by public representation of the play by its owner. It would seem that there may be a distinction between a right to forbid others to perform, and a right to perform one's self, and that the one could exist without the other, unless lost by some act of the owner.

§ 397
Sections 11 and 1 of the Act discussed.

Section 11 of the Act refers to statutory copyright in works not reproduced in copies for sale. It is to be noted that there is nothing in that section that refers to books, save in so far as lectures, or dramatic compositions, may be embodied in book form, nor is there any requirement that the copies called for by the section, be printed. The Act, however, only provides for one kind of copyright, for, although the formalities for obtaining it differ, once obtained, it has the same scope and incidents in every case where the same kind of work is involved, and its term runs in every instance from the first publication of the work.[48] Now, ordinarily, it would seem that if a statute gives certain rights upon compliance therewith,[49] a failure to comply therewith would

46—Toole v. Young, L. R. 9 Q. B. 523, 527; Marsh v. Conquest, 17 C. B. N. S. 418.

47—In Macklin v. Richardson, 2 Amb. 694, the authority upon which all the later decisions are based, it appeared that defendant sent a shorthand writer to a theatre at which plaintiff's manuscript play was being performed and from his notes printed the first act of the play. It was held that by doing so plaintiff's rights in his manuscript were infringed.

48—Section 28.

49—Section 1.

prevent any of such rights from existing. Section 11 says that "copyright" may be had in the works enumerated therein, being those chiefly useful for exhibition, representation, or performance. This copyright, which may be so had, cannot refer to common law copyright, because this, where it exists, does so independently of statute, and it seems difficult to conceive of Congress saying something could be had which already exists. Under Sections 1 and 11, all the rights which an author could have at common law may be obtained by registration under the latter section, with this difference only, that, as will be shown, such rights would not be perpetual but limited as in the case of other copyrights.

One of the rights conferred by Section 1 in connection with copyrights under the Act is the sole right of representing or performing a dramatic composition, whether in manuscript, or not, or whether reproduced in copies for sale, or not.

§ 398 The scope of Section 2 considered.

The ground on which statutory copyright was held to have rendered common law copyright after publication impossible, was that the Statute of Anne, which enabled copyright to be taken out in published books, took away common law copyright in published books, if it existed, because it conferred statutory copyright in published books.[50] It will be noted Section 2 of the present Act confers no rights. It is purely a saving clause of undefined non-statutory rights. The view, which appears fundamentally erroneous, announced in several recent cases, that[51] by force of this section, an author's "literary property" or common law rights persisted even after he had taken out a statutory copyright, has been disapproved.[52] The Court in discussing this

50—Donaldson v. Beckett, 4 Burr. 2408; Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055.

51—Maurel v. Smith, 220 F. 195, for example.

52—Photo-Drama Motion Picture Co. v. Social Uplift, etc., Co., 220 F. 448.

section said, that the section was only intended to indicate that the statute does not displace the common law right. "Whoever elects to avail himself of the statute however, must be held to have abandoned his common law right." The Court did not, however, discuss, nor was it incidental to its decision, what the rights so saved were. The prior United States Copyright Acts limited the rights of public performance conferred by them, to cases of works reproduced in copies for sale or public distribution.[53] The dramatic rights in such works were simply incidental to the other rights given in such works. Dramatic copyright was not possible unless a play was reproduced in copies. The present Act[54] shows that it was intended to apply to cases where a play was kept in manuscript, and that dramatic rights might be obtained under it in dramatic works unpublished up to the time when copyright vested.[55] No case can be suggested where dramatic copyright is not possible under the present Act. In view of the effect given the Statute of Anne, such a saving clause was, hence, natural and necessary. The question of its scope, however, is important, as, unless alleged common law rights of performance are saved by it, it would seem that by applying the reasoning which resulted from the passage of the Statute of Anne and the original United States Copyright Act,[56] such rights would be destroyed by the present Act, which purports to confer equivalent statutory rights in printed *or* manuscript dramas. This great change in the law and its possible far reaching effects appear to have been unremarked so far.

§ 399 Statutory change of the prior law.

§ 400 Further examination of the scope of Section 2.

It should be noted very carefully just what rights Section 2 purports to save. These are purely the rights which the author had at common law to *pre-*

53—Ferris v. Frohman, 223 U. S. 424, 56 L. ed. 492.

54—Cf. § 1 (d).

55—Cf. § 11.

56—Donaldson v. Beckett, 4 Burr. 2408; Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055.

vent third persons from interfering with his work, without his authority. The section in no way refers to any rights which he, himself, may have had, to copy, publish or use this work but simply to his preventative rights. Any right which he, then, may have had, at common law, to perform the work himself, is not preserved by force of this section. If, then, the statute, applying the reasoning suggested, be deemed, in any event, to have taken away this right, if it existed, the question whether the voluntary performance of a play will not (in the absence of implied agreement, etc.) have consequences under the present statute analogous to those of publication under the Statute of Anne, must be considered a difficult and serious one.[57] The same result would be reached in the case of musical compositions and all other works, where statutory copyrights equivalent to the asserted common law rights are offered.

§ 401 Publication is a question of fact.

In the last analysis, publication, or dedication to the public, is a question of fact in each case. Custom and ordinary social and business usages, play an important role in determining the implications to be drawn from various acts of a proprietor of a common law copyright. The nature of different media for putting forth ideas and the nature of the rights which enure, or might enure, in such different classes of works, also has a most important bearing.

§ 402 Abandonment of common law copyright.

Registration of copyright[58] or even, it seems, attempted, but ineffectual, registration of a copyright[59] under the statute, is an abandonment of common law copyright. This appears to follow from

57—Cf. Bouccicault v. Chatterton, 5 Ch. D. 267; Slater: Copyright 99; Drone: Copyright 287 (quoted with approval in Werckmeister v. American Lithographic Co., 134 F. 32). See Bouccicault v. Delafield, 1 H. & M. 597.

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

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

the rule that the necessary deposit of copies is a publication.[60]

§ 403 Foreign publication.

Acts amounting to publication, are equally a publication, although they transpire abroad, without the United States.[61] Consent by an author to publication abroad, it seems, is an abandonment of the right to statutory copyright.[62] This subject is discussed at great length elsewhere.[63]

§ 404 Estoppel, is equivalent of dedication.

Finally, it is deemed principles of the law of estoppel, and the maxim that, a man is presumed to intend the necessary consequences of his acts, will aid the solution of many cases arising under this heading. Where such an estoppel is claimed however, it must be shown by clear and satisfactory proof. Thus if the publisher of a work claims he published with the author's consent, such consent must, apparently, be shown unequivocally. This was illustrated in a case[64] where it appeared Whistler had authorized the defendants to write a work in the nature of his biography. He did not expressly authorize the publication of his letters in this. The Court said the latter authority would not be implied from the established authority.

§ 405 Publication, to terminate such rights must be by the author or one authorized by him.

Since the consequences of a publication are as great as they are, principles of obvious justice require such publication to be made by the proprietor of the work to be effective and a publication made by a third person, without his authority, cannot affect his rights.[65]

Thus in one case,[66] it appeared the American serial and book rights in a novel were sold to plaintiffs. It appeared that prior to the serial publication of the work in the United States and before copy-

60—See § 324.
61—Carte v. Duff, 25 F. 183.
62—Bouccicault v. Wood, 2 Biss. 34.
63—See § 736 *et seq.*
64—Philip v. Pennell, (1907) 2 Ch. 577.
65—Shook v. Nevendorff, 11 N. Y. Daily Reg. 985.
66—Harper & Bros. v. M. A. Donohue & Co., 144 F. 491.

right was obtained there, the owners of the English serial and book rights, published the work both in England and the United States. It was held that this publication did not affect the plaintiff's rights, as there was no privity between the English and American proprietors and that the author's consent to the acts of the English owners did not vary this result, since plaintiff's consent was lacking. On the other hand, in another case,[67] it appeared Richard Wagner has sold the exclusive right of publication of "Parsifal," for all countries, reserving the acting rights of the opera. He had previously transferred to the purchaser "the absolute possession" or "unconditional ownership" (the contracts were in German and there was a dispute as to their meaning) of the composition and libretto. The purchaser sent copies to its New York agent, for sale. It was held this was a publication which prevented Wagner's subsequent attempt to enjoin the performance of the opera.

§ 406 Author, defined.

The question next to be considered is who is an author or proprietor, entitled to copyright in the sense in which these terms are used in copyright law. The definitions found in the cases apply equally to common law, or statutory, copyright. The creator of a work of pure literature or art is its author. Ordinarily, he both originates, and executes, his ideas. But human thought tends to range in narrow, rather than wide, limits. Mechanical facility often does not accompany a mind capable of creative thought. One or more may conceive and one or more, other than they, execute. Difficult questions then may arise, as to who is the author of the resulting work.

§ 407 The author of a photograph.

The Supreme Court[68] stated an author to be, in Worcestor's words: "he to whom anything owes its

67—Wagner v. Conreid, 125 F. 798.

68—Burrow-Giles Lithographing Co. v. Sarony, 111 U. S. 53, 23 L. ed. 349.

origin; originator, maker, one who completes a work of science or literature," but as will be shown, this definition only covers the simpler cases. In the case in which this language is found, it was held that one who posed a subject for portraiture and arranged draperies, lights and accessories so that he might photograph the result, was the author of the resulting photograph. He contributed the thought. Everything else done in taking the picture was mechanical. In another case,[68] a firm of photographers sent employees to make photographs. The employees who actually made the exposures resulting in the negatives were the authors thereof. Bowen, L. J., said[69] the author was "the man who really represents or creates or gives effect to the idea or fancy or imagination, the man in fact who is most nearly the effective cause of the representation when completed." Cotton, L. J., said:[69]

> "Author involves originating, making, producing as the inventive or master mind the thing which is to be protected."

Brett, M. R., thought the author to be he who was "the effective cause of the result by arrangement, etc."[69] In still another English decision,[70] it was held, on the other hand, that where the person who actually took a photograph did so under the immediate control of another, as his manual assistant, the person in control was the author of the photograph.

§ 408 Commercial photography.

There can be no copyright taken out by the photographer in photographs taken for hire and paid for by the sitter,[71] but he can take out a copyright in photographic portraits which he does not make for pay.[72] But it has been held that where a photograph

69—Nottage v. Jackson, 11 Q. B. D. 62.

70—Melville v. Mirror of Life Company, (1895) 2 Ch. D. 53.

71—Ellis v. Ogden, 11 T. L. R. 50; Press Publishing Co. v. Falk 59 F. 324 (semble).

72—Ellis v. Marshall, 11 T. L. R. 522; Press Publishing Co. v. Falk, 59 F. 324.

is taken at the request of the sitter, there is an implied promise to pay for it, if nothing more appear, and that the copyright therein is, accordingly, in the sitter, although the property in the negative may be in the photographer.[73]

§ 409 The modeler of toys.

The modeler of toys was treated as their author, and, hence, proprietor, although he acted for a partnership of which he was a member.[74]

§ 410 Editors.

A sub-editor of a newspaper, who re-wrote a reporter's account of an accident, was the author of the resultant account, not the reporter.[75] The reporter furnished the raw material, viz, the facts, but the sub-editor furnished the thoughts which clothed them and their form.

§ 411 The conceiver of a work, as distinguished from the mechanical executant thereof.

One who conceived the idea of making birdseye views of places where wars were being waged and collected the necessary geographical and historical data but, because he could not draw, employed another to put them together for him, was the author of the resultant print.[76] Here we have one conceiving not only a central idea, or general plan, but also formulating its details, minutely. His mind controlled the draughtsman's throughout and the latter was really only a mechanical agency for the former's use. On the other hand, it has been held[77] that one who conceived the idea of having drawings made of a hand holding a pencil in the proper way to mark ballots was not the author of the resultant drawing but the artist he employed to make it, was. In the latter case what had been conceived was a bare non-artistic and non-literary idea. The drawing, not the idea, alone was copyrightable and this being so, the artist who made the drawing was alone its author.

§ 412 Limitations on doctrine of human instrumentalities.

73—Boucas v. Cooke, (1903) 2 K. B. 227.
74—Britain v. Hanks Bros., 86 L. T. 765.
75—Springfield v. Thame, 89 L. T. 242.
76—Stannard v. Harrison, 14 L. T. 570.
77—Kenrick & Co. v. Lawrence & Co., 25 Q. B. D. 99.

That the practical effect of the doctrine of such cases may be very limited, was shown in a recent decision.[78] There defendant, a business man, had rather concrete ideas as to the form in which he wished an advertisement drawn. He communicated these to the plaintiff, an artist, who embodied his conception of the ideas in a drawing which he copyrighted. A dispute followed and the defendant employed another artist who made a second drawing from the same statement of defendant's desires, without seeing the first drawing. It was held the reproduction of the second drawing, necessarily very similar to the first, was no infringement, as the similarity was due to the use of common ideas of which the copyright proprietor was not the originator or author.

§ 413 Elaboration of simple ideas.

An actor communicated the idea of a vaudeville sketch to one Pink who for a consideration put it into dialogue. It was held Pink was the author of the resultant sketch.[79] This is another instance where one contributed a rough, general idea and another elaborated and developed this to such an extent, that his contribution to the result far outweighed that of the conceiver of the first idea. This result would be the more certain where none of the ideas were suggested to the author and he was not an employee but an independent contractor. Thus a dramatist was employed to write a play by a theatrical manager. It was held this did not create the relation of employer and employee, so as to make the manager proprietor of the resultant work.[80] One who made substantial changes in a play in the public domain, "Trilby," was held to be the author of the play, as changed.[81] Here the original ideas were common property but the ideas grafted

§ 414 Plays written to order.

§ 415 Adaptation.

78—McCarthy v. L. Adler Brothers & Co., 227 F. 630.
79—Tate v. Fullbrook, (1908) 1 K. B. 21.
80—Levy v. Rutley, L. R. 6 C. B. 523.
81—Tree v. Bowkett, 74 L. T. 77.

on these original ideas, had an author, to wit, the adaptor of the original play. So the arranger, not the composer of the original work of music, is the author of the resultant arrangement.[82]

§ 416 The maker of casts.

One who took a cast of fruit and leaves is the author of the resulting cast,[83] as an exercise of ingenuity, artistic taste and arrangement and modeling was involved.

§ 417 Compilation.

One who sent out questions to a number of golf players and compiled biographical notes from the answers, was the author of such notes.[84] So it would appear in the case of a compilation, he who exercised the selective thought necessary to obtain the result [85] is the author. So in the case of a dramatization, or arrangement, or adaptation, of a work, the author would not be the author of the original work, but the person whose thought was the preponderating cause in the effect which we, in such cases, call dramatization,[81] or arrangement, or adaptation.[86] This seems correct, as he is the one who exercised new thought in their arrangement and compilation.

§ 418 Verbatim stenographic reports.

In Walter v. Lane,[87] it was held a reporter of the London Times who made shorthand notes of a public, uncopyrighted, original speech by Lord Rosebury and published a verbatim report thereof from such notes, was the author of that report, to an extent entitling his employer to copyright in the report. Lord Halsbury said, p. 545, in discussing the "authorship" of directories:

> "If the producer of such a book, can be an author within the meaning of the Act, I am unable to understand why the labour of reproducing spoken words into writing and first

82—Wood v. Boosey, L. R. 2 Q. B. 340, aff'd 3 same 223; Boosey v. Fairlie, 7 Ch. D. 301, 309.

83—Caprioni v. Alberti, 65 L. T. 785.

84—James Nisbet & Co. v. The Golf Agency, 23 T. L. R. 370.

85—See §§ 454–469.

86—Lover v. Davidson, 1 C B N. S. 182.

87—(1900) A. C. 539.

publishing it as a book, does not make the person who has so acted, as much an author, as the person who writes down the names and addresses of those who live in a particular street."

§ 419 Walter v. Lane discussed and criticized.

This is a plain misapprehension of the *ratio decidendi,* and effect, of the directory cases, which have held the selection, putting together or arrangement of the names, not their mere manual transcription, furnished the basis of copyright. Lord Halsbury deemed each reporter of the speech would have copyright in his transcription of it, which would be good as against everyone, save possibly Lord Rosebury. Lord Davy thought it immaterial whether or not the speech, so reported, was public property.

Lord James of Hereford said a mere copyist of written matter was not an author, but a translator was, and that a person to whom words were dictated for reproduction was not an author but he here, doubtfully, reached the conclusion that the reporter was an author.

Lord Robertson, who alone dissented, pointed out that a good phonograph might report as faithfully as a stenographer-reporter and that there was structure and arrangement even in the collections of time tables, catalogues and directories mentioned in the prevailing opinions.

This is an extreme case which would probably not be followed in the United States, in any event, because the subject matter of the copyright, would, as far as the reporter was concerned, lack even the modest degree of originality required under the provisions of the Constitution. But even aside from this the case seems quite wrong in principle. All that the reporter did was to exercise a mechanical facility, first, in taking his notes and, secondly, in transcribing them. The only exercise of mental power accompanying this was that of momentary

memory. He was for the time being, a mere conduit through which another's ideas were placed on paper, a mere mechanical adjunct to reproduction of another's ideas. The prevailing view appears to be based, primarily, upon the directory and compilation cases. But such works, in their final form, and last analysis, show the exercise of some arrangement and some selection and the copyright therein is only based upon the use of such selection. The directory cases have been an endless source of confusion and mischief in the theory of the law of copyright, where, as in the principal case, the results of the decisions only, and not the reasons underlying them, have been considered. There may be as much originality in arrangement due to thought, as in thought expressed in words. Indeed, thought without arrangement, can be of little permanent value. Since it is theoretically possible, by stretching some such reasoning, to hold that directories, etc., representing an arrangement of facts, may have an author, what ideas he does use, or embody, are his, and no one else's, and it is just this fact which distinguishes him from the shorthand stenographer in the principal case. No one regards the stenographer who writes out one's letters or briefs as their author, any more than one regards the printer of a book as its author. Copyright was never intended to belong to mere mechanicians. Authorship, at its lowest, involves the exercise of some independent thought, appearing either in the context, form, or arrangement, of a literary or artistic work. It may be doubted whether the case is law in England, as the present Copyright Law (1911) is distinctly limited to "original" works, and it may be more than doubted whether the stenographic work in question could be deemed original.

From the cases cited, it clearly appears authorship is a question of fact and that where more than

§ 420 The authorship of directories.

§ 421 Distinction between the authorship of directories and verbatim transcriptions of speeches.

§ 422 The question raised whether Walter v. Lane is now law even in England.

§ 423 Authorship a question of fact.

one person contributes to the copyrightable result, he who was the master mind of the group of producers, that is to say, who preponderated mentally in the creation and completion of the work, in its final form, is its author in that form.

§ 424 Joint authorship.

Cases may well exist where there may be several or joint authors and it is not believed that an exact equality of contributive thought or effort is required in such cases, but merely that the contribution of each be furnished, primarily, according to a joint design previously conceived, be substantial, and that there not be the relation of employer and employee between the authors. In the leading case of Levy v. Rutley,[88] it was held that where a play was written by one for another, the fact that that other made alterations in it, for the purpose of making it more attractive and suitable for stage representation, would not make him a joint author, or co-author of the play. To constitute joint authorship, it was held, the work must be written originally, by two or more, in furtherance of a preconceived, common design. If this exists, it was held, different portions may be the sole production of either and they may be joint authors, but there must be an original joint design for this rule to apply. The doctrine of this case was recently applied in an action [89] where it had been agreed between plaintiff and defendant that the latter would write a comic opera, for which the former wrote the scenario. The defendant, by agreement, made many changes in the scenario but used, and adopted, the whole plot, frame work and scheme of the scenario. A third person wrote lyrics for the opera, with knowledge of plaintiff's and defendant's relations. It was held the three were joint authors of the result. The case last cited [89] further held that when several collaborators knowingly engage in the

§ 425 Who is, or is not a joint author.

88—L. R. 6 C. B. 523. See also Shelley v. Ross, L. R. 6 C. P. 531.
89—Maurel v. Smith, 220 F. 195.

production of a piece, which is to be presented, originally, as a whole only, they adopt the common design necessary to make them joint authors, although they do their work after the original common design is conceived, and unless they undertake expressly to apportion the return to them for their contributions, they are entitled to equal shares of the resultant returns.

§ 426 Effect of joint authorship, on division of profits.

It was further held both the joint authors and publishing house, which published for one of them, were bound to account for their profits, to the extent of the third author's one-third interest therein.

§ 427 Incidental but distinct contributions to a work do not create joint authorship.

In a State court decision, it appeared the defendant and another had purchased the American rights to a German play.[90] This was translated and adapted to the American stage, for them, by one Smith. The plaintiff was engaged to write the music for the play. He would not collaborate with Smith and one Hobart was engaged to write its lyrics and plaintiff set these to music. It was shown his work was limited to such music for the lyrics. Motion pictures of the resultant comic opera were made, with the consent of the defendants and Smith. The plaintiff sought to restrain their production, claiming they infringed his rights as a joint author of the play. It was held he was not a joint author, his work being separate and distinct from the play, and an injunction was refused him. It was further held that even if he were a co-owner of the play, he could not restrain the motion pictures, without proof that the third persons producing them were not licensees of his fellow co-owners.

§ 428 Contracts between joint authors.

The joint owners of a copyright may contract with reference to it, *inter se*, and this agreement, rather than their original rights under the statute, will control their rights to print and publish a book covered by it.[91]

90—Herbert v. Fields, N. Y. Law Journal, April 1, 1915.
91—Gould v. Banks & Gould, 8 Wend. 562.

§ 429 Employers, as authors of the works of their employees.

The Act[92] provides that the term "author," as used in it, shall include an employer, in the case of works made for hire. While this definition only applies to statutory copyright, as this is far more important than common law copyright, it serves to solve many difficult questions, as in cases where many contributed to the formulation of a work, they are apt to be employees of the same employer.

§ 430 General summary of meaning of "author."

From the subject matter of the cases cited, it thus appears that the word "author," as used in copyright law, not only includes persons whom we call authors in ordinary speech, that is, the makers of literary or quasi-literary works, but also dramatists, sculptors, painters, musicians, architects (probably), modelers and, generally, creators of all copyrightable works in whatever media expressed or embodied.

§ 431 Who is proprietor of a work: the author or his transferee.

The author of a work is its original proprietor. Anyone to whom he transfers the whole title therein becomes the proprietor, when the transfer becomes executed, and the author's rights in the work, aside from contract, then cease. Thus in one case, it appeared that[93] the author of an article, had sold it and the right to copyright it. It was held that upon such sale all his rights of literary property therein ceased, and he could not sue the purchaser, for damages, because of the manner in which it was published, in the absence of contract stipulations, or of facts not amounting to a showing that the publication was made in such a manner as to be a libel. Similarly, it was held, that in the absence of contract, he could not complain that it was not published under the author's name.[94]

§ 432 After transfer, the author's rights, in connection with the work, terminate, except under special contract.

§ 433 Rights of transferee.

The purchaser of a manuscript may, in the absence of contract, refuse to publish it,[95] or change,

92—Section 62.
93—American Law Book Co. v. Chamberlayne, 165 F. 313.
94—Jones v. American Law Book Co., 125 N. Y. A. D. 519.
95—Clemens v. Press Publishing Co., 80 N. Y. Misc. 206.

or modify, its contents to any extent he sees fit,[96] provided he does not publish it in a manner to work a fraud on the public or constituting a libel on the author.

§ 434 Limitations on general rights of proprietor arising out of express or implied contract.

The author of a work may expressly,[97] or impliedly, limit his rights therein, as against parties in privity of contract with him, or the public.[98] Thus it has been held there is an implied contract where a photographic portrait is taken by a professional photographer, for hire, that the negative will only be used for printing such photographs as the sitter might order or authorize.[99]

One who made sketches and drawings while in the Government service, it being understood that all such sketches and drawings were to be the property of the Government, was not the "author" thereof, in the sense contemplated by the statute, and any attempted copyright thereof by him was ineffectual.[1]

§ 435 Proprietorship by special contract.

An author was employed by a publisher under a contract which, while nominally providing for a salary, actually fixed his compensation on the basis of a price for each page accepted, or rejected, by the publisher. The contract provided that the copyright in all works prepared by him under the contract, was to belong to the publisher. He prepared two works, using the office facilities, supplies and library of the publisher, which refused to accept or pay for the works. It was held[2] he was not an employee but that under the contract, the works became the publisher's property whether paid for or not.

§ 436 Miscellan-

In an early case[3] the right of an author to restrain

96—Hackett v. Walter, 80 N. Y. Misc. 340.
97—See Gould v. Banks & Gould, 8 Wend. 560.
98—See Heine v. Appleton, 4 Blatch. 125.
99—Moore v. Rugg, 44 Minn. 28, 9 L. R. A. 58; Pollard v. Photographic Co., 40 Ch. D. 345.
1—Heine v. Appleton, 4 Blatch. 125.
2—Edward Thompson Co. v. Clark, 109 N. Y. Supp. 700.
3—Drummond v. Althemus, 60 F. 338.

cous instances of protection of author's reputation, after transfer of copyright.

publication of works, as his works, was sustained, where the copies were garbled and partial, although he had parted with copyright in the works, but such relief was refused the proprietors of the common law copyright in the works, for lack of jurisdiction.[4] The grounds advanced to sustain the first mentioned decision[3] are stated as the prevention of a fraud upon the public, etc. Similar protection was given an author to prevent the use of his name, by a person not in privity of contract with him, by affixing it as author to a collection of uncopyrighted stories, partly written by him, and partly not.[5] The English cases hold that though an author has parted with his copyright, the purchaser may not change the work in such a manner that the author's reputation will be injured, without becoming liable to the author for damages,[6] but not to injunctive relief.[7] Where a work has become *publici juris*, it has been held a third person in republishing it, may do so, not only by including the author's name, as part of it, but also the pen name under which he produced it.[8]

§ 437 Summary of law as to who is proprietor.

A proprietor, then, need be neither the author nor inventor of the work, but only the legal assignee of the author or inventor can be the proprietor of the work.[9]

§ 438 Remedies available for protection of common law copyright.

It has been said that if the rights of the proprietor of a common law copyright are violated, he is entitled to the same remedies to which the owner of other personal property may resort for redress.[10]

§ 438a Damages.

The remedies available to protect a common law copyright were enumerated by Cozens-Hardy, M.

4—Pott v. Althemus, 60 F. 339.

5—Harte v. DeWitt, 1 Cent. L. J. 360.

6—Archbold v. Sweet, 5 C. & P. 219; Clark v. Freeman, 11 Beav. 112.

7—Cox v. Cox, 11 Hare 118; Lee v. Gibbings, 8 T. L. R. 773.

8—Ellis v. Hurst, 70 N. Y. Misc. 122.

9—Mifflin v. R. H. White Company, 190 U. S. 260, 47 L. ed. 1040; Marzials v. Gibbons, (1874) L. R. 9 Ch. App. 518.

10—Aronson v. Baker, 43 N. J. Eq. 365.

R.[11] as follows: first, an action at the common law; secondly, a suit in equity, for an injunction founded on the common law right; thirdly, a suit in equity, where the piracy has been accompanied by circumstances of fraud, or breach of trust, confidence or contract, express or implied. In a case of the latter type,[12] delivery up of infringing copies was ordered by the Court. Delivery up of wrongful copies, *pendente lite,* to a receiver appointed by the Court, was ordered in a somewhat similar case.[13]

§ 439 Injunction.

§ 440 Delivery up of copies.

§ 441 Accounting for profits.

Since the power to order an accounting has always been deemed incident to the right to grant an injunction, it is not doubted that, in a proper case, if infringement of a common law copyright were established, that defendant's profits might be reached by plaintiff.

§ 442 Conversion of material property in connection with which common law copyright exists.

It has been held, in a decision[14] citing numerous authorities, that when the material object in connection with which a common law copyright exists, as for example a manuscript or painting, is converted, the plaintiff may sue for conversion, and his damages in such case are the work's value to the owner, to be determined by a jury, in its discretion, subject to being set aside as excessive. A verdict of five hundred dollars for conversion of a manuscript list of customers[14] and one for five thousand dollars, in the case of a poem[15] were sustained, where no actual damage was proven.

§ 443 The measure of damages.

§ 444 Pleading.

The plaintiff in such cases should be mindful of the nature and limitations of such property, in drafting his pleadings. Thus, merely alleging that there had been a conveyance of an unpublished play, was held not to show that plaintiff became its proprietor, as the author might have sold it to another or lost

11—Mansell v. Valley Printing Company, (1908) 2 Ch. 441.
12—Prince Albert v. Strange, 2 De G. & M. 693.
13—Simmons Hardware Co. v. Waibel, 1 S. D. 488, 11 L. R. A. 267.
14—Taft v. Smith Gray & Co., 134 N. Y. Supp. 1011.
15—Press Publishing Co. v. Monroe, 51 L. R. A, 353, 73 F. 196.

his rights therein by publication, before his conveyance to plaintiff.[16]

§ 445 Innocent infringement, no defense.

That innocence is no defense where infringement is established was illustrated in an English case where,[17] in an action at law, the owner of unpublished pictures and designs, suitable for advertisements, recovered damages, the cost of producing the works in question, from an innocent infringer who had purchased them, in good faith, from a surreptitious copier.

§ 446 Cost of production allowed as damages.

§ 447 Jurisdiction in common law copyright causes.

The United States Courts have no jurisdiction, unless R. S. 4967 remain unrepealed,[18] in cases involving common law copyrights, except on general grounds of jurisdiction, unconnected with copyright.

§ 448 Jurisdiction of state courts.

The State courts have jurisdiction in cases involving common law copyrights, and this is not lost, although the effect of their decisions, as for example, in passing upon the title to a given work, may indirectly affect the question whether a party defendant has a valid statutory copyright.[19] If a work is published, a State court has no jurisdiction, either on the ground of statutory, or common law, copyright, although, in a proper case, it may award relief on the ground of unfair competition.[20]

§ 449 Equitable relief to authors, apart from copyright law.

Even where an author has no common law or statutory copyright, protection is frequently afforded as between the parties, on the ground of breach of trust or confidence or contract, express or implied. Thus, for example, an employer was protected against the publication of stenographic notes for letters, taken by an employee to a third person, who knew how they were obtained.[21] Similarly, it was held[22] that unwritten interpolations in a play,

16—Ockenholdt v. Frohman, 60 Ill. App. 300.
17—Mansell v. Valley Printing Co., (1908) 2 Ch. 441.
18—See § 1661.
19—Stern v. Laemmle Music Co., 74 N. Y. Misc. 263.
20—Potter v. McPherson, 21 Hun N. Y. 559.
21—Laidlow v. Lear, 30 Ont. 26.
22—Keene v. Wheatley, 4 Phila. 157.

"gags" so-called, composed by an actor in plaintiff's employ, while not a possible subject of copyright, could not be used by a rival manager, who obtained them by a breach of confidence on the part of the actor. Such cases, a number of which are collected in the footnote,[23] are decided on general principles of law entirely apart from questions of copyright. Similarly, in another instance,[24] a newspaper publication of the contents of an unpublished, unperformed play then in process of rehearsal, was restrained on the ground that its subject matter must have been obtained through a breach of confidence by one of the actors in the play.

§ 450 Relief on principles of unfair competition.

Protection is also given, at times, where the facts warrant it, upon principles of the law of unfair competition. This latter subject is discussed elsewhere.[25]

23—Jovatt v. Winyard, 1 Jac. & W. 394; Reuters Telegram Co. v. Byron, 43 L. J. Ch. 561; Lamb v. Evans, (1893) 1 Ch. 218; Louie v. Smellie, (1895) 11 T. L. R. 515.

24—Gilbert v. Star Newspaper, (1894) 11 T. L. R. 4.

25—See § 1180.

CHAPTER VI

EXTENT AND SCOPE OF COPYRIGHT

§ 451 Effect of copyright under present Act, in connection with prior and subsequent copyrights.

§ 452 Copyrights in composite works.

Section 3. *That the copyright provided by this Act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act.*

§ 453 Copyright in works not entirely original.

This section of the law deals with the situation disclosed in the great bulk of non-imaginative works, whether of literature, music, or applied art.

It has been shown that originality is essential to render a work subject to copyright.[26] Such originality may, however, consist either in the matter or arrangement of a work,[27] but not in matter copied, literally, from prior works.[28]

§ 454 Works, only partially original, copyright as to the original portion thereof.

It is, of course, self-evident, that all works are not copyrightable, but it is not always appreciated so readily, that a work may be partially copyrightable and partially not so. In an excellent opinion,[29] containing one of the mines of copyright dicta characteristic of early American copyright decisions,[30] Mr. Justice Story showed [31] that originality

26—See § 118.
27—Emerson v. Davies, 3 Story 768.
28—Barfield v. Nicholson, 2 Sim. & St. 1.
29—Gray v. Russell, 1 Story 11.
30—Compare, for example, Lawrence v. Dana, 4 Cliff. 1.
31—Page 17.

in the use and exposition of previously existing works and materials, free to all, for use, is the foundation of all classical, scientific and technical works. The original notes made by Professor Gould to Adams Latin Grammar, an uncopyrighted work, as well as their plan and arrangement, were, accordingly, held subject to copyright. Annotations of Wheaton's Elements of International Law were held subject to copyright.[31a] Similarly, a work comprising letter press within the public domain, with original wood cuts, was held[32] copyrightable. These decisions illustrate the points, decided in various other cases,[33] that publishing copyrightable with non-copyrightable matter does not make the copyrightable matter any the less subject to copyright.

§ 455 Notes, annotations and illustrations, in works themselves in the public domain.

§ 456 Combination of copyrightable with uncopyrightable matter.

On the one hand, it was held[34] that copyright of a book would protect the original illustrations in it, since these were subject to copyright, but on the other hand, it was held[35] copyright of a book containing a replica of a monogram, would not protect the monogram, since a monogram could not be the subject of copyright.

§ 457 Such new matter must, however, itself be copyrightable for the rule to apply.

This section of the statute, then, is largely declaratory of previous law.[36] The matter which is worked into new shape by the applicant, for a new copyright may either be copyrighted,[37] or uncopyrighted, matter. Whichever it be, the resultant work is a new work.[38] His work may consist in the addition

§ 458 Declaratory nature of the section, in general.

§ 459 What is a new work made

31a—Lawrence v. Dana, 4 Cliff. 1.

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

33—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618; White v. Geroch, 2 B. & Ald. 298.

34—W. Marshall & Co. v. A. H. Bull, Ltd., 85 L. T. N. S. 77. See also Munroe v. Smith, 42 F. 266 (cover and illustrations, semble).

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

36—Kipling v. G. P. Putnam's Sons, 65 L. R. A. 873, 120 F. 631.

37—As shown elsewhere, § 646, copyrighted matter cannot be used for any such purpose without the consent of the copyright proprietor.

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

out of old materials.

of original work to original work, or original work to uncopyrighted work, or of unoriginal work to previously copyrighted work. The result is the same in each instance. These facts are fully recognized by this section. It, accordingly, protects copyrightable, and also previously copyrighted, matter when combined with uncopyrightable matter. But the extent of such protection is naturally, and necessarily, limited. The uncopyrighted matter so combined with the copyrightable matter is, standing by itself, in no way affected by the copyright obtained in the entire work, nor is the duration of the copyright in any previously copyrighted matter extended, by such a new, or combination, copyright. An excellent illustration as to how this portion of the section may work out was supplied in one of the Encyclopedia Britannica cases. The proprietors, being aliens, and the great bulk of the contributions being written by aliens, the work, as the law then stood, was not copyrightable in the United States. Extensive unauthorized reproductions followed. The proprietors had, however, procured certain articles to be written by citizens of the United States and, purchasing these after copyright together with the copyrights therein, included the articles in their Encyclopedia. On the Encyclopedia being reproduced, it was held[39] the inclusion of these copyrighted articles with uncopyrightable matter, did not affect the copyright therein and relief, necessarily comprehensive in scope, was given the proprietors.

§ 460 Nature of the copyright in such works.

§ 461 Claims of copyright in such works.

A general claim of copyright may be made covering an entire work, partly copyrightable and partly not.[38] The validity of copyright at the present day is fixed, not by the claim of copyright but by other considerations, so that the fact that the claim, if general, would be too broad would be immaterial.

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

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

But if the copyrightable matter cannot be picked out from the non-copyrightable matter, the whole copyright would fail, since the burden is on an author to show his work was copyrightable, if challenged, and unless he can prove this in whole, or part, his copyright cannot be sustained.

§ 462 New editions.

Where a new edition of a copyrighted work is published before the expiration of the first copyright, such new edition may be either unchanged, that is, be a mere reprint, or may contain alterations or additions in or to the copyrighted matter, that is, be a new version of the earlier work.[40] Under the former laws,[41] a copyright proprietor was required to deposit, either in the mail, or in the office of the Librarian of Congress, a copy of every subsequent edition wherein any substantial changes were made. Whether this was all that was requisite, aside from questions of notice, for copyright to enure in the new edition, was not settled by any adjudicated case. The question does not require present discussion, as under the statute now in force, which does not contain the language quoted, it appears clear that new editions, containing substantial changes, would require separate copyright, to protect original additions, alterations and changes embodied in such new work. This view is not affected by the fact that the proprietor of a copyrighted work has, concededly, under Section 1, the right to make other versions thereof. The right is not to be confused with the result. The former arises under the first copyright; the latter may require a second copyright to protect the new matter contained in such changes. Copyright in such new editions, or versions, runs from the date of the new edition, with respect to the new matter contained in it, as well as with respect to the combination made in such edition of the old, with

§ 463 The former rule.

§ 464 New versions require separate copyright.

40—See Thomas v. Turner, 33 Ch. Div. 292; Murray v. Bogue, 1 Drew 353.

41—R. S. 4959.

§ 465 Effect of expiration of copyright in original version.

the new matter. By the express terms of this section, however, the copyright term of the matter first copyrighted is not extended by any subsequent copyright, other than a renewal, and anyone would be at liberty to use such first copyrighted matter (except in combination with matter covered by the second copyright) at the expiration of the original copyright term, or renewal thereof, as the case might be.

§ 466 Copyright in new editions or versions discussed.

New editions of either copyrighted or non-copyrighted works are, then, subject to copyright, if they contain original matter, either supplementary to the work in its earlier form, or consisting of substantial changes in such work. As to such new matter, the new edition is a new work.[42] The distinction is between mere reprints[43] and original alterations or additions. The question is one of fact[44] and degree.[45] Since the protection afforded is so slight, being limited to the new matter,[46] and to the combination of the old and new matter, it would seem that a liberal view may well be taken of what is, and what is not, a new edition.

§ 467 Composite works.

Composite works mean those consisting of matter drawn from various different sources or contributed by different authors. The term would be clearly deemed to cover cyclopedic works were those not mentioned separately, in Section 5, thus showing an apparent conception by Congress, that the one does not necessarily include the other. In spite of this separate reference, however, the term "composite works" seems inclusive enough to cover all compilations, provided only that they consist of several distinct parts, drawn from separate sources.

42—Murray v. Bogue, 1 Drew at p. 365; Kipling v. G. P. Putnam's Sons, 65 L. R. A. 873, 120 F. 631.

43—Thomas v. Turner, 33 Ch. D. 292.

44—Black v. Murray & Son, 9 M. 341.

45—8 D. 382 at p. 387.

46—Kipling v. G. P. Putnam's Sons, 65 L. R. A. 873, 120 F. 631.

§ 468
Periodicals.

Periodicals, include newspapers, magazines and other journalistic productions, as well as publications appearing serially, or regularly at fixed times or intervals. The Copyright Office Regulations[47] speak of the necessity of periodicals appearing at intervals of less than a year to be deemed periodicals but there appears no reason for this limitation, if the times of their appearance are fixed and regular.

§ 469
Nature of copyright in composite works.

A proprietor of composite works can only copyright such works as an entirety, if he has shown selection and arrangement in assembling the whole, except as to those parts of which he is the author or proprietor, which he can, of course, copyright for other reasons. In either event, one copyright by him, will copyright everything he can copyright. This was illustrated in a case,[48] where it was said the copyright of an atlas would protect all maps in it, without necessity for individual copyright of each map. He cannot copyright matter of which he is not the author or proprietor, without the author's or proprietor's consent or authority but he may, if the circumstances show this was intended, be deemed a trustee of the copyright for the proprietors of portions of the work not owned by him, even though the copyright is taken in his own name, without any indications that he is such trustee.[49] Any attempt on an author's part to take out a copyright, in that author's name, on matter that has appeared in a periodical, for which a general copyright has been taken in the name of the publisher, is so inconsistent with any claim of such a trust, however, as to negative any contention that it was intended.[50]

§ 470
One copyright of a work protects everything copyrightable therein by the proprietor.

§ 471
Copyrights for benefit of third persons.

Thus, this section does away with any necessity

47—Copyright Office Bulletin No. 15, p. 7.
48—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618.
49—Lawrence v. Dana, 4 Cliff. 1.
50—See § 814.

for the taking out of individual copyrights on several contributions of different persons, included in a single publication, if all of these are owned by one proprietor, or if he represents all of the proprietors, in taking out the copyright.

§ 472 Effect of Act on copyrights obtained under prior acts.

In a very recent decision,[51] the question arose whether a copyright, obtained under the Act prior to the present one, in a song, consisting of music and words, would protect the words from separate publication. The plaintiff invoked this section of the law for its protection. The Court deemed, however, that the application of the section was limited to copyright, taken out under the present Act. The Court appears to have been unaware of the declaratory aspects of the section and of the prior law of infringement by partial reproduction.[52] For reasons given elsewhere,[53] its view of the section is not deemed sound. The portion of the section with reference to the "scope" of prior copyrights would appear to refer rather to the extent of the matter copyrighted or to the duration of rights therein, than to the aggregate of rights constituting copyright. This decision is discussed in detail elsewhere.[54]

51—M. Witmark & Sons v. Standard Music Roll Co., 221 F. 376.
52—See § 1031.
53—See § 245. See also Kelly v. Hooper, 4 Jur. 21.
54—See §§ 1655-9, 1010, 1614.

CHAPTER VII

SUBJECT-MATTER OF COPYRIGHT

Section 4. That the works for which copyright may be secured under this Act shall include all the writings of an author.

§ 473 The present subject matter of copyright.

This section has a two-fold aspect. It shows both the general subject matter of copyright and the necessarily inherent limitations which underlie what may be copyrighted.

§ 474 Everything now copyrightable in which Congress may permit copyright.

Congress has, by using the very words which are used in the section of the Constitution from which it drew the power to pass this Act,[55] shown its intention to exercise that power with respect to all matter in which it could allow copyright constitutionally.[56] It must, therefore, be deemed that everything is copyrightable under the present Act which could, constitutionally, be made copyrightable.

§ 475 Effect of enactment present section on prior law.

In this respect, the Act marks a revolutionary advance in copyright legislation, as all previous Acts confined copyright protection to limited, specified classes of works. Decisions which held, under prior Acts, that works of a given type were not copyrightable under such Acts should, accordingly, be read, and cited, with extreme caution, and only after being carefully considered in connection with the change effected by this section.[57] The importance of this section has, apparently, been

55—See § 81.

56—See House Report 2222 (*ante*, § 73) at p. 10.

57—Cf., for example, J. L. Mott Iron Works v. Clow, 72 F. 168 (an excellent and interesting opinion which is not law; Cf. Da Prato Statuary Co. v. Giulani, 189 F. 90.)

overlooked even by the Copyright Office, judging from its Regulations.[58]

§ 476
What writings are copyrightable.

Copyright is now possible to an "author" in any of his "writings."[59] Such writings must merely tend to promote the "progress of science and the useful arts,"[60] to be copyrightable. Literary merit is not essential. Artistic merit is not requisite.[61]

§ 477
The writings need not possess merit.

The courts will not act as critics[62] and, curiously enough, the more cultured the judge[61] the more reluctant he is, apparently, to pass on any question involving the taste, merit or intrinsic value of a given work in which copyright is claimed.

As has been shown, however, a work must be original or there is no constitutional warrant for its being made the subject of copyright.[63] Judge Shipman expressed the matter as follows:[62]

> "It is difficult to lay down any precise rule which can be applied in all cases as a test of originality. A work may be original in the eye of the law when it is not in the eye of the critic. . . . The policy of the law is to encourage literary labor so far as it can be done without infringing upon the rights already granted to others. Plagiarism and servile imitations are not to be encouraged. Those literary thefts which are committed upon copyrighted works the law promptly suppresses. The mere copyist or the slavish imitator who reproduces old materials substantially in their old form without new combination is entitled to no protection under the statute. But the law rests upon no code of comparative criticism. It protects alike the humblest efforts at instruction or amuse-

58—See § 571.

59—See § 87.

60—See § 93.

61—Bleistein v. Donaldson Lithographing Co., 188 U. S. 239; Hoin v. Harris, 175 F. 875.

62—Bouccicault v. Fox, 4 Blatch. 87.

63—See § 118; DuPuy v. Post Telegram Co., 210 F. 883.

ment, the dull productions of plodding mediocrity and the most original and imposing displays of intellectual power."

Very little reflection upon the subject matter of copyright will demonstrate the necessity for these views.

§ 478 "Originality" and merit are not synonymous.

Judges have, however, occasion when, sitting on the Patent side of the Court, constantly, to consider questions of novelty or originality and cannot, logically, escape similar consideration in Copyright causes. It has, however, been said,[64] that where the copyrightability of a given production is challenged for want of originality, the Court will rarely, if at all, on demurrer, take judicial knowledge of whether it is original or not.

§ 479 Judicial knowledge not taken of "originality."

§ 480 The public domain of uncopyrighted works.

Each theory[65] as to the origin of property in the physical expression of thought, must recognize the existence of a vast fund of ideas and of literary and artistic works in which there is no copyright and which constitute a field or fund available for the use of all men, that is, works in "the public domain" of formulated thought. It is deemed Congress could not, constitutionally, allow copyright in works in that "domain," since, as such works are there for anyone to use, to allow anyone, even their author, a copyright therein, after they became free to the public, could not possibly "promote" that "progress of science and the useful arts" for which alone Congress may legislate. Such progress has been "promoted" by such a work, as fully as possible, before, and after, it became part of the "public domain." *A fortiori*, and from the very language of the constitutional provision, Congress could not grant copyright in a work in the public domain, to anyone other than to its author or originator.[66]

§ 481 Matter in the public domain is not subject to copyright.

64—Henderson v. Tompkins, 60 F. 758.
65—See §§ 139, 140.
66—See §§ 81, 93, 611.

As a contrary result would be unconstitutional, it is not doubted the broad language of the Act will be so limited by judicial construction as to render it coextensive only with the limit of congressional power.[67] A decision under the temporary Act passed in connection with the Louisiana Purchase Exhibition reached this result.[68] On the other hand, as has been pointed out, the originality necessary for copyright, does not involve the use of this term in any very exact or scientific sense. The thoughts which are conceived by the great mass of men are simply a reformulation of thought impulses derived from other men, other works, or external factors. Thoughts which have never been thought before are of an exceeding rarity. The new combination, or refurbishing of old thoughts, or old matter, is due to independent thought, is meritorious and usual. Copyright is not an aristocratic institution. It is, hence, not limited to the product of genius, or even talent, but extends to the tangible product of any thought which is the result of independent mental effort and not mere mechanical repetition or deliberate copying. It is not necessary, hence, that the thoughts in works need be novel to be protected. They may be suggested, though not copied, by the works of another.[69] All that is required to afford the needed degree of originality, is independent thought and an absence of copying the work of others. To this somewhat limited and non-exacting extent, writings, to be copyrightable must be original.

§ 482 Meaning of the originality necessary to copyright.

Unless a work is original, it is not the work of the pretended author.[70] All thought, unless plainly

67—Clayton v. Stone, 2 Paine 382.

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

69—Schumacher v. Schwenke, 25 F. 466; American Mutoscope Co. v. Edison Mfg. Co., 137 F. 263 (an extreme case).

70—Dicks v. Yates, 18 Ch. D. 76 at p. 92; Byrne v. Statist Co., (1914) 1 K. B. 622.

perverted, is of value to the State, as progress and civilization spring from, and increase with thought. Unoriginal thought, mere repetition, can only hinder true thought by encouraging mental laziness or dishonesty. Hence, public policy forbids its encouragement, and, as has been pointed out, copyright acts are intended to give protection commensurate with the original work done by an author himself.[71]

§ 483 Copyright in the original portion of a partially original work.

Very few works, however, taking the mass of copyrighted works by and large, are entirely original.[72] That they are not entirely original will not prevent copyright in so much of the work as is original.[73] There may be copyright in part of a work only.[74] Copyrighting a work will only copyright the copyrightable matter contained in it.[75] The work of others is not the "writing" of the applicant for copyright, or the author under whom he claims, and he cannot obtain copyright in a stranger's work. If this principle is kept firmly in mind, it will prevent much confusion of thought and many errors in the understanding of case law.

§ 484 Copyright only protects the portions of a work copyrightable.

Copyrighting a given work, hence, does not, necessarily, copyright everything in that work. As has been shown, a work may consist of both copyrightable and uncopyrightable matter.[76] Where a work containing both copyrightable and uncopyrightable matter is copyrighted, the only effect of the copyright is to protect the original copyrightable matter contained in it.[77] This rule was well illustrated in a case [78] where English copyright was taken out in Oliver Wendell Holmes, "The Guardian Angel." All but the last six chapters had been pub-

§ 485 Effect of copyrighting a work, part of which is public property.

71—Dicks v. Brooks, L. R. 15 Ch. Div. 22.
72—Emerson v. Davies, 3 Story 779.
73—Hein v. Harris, 175 F. 875.
74—Low v. Ward, L. R. 6 Eq. 415; Reid v. Maxwell, 2 T. L. R. 790.
75—Royal Sales Co. v. Gaynor, 164 F. 207.
76—See § 453.
77—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547.
78—Low v. Ward, L. R. 6 Eq. 415.

lished in the United States, before application was made for English copyright. The Court held, that where the parts of a work could be separated, there might be copyright in any distinct part of it and that, hence, the copyright was valid as to the last six chapters of the novel, although invalid as to the rest of the work.

§ 486 Copyright may exist either in matter or its arrangement.

The originality requisite for copyright may consist either in the formulation of ideas by independent thought, whether in words, or in, or upon, some material substance, or it may consist in the assemblage or arrangement of facts, as in the case of directories, maps, etc. That is, copyright may be either in matter or arrangement, but not in matter copied from prior works.[79] Thus it was held[80] there could be no copyright in specifications of patents copied from the originals in the Patent Office but, on the other hand, daily digests of instruments filed in public offices, were held copyrightable.[81]

§ 487 But not in mere copies.

§ 488 Independent, honest duplication of copyrighted works.

If the originality consist in assemblage or arrangement, it necessarily follows that materials common to all mankind may be, and usually are, used. Since such materials are open to anyone to use as he sees fit, the same result may be achieved, independently, by several and, if so, each would be entitled to copyright in his resultant work. This result, inevitable from the very nature of the usual and permissible method for manufacturing the great bulk of copyrighted works, is still, from time to time, overlooked by judges when considering the exceptional, novel or palpably meritorious work before them. Copyright law, accordingly, differs radically from patent law, as the monopoly given by the latter is unqual-

79—Barfield v. Nicholson, 2 Sim. & St. 1; Emerson v. Davies, 3 Story 768.

80—Wyatt v. Barnard, 3 Ves. & B. 77.

81—Trade Auxiliary etc. v. Middleborough etc., 40 Ch. D. 425.

ified, while the right given by the former is preventative in many respects rather than positive.

§ 489 Inherent evidence of originality.

It may be suggested that if a work be novel or have literary or artistic merit, this may be persuasive evidence of originality, approaching the effect of a *prima facie* presumption of fact.

§ 490 Destruction of the original copyrighted work, before copyright.

While, as has been shown,[82] there can be no copyright in a work until it has been given concrete expression, nevertheless, the original work need not remain in physical existence after it has once had physical being, in order to be copyrightable, if copies of it survive in any physical medium. Thus it was held[83] that where drawings were made for designs and dies were engraved from the drawings and the drawings then destroyed, cards being printed from the dies, the drawings were copyrightable after the destruction of the originals.

§ 491 What are "writings" in general.

Definitions of the word "writings," as used in the Constitution, and now in the Act, are relatively infrequent, in the books. What is a "writing" under the Constitution is considered also elsewhere.[84] Mr. Justice Miller's remarks,[85] previously quoted, will bear repetition at this place:

> "By writings in that clause is meant the literary productions of those authors and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression."

Caution should be used not to misunderstand the phrase "literary productions," used by the Court, in the language quoted, in the case cited, as in applying this definition, it has held a photographic por-

82—See §§ 2, 90.

83—Millar & Lang Ltd. v. Polak, (1908) 1 Ch. 433.

84—See § 87.

85—Burrow Giles Lithographing Co. v. Sarony, 111 U. S. at p. 58, 28 L. ed. 349.

trait embodying original intellectual conceptions in the posing of the subject, was a "literary production"—a use of language which if to be understood literally, would be somewhat unusual.

§ 492 The possibility of copyright in the audible expression of thought discussed.

Mr. R. R. Bowker, in his interesting work on Copyright, says:[86] "It seems evident that the phrase 'visible expression' as used in this decision was intended to give a broad definition and not to narrow the definition by the exclusion, for instance, of 'audible expression,' as otherwise the *performance* of a drama or of a musical composition could not be included under copyright protection." This statement may be questioned and the latter portion is a *non sequiter*. There is no support to be found in any adjudicated case for Mr. Bowker's views, as thus expressed. It is deemed that no matter how broad a judicial construction may be given to the word "writings," there must be a "visible expression" of thought, before a right of property can arise in thought. A book can be read aloud, a drama performed and music played, but this capacity goes merely to the use which can be made of the work itself, after its creation. If there be copyright in a work, its unlawful use may be forbidden and its lawful use protected, but this is not the equivalent of saying that there could be a copyright in such use. If there could be a property in "audible expression," there could be a property in original speech and asserted infringement might be the rule rather than the exception.

§ 493 Works of art and music are "writings."

While there are no cases discussing the constitutional aspect of copyright in sculpture, paintings and musical compositions, they are undoubtedly subject to copyright, as a result of universal acquiescence in congressional legislation, making them the subject of copyright.[87] The artist gives visible expression to his "ideas," on canvas; the sculptor,

86—Page 67.
87—See § 98.

in marble, bronze or wood; the photographer, on negative, or positive; the architect, in buildings; the designer, in prints; the author, on paper; and so down the line of all possible media in which fugitive thought may be fixed and preserved. "Writings," then, are not confined to books composed of letters, or manuscripts, or printed matter. There is nothing in the Constitution to show there was any intention to limit artistic copyright to the so-called fine arts. Economic conditions existing at the time of the adoption of the Constitution were not such as to require the protection of the rights of reproduction, etc., of works of the fine arts as there were no utilities for such reproduction. Care should be taken, therefore, that the legislative assumption that Congress had power to grant copyright protection to works of the fine arts, does not obscure the fact that, on the face of the power as expressed, it had such authority with respect to works of the useful arts, and has probably so legislated by adoption of the section under discussion.[88]

§ 494 Works of the useful arts.

§ 495 The subject matter of copyright defined.

The subject matter of United States copyright at the present time, then, is all "writings," by which are meant each and every visible expression of the ideas of an author, embodied in any tangible medium, or combination of media, whatsoever, whether on, or in, paper, canvas, marble, bronze, stone, metal, textiles, ivory or any other substance.

§ 496 Inchoate works not copyrightable.

But broad as the subject matter of copyright now is, still, it is not unlimited. Thus there can be no copyright in an inchoate projected publication.[89] So, in England, it was held that a work must be in being before it can be subject to copyright.[90]

§ 497 Ideas not copyrightable.

There can be no copyright in ideas, as such, but only in their mode of expression. Ideas themselves, from their very nature, have been deemed free. So,

88—See §§ 81, 97, 572.
89—Centennial Catalogue Co. v. Porter, 5 F. C. 2546.
90—Maxwell v. Hogg, L. R. 2 Ch. App. 307.

§ 498 Opinions not copyrightable.

an opinion, as such, being a mere idea, is not copyrightable although the language in which it is expressed may be copyrightable. Thus, a daily list of the horses which a newspaper expected to win races, was not protected.[91]

§ 499 Ideas, and the means for communicating ideas, distinguished.

The United States Copyright Acts do not attempt to give a monopoly in ideas, but only to particular cognate forms, or media, for reproducing or communicating ideas.[92] Thus, copyright is not conferred in the ideas formulated, or expressed, in writings, but in the writings themselves, that is, in the expression of such ideas. It may. accordingly, be gravely doubted whether writings could be protected in accordance with their "essence," rather than in accordance with their form, or forms, as their essence would be the ideas embraced therein and protection, in essence, would then be copyright in ideas.

§ 500 Consequences of the distinction.

While it is almost impossible to reconcile the decisions which appear to give protection to certain works according to their essence, and in other cases do not do so, certain suggestions may be helpful. The impossibility of generalization should be patent on a consideration of what may be the subject matter of copyright. To take extreme instances, mathematical tables, logarithms, were held [93] original and subject to copyright, where plaintiff swore they represented his calculations, although there were similar preexisting tables. Trade catalogues have been held copyrightable,[94] even where the subjects shown were representations of existing persons.[95]

§ 501 Mathematical tables.

§ 502 Trade catalogues.

§ 503 Translations.

Translations [96] are copyrightable, even though the work translated is not subject to copyright. It appears obvious that the just measure of the protec-

91—Chilton v. Progress Printing & Publishing Co., (1894) 2 Ch. 29.
92—Kalem v. Harper Brothers, 222 U. S. 55, 56 L. ed. 92.
93—Baily v. Taylor, 3 L. J. Ch. 66 (1 Russ. & My. 73).
94—W. Marshall & Co. Ltd. v. A. H. Bull, Ltd., 85 L. T. 77.
95—National Cloak & Suit Co. v. Kaufman, 189 F. 215.
96—Wyatt v. Barnard, 3 Ves. & B. 77.

tion to be given such works cannot be the same, in practice, as must be given, for example, to a work centering around a novel dramatic situation. The same rules of law apply, however, to all copyrights and the protection to be given a copyrighted work can only be commensurate with the copyright. This suggests that the true rule is that the degree of protection afforded a given work is measured by what is actually copyrightable and copyrighted in it, that is to say, by the degree and nature of the original work contained in it, or from which it results.[97] The degree of protection to be given a work should never be confused with the question as to whether the work itself is copyrightable, either in whole or part.

§ 504 The measure of originality in a work, marks the scope of the copyright therein.

§ 505 Necessity of distinguishing between the subject matter of and the rights incident to, copyright.

In a leading case,[98] the complainant asserted copyright in a book, or series of books, consisting of an introductory essay explaining a system of bookkeeping, with forms of blanks annexed, consisting of ruled lines or headings, illustrating the system and showing how it was to be used in practice. The defendant made account books using the same plan, as far as results were concerned, but with a different arrangement of columns and different headings. It was held that the defendant had not infringed the plaintiff's copyright.

§ 505 The distinction illustrated.

This decision is instructive, in that it illustrates the difference between the question as to whether, or not, a given work is copyrightable and the question of what acts by others, a copyright will prevent. The decision, in spite of *dicta*, did not hold the complainant did not have copyright in at least part of his works, but merely that defendant had only made such use of them as was lawful and proper. Similarly, in an early case,[99] Patterson's "Book of Roads," comprising maps of all the principal roads in England, was held a proper subject for copyright

97—Cf. Dicks v. Brooks, L. R. 15 Ch. D. 22.
98—Baker v. Selden, 101 U. S. 99, 25 L. ed. 841.
99—Carnan v. Bowles, 2 Brown's Ch. R. 65.

but a textual description of these very roads, made from it, was held not to infringe the maps contained in it.

§ 507 Examples of failure to observe the distinction.

On the other hand, the distinction illustrated by these cases is not always observed with clearness. Thus an English decision [1] purports to hold that a drawing, showing a hand holding a pencil in the proper way to mark ballots, could not be copyrighted, except as against exact literal reproduction. The point actually involved, however, was less whether plaintiff had a copyright, than whether copying the idea which his sketch was intended to convey was infringement of his copyright. It is impossible to differentiate a drawing of a hand, technically, save as a matter of degree, from a portrait and no one would even attempt to argue [2] that a portrait is not subject to copyright merely because it represents a living person, whom other artists are free to copy. In another instance,[3] the Court held no blank forms containing any particular arrangement of matter required by the California statutes to be delivered to state officers could be copyrighted, on the ground of public policy, in that the state officers, who were also required to make up forms, could not be embarrassed by the existence of such copyrights in preparing their forms. This decision seems to be a fair example of confusing the right to copyright with the degree of protection afforded a copyright proprietor.

§ 508 Examples of what may not be copyrighted: Judicial

There can be no copyright in judicial opinions [4] in the United States, even by a state, it seems, for reasons of public policy,[5] nor, for similar reasons

1—Kenrick & Co. v. Lawrence & Co., 25 Q. B. D. 99.

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

3—Carlisle v. Colusa County, 57 F. 979.

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

5—Banks v. Manchester, 128 U. S. 245, 32 L. ed. 426; Banks v. West Publishing Co., 27 F. 50; Cf. State of Connecticut v. Gould, 34 F. 319.

apparently, in the letters, speeches and conversations of a public man [6] nor in facts, whether these be new [7] or, *a fortiori*, old nor in a plan [8] or method [9] or art, even though entirely novel, although there may, of course, be copyright in the description [10] of the plan, method or art, as contrasted from the plan, method or art itself. "The copyright book is sacred but not the subject of which it treats" said Judge Coxe.[11]

opinions; public matters; facts; plans, methods or arts.

§ 509 But the description of the latter may be copyrighted.

The United States Supreme Court has phrased the general rule as follows:

> "The description of an art in a book entitled to copyright lays no foundation for an exclusive claim to the art itself. The object of the one is explanation, the object of the other, use. Publication of the book, if the art is novel, and not protected by patent, dedicates the art to the public." [12]

Similarly, it has been held [13] that the copyright of a map of certain wards in the City of New York marked with arbitrary colorings and signs, explained by a reference or key, so that one looking at the map could readily ascertain the characteristics of the buildings located in such territory, was not infringed by a similar map of Philadelphia, as the copyright was of the map, as such, not of the system or contrivance used to facilitate its use. For the same reasons, copyright in a map or chart will not prevent anyone from observing and setting down, the natural objects and public records from which maps are made, so long as he does not copy

§ 510 The effect of copyright in maps or charts.

6—Gilmore v. Anderson, 38 F. 846.

7—Tribune Co. of Chicago v. Associated Press, 116 F. 126; Walter v. Steinkopff, L. R. 3 Ch. D. 489.

8—Burke v. Johnson, 146 F. 209.

9—Ehret v. Pierce, 10 F. 553.

10—Mutual Advertising Co. v. Refo, 76 F. 961.

11—Griggs v. Perrin, 49 F. 15. See also Sayre v. Moore, 1 East 357.

12—Baker v. Selden, 101 U. S. 99, 25 L. ed. 841.

13—Peiris v. Hexamer, 99 U. S. 675, 25 L. ed. 308.

§ 511 Its effect in photographs.

the map or chart itself.[14] So copyrighting photographs of a dancer, dancing, gives no property in her photographed poses.[15]

§ 512 Graphic representations of living persons.

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

§ 513 Paint advertisements.

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

§ 514 Mechanics of book making.

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

§ 515 Pagination, etc.

§ 516 Mechanical devices.

nor, it would seem, in the mere arrangement of reported cases in sequence, their paging and distribution into volumes.[19] Mechanical devices cannot be protected under the copyright statute,[20] in so far as their mechanical aspects are concerned, but, as is pointed out elsewhere,[21] if they are formulated in an original artistic form, no reason appears to exist under the present statute why such form should not be protected by Copyright.

§ 517 Immoral, indecent and libellous works.

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

14—Blunt v. Patten, 2 Paine 397.

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

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

17—Ehret v. Pierce, 10 F. 553.

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

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

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

21—See §§ 606, 572.

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

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

§ 518 Works containing apparently intentional misstatements.

§ 519 Works contravening public policy.

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

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

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

25—Davies v. Boes, 209 F. 53.

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

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

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

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

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

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

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

§ 521 Single word not copyrightable.

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

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

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

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

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

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

32—Cf. Chils v. Gronland, 41 F. 145.

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

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

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

dental to another, examined.

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

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

§ 524 The question treated as one of fact.

In another English case,[41] the plaintiff had been employed as conductor of the orchestra in a theatre

36—See Drone: Copyright.

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

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

39—Maurel v. Smith, 220 F. 195.

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

41—Eaton v. Lake, 20 Q. B. D. 378.

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

§ 525 What is a copyrightable entity.

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

42—See § 523, n. 7.

43—See § 453.

44—See § 456.

45—See § 661.

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

47—See § 618.

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

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

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

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

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

48—See §§ 484, 470.
49—Falk v. Brett Lithographing Co., 48 F. 678.

CHAPTER VIII

CLASSIFICATION OF WORKS FOR REGISTRATION

§ 528
Classification of copyrightable works for registration.

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

§ 529
Books.

(a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations.[52]

§ 530
Registration of copyright.

Sections 11 and 12 of the Act require the registration of all copyrights secured under the present Act.[53] Section 4 is the section which defines the subject matter of copyright.[54] Section 5 does not purport to do anything more than to provide for a partial classification of some of the works copyrightable under Section 5, when registered, as required by Sections 11 and 12. It does not define that which is made copyrightable. Its position in the Act was,

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

however, probably, dictated by a desire to annex illustrations to Section 4 of what Congress intended to include in the language used in that section, but by the express concluding paragraph[55] of Section 5, the specification of works subject to copyright, in Section 5, is not to be deemed exclusive so as to qualify Section 4. The Copyright Office, hence, is

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

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

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

53—See §§ 766, 788.

54—See § 473.

55—See § 588.

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

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

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

§ 533 Printing not necessary.

A book did not need to be printed to be subject to copyright.[58]

§ 534 What a book includes.

A book includes the entire volume, and every part, or division of a volume published separately [59] including the illustrations in it.[60]

§ 535 Picture books.

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

56—See Appendix.

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

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

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

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

trations or pictures only, if such works are not covered by other sections of the Act.[61]

§ 536 The purpose or size of a work immaterial.

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

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

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

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

Catalogues,[65]
Dictionaries,[66]
"Tabulated forms of information frequently called charts,"[67]
Mathematical tables,[68]
Librettos,[69]
Descriptions of moving pictures or spectacles,[70]

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

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

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

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

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

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

67—Blunt v. Patten, 2 Paine 493.

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

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

70—Copyright Office Regulations.

Annotations of common materials,[71]
Collections of statistics,[72]
Translations,[73]
Digests,[74]
Road and guide books,[75]
Time tables, to a limited extent,[76]
Lists of hounds,[77]
Abstracts of titles to lands,[78]
Court Calendars,[79]
Statutory or legal forms or precedents,[80]
Directories,[81]

A secret price list, showing cost and selling prices by means of letters, characters and figures,[82]

Tables of logarithms,[83]
Reports of a mining engineer,[84]
Recipes,[85]
Lists of trotting records and stud books,[86]
Racing charts,[87]

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

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

73—Wyatt v. Barnard, 3 Ves. & B. 77.

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

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

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

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

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

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

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

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

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

83—Baily v. Taylor, 1 Russ. & My. 73.

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

85—Rundell v. Murray, Jac. 311.

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

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

Newspaper reports of public speeches,[88]
Telegraphic codes,[89]
Commercial or other circulars, containing information in the form of reading matter, other than mere lists of names and addresses,[90]
Single poems, which include the words of a song without music,[90]
A shipping and railroad guide,[91]
Literary contributions to periodicals or newspapers,[90]
Application forms,[90]
Lists of statistics,[92]
Periodical abstracts of recorded bills of sale, etc., made from the originals filed in public offices.[93]

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

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

Blank books for use in carrying out any system of transacting business, including records, books of account, memorandum books, diaries or journals, bank books or check books,[94]
Verbatim copies of public documents,[95]
Letter file indexes,[96]
Sleeve pattern charts,[97]

88—Walter v. Lane, (1900) A. C. 539.
89—Ager v. Peninsular etc. Co., 26 Ch. D. 637; Ager v. Collingridge, 2 T. L. R. 291.
90—Copyright Office Rules and Regulations, p. 6.
91—Bullinger v. Mackey, 15 Blatch. 558.
92—Hansen v. Jacquard Jewelry Co., 32 F. 202.
93—Trade Auxiliary Co. v. Middlesborough etc. Co., 40 Ch. D. 425.
94—Everson v. Young, 26 Wash. L. R. 546.
95—Du Puy v. Post Telegram Co., 210 F. 833.
96—Amberge File & Index Co. v. Shea-Smith Co., 78 F. 479.
97—Hollinrake v. Truswell, (1894) 3 Ch. 420. The case of Drury v. Ewing, 1 Bond 540 (contra) which held a chart, published on a single sheet, containing diagrams representing a system for taking the measures for, and for cutting, ladies' garments, with printed instructions for its practical use, was copyrightable as a book, was disapproved in Baker v. Selden, 101 U. S. 99, 25 L. ed. 841.

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

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

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

A single sheet of music;[11]
A single sheet of drawing;[12]
Newspapers;[13]

98—Cable v. Marks, 52 L. J. Ch. 107.
99—Davis v. Committi, 52 L. T. N. S. 539.
1—Chilton v. Progress Printing etc. Co., (1895) 2 Ch. 29.
2—Clayton v. Stone, 2 Paine 382. See § 104 *et seq.*
3—Griffin v. Kingston R. R. Co., 17 Ont. 660.
4—Royal Sales Co. v. Gaynor, 164 F. 207.
5—Page v. Wisden, 20 L. T. N. S. 435.
6—Leslie v. Young, (1894) A. C. 335.
7—Tribune Co. v. Associated Press, 116 F. 126.
8—Fournet v. Pearson Ltd., 14 L. T. N. S. 82.
9—Scoville v. Toland, 6 West. L. J. 84.
10—*Libraco* Ltd. v. Shaw & Walker Ltd., 30 T. L. R. 22.
11—Clementi v. Golding, 2 Camp. 25; Storace v. Longman, 2 Camp. 26 (n); White v. Geroch, 2 B. & Ald. 298; Bach v. Longman, 1 Cowp. 623.
12—Davis v. Benjamin, (1906) 2 Ch. 491.
13—Walter v. Howe, 17 Ch. D. 708 (overruling Cox v. Land & Water Co., L. R. 9 Eq. 324).

Compilations of common materials,[14] if put into the form of a book;[15]

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

§ 540 General observations on the nature of copyrightable books.

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

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

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

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

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

18—Comyns v. Hyde, (1895) 72 L. T. 250; Guggenheim v. Long, 12 T. L. R. 491.

§ 541 Directories.

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

§ 542 Compilations of advertisements.

§ 543 "Book" defined for purposes of copyright registration.

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

§ 544 The limited powers of the Copyright Office.

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

19—Walter v. Lane, (1900) A. C. 539.

20—Lamb v. Evans, (1893) 1 Ch. 218.

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

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

§ 545 The authority to make rules for registration.

§ 546 The Rules in general.

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

§ 547 Commercial and legal forms.

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

22—See §§ 47-61, inclusive.
23—See §§ 23-24.
24—Section 53, § 1612.
25—No. 15. These are set forth in full in the Appendix.

v. Selden[26] where as has been shown,[27] the works involved in the litigation were held not infringed, not totally devoid of copyright.

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

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

§ 549 Prefaces.

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

§ 550 Indices.

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

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

26—101 U. S. 99, 25 L. ed. 841.

27—See § 506.

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

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

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

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

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

The second class of works mentioned in Section 5 are

§ 552 Periodicals.

(b) Periodicals, including newspapers.

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

The third class mentioned are

§ 553 Lectures, sermons and addresses.

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

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

§ 554 Dramatic compositions.

(d) Dramatic or dramatico-musical compositions.

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

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

33—See § 588.

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

§ 555 Dramatico-musical compositions.

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

§ 556 Vaudeville singing act.

The Copyright Office Regulations say: [36]

§ 557 What the term dramatic composition does not include.

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

§ 558 Ballets.

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

§ 559 Animal shows.

35—Green v. Luby, 177 F. 287.
36—See Rules, p. 7.
37—Barnes v. Miner, 122 F. 480.

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

§ 560 Scenic effects.

§ 561 Moving pictures.

The Regulations further provide:

§ 562 The registration of songs.

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

It may be remarked that except for purposes of registration, this may be deemed misleading unless by "ordinary" songs are meant non-dramatic ones. This appears to be the distinction taken in the English cases.[42]

The fifth class created by the section is:

§ 563 Musical composition.

(e) Musical Compositions.

§ 564 Songs.

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

38—See Lee v. Simpson, 3 C. B. 871.

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

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

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

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

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

§ 565 Adaptations and combinations of music.

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

The sixth class is:

(f) Maps.

§ 566 What is a map.

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

§ 567 What is not a map.

§ 568 Anatomical charts.

The seventh class is:

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

§ 569 Works of art.

§ 570 Changes in statutory language.

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

Bishop, 25 L. T. N. S. 908 and Roberts v. Bignell, 3 T. L. R. 552, with Fuller v. Blackpool Winter Garden Co., (1895) 2 Q. B. 429.

In Henderson v. Tompkins, 60 F. 758, a topical song was held copyrightable, apparently as a book, as the Court refused to pass upon its alleged humor.

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

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

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

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

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

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

The Copyright Regulations[48] say that the term "works of art" includes "all works belonging fairly to the so-called fine arts. (Paintings, drawings, sculptures.) Productions of the industrial arts utilitarian in purpose and character, are not subject to copyright registration, even if artistically made or ornamented. No copyright exists in toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics or any similar articles."

§ 572 The narrow view criticised.

This conception appears to take an unduly restricted view of the Act and appears unsupported either by statute or decision. Section 4 shows that Congress intended to make everything copyrightable which it could constitutionally make copyrightable. In changing the phraseology used in the previous Acts, by omitting the enumeration of definite forms of the fine arts, and substituting a general phrase, "works of art," and by omitting the word "fine" before "arts," where it refers to designs, etc., in this subdivision, it might have been deemed that, even without Section 4 of the Act, Congress had ceased to limit copyright protection strictly to works of the so called "fine arts." When, however, the changes in the language of this subdivision are considered in connection with the language used in Section 4, it appears clear that the view taken by the Copyright Office is erroneous. A tapestry is a "woven fabric," a mosaic is neither a "painting, drawing or sculpture." Wonderful Japanese embroideries may show a landscape or field of iris more beautifully than many a painting. Venetian

47—R. S. 4952, as amended by the Act of March 3, 1891.
48—See Appendix.

and other glassware, enamels, ceramics, laces, embroideries, have always justly been deemed works of art, where the thought and taste of the creative mind have guided, and controlled, skilled hands, in the creation and formulation of concrete beauty. A toy even may be an object of the fine arts[49] and no one who has seen the games of chess which are produced in the Orient will deny that a game, or rather the means for playing it, may also be a work of fine art. Playing cards were held copyrightable under prior, far less inclusive, legislation.[50] The Constitution[51] does not speak of the "fine arts" at all, in the provision under which the Copyright Act is passed, but it does speak of the "useful arts." It is deemed that under this section,[52] in view of its apparent purpose, all works of the fine, or useful, arts are registrable, which are the visible expression of creative ideas, relying for acceptance upon their form or thought or informative qualities, as distinguished from products, mechanical in intention, form or scope, falling within the normal domain of patent law.[53]

§ 573 Toys.

§ 574 Playing cards.

§ 575 The true meaning of works of art for copyright purposes.

The views of the Copyright Office, as above expressed, are doubly wrong when it is remembered that the utilitarian object for which a work may be used, in no way affects its copyrightability, if it, itself, would be deemed copyrightable.[54] Thus in an English case[55] it was held that merely because an

§ 576 The utilitarian object of a work does not prevent its copyright.

49—Britain v. Hanks Brothers, 86 L. T. 765.

50—Richardson v. Miller, 20 F. C. 11791.

51—See § 81.

52—Section 4.

53—As to what the requisite originality in such a case is, see Saunders v. Wiel, (1893) 1 Q. B. D. 470, a patent design decision.

54—Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 47 L. ed. 460; Yuengling v. Schile, 12 F. 97; National Cloak & Suit Co. v. Kaufman, 189 F. 215; Schumacher v. Wogram, 35 F. 210; contra, would doubtless not be followed in view of the Bleistein case.

55—Hildesheimer v. Dunn, 64 L. T. N. S. 452. See also Louis De Jonge & Co. v. Breuker Kessler Co., 182 F. 150, aff'd 235 U. S. 33, 59 L. ed. 113.

article in which copyright is sought is one of commerce, was no reason for holding it was not copyrightable. In that case, the article consisted of a gloved hand, painted on cardboard, the front of the hand being on one side and the back on the other. The cardboard was arranged to open, book-wise. When open, the lines of palmistry appeared on the one interior surface and some verses on the other. The Court was in doubt whether this was a book or a picture, but entertained no doubt it was a copyrightable work and protected it accordingly. In an earlier case [56] an album with designs on each page, around an open space, intended to be filled by the insertion of a photograph, was said to be non-copyrightable as a book, as it was a mere article of commerce. What had been copied in that case was the structure of the work, not the designs, so that there was no infringement by defendant in any event. The dicta in the case appear unconsidered and overruled.[55] Similarly, in another case,[57] a painting, seven inches by four and one-half inches, painted for a corporation, from a design suggested by a woodcut of another's painting, was held copyrightable, neither its small size nor that it could readily be lithographed and used as an advertisement nor that it was suggested by the work of another, affecting this result.

The medium in which a work of art is embodied cannot, in view of Section 4, affect its copyrightability and, since culture may be deemed, at least, as important as mere learning, in national development, it is deemed the subdivision of this section should be construed liberally and that the views of the Copyright Office with respect to the scope of the present statute, in this respect, should be disapproved.

56—Schové v. Schmincké, 33 Ch. D. 546.
57—Schumacher v. Schwencke, 25 F. 466.

§ 577 Artistic works under the English law.

The British Act, Section 35 defines artistic work to include a work of "artistic craftsmanship" and has ceased to limit copyright protection merely to works of fine art. It should be carefully remembered, however, that copyright protection in the case of works of art designed purely for utilitarian purposes would not protect so much of the work as consists in its capacity for use in any given capacity but merely its form, in so far as original.[58] Thus in one case[59] an envelope with the word "The Christograph" printed upon it, containing a piece of cardboard, so cut that it cast a shadow representing the painting "Ecco Homo," and a slip of paper bearing some lines from Longfellow, which served as a key for the use of the cardboard, was held not to be subject to copyright, as it was a mere child's trick, except for the verse and reproduction of the painting, neither of which were the original work of its author or deviser. In another case,[60] it was said that colored designs for rugs and carpets, having a substantial monetary value, painted by skilled persons, were, nevertheless, not copyrightable as paintings but merely registrable as designs. This *dictum*, is doubtful on principle, and not law in the United States.[61]

§ 578 Cautionary remarks as to scope of possible copyright in works of the useful arts.

The eighth class is:

(h) Reproductions of a work of art.

§ 579 Reproductions of works of art.

The Copyright Office Regulations[62] say, and it is believed correctly, "this term refers to such reproductions (engravings, woodcuts, etchings, casts, etc.) as contain in themselves an artistic element distinct from that of the original work of art which has been reproduced." Unless this view be taken, it is

58—Cf. Burnell v. Chown, 69 F. 993.

59—Cable v. Marks, 52 L. J. Ch. 107.

60—Woodward v. London etc. R. R. Co., (1878) 3 Ex. Div. 121.

61—Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 47 L. ed. 460.

62—Number 13.

deemed reproductions of a work, in the public domain, or previously copyrighted, could not be copyrighted, constitutionally.

The ninth class consists of:

(i) Drawings or plastic works of a scientific or technical character.

§ 580 Drawings and models of a scientific nature.

These terms include diagrams of models illustrating scientific, or technical, works, or formulating scientific, or technical, information, in plastic, or linear, form, as for example, a model of the human eye for class room use, architects' or engineers' plans or designs,[63] etc.

The tenth class is:

(j) Photographs.

§ 581 Negatives and positives.

This class does not include motion pictures. The words "or negative thereof," found in previous statutes, after the words "photographs," have been omitted. The Copyright Office Regulations accordingly, deem the term, as here used, to cover only positive prints. While ordinarily such an omission would appear to lead to such result, it can scarcely be doubted, in view of the language of Section 4, that negatives are copyrightable, equally as much as positives.

§ 582 Photographs of paintings.

A photograph of a painting has been held[64] an original photograph, subject to copyright. The Court remarked that all photographs are copies of some object. This is of course true, and no objection to deeming that photographs are original. The constitutional aspect of copyright in photographs is discussed elsewhere.[65]

The British Act,[66] defines photographs as including photo-lithographs and works produced by

63—Copyright Office Rules, 14.
64—Grave's Case, L. R. 4 Q. B. 715, p. 723.
65—See § 89.
66—Section 33.

processes analogous to photography, but these, in the United States, are, probably, included in the following class, to wit:

(k) Prints and pictorial illustrations.

§ 583 What are prints and pictorial illustrations.

§ 584 The nature of copyright in engravings.

This term includes engravings, wood cuts, prints,[67] chromos[68] and photogravures, half tones, photo engravings, and all other pictures not photographs, or otherwise classified in the Act, reproduced by mechanical processes. Copyright law with reference to this class of works, is well illustrated by language used in a leading case which dealt with engravings:

> "An engraver is always a copyist," said Best, C. J., in Newton v. Cowie,[69] but "although a copyist, produces the resemblance by means very different from those employed by the painter or draftsman from whom he copies: means, which require great labor and talent. The engraver produces his effects by the management of light and shade, or, as the term of his art expresses it, the chiaro-oscuro. The due degrees of light and shade are produced by different lines and dots; he who is the engraver must decide on the choice of the different lines and dots for himself and on his choice depends the success of his print. If he copies from another engraving he may see how the person who engraved that has produced the desired effect and so without skill or attention becomes a successful rival. The first engraver does not claim the monopoly of the use of the picture from which the engraving is made; he says, take the trouble of going to the picture yourself but do not avail yourself of my labor, who have

67—Whether colored or not. Hills & Co. v. Austrich, 120 F. 862.
68—Yuengling v. Schile, 12 F. 97.
69—4 Bing. 234.

been to the picture and have executed the engraving."

§ 585 Illustrated business catalogues.

It has been held[70] that the protection of the present Copyright Law is not confined to pictorial illustrations known as works of fine art, so that the commercial purpose, form and utility of an illustrated catalogue was no bar to copyright.

The next class created by the Section is:

(l) Motion picture photoplays.

§ 586 What are motion picture photoplays.

This term means dramatic compositions in photographic form, designed for representation upon a blank wall or screen, by having light cast through them, while in motion. It includes all motion pictures where the arrangement, plot, incidents, or acting form, or the combination of incidents represented, give the work, as a whole, the character of pantomime in photographic form.[71] It does not include scenarios or descriptions of moving picture plays, which would, however, be copyrightable as books.[72]

The final class created by the Section is:

(m) Motion pictures other than photoplays.

§ 587 Other motion pictures.

This class includes all copyrightable motion picture photographs, which are not photoplays. In view of the reservation of opinion on that point in Burrow Giles Lithographing Co. v. Sarony,[73] it must, despite the decision in Cleland v. Thayer,[74] be deemed, technically, an open question whether ordinary, as distinguished from artistic, photographs, are copyrightable. It is believed, however, that by a careful study of the line of testimony which proved effective in the Sarony case, almost

70—National Cloak & Suit Co. v. Kaufman, 189 F. ?15.

71—Prior to the passage of the present Act such works were protected as photographs: Edison v. Lubin, 122 F. 240.

72—See § 537.

73—111 U. S. 53, 28 L. ed. 349.

74—121 F. 71.

any photograph can be proven copyrightable, on the facts,[75] as most of the matters that impressed the Court in the Sarony case are common, consciously or not, to most exercises of photography and that this is particularly true of motion pictures.

The Section, after making the foregoing classifications, concludes with the words:

§ 588
Express provision that the classification effected by Section 5 is not exclusive.

"Provided, nevertheless, that the above specifications shall not be held to limit the subject-matter of copyright as defined in Section 4 of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act."

This language emphasizes that the section under discussion is designed purely for administrative purposes and not as an exclusive enumeration of works copyrightable under the statute.

§ 589
Errors of classification.

Errors of classification do not affect a copyright[76] nor do the enumerated classes of copyrightable matters limit the scope of what is copyrightable under the Act. It should be noted, however, that the saving clause in this section with reference to erroneous statements in the application for registration only refers to errors of classification.

§ 590
Misstatements in applications for copyright registration, other than as to classification.

A serious question may then arise, if the application contain incorrect statements of fact, other than as to the classification of a work. It would appear that having due regard to the machinery of the Act, and the purpose of requiring such information, to-wit, that persons interested may be on their guard against infringement, that such incorrect statements would vitiate the registration.[77]

Various classes of copyrightable, or non-copyrightable, works may be discussed here to advantage.

75—Falk v. Brett Lithographing Co., 48 F. 678; Thornton v. Schreiber, 17 F. 603; Falk v. Donaldson, 57 F. 32.

76—Green v. Luby, 177 F. 287 .

77—Cf. Thomas v. Turner, 33 Ch. D. 292.

It may also be remarked that all decisions prior to the present Act as to what is not copyrightable require the most careful scrutiny before they be deemed authorities under the present Act, because of the great extension, potentially and actually, made in the subject matter of copyright, by reason of the enactment of Section 4 of the present Act.

§ 591 Copyright in titles of works.

Thus the decisions were in conflict as to whether, or not, copyright could be obtained in a title itself. The better opinion, as the law stood, appears to have been that such titles, *per se*, were not copyrightable.[78] They were not "books" but the titles of books.[79] If at the present time, a title shows originality, it would seem, however, that it might be copyrightable as a "writing," since length cannot be a requisite of copyright and much thought may be packed into small compass.[80] Protection has been given titles as trade-marks and along the lines of unfair competition, even where they have not been held copyrightable.[81]

§ 592 Protection of titles on other grounds.

§ 593 Trade-marks.

Trade-marks, as such, are deemed non-copyrightable[82] but a work of art would, it seems, be copyrightable, even though designed to be used as a trade-mark.[83]

§ 594 Prints and labels for utilitarian purposes.

The Attorney General of the United States has been of opinion that prints or labels, "not connected with the fine arts," but "designed to be used for any other articles of manufacture," are, by virtue of Section 3 of the Act of June 18, 1874, which sub-

78—Dicks v. Yates, 18 Ch. D. 76; Harper v. Ranous, 67 F. 904; Corbett v. Purdy, 80 F. 901; Crotch v. Arnold, 54 Solic. J. 49; Broad v. Meyer, 57 Solic. J. 145.

79—Osgood v. Allen, 1 Holmes 185.

80—In Chils v. Gronland, 41 F. 145, English definitions of foreign words, no matter how short, were held copyrightable.

81—See § 1177.

82—Trade Mark cases, 100 U. S. 82, 25 L. ed. 550.

83—Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 47 L. ed. 460; Rosenbach v. Dreyfus, 2 F. 217, is probably no longer law. See National Cloak & Suit Co. v. Kaufman, 189 F. 215.

division he deems unrepealed, not copyrightable but subject only to registration in the Patent Office, "in conformity with the regulations provided by law as to copyright of prints," except that there shall be paid for recording the title of any print or label, not a trade-mark, six dollars. Both the Patent and Copyright Offices have, necessarily, acted upon this construction of the statutes.

§ 595 Method of registration under Act of 1874.

§ 596 The Act of 1874.

The Act of June 18, 1874, was an act to amend the law relating to patents, trade-marks and copyrights. No reference was made to any particular statute in any more definite form. That Act, by its first section, regulated the form of notices of copyright and referred, in this connection, to prints, cuts, engravings and chromos, as well as to other classes of copyrightable works. It referred, in its second section, to certain fees, to be paid to the Librarian of Congress. Its third section read as follows:

> "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."[84]

84—Act of June 18, 1874.

§ 597
Provisions as to labels, etc., in the drafts of the present Act.

There can be no question that to the extent of the first two sections and the definition contained in the third section, at least, this Act is repealed.

In the earlier drafts of the present Act, Section 5 contained a subdivision [85] which, if enacted, would have made an especial classification of "Labels, and prints relating to articles of manufacture, as heretofore registered in the Patent Office, under the Act of June 18, 1874." The proposed term of copyright [86] therein was twenty-eight (28) years and a reference thereto made in the section [87] requiring the deposit of copies. All these proposed provisions were stricken out, before the enactment of the present Act. The proposed Act as originally drafted, on the other hand, only purported to give copyright in the "works" [88] of an author, instead of in all "writings." What the significance of the omission of the provisions with reference to labels was is not explained by Committee reports or debates. Whether Congress deemed that since by the Act, it made everything copyrightable which it could make copyrightable, it was unnecessary to make especial provision in the Act for such prints and labels; whether it thought that in omitting the limiting definition of the Act of 1874 with reference to the meaning to be given to "prints," (it is to be noted the words "cut" or "engraving," the use of which was also so limited by the same definition, are entirely omitted from the present Act), the words "prints" and "pictorial illustrations" would comprehend labels or prints designed to be used for other articles of manufacture, or whether it purposed to leave a fragment of the Act of June 18, 1874, with reference thereto in force, is shrouded in

§ 598
Discussion of the omission of such provisions and the effect of the Act, as passed upon registration of labels, etc., under the Act of 1874.

85—See Copyright Office Bulletin No. 12 (1906).

86—Idem, p. 12.

87—Idem, p. 22.

88—See Copyright Office Bulletin No. 12, (1906) p. 12, and House Committee Report 2222, *supra*, § 78.

mystery, as far as extrinsic evidence is concerned. That such prints or labels could be made copyrightable, if original, would seem clear. That Congress intended to make everything copyrightable, which it had the power to make copyrightable, is also known.[89] While in view of these considerations, and the grammatical structure of the Act of 1874, and in view of the self evident fact that the bulk of the Act is repealed by the present one, the correctness of the Attorney General's opinion might be well doubted, still, in view of the great weight given by the Federal Courts to departmental practice and decisions, it is possible that, if questioned, his opinion would be upheld. It should be observed, in this connection, that the construction which that Act required to be put on the words "prints or pictorial illustrations" was limited to the Act and no such limitation is found in the present Copyright Law, although the same words "prints and pictorial illustrations" are used there. So that the question just discussed is not one of the construction of words in Section 5 but whether, or not, so much of the Act of 1874 remains unrepealed as prescribes a different mode of registration for prints and labels intended to be used in connection with articles of manufacture.

§ 599 Remedies of parties registering labels.

The learned opinion of the Attorney General[90] curiously enough, does not discuss the effect of Section 4 of the Act, in its bearing upon the problem before him. If the Act of 1874 remain unrepealed, in part, the decision in Marsh v. Warren,[91] remains of interest. In that case it was held that the rights and remedies of persons registering labels under that Act, were those contained in the copyright laws and that the Act referred to such labels, prints, etc., as were unpublished, up to the time of registration.

89—See House Committee Report 2222, *supra.*
90—23 Opinions Attorney Gen. 116.
91—4 Am. L. T. N. S. 126.

§ 600 Only published labels may be registered.

It may, however, be noted that by applying the reasoning of that decision to the present Act, that if a portion of the Act of 1874 be still in effect, it, because of the change in that law made by Section 9,[92] now refers to published labels only.

§ 601 News.

News, as such, is not copyrightable, although the form [93] in which it is expressed, may be.[94] This is really a question of infringement and will be found discussed under that head.[95] The Courts, in one instance,[96] thought daily price quotations of too fugitive a character to be copyrightable, but this case is sustainable on the ground of lack of originality.[97] Such quotations may, however, be protected under the doctrine of unfair competition.[97]

§ 602 Daily price quotations.

§ 603 Advertisements and catalogues.

A mere advertisement of a bare list of articles, prices or facts would seem not copyrightable. It would lack the minimum of originality necessary for copyright. On the other hand, catalogues [98] and other advertisements having originality, or a quasi artistic character, are copyrightable. It requires very little originality, indeed, to render proposed advertising matter copyrightable. So catalogues of ladies' suits [99] and of tombstones [1] and circus posters [2] have been held copyrightable. One English

§ 604 Posters.

§ 605 Price lists.

92—See § 729.

93—Tribune Co. of Chicago v. Associated Press, 116 F. 126; Walter v. Steinkopff, (1892) L. R. 3 Ch. D. 489.

94—Springfield v. Thame, 89 L. T. 242.

95—See § 968 *et seq.*

96—Clayton v. Stone, 2 Paine 382.

97—National Tel. News Co. v. Western Union, 60 L. R. A. 805, 119 F. 294; Exchange Telegraph Co. v. Gregory & Co., L. R. (1895) 1 Q. B. 147.

98—Hotten v. Arthur, 5 H. & M. 603; Maple v. Junior Army & Navy Stores, 21 Ch. D. 232; W. Marshall & Co. Ltd. v. A. H. Bull Ltd., 85 L. T. 77; Da Prato Statuary Co. v. Guilani, 189 F. 90; National Cloak & Suit Co. v. Kaufman, 189 F. 215; Davis v. Benjamin, (1906) 2 Ch. 491; J. H. White Mfg. Co. v. Shapiro, 227 F. 956.

99—National Cloak & Suit Co. v. Kaufman, 189 F. 215.

1—Da Prato Statuary Co. v. Guilani, 189 F. 90; Grace v. Newman, L. R. 19 Eq. 623.

2—Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 47 L. ed. 460.

case has even gone so far as to hold there could be copyright in a catalogue simply consisting of an alphabetical arrangement of druggists' wares, with prices attached, with headings and sub-headings.[3] But it may be questioned whether this, and other extreme English decisions, would be followed here, in view of the Constitution. The tendency of the more modern cases is to increase, rather than to restrict, the subject matter of copyright and this is plainly indicated by the advertisement cases. This is unquestionably due to changes in the language of statutes applicable in the premises.

§ 606
Designs for works of art, both patentable and copyrightable.

The Act of May 9, 1902, provides that any new original and ornamental designs for an article of manufacture may be patented. This Act is not specifically repealed by the present Copyright Code but, if such manufactured articles are to be "objects of art," it would appear that designs therefor may be copyrighted as "writings," whether, or not, they may be patented.

It is deemed that it is merely a matter of legislative intention and procedure whether many forms of expression, lying on the borderland between copyright and patent, be subject to the Copyright or Patent Laws, and that such designs fall into the natural, as distinguished from the artificial, historical, domain of copyright. Such designs would accordingly appear both copyrightable and patentable.

In an interesting decision, involving this point,[4] a painting of artistic merit, but suitable also for designs to be printed on boxes, copies of which were intended to be used for that purpose, could, it was held, under the statutes as they existed prior to the adoption of the present Act, be protected either by copyright or patent. The Court said that if an

3—Collis v. Cater, 78 L. T. 613.

4—Louis DeJonge & Co. v. Breuker & Kessler Co., 182 F. 150, aff'd 235 U. S. 33, 59 L. ed. 113.

election was made of either, it was exclusive, but did not intimate that both a design patent and copyright might not have been taken out simultaneously. This decision appears law under the present Act, but is no authority against a ruling that both copyright and patent may not, in a proper case, co-exist in connection with different aspects of a given entity.

Under the English statutes, it has been held[5] that a patent and a design copyright may co-exist in connection with the same work.

§ 607 The registration of copyrightable matter, not classified by Section 5.

The interesting question remains to be considered whether the copyrightable matter not falling within the classes enumerated, is to be described as "unclassified," in applying for registration or what, if any, "specification" in connection therewith, the application for registration should contain.

It is to be noted that while all copyrights require registration, only certain classes of copyrights, in terms, require specification, in the applications for registration, of the class within which they belong and that the section requiring such specification, expressly provides that no error in classification shall affect the validity of the copyright and that the enumeration of specified classes for specification shall not be taken to limit the subject matter of copyright. It would seem then, that the provision thus made for specification or classification, is merely designed to facilitate the administrative details of the Copyright Office's work and that where no provision is made for classification, no attempt to classify an unenumerated work need be made by the copyright proprietor nor need he describe the work as unclassified. It was probably the intention of the framers of the Act by laying down broad general classes of works to make these as inclusive as possible. Since misdescription will

§ 608 Prudential rules in filing applications for copyright.

5—Werner Motors Ltd. v. A. W. Gambage Ltd., (1904) 1 Ch. 264.

not affect a copyright [6] but non-description probably would, if it were, subsequently, judicially determined that the work in question could have been properly described as falling within a specified class, it would seem that safe practice, on registration, would require that a work, in doubtful cases, be described as falling within the class which appears most cognate to it, and where the least violence would be done to terminology, if the work were subsequently held to fall within the class. For example, a violinist improvises before a phonograph. This records the resulting harmonics, but the work is not reduced to ordinary musical notation, and the cylinder or disk remains the only record thereof. If it be desired to register this for copyright, it might be deemed open to question whether this could, or could not, be properly called a musical composition, because not in the form of staff notation, but it is a "writing," and hence copyrightable. In registering it, it should accordingly, for safety, be described as a musical composition as the nearest class to it, specified in the Act.

§ 609 Applications for copyright not amendable.

There can only be one application for copyright. There cannot be an amended application. The first application exhausts the author's right.[7]

§ 609a Application through agent.

An agent may make the application for his principal.[8]

6—See § 588.

7—Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 54 L. ed. 150.

8—Meccano, Ldt. v. Wagner, 234 F. 912.

CHAPTER IX

WORKS COMPRISING OR FOUNDED UPON OTHER WORKS

§ 610
Works, involving matter previously copyrighted, or in the public domain.

Section 6. *That compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions or works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this Act.*

§ 611
The public domain in copyright law.

In the course of years, a great body of works has arisen which either were voluntarily, or involuntarily, made public property, by dedication or publication, without a statutory copyright having been first obtained, or in which the copyright, if obtained, has expired by limitation of time, or been otherwise terminated. These works are said to be in the public domain, since they are public property, in the sense that anyone may use them for any purpose. Such utilization may be either physical or mental. Such works are, from their nature, subject to alteration and the thought manifested in making such changes, renders a resultant new version of the work subject to copyright. If new matter is added to an old work, the result is copyrightable. The new matter, or arrangement, or combination, furnishes the necessary basis of originality. New matter, for this purpose, may be said to be any matter which, if standing by itself, would be entitled to copyright. When combined with old matter, the effect of the copyright is to give absolute protection

§ 612
Permissible uses of works in public domain.

§ 613
New works due to addition, arrangement or combination.

§ 614
New matter defined.

to the new matter and also protection to the old and new matter in combination.[8] The old work plus such new alterations and additions, is a new work.[9]

§ 615 Nature of copyright in combination of old and new matter.

While the use of the word "version," in this connection is not entirely satisfactory,—since for example, it is ill-adapted to describe the simple annotation of a work,[10]—still the term is less likely to mislead than the expression usually used in this connection, that is "new edition." This is illustrated by reference to the English cases.

§ 616 Annotations.

§ 617 Meaning of new edition discussed.

Thus in two cases involving publisher's contracts,[11] it was held a new edition of a work may, or may not, be a new work, as it may be a mere reprint, or merely a new issue of a work, printed in quantity and put forth in batches, at intervals, as required by the public demand. On the other hand, the new edition may, obviously, differ widely from the work in its first impression, or as it stood when originally issued.

§ 618 The nature of copyright in new versions of a work.

The extent of the copyright in a true new edition, as distinguished from a mere reprint of a work, depends entirely on the nature of the changes made in the original work. If separable parts are altered, only those parts and the combination of old and new matter, in combination, are protected by the new copyright.[12] If, on the other hand, the entire work is reformulated, copyright may be obtained in such reformulation. In either event, the work in which such new copyright is obtained will not be deemed infringed by the publication of the whole, or part of the work, in its original form, unless some

§ 619 Effect of authorized publication of original work.

8—Lover v. Davidson, 1 C. B. N. S. 182; Leader v. Purday, 7 C. B. 4; West Publishing Co. v. Edward Thompson Co., 176 F. 839.

9—West Publishing Co. v. Edward Thompson Co., 176 F. 839; Lawrence v. Dana, 4 Cliff. 1.

10—Lawrence v. Dana, 4 Cliff 1.

11—Thomas v. Turner, 33 Ch. D. 292; Reade v. Bentley, 27 L. J. Ch. 254.

12—Cary v. Longman, 1 East 358; Black v. Murray, 9 Scotch Sess. Cas. 3rd Ser. 341. See also Murray v. Bogue, 1 Drew 353.

of the newly copyrighted matter is combined with it.[13]

§ 620 Nature of possible alterations in a work.

The changes in the original work may take various forms. The text may be altered by excision or insertion. The form of the work may be altered, as in the case of the dramatization of a novel. The words in which it is expressed may be altered, either by rephrasing, or by turning it into another language.

§ 621 Limited scope of copyright in such works.

In either such case, the original thought used in the selection, arrangement and combination of existing materials is copyrightable.[14] There can be no copyright in the matter itself, since this is in the public domain, but there can be copyright in the arrangement, formulation and combination of such matter. On the other hand, the plan of such arrangement, or combination, is not copyrightable apart from the matter used. That is to say, anyone else can use such plan or combination in connection with other matter.[15] It is even more important here than elsewhere to bear in mind the sharp distinctions between copyrightability and the effect and extent of copyright when obtained. These are totally distinct questions, as is shown in detail elsewhere,[16] and unless the difference between them is borne in mind, confusion is certain.

§ 622 Arrangement, etc., of such a work is copyrightable but not the plan of arrangement.

§ 623 Translations; dramatizations; abridgements; digests.

There could be copyright, then, even before the enactment of the present Section, for the same reasons and subject to the same limitations, in translations,[17] dramatizations,[18] and abridgments,[19] whether in the form of digests, or otherwise, if there be true abridging, rather than mere mechanical

13—Thomas v. Turner, 33 Ch. D. 292.

14—Emerson v. Davies, 3 Story 768; Lawrence v. Dana, 4 Cliff. 1.

15—Perris v. Hexamer, 99 U. S. 675, 25 L. ed. 308.

16—See § 505.

17—Wyatt v. Barnard, 3 Ves. & B. 77; Emerson v. Davies, 3 Story 768.

18—Shook v. Rankin, 6 Biss. 477; Fleron v. Lackaye, 14 N. Y. Supp. 292.

19—Gray v. Russell, 1 Story 11; Folsom v. Marsh, 2 Id. 100.

omission and recopying, or in any other version, or change of form of given matter, which does not involve mere repetition.[20]

§ 624 New versions in general.

The same result may be deemed achieved, although with more difficulty, where old matter is added to old matter.[21] Copyright can then exist in the collocation of the matter. The theoretical basis for such copyright is the thought exercised in the selection and arrangement of the works or matter so to be combined. Such works, which, generically, include all those in which the element of compilation is predominant, mark the limit, in this direction, of copyrightability.

§ 625 Copyright in the simple combination of old matter: its scope and theoretical basis.

Very little consideration is requisite to show the necessity for permitting copyright in such works, for as is convincingly demonstrated in Gray v. Russell,[22] originality in the use and exposition of existing works and materials, free to all for use in this manner, is the foundation of all truly valuable classical, scientific and technical works. It is only by using, and expounding existing materials that a text book or a work of reference can have value. Scholarship, as distinguished from creative genius, must deal with existing materials, yet no one can deny the value of the works it produces nor their just claim to copyright.

§ 626 The reason for allowing copyright in works based on prior works.

The very fact, however, that such works may be copyrighted, necessarily leads to important considerations with respect to the effect of copyrights, when obtained.

§ 627 Effect of allowing copyright in such works, upon its nature and scope.

It is obvious that anyone may use old matter or common material, even for the same general purposes as has the proprietor of a compilation in which it occurs. If such use is accurate, a resulting

20—Wood v. Boosey, L. R. 2 Q. B. 340, aff'd 3 same 223; (piano arrangement of opera) Atwill v. Ferrett, 2 Blatch. 39.

21—The directory cases illustrate this. See § 537. See also Taft v. Smith, 134 N. Y. Supp. 1011; Lewis v. Fullerton, 2 Beav. 6.

22—1 Story 11.

§ 628 Similarities due to common subject matter.

compilation may be identical. Thus a compilation of lyric verse covering a given period, if made by equally competent scholars or critics, might well be precisely similar to an earlier one. In the case of translations or abridgments, striking similarity would be expected. In the case of the arrangement of historical material, especially where it is sought to maintain a common theory, the same result is probable.[23] This is true also, although to a somewhat lesser degree, in the case of dramatizations.[24] Yet in each such instance, the author of the second work may have acted in entire good faith and even have been ignorant of the prior work. If so, he has merely exercised his rights to use common materials, just as his predecessor did, and his work is as truly original, and hence, as copyrightable, as his predecessor's was. As long as the author of the second work has not copied his predecessor's work, as distinguished from copying their common material, his predecessor cannot complain[25] because the former has achieved the same, or an essentially similar, result. He cannot complain even though his work, by indicating the common sources, has facilitated, or led to, consultation of these by his successor.[26]

§ 629 Lawful use of common sources, including those indicated by a copyrighted work.

§ 630 Copyright in such works simply prevents copying.

The scope of copyright in such works, which is discussed elsewhere, is then limited so as simply to prevent a subsequent laborer in the same vineyard from seeking to save time or trouble by copying his predecessor's work.[27] This is just, as little originality is needed to render such works copyrightable.

§ 631 Lists of battles.

This was illustrated by a case in which[28] a list of battles, with the casualties sustained in each, made

23—Pike v. Nicholas, 5 Ch. App. 251.

24—Robl v. Palace Theatre Ltd., 28 L. T. R. 69; Glaser v. St. Elmo Inc., 175 F. 276; Spiers v. Brown, 6 W. R. 352; Harper Brothers v. Kalem, 169 F. 61 (semble).

25—See § 454.

26—Pike v. Nicholas, 5 Ch. App. 251.

27—Spiers v. Brown, 6 W. R. 352.

28—Hansen v. Jacquard Jewelry Co., 32 F. 202.

from official documents and chronologically arranged, was held copyrightable as a compilation of value. The same result was reached in connection with a list of race horses and their past performances.[29] Blank legal forms, intended for applicants for liquor licenses, consisting of a combination of necessary papers, were held[30] copyrightable.

§ 632 Lists of race horses.

§ 633 Statutory legal forms.

The various decisions which deal with copyright in law reports may be mentioned at this point. There can be no copyright in the opinions of the Court[31] but there can be a copyright which will include all the original work of the reporter comprehended in the preparation of the volumes, as for example,[32] in their title pages, tables of cases, headnotes, if written by him and not by the Court, statements of facts, arguments of counsel, indices, order and arrangement of cases, the division of the reports into volumes, the numbering and pagination of the volumes, tables of the cases cited in the opinions, the subdivision of indices into appropriate condensed titles and cross references therein. The same result is reached in the case of statutes.[33] If, however, the only original work, in reports, attributable to a reporter, is the mere arrangement of cases in sequence, their pagination and distribution into volumes, such mechanical details will not support a copyright.[34] It is the classification, compilation and rearrangement of matter which forms the basis of his rights,[35] and the incidental results of the mechanics connected therewith, not the mechanics themselves, are the subject of his copyright. In any event, a copyright in so far as it can exist in the plan,

§ 634 Law reports.

§ 635 Judicial opinions.

§ 636 Reportorial work.

§ 637 Compilation of statutes.

§ 638 Mechanical details of book-making.

29—Egbert v. Greenberg, 100 F. 447.

30—Brightley v. Littleton, 37 F. 103.

31—Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055.

32—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547.

33—Howell v. Miller, 91 F. 129.

34—Banks Law Publishing Co. v. Lawyers Cooperative Pub. Co., 169 F. 386.

35—West Publishing Co. v. Edward Thompson Co., 176 F. 839.

arrangement and combination of materials, can only protect that which is original in such plan, arrangement and combination.[36] Citations, in the form of notes to Court Rules, have been protected.[37] A digest, or synopsis of judicial decisions, may be copyrighted, as well as the selection, and arrangement, of cases referring to a particular subject.[38]

§ 639 Annotations by citations of cases.

§ 640 Digests.

§ 641 Literal reproductions of common materials.

There are, however, limits to the copyrightability of such works, of the general character under discussion. If the old matter is simply reproduced, without addition or change, there can be no copyright in such bare reproduction. Thus it has been held [39] there could be no copyright in specifications of patents, copied from the originals in the Patent Office. This decision may be contrasted to advantage with another case,[40] where an engraving of printed patent specifications, on file in the same office, was held subject to copyright, since the common materials were, in the latter case, simply used as a basis for a new work, formulated in a different medium from the original.

§ 642 Engravings of printed matter.

§ 643 Colorable changes in reproducing common materials.

The new work as stated, cannot be a mere copy of the old one, nor can the changes in it, if merely colorable, give any substantial rights.

These rules were well illustrated in a case,[41] where a photograph had been published, without its author obtaining a copyright. Thereafter, he made some minor changes, which he etched upon the negative and attempted to copyright the result, as a photograph. It was held he could not do this. The work he attempted to copyright, it was held, if copyrightable at all, was copyrightable only in so far as the

36—Bullinger v. Mackey, 15 Blatch. 558.

37—Banks v. McDivitt, 13 Blatch. 163.

38—West Publishing Co. v. Lawyers Cooperative Co., 64 F. 360, aff'd 35 L. R. A. 400, 79 F. 756.

39—Wyatt v. Barnard, 3 Ves. & B. 77.

40—Newton v. Cowie, 4 Bing. 234. See also Vernon Abstract Co. v. Waggoner Title Co., 49 Tex. C. A. 144.

41—Snow v. Laird, 99 F. 813.

etching was concerned and that such a colorable change, in a photograph in the public domain, could create no rights in the photograph.

Adding alto parts to hymns in the public domain was held not such new and original work as would give a copyright in the composite result.[42] So merely changing the musical notation of a work for the pianoforte, so that it could be played on the clarionet, was held not to render the result copyrightable.[43] These cases, save in so far as they may be deemed to deal with the scope of copyright, rather than with the question of what is copyrightable, or to represent an application of the doctrine of "de minimus lex non curat," may be deemed doubtful, as no good reason can be shown why musical works and those embodied in words, should not be treated in accordance with the same principles.

§ 644 Attempted successive or simultaneous copyrights in a single work.

There cannot be two successive copyrights in the same work,[44] the one not being a renewal of the other, nor can two copyrights subsist, at the same time, in the same subject matter.

This rule was illustrated in a case decided by the Supreme Court,[45] in which it was held that where an artist had copyrighted a painting, he could not copyright a photograph of it, without proof that the copyright in the painting had terminated, as he could not have two copyrights at the same time, in the same subject matter. This decision may, however, be misunderstood, unless carefully considered. The action, in which it was handed down, was one for penalties, where rules of strict construction and proof obtain. If the photograph had been original, in the sense in which photographs are original [46]

42—Cooper v. Janes, 213 F. 871.

43—Jollie v. Jacques, 1 Blatch. 18.

44—Mifflin v. Dutton, 61 L. R. A. 134, 112 F. 1004.

45—Caliga v. Inter Ocean Newspaper Co., 157 F. 186, aff'd 215 U. S. 182, 54 L. ed. 150.

46—See Grave's case, L. R. 4 Q. B. 715.

and not a mere mechanical copy of the painting, it would seem there might have been copyright in it, as a photograph, though not in its subject matter, as the fact that the author of the painting was also its author, would not appear controlling in its bearing upon the vital question of whether it was in fact original.[47] In the absence of satisfactory proof on the point, however, the Court undoubtedly, and correctly, deemed the photograph a mere copy of the painting and not original.

§ 645 New versions of copyrighted works.

While the previous discussion has dealt with matter in which copyright does not subsist, it is equally applicable to copyrighted matter, with certain necessary differences.

§ 646 The consent of the proprietor essential.

Copyrighted matter can only be used in compilations, or abridged, adapted, arranged, dramatized, translated or formulated in versions other than the original, with the consent of the proprietor of such copyrighted work, as long as the copyright in it subsists.[48] This is true although the result of such reformulation would be, or is, practically a new work, if made from a previously copyrighted work, in which copyright still exists. This rule is so broad that it will prevent an adaptation of a story, or a

§ 647 Plots of novels.

dramatization, without the author's consent, if it contains the plot or theme, if original, of the story.[49] Such a work cannot be used in any manner inconsistent with the copyright proprietor's rights, without his consent but may be used, as indicated in this section, with his consent. The fact, if it be one, that the new work is an improvement on the earlier one can, of course, make no difference, as the copyright proprietor is not bound to permit his property to be improved without his consent.[50] If

§ 648 Improvements in copyrighted works.

47—See § 482.

48—Campbell v. Scott, 11 Sim. 31; Carte v. Evans, 27 F. 861 (semble).

49—Dam v. Kirk La Shelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902; Stevenson v. Fox, 226 F. 991.

50—See Reed v. Holliday, 19 F. 325.

the consent is given, however, the same rule applies as in the case of new versions of uncopyrighted works. Thus, the fact that a pianoforte arrangement of an opera, would have been an infringement, if made without authority, it was held,[51] would not prevent it from being a new composition, for purposes of copyright, if made by authority.

§ 649 Piano arrangement of opera.

This section, it will be noted from the cases cited, is largely declaratory, but its presence in the Act prevents, for example, the injustice of the previous English law, where these rules were by no means so clear.[52]

§ 650 Declaratory nature of section.

There is nothing, in the language of the section, restricting the rule of law laid down by it to literate works. It would, hence, appear to apply to dramatic,[53] musical,[54] artistic and other works to the same extent as to literate works, so far as the nature of such works and the various expressions used in the section, permit. Thus, for example there may be a compilation, adaptation or arrangement of music but there could be no translation or dramatization of such a composition. A work of sculpture could not be compiled, but might be adapted, and so on down the list of copyrightable media. This is in accordance with the prior law.[55] Thus a photograph of a painting was held subject to copyright,[56] as was an engraving made from patent specifications, on file in a public office,[57] and the setting of words to old airs so as to make a new song.[58]

§ 651 Photographs of paintings.

§ 652 New words to old music.

51—Wood v. Boosey, L. R. 3 Q. B. 223.

52—Toole v. Youug, L. R. 9 Q. B. 527.

53—Bouccicault v. Fox, 4 Blatch. 87.

54—Carte v. Evans, 27 F. 861; Reed v. Carusi, 1 Taney 73, contra, is not in accordance with the modern authorities and may be deemed not law.

55—Carte v. Evans, 27 F. 861; Bouccicault v. Fox, 4 Blatch. 87.

56—Grave's Case, L. R. 4 Q. B. 715.

57—Newton v. Cowie, 4 Bing. 234.

58—Lover v. Davidson, 1 C. B. N. S. 182; Leader v. Purday, 7 C. B. 134.

§ 653
Statutory limitation of effect of copyright in new versions, etc., of old works.

But the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

§ 654
Discussion of application of foregoing portion of section.

This portion of the section is designed to prevent the section from being made the basis for attempted claims of copyright in uncopyrightable matter, or for perpetual copyright, by successive additions of "new" matter, etc., to works previously copyrighted. After copyright of a new version of a work in the public domain, the original work still remains in the public domain and may be used as freely as before and the fact that in the course of such use, successive versions may be made and copyrighted, would give no rights to any one of such copyright proprietors, by preoccupancy or otherwise, as against the others, if the later versions be, in fact, independently made. The rights of the public, once vested, cannot be divested. In a work in which such public property appears, only the original work of the author of the new version of the work, is subject to copyright. He need not specify what this is, in applying for, or claiming, copyright, since the statute requires no such specification. But on the other hand, no breadth of claim, or form, or grant. of application can give him copyright in that which not he but others have created and which belongs to the public.

§ 655
Legal status of works on expiration of copyright therein.

On the expiration of a copyright, if unrenewed, or on the expiration of a renewal of copyright, the work involved becomes public property and its situation thence forward is just the same as if there never had been copyright in the work.

On the expiration of the copyright in a work, anyone may use it for any purpose and neither the pro-

prietor, nor one claiming under him, can prevent this, because he has lawfully made other versions or forms of it, during the life of the copyright, as long as such other versions or forms are not copied.[59]

§ 656 Status unaffected by copyright of new versions.

This result cannot be evaded; but, it appears clear, that in so far as such new versions of a work are original, the copyright in them is not affected by the expiration of the copyright in the original, or parent, work.

§ 657 Consents of copyright proprietors to the making of new versions, etc.

The consent of a copyright proprietor to the use of his work under this section should not, it would seem, penalize him with respect to third persons, as to any act of the person receiving such consent, unless such act is clearly authorized by the proprietor. The consent is purely personal to the person receiving it, it would seem;[60] is in the nature of a limited license;[61] and the copyright would remain unaffected thereby, technically, although practically, such a consent, if acted upon, might much reduce its value. Such consents appear non-assignable, as the proprietor of a copyright would seem, by implication, to rely upon the personality of the individual who receives the consent, to make an acceptable version of the work.[62]

§ 658 The proprietor's consent may be verbal.

No form is prescribed for such consent which, accordingly, may, it would seem, either be written or oral, or evidenced by acts.

§ 659 Recording unnecessary.

No provision is made for recording such consents and purchasers of copyright must, under counsel's advice, seek such protection as they may, against such consents being outstanding when they purchase.

On the other hand, the path of the translator, adapter or compiler may be beset by unexpected difficulties. Thus in one case[63] it was deemed that

59—Glaser v. St. Elmo Inc., 175 F. 276.
60—Cf. § 1535.
61—Cf. § 1519.
62—Cf. § 1537.
63—Murray v. Bogue, 1 Drew 353.

§ 660 Unlawful retranslation of a lawful foreign translation.

if a foreigner were to translate an English work abroad, as he lawfully might, and this were then to be translated into English, in England, this would be an infringement, even if this were done in good faith, in ignorance of the fact that what was being retranslated was a translation.

This section suggests a further interesting question for discussion.

§ 661 Utilization by the copyright proprietor in person, of the right to make a new version of a work.

If the proprietor of a copyrighted work, instead of permitting a third person to dramatize it, or to change the form in which it was copyrighted, does so himself, it may be questioned whether this is a new work, requiring a new copyright and if no new copyright be obtained, what would be the effect of a publication of the work, in its new form, upon the copyright of the work in its original form. It would seem that under this section, the copyright proprietor who chooses to utilize his statutory right to alter the form of his original work,[64] may obtain a new copyright in connection with the publication of the new version, as it would seem what he can permit another to do, he can do himself. Since, however, his original copyright is not merely in the words or groups of words in which he has expressed his thought, but rather in the intellectual conceptions so expressed, in so far as these are the product of his original thought,[65] and, since one of his rights is to vary the form in which he has chosen originally to record his thought,[64] it would not necessarily follow that since such a change of form, if made by a third person, would, necessarily, be a new work, because the third person's thought would be a new intervening factor, that such a change would be a new work, if made by the original author. If the new version could be deemed a copy of the first work, in the broad sense in which "copy" is used in this

64—See § 173 and discussion thereunder.
65—See § 504.

branch of law,[66] and the original copyright notice is affixed to such new version, it may be possible that the original copyright would cover the new version.[67] It may be significant as bearing upon this point that the wording of the present statute gives copyright in a work [68] and not merely in certain forms of a work. If the new version is not a copy of the original, in that it differs from it substantially, it may be doubted whether the original copyright would protect the new version and whether an uncopyrighted publication of the new version would not defeat the original copyright. The matter appears largely one of degree. Common prudence will counsel the taking out of new copyrights in all such cases and the printing of notices of the old and new copyright on every copy of the new version, one beneath the other.

§ 662 The necessity for a new copyright.

§ 663 Effect of notices of copyright.

If the original notice of copyright only were printed, the Courts might take the middle ground, where possible on the facts, of holding that those portions of the work which were in the original work, were still protected by the original copyright, but, on the other hand, they might deem the copyright was in the work, as an entirety, and that substantial alteration in such entirety and publication without re-copyright destroyed the entirety and hence the copyright.[69]

§ 664 Notices of copyright in case of new versions.

On authority,[70] a notice of copyright of the new version will suffice, without notice of earlier copyrights in prior versions of the work made by the same author. It may be questioned, however, whether, under such circumstances, the effect of failing to affix the notice of prior copyright is not

66—See §§ 1023–1045.

67—Cf. Caliga v. Inter Ocean Newspaper Co., 157 F. 186; aff'd 215 U. S. 182, 54 L. ed. 150.

68—Section 5.

69—Cf. West Pub. Co. v. Edward Thompson Co., 176 F. 839.

70—Lawrence v. Dana, 4 Cliff. 1; West Pub. Co. v. Edward Thompson Co., 176 F. 839.

to render the work, in its original form, public property and is not simply to protect the new matter, in the new version, as well as the combination of the old and new matter, in combination.

§ 665 Effect of inclusion of copyrighted work in published uncopyrighted work.

A further aspect of this question was illustrated in a recent decision. There a work was copyrighted in the United States. Its proprietor compiled a larger work, into which he incorporated the copyrighted work. He published this in England and sold imported copies in the United States. Each of such English copies bore a notice reading as follows:

> "This Code includes the Telegraph Cyphers, entered according to act of Congress, in the year 1906, by E. I. Bentley, in the office of the Librarian of Congress. All rights reserved. Entered at Stationers Hall."

It was held [71] that the larger work became *publici juris*, as an entirety, when imported and sold by its author, because it was uncopyrighted and did not bear a proper statutory notice of copyright, as the notice affixed to it did not specify where it included the copyrighted work, and the public were not bound to compare the two works to find out what was copyrighted and what was not.

71—Bentley v. Tibbals, 223 F. 247.

CHAPTER X

WORKS IN PUBLIC DOMAIN AND GOVERNMENTAL PUBLICATIONS

§ 666 Copyright forbidden in works in public domain.

Section 7. That no copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to the going into effect of this Act and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof; Provided, however, That the publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.

§ 667 Effect of governmental reprints of copyrighted matter regulated.

§ 668 Twofold subject matter of section.

This section deals with a twofold subject. It provides that no copyright shall subsist in the original text of any work in the public domain, or in any work which was published in this country, or in any foreign country, prior to the passage of the Act, not theretofore copyrighted in the United States, nor in Federal publications or reprints. It also contains a provision that Federal use of copyrighted matter shall not affect the copyright proprietor's rights in his work.

§ 669 Federal publications not copyrightable. Governmental publications, in general.

Thus, by express provision of statute, there can be no copyright in any publications of the United States Government and this would include its

departments and officers, acting as officers. This would appear to be strictly in consonance with a sound public policy and declaratory of prior law. Thus, prior to the passage of the present Act, it had been held that copyright could not be obtained even by the judges,[72] in the opinions of judges or courts, Federal or State, or in statutes, although copyright might be obtained in headnotes, not written by the judges, indices, abstracts of arguments of counsel, annotations, and pagination and arrangement by the reporter, of the matter set forth in such works.[73] While the States are not mentioned in this section, it may be questioned, for the reasons underlying the decisions cited, whether any copyright may be obtained by any State, or State officer, in any State paper or publication,[72] since a republic can only rest upon a firm basis if its citizens are afforded as untrammelled a means as possible of knowing its affairs and doings and communicating that knowledge to others, and since works composed by public officers in their official capacity, belong to the people whom they represent and who pay them for their services in making such compositions.

§ 670 State ownership of copyright.

In one instance,[74] a copyright in the reports of decisions of State Courts, made by a salaried law reporter, for the State was held valid. The Secretary of State had entered these in his name, "in trust for the State of New York." The decision is authority merely for the proposition that the State, in this instance, stood in the same position as any other employer and does not hold that its copyright is greater in scope, or subject matter, than that of any other reporter, or employer, would have been.

It should be noted that there is nothing in this Section of the Act which permits the reprint of

72—Banks v. Manchester, 128 U. S. 245, 32 L. ed. 426.

73—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547. See §§ 508, 634.

74—Little v. Gould, 2 Blatch. 362.

§ 671
Federal reprints of copyrighted matter.

copyrighted matter by the Government, without the consent of copyright proprietors, but the latter are protected against the consequences of any such use by the Government, whether with, or without, their consent, on principles of public policy. The reference to Governmental use of copyrighted matter was inserted in the Act as a convenience, to obviate the necessity for passing individual Acts protecting copyrights, in each instance where such use was made, the passage of such Acts having been deemed requisite, under prior legislation, for the copyright proprietors' protection.[75]

§ 672
Works in the public domain, not copyrightable.

Attention has been called, elsewhere, to the radical extension in the subject matter of copyright effected by the passage of Section 4 of the present Act.[76] While it may well be doubted whether that Section, even if standing alone, would have been construed so as to permit copyright, even by its author, in the original text of any work which had become part of the public domain,[77] the wisdom of preventing such a construction of the Act, which might well have resulted in holding it unconstitutional, probably dictated the enactment of the portion of Section 7 which provides that there can be no copyright in the original text of works in the public domain. Section 6 of the Act furnished statutory authority for the public use of such works.[78] The law has been shown to be elsewhere, in connection with the discussion of Section 2,[79] that a work becomes part of the public domain as soon as published, unless it is copyrighted, on or before, such publication. It should be noted that Section 7 refers to works which are in the public domain or to works which were published in the United States, prior to the passage of the

§ 673
The effect of the section as to when works become part of the public domain, since its enactment.

75—House Report 2222, p. 10.
76—See § 475.
77—Cf. Encyclopedia Britannica Co. v. Werner Co., 135 F. 841.
78—See § 610.
79—See § 265.

Act. It is not deemed that this reference to publication, limited in time as it is, in any way militates against the view expressed as to when works become a part of the public domain.

A reference to the early drafts of the present Act [80] is helpful in this connection. These contemplated a provision that copyright should not subsist "in the original text of a work by any author, not a citizen of the United States, first published without the limits of the United States, prior to July 1, 1891, or in the original text of any work which has fallen into the public domain." [80] The dates to which reference was made in the language quoted, was the date when the so-called Chace Act [81] became effective in its amendment of the then Revised Statutes,[82] so as to permit copyright by non-resident aliens of their works, under certain conditions therein set forth. The precise purpose of this suggested enactment is not clear. That, if passed, it would have furnished a basis for a claim that prior foreign publication after 1891, would not have prevented United States copyright, is apparent. Its language was wholly retrospective. That it did not commend itself to Congress, is shown by the amendments made in it before the passage of the Act. It is deemed that instead of denoting a Congressional intention to fix a time-boundary to the "public domain," or that works published without copyright were not to be considered as falling within that domain, that the language with reference to publication, properly construed, was simply intended to deal with works falling within it, prior to the passage of the Act, while the provision with reference to works in the public domain was intended to cover works which might become part of it, both before and after the enactment of the present Statute.

80—Copyright Office Bulletin No. 12, p. 15.
81—Act of March 3, 1891.
82—Section 4952.

§ 674 Discussion of the question whether the section affects the problem of works first published abroad.

Attempts have been made in connection with the discussion of the question as to whether first publication outside of the United States, without prior copyright, in the United States, forfeits the right to such copyright to lay stress on the portion of this section which says that no copyright shall be obtained in works published abroad prior to the passage of the Act, to prove that Congress intended by this to allow copyright in such works, if published abroad after the passage of the Act. Such assertions appear to misapprehend the purpose and scope of the section. While this matter is discussed elsewhere,[83] it may be noted here that the portion of the section under discussion, refers to publication in the United States, or abroad, prior to the passage of the Act only, as enacted, and that no one could claim that publication after the passage of the Act, in the United States, without obtaining statutory copyright, would not defeat a claim to future United States Copyright. If it be answered that other provisions of the statute apply to publication in the United States after the date of the Statute, this in reality merely emphasizes that this portion of the section in no way affects the problem as to the effect of foreign publication, after the passage of the statute, but is retrospective only. This whole subject, in its different aspects, is discussed elsewhere.[83]

83—See § 763.

CHAPTER XI

PERSONS WHO MAY OBTAIN COPYRIGHT

§ 675 Who is entitled to copyright.

Section 8. That the author or proprietor of any work made the subject of copyright by this Act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this Act: Provided, however, That the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:

§ 676 Resident aliens.

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

§ 677 Non-resident aliens.

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

§ 678 Presidential proclamations.

The existence of the reciprocal 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.

§ 679 Authors.

That authorship can alone afford the necessary theoretical and constitutional basis[84] for statutory copyright is recognized by Section 4 of the Act,[85] and is emphasized by Section 8. The language used in the latter section refers both to authors or proprietors, of works, and is a substantial re-enactment of prior legislation.[86] As has been shown elsewhere,[87] the author's right to a statutory copyright may be assigned prior to taking the steps requisite to statutory copyright. Such assignment may either be express or, as follows from the very language of Section 8, may, if the author die before copyrighting his work, result from operation of law, by devolution to the author's personal representatives. An early instance where it was held that the right to copyright could be bequeathed by will involved the letters of George Washington.[88]

§ 680 Assignments of right to copyright.

§ 681 Inheritance of right to copyright.

Prior to copyright, the right to copyright is inchoate.[89] It does not arise by force of any rule of common law, but purely by reason of the statutes which render statutory copyright possible.

§ 682 Inchoate right to copyright

§ 683 Its statutory origin.

The inchoate right to copyright may be assigned, verbally, prior to the copyright being taken out.[89] The transfer of the right, although it begins by being personal, since it arises out of the act of authorship, is regulated, in the absence of statutory provision, by the rules of law applicable to property generally.[90]

§ 684 Verbal and other assignments of right to copyright.

Thus while there can be no copyright in an inchoate work,[91] there can be a valid, equitable

84—See § 83; Saake v. Lederer, 174 F. 135.
85—See § 473.
86—See R. S. 4952.
87—See § 124.
88—2 Story 100.
89—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547; Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618.
90—Cf. Parton v. Prang, 3 Cliff. 537; Aronson v. Baker, 43 N. J. Eq. 365.
91—See § 496.

§ 685 The right to copyright works written under contract.

agreement to assign a book to be written and if the book is written and delivered, pursuant to such an agreement, the right to copyright it, has been held,[92] to vest in the purchaser, even though he has not paid for the book.

§ 686 Equities binding assignor.

Such assignments must, however, be distinguished from contracts to assign.[93] The assignee stands in his assignor's shoes and takes the assignment subject to all known,[93] and, possibly, all unknown, equities.

§ 687 Assignments of rights incident to copyright distinguished from right to copyright.

Assignment of rights which would be comprehended in a statutory copyright, are not, however, necessarily equivalent to the assignment of the right to take out the copyright.

§ 688 Effect of subsequent copyright on such prior partial assignments.

If one or more of the separate rights which are comprehended in a statutory copyright, if obtained, be assigned, prior to copyright, a copyright taken out in the name of the proprietor of the right to copyright, will protect such assignee.[94] Similarly,

§ 689 Effect of attempted copyright by such partial assignee.

where the contract between the parties granted the stage rights in the United States, the author agreeing to copyright the play, this was held to involve a retention of the right to copyright by the author and that an attempted copyright by the assignee of such rights was entirely ineffectual.[95]

§ 690 Record of assignments prior to copyright not necessary.

There is nothing in the Act, any more than there is in the English Statutes,[96] that requires the record of assignments, executed prior to copyright, of the right to copyright a work or of any or all of the rights which are comprehended in a copyright if obtained.

§ 691 Proprietors.

The proprietor of a work, is also, in a proper case, entitled to copyright. The word "proprietor,"

92—T. Ward Lock & Co. Ltd. v. Long, (1906) 2 Ch. 550. See § 406.

93—T. B. Harms & Francis, Day & Hu[illegible]r v. Stern, 229 F. 42.

94—Ford v. Charles E. Blaney Amusement Co., 148 F. 642.

95—Saake v. Lederer, 174 F. 135.

96—Troitzsch v. Rees, 3 L. T. 773.

as used in this section means only a legal assignee of the author.[97] Mr. Drone's apparent view to the contrary,[98] is not in accord with authority,[97] and is manifestly erroneous, in its disregard of constitutional limitations on United States copyright legislation.[99]

§ 692 Attempted copyrights by persons not acting for proprietor.

Attempted copyright by one who is not the author of the work, does not stand in privity of title with the author or does not act for him, in his name, as his agent, would be a mere nullity.[1] The questions as to who may be deemed the author or proprietor of a work have been considered elsewhere.[2]

§ 693 Joint authorship creates tenancy in common.

Joint authorship is also discussed in other portions of this work.[3] The latter expression while convenient, appears liable to create misunderstanding. All the authorities appear to agree that where several persons participate in the ownership of a copyright, they hold it as tenants in common, not as joint tenants.[4] The technical results which flow from this result have, at times, been overlooked, where the joint origin of a work, rather than the resultant estate in common, in the copyright in it, appear to have been given erroneous importance by the Courts. Thus the English and American authorities appear in direct contradiction with reference to the rights of co-owners of a copyright with respect to granting licenses to third persons

§ 694 Conflict of authority as to licenses by one co-owner of copyright.

97—Cf. Mifflin v. R. H. White Co., 190 U. S. 260, 47 L. ed. 1040.

98—Page 241, "There is no reason why a person who is the owner of an unpublished manuscript or work of art which has been found or otherwise brought to light, may not obtain a copyright therein, altho the name of the author be unknown." "Moreover, if it was necessary under the Act of 1831, that a person who was not the author should show a title derived from the author, that requirement cannot be regarded as now existing."

99—See § 124.

1—Clementi v. Walker, 2 Barn & Cr. 861; Cf. Ferris v. Frohman, 223 U. S. 424, 56 L. ed. 492.

2—See § 406.

3—See § 424.

4—Powell v. Head, 12 Ch. D. 686; Carter v. Bailey, 64 Me. 458; Lauri v. Renaud, (1892) 3 Ch. 403.

to use the copyrighted work. The English view, which appears based upon the sounder technical reasoning,[5] is that a license in which all the owners of a copyright do not join, is a nullity, as against a non-assenting owner,[5] while the precise contrary has been held [6] in several cases decided by the New York Courts. Such questions are discussed in more detail in connection with the subject of renewal,[7] and assignment [8] of copyright.

§ 695 Statutory formalities to procure copyright: performance by agent.

In accordance with provisions found elsewhere in the Act,[9] statutory copyright arises upon the performance of certain specified acts. Registration of copyright is also essential [10] and, in various instances, notice of copyright must be affixed to copies of the copyrighted work.[11] Such notice must contain the name of the copyright proprietor, in various instances.[11] It should be noted that the various ministerial acts essential to perfecting a statutory copyright need not be performed, in person, by the person entitled to the copyright. It should also be noted that there is nothing in the use of the term "proprietor" which limits the class of those entitled to copyright, to holders of the beneficial interests in a work. On the contrary, it may be deemed established that there is nothing in the copyright law to prevent one from taking out a copyright as trustee for another and the trust need not appear on the face of the copyright proceedings.[12]

§ 696 Equitable proprietors of copyright. Secret trusts.

5—Powell v. Head, 12 Ch. D. 686.

6—Nillson v. Lawrence, 148 N. Y. A. D. 678; Herbert v. Fields, New York Law Journal, April 1, 1915; s. c. New York Law Journal, May 20, 1915.

7—See §§ 962, 424.

8—See § 1525.

9—See § 729.

10—See § 762.

11—See § 730.

12—Little v. Gould, 2 Blatch. 362.

In one case,[13] a copyright was taken out in the name of a publisher. The author was a married woman. It was held the fact of coverture was immaterial, as it would be presumed, under the special circumstances of the case, that legal title to the work had vested properly in the complainant and it was immaterial who had the beneficial interest in the royalties in it.

In another case,[14] gratuitous services were rendered by the plaintiff, a friend of the widow of Prof. Wheaton, in the annotation of Wheaton's Elements of International Law, upon the understanding that the result would be copyrighted, but that he should retain his property in the notes so made by him apart from their use with the book in question. It was held his contributions became Mrs. Wheaton's property, as made, as did the inchoate right of copyright in the notes, but that she held this right in trust for him, in so far as concerned his right to the separate use of the notes, but that this trust did not prevent her taking out a statutory copyright in the notes, in her own name, without mention of the plaintiff, in connection with the proceedings. Thus the legal title to a copyright may remain in the proprietor, while the beneficial interest therein, to the extent which may be agreed upon, may be in another party.[15]

§ 697 Implied trusts.

Such trusts, then, may be either express or implied. This was illustrated in a case [16] where the plaintiff and defendant had agreed that the defendant would write a comic opera. The plaintiff wrote the scenario. The defendant, by agreement, made many changes in it, but used its substance. A third person, having knowledge of the agreement, wrote

13—Scribner v. Clark, 50 F. 473; aff'd sub. nom., Belford v. Scribner, 144 U. S. 488, 36 L. ed. 514.

14—Lawrence v. Dana, 4 Cliff. 1.

15—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618.

16—Maurel v. Smith, 220 F. 195.

the lyrics. The latter were published separately. The defendant took out a copyright in the work, as an entirety, in his own name; the third person, a copyright in the lyrics and music, in the name of the firm of music-publishers who printed and issued the lyrics. This was done without any preliminary consent by the plaintiff. It was held that the work was an entire work; that the parties to its production were its joint authors; that the copyright proprietor and the music publishers would be deemed trustees of the copyrights to the extent of the plaintiff's interests therein and that the subsequent acquiescence of the plaintiff in the copyrighting of the work was as effectual as if the plaintiff had authorized the taking out of the copyrights in the first instance.

§ 698 Trust implied from subsequent acquiescence in copyright.

In a very recent case, it appeared that a composer had entered into a contract with defendant, a publisher, granting the latter, upon a royalty basis, the sole and exclusive production and publishing rights of all music composed by him within a period of five years. The composer, in violation of the agreement, assigned the right to copyright one of his works to plaintiff, who took with full knowledge of defendant's contract. The resultant copyright was held valid, but deemed to be held in trust, for defendant.[17] The trust arose *ex maleficio*.

§ 699 Limitation on doctrine of implied trust.

But, it seems, there must be some legal basis, in the relations between the parties from which such a trust can arise, for the doctrine to apply. Thus where the bare fact of assignment of the right to copyright was proven, it was held,[18] the assignor could not, thereafter, take out a copyright in his own name, even if intended for the assignee and that, even if the assignee joined with him as co-plaintiff in a suit for infringement, the suit would fail. The assignor's act was that of a pure volunteer, who

§ 700 Unauthorized copyright by assignor after assignment.

17—T. B. Harms & Francis, Day & Hunter v. Stern, 229 F. 42.

18—London Printing & Publishing Alliance v. Cox, (1891) 3 Ch. 291.

had neither legal nor equitable title and was, hence, a nullity.

§ 701 Copyrights taken out under trade names.

A copyright may be obtained in a trade name [19] by a person entitled thereto and successive copyrights in various editions may be taken out in different trade names.[20] This is true even though the trade-name be that of an alien, if he be entitled to the copyright [21] or if it be that of a corporation.[22]

§ 702 Employers, as authors.

Section 62 of the Act provides, an "author shall include an employer in the case of works made for hire." This provision is probably simply declaratory of prior law.[23] It is probably still the law that the mere fact that the author of a work is an employee does not vest copyright in it in his employer.[24] The employment must relate directly to the work which the employer claims to be his, as a result of the relationship. That is, to, say, the employee must be employed to make that specific work or on the understanding, express or implied, that the work in question shall belong to his employer.[25] What the contract between the parties was, would depend on general principles of law, unconnected with the law of copyright. Attempts to ignore this rule can only result in error: to apply it, enables the parties to regulate their rights by appropriate agreement. Injustice can readily be prevented by application of the rule that, where the facts warrant it, an agreement that a work is to be the property of one who pays for it may be implied.[26]

19—Scribner v. Henry G. Allen Co., 49 F. 854.

20—Scribner v. Clark, 50 F. 473.

21—Werckmeister v. Springer Lithographic Co., 63 F. 808.

22—Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 47 L. ed. 460.

23—Little v. Gould, 2 Blatch. 165; Heine v. Appleton, 4 Blatch. 125; Lawrence v. Dana, 4 Cliff. 1 (semble).

24—Bouccicault v. Fox, 5 Blatch. 87; Bishop of Hereford v. Griffin, 16 Sim. 190; Shepherd v. Conquest, 17 C. B. 427; Levy v. Rutley, L. R. 6 C. P. 523.

25—Sweet v. Benning, 16 C. B. 459.

26—Cf. Lawrence & Bullen v. Aflalo, (1904) A. C. 17.

The property in works made for an employer is discussed in more detail elsewhere.[27]

§ 703 Copyright formerly limited to citizens or resident aliens.

Prior to the year 1891, copyright in the United States was limited to citizens of the United States or aliens, resident therein.[28] In 1891, as a result of prolonged efforts,[29] an Act[30] was passed which provided, after omitting the language restricting copyright to citizens or resident aliens,

§ 704 The Chace Act.

> "this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America, the benefit of copyright on substantially the same basis as its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may at its pleasure become a party to such agreement. The existence of the conditions aforesaid shall be determined by the President of the United States by proclamation made from time to time as the purposes of this Act may require."

§ 705 The present law as to aliens seeking United States copyright: resident aliens.

Under the present Act, all citizens of the United States, wherever resident or domiciled, are entitled to copyright in works of which they are the authors. All alien authors, domiciled[30a] in the United States at the time of the first publication of their works, are entitled to copyright.

Alien authors, who are the citizens or subjects of any country, which shall have been determined by Presidential proclamation, as granting either by treaty, convention, agreement, or law, the benefit of

27—See §§ 1634–1652. See Bentley v. Tibbals, 223 F. 247, for history of subject.

28—See R. S. 4952. See §§ 739, 72.

29—See George Haven Putnam: "The Question of Copyright," for a history of these.

30—Act of March 3, 1891.

30a—See § 707.

§ 706 Non-resident aliens.

copyright on substantially the same basis as to its own citizens, or, which has, by similar proclamation, been deemed to be a party to an international agreement for reciprocity in the granting of copyright, to which the United States may become a party, at its pleasure, are also entitled to United States copyright.

§ 707 "Domiciled" defined.

The word "domiciled" is used in this section in its ordinary sense of actual residence at a particular place, accompanied by positive, or presumptive, proof of an intention to remain there for an unlimited time.[31]

The prior statutes used the term "resident" instead of "domiciled" in this connection, but the courts did not make any distinction in this respect, holding, in view of the obvious purpose of the Act, that mere temporary residence was not meant by the term but that residence, plus an intention to continue to reside permanently in the United States, was essential.[32]

An English case[33] which held a mere temporary residence by an alien anywhere in the English dominions sufficient to enable such alien to procure an English copyright, was decided under the language of 5 and 6 Vict. c. 45 and is no longer an authority on the point so decided, because of differences between that act and later statutes. The further point decided in it that the purpose of such residence, whether merely to procure copyright or not, is immaterial, appears entirely sound.

§ 708 Purpose of change of domicile immaterial.

The change in statutory language to which attention has just been directed tends to remove opportunities for confusion in the case of those not familiar with the case law.

That the term "United States," as used in this

31—Mitchell v. U. S., 21 Wall. 350, 22 L. ed. 584; Sun Printing Assn. v. Edwards, 194 U. S. 377, 48 L. ed. 1027.

32—Bouccicault v. Wood, 2 Biss. 34.

33—Rutledge v. Low, 3 H. L. C. 100.

§ 709 Meaning of "United States" as used in section.

section, includes the territorial dependencies of the United States, such as Porto Rico, the Philippines, Alaska and Hawaii, appears to follow from the decisions [34] and language of Section 34 of the Act.[35]

§ 710 The question raised as to where the first publication referred to in section must be made.

It is to be noted that while the statute provides that alien authors or proprietors may have copyright in their works, irrespective of questions of reciprocity in copyright, if they are domiciled in the United States, at the time of the first publication of their works, it is not stated in this section whether the "first publication" in question, must, or need not, be made in the United States. It is deemed that this term refers to the first publication indicated in Section 9 of the Act and, according, that the question whether the "first publication" of a work, in this instance, means in the United States, depends on the general question whether the first publication required by the statute to obtain copyright must, or need not, be made in the United States. This question is discussed elsewhere.[36]

§ 711 Reciprocity or not, of country of origin of resident aliens.

It is to be noted in connection with alien authors and proprietors domiciled in the United States, that it is a matter of no importance under the statute whether the country of which they are citizens, or

§ 712 Partly naturalized aliens.

subjects, has been proclaimed subject to reciprocal copyright, or not. In fact it appears immaterial, under the language of the section, whether they are citizens or subjects of any country or not, or whether they are in the indeterminate status of the partly naturalized.

Domicile, not citizenship, is the essential question in their case.

This is in direct contradistinction from the case

34—De Luna v. Bidwell, 182 U. S. 1, 45 L. ed. 1041; Goetze v. U. S., 182 U. S. 221, 45 L. ed. 1065; Dooley v. U. S., 183 U. S. 151, 46 L. ed. 128; 14 Diamond Rings v. U. S., 183 U. S. 176, 46 L. ed. 138; U. S. v. Heinzen, 206 U. S. 370, 51 L. ed. 1098.

35—See § 1388.

36—See § 736.

of aliens not domiciled in the United States, at the time of the first publication of their works. In their case, the essential question is whether, or not, they are citizens or subjects of a country which the President has proclaimed to satisfy the requirements of this Section of the Act.

§ 713 Non-resident aliens: proclamation as to their country of origin essential to their right to copyright.

The Courts will not investigate, or pass upon, the facts, or law, on which the President based such proclamation [37] nor upon subsequent changes in such law. The proclamations stand until revoked by the President.[38] By the express provisions of the section, in the absence of proclamation, it is immaterial whether reciprocal copyright conditions with a foreign country, or state, prevail, or might prevail.[37] Citizens or subjects of countries or states mentioned in such proclamations, are entitled to copyright, wherever domiciled or resident. On the other hand, the right is limited to citizens and subjects of such countries, and does not embrace residents therein, nationals of countries not mentioned in such proclamations.

§ 714 Nature and effect of presidential proclamations under Act.

Any proprietor of a work entitled to copyright may, if the right to copyright it has passed to him from the author, have copyright in it, if the author, but for such assignment, would have been entitled to such copyright. While this section would, apparently, permit the proprietor of a work to obtain copyright therein, if himself, nationally qualified, although the author himself would not be so qualified, and hence not entitled to copyright before assignment, this is not the law [39] but, on the contrary, in the words of the Copyright Office Regulations, "if the author of the work should be a person who could not himself claim the benefit of the copyright act, the proprietor can not claim it." [40]

§ 715 Assignees of aliens.

37—Bong v. Campbell Art Co., 214 U. S. 236, 53 L. ed. 979.
38—Chappell & Co. v. Fields, 210 F. 864.
39—Bong v. Campbell Art Co., 214 U. S. 236, 53 L. ed. 979.
40—Paragraph 2, § 2.

In the case of aliens not domiciled in the United States, the question whether, or not, the author was a subject or citizen of a state or country proclaimed by the President to satisfy the requirements of this section, determines the proprietor's right to copyright, whatever the national status of the proprietor. This appears equally true where alien proprietors are domiciled in the United States, and the alien authors are not so domiciled, and, as the language in each instance is the same, would seem to be equally true in the case of American citizens, who become proprietors of the works of alien authors not domiciled in the United States.

§ 716 Alien employees of domestic employers.

Attention has been called to the fact that, pursuant to the provisions of Section 62 of the Act, "the word 'author' shall include an employer in the case of works made for hire." The situation of alien employees of a domestic employer, would suggest the question whether such an employer would be entitled to copyright in works made for him by such employees, if such employees would be unable themselves to procure copyright in the works, by reason of non-inclusion among the aliens capable of obtaining copyright under this section. This must be deemed a doubtful question,[41] but reasons of expediency appear to render it likely that the literal reading of the two sections will be adopted and such copyrights permitted. The possibilities of an evasion of the Act, under color of such employment contracts, may lead to a different conclusion.

§ 717 Devices for obtaining copyright protection for alien works under prior law.

A means for enabling alien authors, not themselves, entitled to copyright, to procure qualified protection, more especially against the unwary infringer, is suggested by a decision under the prior law.[42] In that case, the composer of the music of "The Mikado" was an alien, who could not procure a copyright in the United States, as the law then

41—Cf. Gessendorfer v. Mendelsohn, 13 T. L. R. 91.

42—Carte v. Evans, 27 F. 861.

stood. He gave his consent that a citizen of the United States make a piano-forte arrangement of the orchestral score from the original manuscript. This arrangement was copyrighted by its maker and the copyright in such arrangement was, thereafter, assigned to the alien composer of the original score. The copyright was held valid and enforceable. It should be noted that there is no suggestion in this decision, that the effect of this copyright was to give any copyright protection to the original work. Any one was at liberty to use this despite the copyright.[43] But since the copyright in the arrangement was valid, no one could copy the arrangement, without violating the copyright proprietor's rights.

Similarly, in a later decision,[44] the alien publishers of the Encyclopedia Britannica procured copyrighted articles for insertion in their publication, with the express purpose of preventing the work from being reprinted in the United States, as an entirety, without their consent.

§ 718 Assignments of copyrights to aliens not entitled to copyright.

Such copyrights were sustained and effected this purpose. These decisions are direct authorities for the rule that a copyright taken out by a person entitled thereto, may be assigned to a person who would not himself have been entitled to take it out, without in any way affecting its validity.

§ 719 Distinction between such assignments and attempted assignments by unqualified aliens of right to copyright.

On the other hand, it has been held[45] that an alien not entitled to copyright, could not by assignment to a person otherwise capable of taking out a copyright, enable such person to take out a copyright, since he could not confer a right which he did not himself have.

Some stress is laid, in the opinion of the Court, upon the fact that the assignor retained title to the material object in connection with which the copy-

43—Cf. Carte v. Duff, 25 F. 183.

44—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618.

45—Bong v. Alfred S. Campbell Art Co., 155 F. 116; aff'd 214 U. S. 236, 53 L. ed. 979.

§ 720 Effect of retention by alien of material exemplification of work.

right was sought, but this does not appear to affect the result, as the right sought to be asserted and the material object in question are separate and distinct.[46] Thus in another case decided by the Supreme Court,[47] a painting was sold abroad to one person and the artist, for a valuable consideration, executed a paper, by which he "hereby transfers the copyright in my picture" to another. It was held that he might, before copyright, assign his right to copyright, independently of the ownership of the tangible article itself and that the paper in question, was effective in causing a complete transfer of such right in connection with such picture.

§ 721 Countries mentioned in presidential proclamations.

Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and her possessions, Italy, Mexico, the Netherlands and possessions, Norway, Portugal, Spain and Switzerland were proclaimed as countries where the reciprocal conditions contemplated by this section exist, except in the case of mechanical reproductions of music, by proclamation dated April 9, 1910.

Proclamations of June 29, 1910, with reference to Luxemburg; May 26, 1911, with reference to Sweden; October 4, 1912, referring to Tunis, and October 5, 1912, with reference to Hungary, have added these countries to the list in question.

§ 722 Treaties affecting copyright.

Special treaties with reference to the matter exist with China, Japan and Hungary and by virtue of ratification of the Pan-American Convention of Mexico, with such countries, as have adhered, or as may from time to time, adhere to this.

The Chinese and Japanese treaties are so limited as not to be of especial importance. The convention with Hungary expressly makes enjoyment and exercise of the reciprocal rights granted, subject to the performance of the conditions and regulations

46—Section 41.

47—American Tobacco Co. v. Werckmeister, 207 U. S. 384, 52 L. ed. 257.

of the country where protection is claimed under that convention. It is interesting to observe that this convention refers both to published and unpublished works.

§ 723 Pan-American Conventions.

The Mexico City Convention of 1902, provides amongst other things:[48]

"The signatory States constitute themselves into a Union for the purpose of recognizing and protecting the rights of literary and artistic property, in conformity with the stipulations of the present Convention.[49]

In order to obtain the recognition of the copyright of a work, it is indispensable that the author or his assigns or legitimate representative, shall address a petition to the official department which each Government may designate claiming the recognition of such right, which petition must be accompanied by two copies of his work, said copies to remain in the proper department.

If the author or his assigns should desire that this copyright be recognized in any other of the signatory countries, he shall attach to his petition a number of copies equal to that of the countries, he may therein designate. The said department shall distribute the copies mentioned among those countries accompanied by a copy of the respective certificate in order that the copyright of the author may be recognized by them.

Any omissions which the said department may incur in this respect shall not give the author or his assigns any rights to present claims against the State.[50]

The authors who belong to one of the signatory countries or their assigns shall enjoy in the

48—37 U. S. Stat. at Large, 1632.
49—Article 1.
50—Article 4.

other countries the rights which their respective laws at present grant, or in the future may grant, to their own citizens, but such right shall not exceed the term of protection granted in the country of its origin."[51]

§ 724 Countries adhering to Mexico City Convention.

This Convention was ratified by the United States, March 16, 1908.[52] It was proclaimed in effect, April 9, 1908, more than six years after its negotiation. In the intervening period, only five other countries, Guatemala, Costa Rica, Salvador, Honduras and Nicaragua, had adhered to it, as appears from the proclamation of the President putting it into effect.[53]

§ 725 Effect of Convention in United States.

It is, of course, familiar law that treaties may, or may not, be self executing.[54] There does not appear to be any appropriate legislation on the part of the United States, for putting this Convention into force, and it may be doubted as to just what effect it has, save to entitle citizens and subjects of countries which are parties to it, to copyright upon compliance with the general Copyright Act.

§ 726 The Buenos Ayres Convention.

The Buenos Ayres Convention of 1910, contains amongst others, the following provisions:

"The acknowledgment of a copyright obtained in one State, in conformity with its laws, shall produce its effects of full right in all the other States without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property right."[55]

"The author of a protected work, except in case of proof to the contrary, shall be considered the person whose name or well-known

51—Article 5.
52—Senate Documents Vol. 48, 61st Congress, 2nd Session.
53—35 U. S. Stat. at Large, 1945.
54—Cf. Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766.
55—Article 3.

nom de plume is indicated therein; consequently suit brought by such author or his representative against counterfeiters or violators shall be admitted by the courts of the signatory states."[56]

"The authors or their assigns, citizens or domiciled foreigners, shall enjoy in the signatory countries, the rights that the respective laws accord, without those rights being allowed to exceed the term of protection granted in the country of origin."[57]

"The reproduction of extracts from literary or artistic publications for the purpose of instruction or chrestomatry, does not confer any right of property, and may, therefore, be freely made in all the signatory countries."[58]

"The indirect appropriation of unauthorized parts of a literary or artistic work having no original character, shall be deemed an illicit reproduction, in so far as affects civil liability."[59]

This convention was ratified by the United States Senate, February 16, 1911.[60] This convention still awaits the ratification of other governments to become effective. In view of the length of time which has elapsed since its negotiation, such further ratification appears problematical. Discussion of the Convention, accordingly, is unnecessary at the present time, except that extreme doubt may be expressed as to whether Article 3 is as "simple" as Mr. Bowker deems,[61] or whether this convention could have the effect apparently intended by it, without further legislation.

56—Article 5.
57—Article 6.
58—Article 12.
59—Article 13.
60—Senate Documents Vol. 10, 62nd Congress, 3rd Session.
61—Bowker, p. 336.

§ 727 Proclamations referring to mechanical music.

Proclamations of December 8, 1910, with reference to Germany; June 14, 1911, with reference to Belgium, Luxemburg, Norway, and October 15, 1912, as to Hungary, proclaimed these countries to be on a reciprocal basis, in connection with mechanical reproductions of music.

§ 728 European International Conventions.

Discussion of European international copyright conventions falls without the scope of this volume. The Pan-American Conventions and the Berne, Paris and Berlin Conventions are however reprinted, for purposes of convenience, in the Appendix.[62]

62—See Appendix.

CHAPTER XII

HOW STATUTORY COPYRIGHT MAY BE SECURED

§ 729
Method of securing copyright prescribed.

Section 9. That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under Section 21 of this Act.

§ 730
When notice of copyright required.

(a) IN GENERAL

§ 731
The method of securing copyright under the present and prior Acts.

This section is new and the procedure for obtaining copyright outlined in it, and in the following sections, reverses the former procedure, as laid down in R. S. Section 4956, as amended by the Act of March 3, 1891. Under the prior law, deposit of copies and registration were required to be made on, or before, the day of publication: under the present Act, as will be shown, publication is required to precede registration.

§ 732
Copyright vests upon publication, with notice of copyright.

Subject to a possible qualification to the contrary, in the case of works not reproduced in copies for sale or public distribution, which will be fully discussed in connection with Section 11 of the Act,[63] copyright in a copyrightable work now vests on the act of publication being made, provided that the work, when published, bear the notice of copyright required by this section, in the form prescribed in Section 18 of the Act.[64] Various formalities are

§ 733
Registration.

63—See § 766.
64—See § 853.

§ 734 Publication, not registration, secures copyright.

thereafter required to obtain registration of copyright,[65] and a failure to observe these requirements may avoid the copyright,[66] but it should be carefully remembered, since this is a matter of primary importance, that copyright is not obtained, under the present law, by registration, but by publication with notice of copyright. This changes the prior law, as under it, statutory copyright arose on registration. Under the present statute, the historical boundary between common law and statutory copyright—publication—is restored and emphasized. This change in the law can only merit commendation. The meaning of the word "publication," in its double aspect,[67] and its effects, historical and present,[68] has been discussed elsewhere.

§ 735 Effect of change in law.

§ 736 First publication without the United States.

Two of the great open questions under the Act are, must the publication which initiates copyright be made in the United States and what, if any, effect will a first publication without the United States, have on a subsequent attempted copyright therein.

§ 737 Indefinite language of present Act.

There is nothing in the Statute which, in terms, states that the first publication which initiates, and which alone can initiate, statutory copyright must take place in the United States, nor that publication without the United States, before publication in the United States, prevents statutory copyright therein. In these respects, the Statute differs from predecessor statutes. Its verbiage here, unfortunately, is indefinite.

§ 738 The struggle for international copyright.

After the authors or booksellers had lost the battle for perpetual copyright,[69] their next great struggle was for international copyright. This campaign is still unfinished. The victory won in removing alienage, uncoupled with residence, as a bar to

65—See § 788.
66—See § 789.
67—See § 262.
68—See §§ 283, 289, 293, 398.
69—See § 22.

copyright,[70] marked a definite stage in the struggle. It has not, however, satisfied the protagonists, who desire international copyright.[71] They seek a system where publication in any country will ensure copyright in every country. The failure of the present Act in so many words to negative this conception, has been deemed to leave its effect doubtful. This fact and the absence of final judicial decisions, complicates the difficulty, while its emphasizes the necessity, for passing upon the great question involved.

§ 739 Prior legislation with respect to initial foreign publication.

A brief résumé of prior legislation may precede a discussion of the matter.

The first Copyright Act, Section 3,[72] provided that no one should be entitled to copyright, unless he deposited a printed copy of the title of the work, before publication, in a designated place and (Section 5) that nothing in the Act should be construed "to prohibit the importation or vending, reprinting or publishing within the United States" of a copyrightable work, written, printed or published by any person, not a citizen of the United States, in foreign parts or places, without the jurisdiction of the United States. In the Revision of 1831,[73] the first-mentioned provision was preserved and the latter broadened so as to prevent copyright in all works by "any person not being a citizen of the United States, nor resident within the jurisdiction thereof," which were first published without the United States. In the Revision of 1870,[74] it was provided that no person should be entitled to copyright unless he, before publication, deposited a title in the mails addressed to the Librarian of Congress and, after publication, deposited required copies. The language of the Act of 1831, changed to correspond with the

70—See § 704.
71—See for example Bowker: X.
72—Act of May 31, 1790.
73—Act of Feb. 3, 1831, 21st Congress, 2nd Sess. c. 16.
74—Act of July 8, 1870, 41st Congress, 2nd Sess. c. 230.

enlarged subject of copyrights, was retained with respect to works of persons not citizens of the United States nor resident therein, first published abroad. The Revision of 1873,[75] did not change the statutory provisions in question. Under all these statutes, then, by their express language, only citizens of the United States or residents[76] therein, were permitted statutory copyrights.

When the agitation against this exclusion of non-resident aliens, who, up to that time, were totally unable to obtain any protection for their works, in any manner, culminated in the passage of the Act of March 3, 1891, Section 4956 of the Revised Statutes was amended so that it read that no person should be entitled to copyright unless he should, "on or before the day of publication in this or any foreign country," deliver to the Librarian of Congress, or mail in the United States to him, the printed title required by the Act and also "not later than the day of publication thereof in this or any foreign country" similarly deliver, or mail in the United States, two copies of the work. The provisions of prior law which, in terms, made works by persons not citizens of the United States, or resident therein, public property, were repealed by this Act, and the privilege of copyright was extended to certain resident and non-resident aliens.[77]

By the Act of March 3, 1905,[78] Section 4952 of the Revised Statutes was amended by providing that whenever the author or proprietor of a book in a foreign language, first published in a foreign country, deposited a complete copy thereof, within thirty days after such first publication, in the office of the Librarian of Congress, placing a notice of the reservation of copyright therein and in all other

75—Act of Dec. 1, 1873 (R. S. 4956, 4971).

76—See § 707.

77—See § 704.

78—Fifty-first Congress, 2nd Sess. c. 565; 58th Congress, 3rd Sess. c. 1432.

copies sold or distributed in the United States, and, within twelve months from the date of first publication, filed a title and two copies of the book, in the original language, or, in his option, of an English translation printed from type set in the United States, or from plates made therefrom, he should for twenty-eight years from the date of recording the title or the English translation, have the sole liberty of printing, reprinting, publishing, vending, translating, and dramatizing the said book.

§ 740 The law as to initial foreign publication prior to 1891.

It will appear from an examination of the statutes thus quoted, that before 1891, there was no express statutory reference to foreign publication, but that the works of alien non-residents, wherever published, were not copyrightable in the United States. Writing with reference to the statutes prior to 1891, Mr. Drone [79] expressed the opinion that the Courts would hold that the publication referred to in the statutes meant first publication in the United States, and that first publication abroad would prevent statutory copyright in the United States.

"It cannot be doubted," said Brown, J., writing in 1882, "that the purpose of the copyright laws from the foundation of the government has been to encourage native talent and to protect American authors and artists only." [80]

"It is immaterial whether the publication," i. e., by which common law rights terminate, "be made in one country or another. Such rights of authors as are saved by statute are not recognized extra-territorially. They can only be enforced in the sovereignty of their origin," said Wallace, J.,[81] in 1885.

§ 741 The English view.

The English judges, no matter how much they differed on other points, in the great controversies which centered about the Statute of Anne, were

79—Drone: Copyright, p. 295.
80—Yuengling v. Schile, 12 F. 97, 103.
81—Carte v. Duff, 25 F. 183.

steadfastly of opinion that first publication, without Great Britain, would prevent a British copyright.[82]

"The doctrine of a prior publication abroad destroying the right of the foreign author to publish here so as to acquire English copyright appears to me to rest upon satisfactory grounds," said Mr. Justice Crompton.[83] "When the work has been made public abroad, there is no statute which makes that publication the commencement of the monopoly here and the work becoming *publici juris* here, and it being once lawful for any one to publish it in England, it would be impossible to hold that a subsequent publication here was a first publication within the meaning of the Act, so as to give a monopoly which would make unlawful the continuing to publish what had once been *publici juris* and might have been lawfully published here."[83]

§ 742 The effect of the Act of 1891 upon the question.

The Act of 1891 contemplated either a first publication in this country or abroad, *but* it provided for the public deposit of copies in this country, on or before the date of publication abroad.[84] Hence in the case of works published abroad it, theoretically, provided for, at least, a simultaneous publication of the work in this country and abroad, as deposit of copies in the Copyright Office is in itself a publication, independently of what is done elsewhere.[85] A simultaneous publication, it has been held, will satisfy the requirements of a statute requiring first publication to be made in a given country.[86] The Act of 1895 which provided for

§ 743 Simultaneous foreign and domestic publication.

§ 744 The Act of 1895.

82—See opinions of Judges in Jefferys v. Boosey, 4 H. L. C. 815. And see cases cited, § 756 (n.) 8.

83—Jefferys v. Boosey, 4 H. L. C. 815, at 852.

84—See § 69.

85—See § 324. The publication required by this section does not require any effort at commercial exploitation or putting of the work on the market. Stern v. Jerome H. Remick Co., 175 F. 282.

86—Francis Day & Hunter v. Feldman & Co., (1914) L. R. 2 Ch. 728.

so-called ad interim copyrights, was limited to books in foreign languages, provided for deposit within thirty days after foreign publication[87] and was plainly intended to further translations of books in foreign tongues into English or to facilitate the prompt introduction of such works, in their original condition, into this country.

Having this prior legislation in mind, the present statute may now be considered. The apparently unrestricted language used in the section is not decisive, as to its proper judicial construction.

§ 745 The Louisiana Purchase Exposition Copyright Act.

In 1904, Congress passed an Act[88] to afford protection to exhibitors of foreign works at the Louisiana Purchase Exposition. In this it was provided that the author of any of certain specified works, "published abroad prior to November thirtieth, nineteen hundred and four, but not registered for copyright protection in the United States copyright office," "or produced without the limits of the United States" prior to said date, "intended for exhibition at the Louisiana Purchase Exposition" should, upon compliance with the Act, have copyright in such works. The term of copyright was to be two years "from the date of the receipt of the book or other article in the copyright office." Machinery was provided for the extension of this term, by domestic reproduction, within the initial copyright period. No registration was to be made under the Act after Nov. 30, 1904. In the only reported decision[89] which construed this Act, it was held that this Act, despite its broad language, did not enable copyright to be taken out under it for a book previously sold abroad and by other publishers in the United States, for many years prior to the passage of the Act.

§ 746 Narrow judicial construction of its sweeping language.

87—See § 75.
88—Act of January 7, 1904 (58th Congress, 2nd Sess. c. 2).
89—Encyclopedia Britannica Co. v. Werner Co., 135 F. 841.

§ 747
Rule as to judicial construction applicable to such statutes.

The Supreme Court[90] has stated that it will hesitate to construe the Copyright Act in such a manner that foreign authors and composers can obtain rights in this country which they cannot secure in their own, by international copyright laws passed before the existing statute.

Registration of copyright now follows the vesting of copyright instead of preceding, or being synchronous with it. Publication, with notice of copyright, secures copyright *but such notices are only required to be affixed to copies published or offered for sale in the United States.* Since copyright is procured by publication with notice and the notice essential to create copyright is only necessary where publication takes place in the United States, and such notices outside of the United States would be quite useless and futile,[91] it would seem to follow, *ex proprio vigore*, from the language used in this section, that, save in cases of ad interim copyrights, the initial publication contemplated by the present Act to secure copyright, must take place in the United States.

§ 748
First publication to secure copyright must take place in United States.

This view is supported by the general rule of construction that, wherever possible, the general words of a statute are to be so construed as to avoid giving it an extra-territorial effect.[92] It is also supported by an examination of House Report 2222[93] which accompanied the present Act on its passage through the House, and, after adoption by the Senate Committee on Patents,[94] on its passage through the Senate. The Congressional Record shows the present Act was passed substantially without discussion, largely on the strength of this Report.

90—White Smith Music Publishing Co. v. Apollo Co., 209 U. S. 1, 52 L. ed. 655.

91—See § 760.

92—American Banana Co. v. United Fruit Co., 213 U. S. 347, 53 L. ed. 826.

93—Sixtieth Congress, 2nd Session.

94—See § 78.

The Report is a somewhat elaborate analysis of proposed changes or re-enactments of then existing copyright statutes. There is no statement contained in it to show any intention to change the pre-existing law, which made first publication in the United States essential to the securing of United States copyright. A fundamental change such as this, if intended, would almost certainly have been discussed in the Report. Reference may be made to this Report for light in construing the Act.[95]

§ 749 "Publication" as used in this section means first publication.

It seems clear, then, that the publication required, by this section, to initiate United States copyright must take place within the United States. Such publication means first publication. No instance has been found in the books or statutes where the word "publication" used alone, without qualifying adjective or adverb, to describe the act upon which a statutory copyright may be predicated, has not been deemed to mean first, or initial, publication. Such initial, or first publication, has marked the historic boundary of statutory copyright since the Statute of Anne.[96] There can be but one initial or first publication.[97] Once it takes place, no matter where, the work is public. Steamship, railroad, cable, telegraph, wireless, speedily spread it over the face of the civilized world, if it have merit, or popular appeal to nations outside of the country of origin, but, even if this is not done, the work is public. This being so, great doubt may be expressed whether Congress could, constitutionally, permit copyrights in matter which had been published abroad, unless, if at all, such copyright were made conditional on almost immediate subsequent publication in this country, in such exceptional cases as are provided

§ 750 Constitutional questions as to copyright in works first published abroad.

95—Holy Trinity Church v. U. S., 143 U. S. 457, 464, 36 L. ed. 226, 229; Binns v. U. S. 194 U. S. 486–495, 48 L. ed. 1087–1090; Johnson v. Southern Pacific Co., 196 U. S. 1, 19. 20, 49 L. ed. 363, 370, 371.

96—See §§ 25, 247 *et seq.*

97—Thomas v. Turner, 33 Ch. D. 292.

for in Sections 21 and 22 of the Act with reference to ad interim copyright, for books. It should always be borne in mind that the power of Congress to enact copyright laws is not unlimited; it can only pass such statutes as are calculated, at least, to some degree, "to promote the progress of science and the useful arts."[98] As it can only legislate for the United States, this must mean promote such progress in the United States. It is somewhat difficult to see how such progress in the United States could be promoted by any laws which would confer property rights, in the United States, in connection with publications made outside of the United States, while, on the other hand, theoretically at least, even a nominal first publication in this country promotes the progress of science and the useful arts.

The constitutional aspects of this question have not been ignored, it would seem, by the framers of the various proposed bills, which have avowedly been intended to create international copyright.[99] Simultaneous publication in the United States, as well as in the country of the work's origin or its substantial equivalent, was a general characteristic of such bills.

§ 751 Discussion of the question whether a first publication abroad will not defeat a subsequent United States copyright.

Anyone may buy the work abroad and import a copy, if no copyright has been obtained in the United States for the work. Save as restrained by the copyright laws, he may make any use of it he sees fit. If uncopyrighted, he may copy it.[1] If the case be supposed of French publication in 1909, can it possibly be argued that by merely failing to take any steps amounting to publication within the United States, the author might, for example, in 1915 take out United States copyright and proceed

98—See § 81.

99—The history of this movement will be found in Bowker: Copyright, p. 341.

1—Maule, J., in Jefferys v. Boosey, 4 H. L. C. at p. 894; Warne & Co. v. Seebohm, 39 Ch. D. 73.

against anyone who in the interval had incautiously reproduced, in the United States, copies of such work purchased in France? Many works have no ear-marks showing the country of their origin. This is especially true of non-literate works. The mere presence of copies in a given country is, hence, no proof that they were produced in that country. Can it be argued that once the work is within this country, and part of the general mass of property therein, anyone who desires to reproduce it must endeavor, at his peril, to search the balance of the world to ascertain the country of origin and whether the author took out a copyright in the country of origin or elsewhere, or not? Even if the work bore a notice of its origin, or reservation of rights, which might, or might not, be true, this could not affect the situation, as no notices printed on works published abroad can have any effect in the United States, even if valid under the local foreign law.[2] Moreover the mere taking out of a foreign copyright, being a matter of local extra-territorial statute, cannot affect the situation of the work in the United States. The question whether such situation may be altered by treaty is considered elsewhere.[3] Once the work be published abroad, then, whether or not the author has a foreign copyright, is a matter of no importance. So that if the view were taken that first publication abroad did not defeat American copyright, this would be true even if the work became part of the uncopyrighted public domain of the country of origin. Such a situation was, obviously, not intended. If Congress could not give copyright, constitutionally, in a work in the public domain in this country, it could not well do so in a work in the public domain in a foreign country. For these reasons, therefore, and since as has been shown, the first publication, which initiates

2—Savage v. Hoffman, 150 F. 584; Wagner v. Conreid, 125 F. 798.
3—See § 752.

copyright (and there can be but one), must take place in the United States, it would seem clear that a publication abroad, without copyright in the United States, would cause the work to fall into the public domain in the United States. By publication, in this connection, is meant such a publication as at common law would have ended common law copyright.[4] What judicial authority there is, is to the effect that a publication abroad, (unless it amount only to what is called a publication solely by force of a foreign statute) terminates common law rights everywhere.[5] Since the right of first publication is a common law right,[6] and the exercise of this right is essential to initiate statutory copyright, if the common law right is lost, the statutory right cannot arise.

For the reasons given it is deemed both that the first publication required by the statute to initiate copyright must be had in the United States (except possibly in cases where ad interim copyrights are sought)[7] and that first publication abroad (except possibly where the formalities incident to ad interim copyrights are observed)[7] will prevent subsequent statutory copyright in the United States.

§ 752 The feasibility discussed, of international copyright by treaty.

Attention has been directed elsewhere to various copyright treaties and conventions to which the United States is a party.[8] Since the treaty making power is practically unlimited,[9] it may well be that that may be done by treaty which could not be done by statute passed under the limited congressional power with respect to copyrights. Unless, however, such treaties are so drafted as to be self-executing,[10] interesting questions would arise, if

4—See §§ 356–7.
5—See §§ 756 (n. 8), 755.
6—See § 252.
7—See § 927.
8—See §§ 722–726.
9—Geofrey v. Riggs, 133 U. S. 258, 33 L ed. 642.
10—See § 725.

Congress attempted by appropriate legislation, to render them efficacious, and this legislation were such that it transcended the copyright clause of the Constitution. As this has not yet been attempted, it is unnecessary to discuss the question at this time and place.

A great judge[11] has pointed out, that if foreign publication would not defeat domestic copyright, the attempts to establish international copyright by treaties, or conventions, would be altogether unnecessary, and such considerations, while they emphasize the views enunciated in the text, would appear to indicate the line of least resistance for international copyright. Since, as has been indicated, a simultaneous publication in this country and abroad, would be deemed a first publication in each of the countries where it takes place,[12] no hardship can result to any author, vigilant and advised of his rights, by requiring first publication in the United States as a condition for the grant of statutory copyright therein. Much hardship to individual citizens may, on the other hand, be avoided and the general advancement of the public interest may be furthered,[13] by ensuring the speedy importation of foreign works, by steadfast adherence to the rule indicated.

§ 753 The justice and public policy of requiring domestic first publication.

Such judicial authority as exists, in connection with cases which have arisen under the present Statute, supports the foregoing conclusions.

§ 754 The decisions applicable to the foregoing questions cited and discussed.

The Supreme Court of the State of New York (Bijur, J.) held first publication abroad prevented copyright in the United States, without, however, giving any reasons for its view.[14]

11—See remarks of Pollock, C. B. in Chappell v. Purday, 14 M. & W. 303.

12—Francis Day & Hunter v. Feldman & Co., (1914) L. R. 2 Ch. 728; Cocks v. Purday, 2 Carr. & Kir. 268.

13—Clementi v. Walker, 2 Barn. & Cr. 861.

14—Stern v. T. B. Harms Co., N. Y. Law Journal, Nov. 18, 1914.

§ 755 Universal Feature Film Co. v. Copperman.

In a recent important and instructive case,[15] the following facts appeared: The plaintiff was assignee of an alleged United States copyright, procured by a Danish corporation upon a motion picture photo-play made by it in Denmark. It had sold numerous copies of the play outside of the United States, inserting in the invoices, a statement that the films so sold were not to be used outside of the country where sold. The defendant purchased a second-hand copy, without notice of the attempted territorial restriction, from a third person, in London. After he brought this to the United States, the Danish Company attempted to obtain a United States Copyright under Section 11 of the Act and then brought suit against the defendant to prevent exhibition of his copy. The lower Court, (Hough, J.) in rendering judgment for defendant, held that publication in Europe defeated the subsequent effort at United States Copyright protection. The Court did not, however, discuss the matter and, evidently, assumed the previous law in this respect to be unchanged. The Court said incidentally:

> "Section 9 of the Act of 1909 carries forward substantially the historic method of obtaining copyright and corresponds to Rev. Stat. Section 4956 when it says: 'any person entitled thereto by this Act may secure copyright for his work by publication thereof without the notice of copyright required by this Act.' Around this method of procuring copyright has grown a great body of case law, the sum of which is that publication with notice is the essence of compliance with the statute and publication without such notice amounts to a dedication to the public sufficient to defeat all subsequent efforts at copyright protection."[16]

15—Universal Film Co. v. Copperman, 212 F. 301.
16—212 F. 301, 302.

§ 756 The foregoing decision, on appeal.

On appeal, this decision was affirmed by the Circuit Court of Appeals,[17] on the ground that the copy involved was not an infringing copy, without discussion of the question of foreign publication, save inferentially. While this decision is sound, there is much in the opinion of the Circuit Court of Appeals which will not bear critical examination. Thus it speaks of the Danish Company's "common law rights" in England, although common law copyrights no longer exist there, having been abolished by statute.[18] It would be difficult to conceive of common law "rights" in Denmark, the country of origin, as the common law never prevailed there.[19] When the Court states that the Danish Company "abandoned its common law property in the United States when it took out the statutory copyright," the question suggests itself how could it have any such property to abandon, when it apparently did not, and could not have it, in any other country in the world? This leads to the further question as to when the court deemed this common law property in the United States, arose? It could not have well been on the production of the photoplay in Denmark. The mere act of creation in Denmark could not well, simultaneously, create property rights in the United States, where there was nothing to mark the accrual of such rights, if created, without any evidence whether such rights arose in Denmark or not. Yet common law rights, where recognized, are supposed to arise on the act of creation. If the Court did not take this view, are the rights supposed to have accrued when the Danish Company first

17—218 F. 578.

18—British Copyright Act, (1911) § 31.

19—Barrielli v. Bettman, 199 F. 838, and cf. as to the presumption in such matters. Cuba R. R. v. Crosby, 222 U. S. 473, 56 L. ed. 274, 38 L. R. A. (N. S.) 40; Savage v. O'Neill, 44 N. Y. 298; Lucia Mining Co. v. Evans, 146 N. Y. A. D. 416; Matter of Hall, 61 N. Y. A. D. 266; Crashley v. Press Publishing Co., 179 N. Y. 903; Schweitzer v. H. A. P. A. Gesellschaft, 149 A. D. 900.

brought a copy of the work into this country? If so, they would apparently arise out of the act of importation, which would be somewhat of a novelty in copyright law. There are no cases which, in terms, hold that there can be a common law copyright in this country, where there was not, at some time, a common law copyright in the country of the work's origin. Did the Circuit Court of Appeals regard it a matter of no importance whether, or not, the work had been published in the country of origin, or elsewhere, before being imported? The decision is silent on this point. The essence of common law copyright is the right of first publication. All cases prior to this decision have deemed it immaterial where this right of first publication was exercised. Once exercised, it was gone and the common law copyright with it. What the Court meant by saying that the sale of films after copyright was as consistent with the proprietor's statutory ownership, as was the sale of films before copyright, with its common law ownership, is not clear. The copyright had been registered under Section 11 of the Act. Section 12 requires, expressly, a re-registration, if the work is produced in copies for sale. Such copies are required to bear statutory notices. No such notices were affixed, nor was there any re-registration of the work, after copies were produced for sale. It is elementary law that sales of works, whether intended to be read or performed, are inconsistent with common law copyright.[20] The sale of copies terminates the latter, and it is difficult to see why this is not equally as true of printed copies of a motion picture film as of books. It would seem that if the Court had used the word "inconsistent" instead of "consistent," in this portion of its opinion, it would have more nearly approximated correctness. It is not clear from the Court's opinion

20—See § 317.

whether it regarded the attempted United States copyright as valid.[21] If so, its opinion may, with all due respect, be deemed less convincing than that of the lower Court upon this point, the more especially as it advances no reasons in support of any contention that the statutory copyright involved was valid. These criticisms, however, run to the language of the opinion, rather than of the point actually and necessarily decided, to-wit, that whether or not the copyright was valid, the copy involved was not an infringing one.

In a case decided under the prior Act,[22] an English authoress had, it appeared, sold the American serial and book rights in her novel, including the sole right to publish it in the United States, to the plaintiffs. The contract provided that the plaintiffs should take all necessary steps under the United States Copyright Acts, "to secure their own rights and those of the author in said work." She sold the English rights to other publishers. Whether this was before, or after, her contract with plaintiffs, does not appear. The proprietors of the English rights published the story, serially, in England and the United States, before the plaintiffs began publication of the work. The plaintiffs copyrighted the work, serially, as chapters appeared in the periodical published by them, and as an entirety, simultaneously with its English publication as an entirety. It was held, amongst other things, that the prior United States and English publication of the work did not affect the plaintiff's copyright, as there was no privity between the plaintiff and the English publishers who had published it serially, as indicated, and that the consent of the author to what the English publishers did had no effect upon the plaintiff's copyright. This decision was affirmed

21—For further discussion of this decision, see § 748.
22—Harper Bros. v. M. A. Donahue & Co., 144 F. 491.

without opinion by the Circuit Court of Appeals.[23] The Court's apparent view that only prior publication in the United States can affect the right to United States copyright appears novel[24] and unsound.[25] The Court's further apparent view that there may be a difference between prior publication by an author, and similar acts by the licensee of an author appears, if sound, to rest upon the special language of prior statutes.[26] The date and tenor of the author's agreement with the English publishers, if this had been in evidence, might have had a controlling bearing upon the proper decision of the case. As it was, upon the facts stated in the decision, it may well be that the case is properly sustainable on the ground that the rights conveyed to the American publishers were so broad as to include the right to the American copyright under the then statute,[27] in which event, neither subsequent domestic or foreign publication, either by the author or a third person, probably, could affect the rights of such assignee to United States copyright.

Earlier cases holding foreign publication to be a dedication of the work to the public will be found below.[28]

§ 757 Differences between copyrights and patents respecting foreign

At this point an important difference between patents and copyrights may again be noted, arising out of the difference between the words "author"—meaning an originator or creator—and "inventor,"

23—146 F. 1023.

24—See § 740.

25—Cf. Chappell v. Purday, 14 M. & W. 303.

26—R. S. 4962.

27—R. S. 4952.

28—Daly v. Walrath, 40 N. Y. A. D. 220; Bouccicault v. Wood, 2 Biss. 34 (semble); Clementi v. Walker, 2 Barn. & Cr. 861; Guichard v. Mori, 9 L. J. Ch. O. S. 227; Chappell v. Purday, 4 Y. & C. Exch. 435; Rutledge v. Low, L. R. 3 H. L. C. 100; Cocks v. Purday, 5 C. B. 860; Jefferys v. Boosey, 4 H. L. C. 815; Bouccicault v. Delafield, 1 Hem. & M. 597; Low v. Ward, L. R. 6 Eq. 415; Bouccicault v. Chatterton, 5 Ch. D. 267; Clementi v. Walker, 2 Barn. & Cr. 861; Page v. Townsend, 5 Sim. 375.

publication or use.

which may include a mere discoverer, of the idea of another, as well as a creator. Under the patent laws, prior foreign use of an article, patented in good faith, in this country, is no defense, unless it was described in a prior printed article or publication. No more cogent appreciation of the international fluidity of writings would be possible than that evidenced by this section of the patent laws, and the absence of similar provisions in the copyright laws is deemed significant.

§ 758 Simultaneous publication is first publication.

If the view that first publication of a work must be made in the United States be sound, a contemporaneous domestic and foreign publication would satisfy this requirement.[29]

§ 759 Proof of foreign publication.

In an English decision,[30] it was said that in view of its consequences, if established, proof of prior foreign publication must be clear and convincing.

§ 760 Notice of copyright: when requisite.

The notice of copyright required by the present Act must be affixed to every copy of a work published or offered for sale in the United States, except in cases of ad interim copyright. Notice need not be affixed to copies published abroad[31]—even by the proprietor.[32] Since works deposited in the Copyright Office are "published,"[33] it would seem the notice should be affixed to such works and this is especially important where, through one reason or another, it is desired to rely on this deposit as constituting the required statutory publication.

As the proprietor of a copyright should not be held responsible for acts of persons not in privity with him, the failure to annex notices of copyright

29—Francis, Day & Hunter v. Feldman, (1914) L. R. 2 Ch. 729; Cocks v. Purday, 5 C. B. 884; Buxton v. James, 5 De G. & Sm. 80; Boosey v. Purday, 4 Exch. R. 145.

30—Ex parte Davidson, 18 C. B. 297, 311.

31—Harper v. Donohue, 144 F. 491.

32—United Dictionary Co. v. G. & C. Merriam Co., 208 U. S. 260, 52 L. ed. 478.

33—See § 324.

§ 761 Unauthorized foreign publication.

to copies, not published, or offered for sale by his authority, is immaterial.[34] Similarly, a foreign publication, without the consent of the author, cannot affect his rights in the United States.[35]

(b) REGISTRATION OF COPYRIGHT

§ 762 Registration of copyright.

§ 763 Certificate of registration.

Section 10. *That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in Section* 55 *of this Act.*

With the possible exception of the instances discussed under the following section,[36] copyright no longer arises on the deposit of copies, as under the former statutes,[37] but vests upon publication of the work with the prescribed statutory notice upon it.[38]

§ 764 Registration, essential.

Registration of such copyright continues to be essential, however, for while the language of this section appears permissive, the language of Section 12, which also deals with registration, in connection with the deposit of copies, is mandatory.[39] The question as to what are the consequences of a failure to register a work under the present Act, is dealt with in connection with the discussion of that Section.[40]

§ 765 Who may obtain certificates of registration.

The Section, in its reference to the persons who may obtain registration under it, appears to refer to all persons comprehended within the language of Section 9.[41] It does not appear to include persons

34—Bouccicault v. Wood, 2 Biss. 34 (semble).

35—Bouccicault v. Wood, 2 Biss. 34 (semble); Shook v. Neuendorff, 11 N. Y. Daily R. 985.

36—See § 766.

37—See §§ 734, 789, 731.

38—See § 729.

39—See § 788.

40—See § 789.

41—See § 729.

who obtain copyrights under Section 11. This omission appears to have a direct bearing upon the question as to who can obtain certificates under Section 55 of the Act, a question which is discussed in connection with that section.[42]

(c) AS TO WORKS NOT REPRODUCED IN COPIES FOR SALE

§ 766
How copyright may be obtained in certain works not reproduced in copies for sale.

Section 11. *That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under Sections* 12 *and* 13 *of this Act, where the work is later reproduced in copies for sale.*

§ 767
The question discussed whether this section refers to published or unpublished works.

The questions which arise under this section of the law present matters of great commercial importance and of equal legal doubt. The matters in question hinge primarily upon whether the copyright contemplated by this section is in unpublished, or published, works only. There are at least four possible views which may be taken of this Section: (a) that it only contemplates copyright in works, unpublished prior to copyright; (b) that it contem-

42—See § 1629.

plates copyright only in published works, not reproduced in copies for sale; (c) that it contemplates copyright in unpublished works of the classes specified therein, save in the case of motion pictures but only in published motion pictures; and, (d), that it contemplates a sort of reinforced common law copyright, which view, however, merely, it seems, deals with the effect of the section and not with its subject matter, save in so far as it, having the historical common law copyright in mind, assumes it to be in unpublished works. The Copyright Office has taken the first view.[43] So, although with difficulty, has Mr. Bowker, in his work on Copyright.[44] He also takes the last view suggested. On the other hand in the only adjudicated case which discusses the matter, Hough, J., was of the opinion [45] that this section referred to published works, not however reproduced in copies for sale.

Before proceeding to a critical examination of the question, a few general observations on the section are necessary.

§ 768 Scope and effect of the section as originally enacted.

As originally enacted, the section contained no express reference to motion pictures. It called therefore, in every case covered by it, for the deposit of at least one copy of the work, in the Copyright Office, with claim of copyright, since a "photograph or identifying reproduction of a work of art, etc.," would, almost certainly, be deemed a copy thereof within the technical use of the word copy made in the preceding sentence. According to cases previously cited, the deposit of the requisite copy would be a publication of the work,[46] so that before the passage of the amendment of 1912,[47] the question under discussion was not important.

§ 769 Its amendment in 1912.

43—Copyright Office Regulations, 1, 17.

44—Page 179.

45—Universal Film Co. v. Copperman, 212 F. 301, aff'd on another point, 218 F. 578.

46—See § 324.

47—Act of August 24, 1912.

In 1912, however, provision was made permitting the deposit of a title and description, with prints taken from each scene or act of a photoplay or from two different sections of a complete motion picture other than a photoplay, instead of a copy of such works, if copyright were sought under this section. It is the situation created by this amendment that has chiefly complicated, and given importance to, the question under discussion.

§ 770 Nature and subject matter of works covered by the section.

It is to be noted that only a limited number of classes of works are covered by Section 11. Books, for example, other than dramatic works, are not covered by it. The works that are mentioned in it have all one common characteristic, that is, they are in their nature primarily adapted for representation, presentation or exhibition. The works chiefly designed to be covered by the section were dramatic and artistic works and these, except in the case of photographs perhaps, are not usually reproduced in copies for sale, nor are they normally "published," having due regard to the doctrine that mere exhibition or performance, though public, is not publication.[48] Such works under the common law, if unpublished, enjoy a very substantial degree of protection,[49] so great in fact, that under past statutes, permissive statutory copyrights in various classes of such works, were the exception rather than the rule.

§ 771 Their protection at common law.

§ 772 Limitations on common law protection.

There are three great difficulties with common law copyright, however, (a) the proprietor may at any time, to his surprise, learn that something he has done has amounted to a publication and ended his rights; (b) if his title is challenged, he may, in the absence of registration, especially after lapse of time, have difficulty in procuring evidence of title, and (c) in case of infringement, he can only procure

48—See §§ 348, 356, 396.
49—See § 438.

§ 773 General observations on reasons for preferring statutory, to common law protection.

actual damages, not penalties or fixed damages, and often, though damaged, he cannot prove actual damages, technically. These considerations may well induce the surrender of a common law copyright and the taking out of a statutory one. Their existence is the true reason for copyright legislation. Thus the Statute of Anne was passed because of the desire for effective remedy, by way of penalties,[50] against infringement. On the other hand, a common law copyright is perpetual, if there be no publication[51] and under our Constitution, a statutory copyright must be limited to time.[52] Imitation or copying, in subtle form, which may, or may not, amount to piracy, is rendered more facile by statutory copyright, which makes copies accessible to the public. An enlightened public policy, however, while recognizing the logical right of an author in and to his work, also recognizes the great public interest in seeing that the ideas embodied in such works may be made accessible to the public, at least in some degree, so that the progress of science and the arts may be promoted thereby, which generally could not be the case as long as such works remained strictly private, that is to say, unpublished. The tendency has been to strike a mean between such public and private interests, by leaving it to the author to determine whether he chooses to rest upon his inherent rights, or whether he chooses to obtain statutory rights from the public, as embodied in Government, and, in return, make his work public, that is, to publish it.

§ 774 The general scheme of vesting of copyright under the present Act.

Since Congress, conscious of the historical boundary between common law and statutory copyright,[53] had fixed on publication as the basis of copyright under the statute,[54] it became necessary to furnish

50—Millar v. Taylor, 4 Burr. 2350, per Aston, J.
51—See § 270.
52—See § 121.
53—See §§ 247–263.
54—See House Report 2222, referred to elsewhere (§ 78).

machinery for copyrighting works upon the same basis, where such works were of classes, which for commercial reasons, were ordinarily not published. This was not essential under prior statutes, where registration was made the basis of copyright, but provision had to be made for this, when the change in theory of statutory copyright was made, to which attention was directed eleswhere.[55] By initiating copyright in such cases on the deposit of copies, the same result was reached, however, since such deposit was a technical publication.[56] This statutory scheme is further indicated, with reasonable clarity, by Section 12 of the Act, which appears to provide that "*after copyright has been secured by publication* of the work with notice of copyright as provided in Section 9 of the Act" there was to be promptly deposited, *if the work was not reproduced in copies for sale,* "the copy, print, photograph or other identifying reproduction provided by Section 11 of the Act."[57] It will be noted that this language was appropriate to Section 11, before the inclusion of motion pictures, *eo nomine.* It was further emphasized by Section 23 of the Act, which alone fixes the duration of copyright and provides this shall be twenty-eight years "from the date of publication of the work."

§ 775 Practical reasons for the amendment of 1912.

The Courts had held that the term "photographs" covered and included motion pictures,[58] so that as Section 11 stood before the amendment of 1912, motion pictures were included, although not specifically mentioned. But a motion-picture film costs money and even the single copy required before the section was amended, represented a fairly substantial investment. Therefore, although this was by no means the ostensible ground for the amendment,

55—Sec § 731.
56—Sec § 324.
57—Sec § 788.
58—American Mutoscope, etc., Co. v. Edison Mfg. Co., 137 F. 263.

which, on the contrary, purported to put motion picture men on an equality with proprietors of other plays, the section was amended, so as for the first time to require, not the filing of copies, but, titles, descriptions, and prints from different portions of motion pictures, on the copyright of such works under Section 11. This is a much cheaper method of procedure than the deposit of a copy. Section 12 was not amended at the same time at which Section 11 was, but the phrase "identifying, reproduction" used in it, when speaking of Section 11, may be broad enough to include the matter now required to be deposited under it, in the case of motion pictures. It would seem, then, that if Section 11 refers to published works, in every case of copyright under it, except motion pictures, the deposit of the requisite copy satisfies any requirement of publication, provided it bear the notice of copyright referred to in Section 9 but that in the case of motion pictures, whether photoplays or otherwise, since what is to be deposited since 1912 is not a copy, an independent precedent publication prior to deposit is requisite, if publication is required in cases of copyright under this Section.

§ 776 Effect of deposit of works, other than motion pictures, in obtaining copyright under this section.

§ 777 Discussion of theory that Section 11 refers to unpublished works or reinforces common law copyrights by statutory protection.

The view that the section refers to unpublished works appears to rest, partly upon certain phrases in the statute, partly upon what its framers probably had in mind in connection with early drafts of the Act, and also upon a conception that works which are not reproduced in copies for sale, cannot be published and, hence, that the section can only refer to unpublished works. But there is nothing in the nature of the works enumerated in Section 11 which would render them incapable of publication and a copyright in any work incapable of publication would seem a contradiction of terms, upon its face. This section refers to the situation which exists at the time when statutory copyright is sought. It deals, not so much with what can be done with the

works to which it refers, as with what has, or has not, been done with them, prior to that time. Any conception therefore, that the works enumerated in Section 11 cannot be published, would appear demonstrably fallacious. Mr. Bowker[59] deems that this section confers "a common law copyright, fortified by statutory protection, an ideal example of copyright law." Unfortunately, he adduces no reasons for the view of the section so taken by him. It will be noted that his position goes beyond that necessarily taken by the Copyright Office, as he deals with the nature of copyright under Section 11, while the Copyright Office's view only, necessarily deals with the possible subject matter of copyright under that section. Mr. Bowker,[60] in support of his views, suggests first, that this section makes "a grant" "for protection under the common law rather than a statutory and limited grant of privilege" and in the following paragraph advances the alternative view that Congress is "here not making a grant but is offering statutory protection to the inherent right of an author in his unpublished work." An examination of the Report of the House of Representatives Committee in charge of the Act, shows that Congress had neither of these views in mind when the Act was passed.[61]

Mr. Bowker's view appears to do palpable and unnecessary violence to the language of the section and to the whole scheme of the statute. There is no language in the statute, which, in terms, provides for more than one kind of copyright under the statute. Copyright is nowhere defined in the Act, but, since, as has been pointed out,[62] statutory copyright consists of the rights, or incidents thereto, conferred by the statute which creates it, and since the section

59—Page 145.
60—Page 180.
61—See § 78.
62—See § 143.

of the statute enumerating these is general, copyright under the statute, once obtained, is one and the same thing in all cases, under whatever section of the statute it is procured.

This result is not affected by differences in requirements as to registration or re-registration, as the nature of the right secured, as distinguished from its record, is definite and distinct. Evidence of this, if needed, is found in the fact that this section (11) elsewhere provides for the re-registration of works copyrighted or registered under it, but does not provide for a new copyright on such re-registration, the copyright merely continuing on re-registration, the same after, as before. Section 2 preserves common law rights in unpublished works and Congress in that section was careful not to use the term "copyright" in connection with the rights so preserved, thus avoiding possible confusion. The language of Section 2 refers to an existing right; the language of Section 11, to future rights. The words "copyright may also be had," with which Section 11 begins, would be a curious method of phrasing, with respect to an existing right. Such language would also be a strange way of saying that the holders of common law copyrights were to be entitled to the remedies of the Act. The language used does not fit any such intention but plainly points in the opposite direction. The words used furnish persuasive internal evidence that Congress intended to create rights under Section 11 and not merely to recognize existing rights, as it had under Section 2. The whole scheme of the statute, evidenced on comparing Sections 9, 10, 11, 12 and 23 of the Act with one another, and, in turn, contrasting these sections with Sections 4952 and 4956 of the Revised Statutes (which such provisions of the existing statute supersede), shows that under the present statute, copyright was to be secured by publication with notice and not merely on registra-

tion, as had been the case formerly. Such a statutory scheme is harmonious and conforms to the historical, technical theory that publication is the end of common law, and the potential beginning of statutory, copyright.[63] The difficulty with the view that this section does not create copyrights but merely gives statutory protection to existing common law rights is, firstly, that it in no way corresponds to the language of the section nor, secondly, to the scheme of the statute.

It may further be suggested that if the copyright covered by Section 11 were merely common law copyright, the rights of the proprietor would only be those existing at common law and not those set forth in Section 1, which constitute statutory copyright; otherwise, the scope of his right, as distinguished from remedies for its protection, would be increased, and hence cease to be solely a common law right. This result would probably be thoroughly unpalatable to proprietors of such copyrights, especially, in view of the fact that they would always, except where their works were motion pictures, be open to the contention that the deposit of a copy in the Copyright Office was a publication which worked its usual result. This would seem to lead to the apparently absurd conclusion that the common law right was lost by the very action which was intended to protect it, without procuring the statutory right which would, were it not for this view, if sound, accrue on the act of publication.

As for the alternate view that this section contemplates a statutory copyright in unpublished works, it may be said that this view is open to much the same objections. There is, admittedly, an additional and very serious argument against it, which also appears to be an almost insuperable obstacle to deeming that the section can refer to works which

65—See §§ 246–263.

are not published before, or on, copyright under it. The only provision in the statute as to the duration of "the copyright secured by this Act" is that it shall be 28 years "from the date of first publication." Unless, then, Section 11 refers to published works, or works which are published on a copyright being taken out under it, no duration would be fixed for the copyright which may be had thereunder, and such a copyright would be beyond the powers of Congress to grant, since it may only secure such rights to authors for limited terms.[64] It would seem that even a view that Sections 23 and 11 when construed together (if the view that Section 11 refers to unpublished works, were to prevail), were intended to grant copyrights until publication and for 28 years thereafter, would not cure this difficulty, since, as publication might then never take place, such term would not seem limited, in point of time, as required by the Constitution.

Confronted with this difficulty of the duration of copyright under Section 11, the Copyright Office, despite its view that the section is designed to create copyright in unpublished works, issues certificates stating the copyright to be for 28 years, but without mentioning the initial date. This would, presumably, be the date of the certificate and this in turn, would, normally, be substantially the date of deposit, and, hence, publication, where a copy is deposited. There is no apparent warrant, in the statute, for this action of the Copyright Office, with respect to moving pictures in any event, unless the view be correct, that this section refers to published, and not to unpublished, works; but its action in this respect is virtually an admission that publication is requisite, or must be incident, to all copyright under the statute.

64—See § 81.

Mr. Bowker,[65] in an effort to meet this difficulty, suggests, apparently, that first performance of a work may be deemed the equivalent of first publication for the purpose of fixing the beginning of the statutory term provided for in Section 23. He says "in any event the author has clear rights for 28 years from the date of publication or the date of first performance, whichever the earlier." Painstaking effort has been made to find any language in the statute, or any judicial authority, sustaining this view. The decisions, save as based upon special language of English statutes, not found in the present Act, are to the precise contrary[66] and there is no provision in the Act which appears to lend itself to this view. It was probably based on the fact that the earlier English statutes provided, in effect, that the copyright term should run from the time of the first performance of a dramatic work and upon inadvertent conclusions drawn from cases construing the provisions of these Acts.[67]

Other clauses in the Statute may, however, be deemed to support the theory that this section refers to unpublished works only. The phrase, "privilege of registration of copyright under this section," used in Section 11 is confusing and has, doubtless, been parent to much of the perplexity caused by the section. Since, however, the section both purports to confer copyright and also, partially, provides for its registration, there is no necessary reason for laying undue emphasis on the language in question. It may also be argued, although this seems doubtful, that this phrase shows the section is merely intended to cover the registration of copyrights obtained in accordance with Section 9, in cases where works are not reproduced in copies for sale, which would lead

65—Pages 179, 180.
66—See § 348.
67—3 and 4 William IV. c. 15; 5 and 6 Vict. c. 45.

to the result, that Section 11 applies to published works.

The other phrase which requires discussion in this connection, will be found at the end of Section 60, with reference to the disposal of copyright deposits, reading: "That no manuscript of an unpublished work shall be destroyed during its term of copyright without specific notice to the copyright proprietor of record, permitting him to claim and remove it." This language can only fit Section 11 of the Act and although not noticed in, or discussed by, any decision or text writer, it, at first impression, appears to sustain the views of Section 11, entertained by the Copyright Office and Mr. Bowker.

Fortunately, however, there is some extrinsic evidence available, which appears highly significant, both as to the reason why this provision is in the Act, and also as to the proper construction to be given this section.

It has been held that a badly expressed and apparently contradictory enactment (and this section is both) may be interpreted by a reference to the Journals of Congress, where it appears that the peculiar phraseology in question, is the result of an amendment introduced without due reference to language in the original bill.[68] This rule may be invoked with benefit at this place.

An examination of the original Bill[69] presented to Congress and a comparison of its language with that of this section is illuminating. As originally drafted, Section 11 of the Act was part of Section 10 and *dealt solely* with *registration.*

Section 10 of the proposed Bill read as follows:

"That such person" (referring to the proprietor of the copyright under Section 9) "may

68—Blake v. National Bank, 23 Wall. 307, 23 L. ed. 119.

69—Copyright Office Bulletin 12; Senate B. 6330; H. B. 19853; 59th Congress, 1st Session.

obtain registration of his claim to copyright by complying with the requirements prescribed in this Act; and such registration shall be prima facie evidence of ownership.

"Registration may also be had of works, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of the title and one complete printed or manuscript copy of such work if it be a lecture or similar production, or a dramatic or musical composition; or a photograph or other identifying reproduction thereof, if it be a work of art, or a plastic work or drawing; the notice of copyright in these latter cases being affixed to the original before publication as required by Section 9 above. But the privilege of registration secured hereunder shall not exempt the copyright proprietor from the requirement of deposit of copies under Section 11 herein where the work is later reproduced in copies for sale."

The language quoted from Section 62 comes unchanged from the original draft of the bill and was quite harmonious with the remainder of the original draft. It will at once be noted that, while the original draft of the bill only purported, in this section, to confer the right of registration of a claim to copyright, that is, of an existing right, the section, as enacted, purports to confer copyright. This change in language appears too significant to be deemed accidental. It will further be observed that the section, *as proposed,* may well have been designed to cover common law copyrights in unpublished works. This view is strengthened by the fact that the proposed bill contained a section (Section 21) giving protection by way of injunction and damages for infringement of unpublished works, of a very different character however, from the protection given in the case of published works, which

section was stricken out when the bill, as introduced, was amended into its present form. The term prescribed for copyrights in the original draft did not refer to unpublished works, thus making it clear that the proposed Act in referring to unpublished works did not intend to put them on a parity with published productions but merely to give them the privilege of registration and protection, in the Federal Courts, by way of injunction and damages. A comparison of the differences, between what was proposed, and what was enacted, appears to make it clear that the efforts made by the authors of the bill, which later ripened into the Copyright Law, to have it apply to unpublished, as well as to published works, did not find favor in the eyes of Congress and that only unskillful amendment has caused doubts to be expressed where none, in view of the manifest legislative intent, should really exist. If, however, the word "unpublished," as used in Section 60, be construed, "unpublished before the time of deposit under Section 11," the quotation in question presents no difficulties to what appears the proper solution of the question, since motion pictures, which are the only class of works, covered by the section, of which copies need not be deposited, are certainly not manuscripts. Since the phrase was apparently overlooked, because of its location in the statute, when the amendments, to which attention has been called, were made to the original draft, judicial ingenuity may doubtless be safely entrusted with the task of properly construing this survival of the original draft of the Act.

§ 778 The view discussed that this Section refers both to published and unpublished works.

Reference has been made to a possible view that this section may refer to unpublished works save in so far as it refers to motion pictures but with reference to these, it contemplates prior publication. This view, which is suggested, rather than definitely formulated, in the opinion of the lower court, in

Universal Feature Film Co. v. Copperman,[70] rests upon the somewhat tenuous basis of the punctuation of the section. It did not find favor with the Circuit Court of Appeals[71] and may be deemed doubtful. It may be said that it is to be regretted that the Circuit Court of Appeals, in the decision cited, did not discuss the lower Court's view that Section 11 only refers to published works, thus leaving the question open whether it would so hold, if the question were essential to its decision of a given cause.

§ 779
The opinion expressed that this section does not refer to works unpublished after copyright.

While in the absence of decisions fully discussing the matters set forth herein and finally passing thereon, the question as to the proper scope and application of this section is of the utmost difficulty and full of doubt, it is deemed, that, having regard to Constitutional limitations, the language of the section and the general scheme of the statute, this section applies to published works only,[70] creates a copyright therein, and does not merely fortify a common law right with new remedies. The only expression of judicial opinion available,[70] appears to support this view, and many of the suggestions in its favor contained in this work, do not appear to have been before the Court when it rendered its opinion.

§ 780
The view expressed that the publication, essential to copyright under this Section, may be contemporaneous with registration.

It is deemed, however, that under a proper reading of the language of this section, it may well be held that the publication requisite may be contemporaneous with registration, that is to say, that the deposit of the prescribed copy in the Copyright Office is sufficient publication of the work and that, if there has been no prior publication, the copyright will date from the time of deposit of the copy. Such a publication would arise in the case of all works mentioned in the section, save motion pictures, where under the section, a copy is not to be deposited. As to the latter works, it would seem an

70—212 F. 301.
71—218 F. 578.

independent publication, with notice, would be essential prior to deposit, and, since the commercial interests involved in motion pictures are large, it would seem wise to err on the side of taking every precaution in this connection.

§ 781 Meaning of words "not reproduced 'in copies' for sale."

A question of no little importance, is the meaning to be attributed to the words, works "of which copies are not reproduced, for sale," with which Section 11 alone deals. As has been previously pointed out, the word "sale" as used in the Act does not appear to be limited to technical sales, but also covers public distribution, not technical sales.[72] Whether this extended construction will be given to the word, as here used, is an open question. It is a little difficult to see why works reproduced in copies for lease, exchange, gift or any other purpose, in the course of which their possession will pass into the hands of the public, should not stand on the same basis as works reproduced in copies for technical sale. If so, they would not be copyrightable under Section 11, but would only be copyrightable under Sections 9, 10 and 12. While this result would appear just, as the proprietors of works reproduced in copies for any such purposes should, it would seem, stand on one and the same footing, it is uncertain whether, or not, such a construction of the Section will prevail.

§ 782 Works covered by Section 11.

The scope of the section, with reference to the copyrightable media covered by it, is relatively limited. Thus it does not apply to books, periodicals, maps, prints or pictorial illustrations, and possibly not to reproductions of a work of art, but does cover the other classes of works specifically enumerated in Section 5.[73]

§ 783 What is a description of a work.

It will be noted that the section calls for the deposit of a "title and description of the work," if a moving picture be copyrighted under it.

72—Section 62.

73—See § 528 *et seq.*

In an English case,[74] in considering what the requirements were of a statute which provided for "a short description of the nature and subject of a work" in connection with its registration, the Court deemed the object of such a requirement to be to enable a person who had it before him to judge whether the registration applied to a work which he intended to copy. The Court, accordingly, held the requirements of such a statute were satisfied by describing a work as "a painting in oil," plus its title if not over-fanciful.

A somewhat less liberal rule has been applied in the United States. Thus, it has been held,[75] that where a statute required that a description of a photograph be furnished and a copy of the work be filed, on registration, merely filing a copy, although this was "in itself a description" was an insufficient compliance with the statute to support an action for penalties under it. The penal nature of the statute involved in the decision cited, and the nature of the action in which it was rendered, make it doubtful, however, whether this decision would be followed under the present Act, in preference to the English case cited.[74]

§ 784 The functions of the Copyright Office with respect to copyrights under this Section.

No machinery is provided for any judicial action by the Copyright Office here, any more than elsewhere in the Act, and every copyright proprietor who acts under Section 11 does so at his peril, in being able to prove, subsequently, that his work was not, at that time, reproduced in copies for sale. The practice of the Copyright Office in issuing certificates under this Section is discussed elsewhere.[76]

§ 785 Separate copyrights in different mani-

In a recent case,[77] it was said that the effect of the amendment of 1912 was to allow separate copyrights

74—Ex parte Beal., L. R. 3 Q. B. 387.

75—Bennett v. Carr, 96 F. 213.

76—See § 1616.

77—Photo-Drama Motion Picture Co. v. Social Uplift Film Co., 220 F. 448.

festations of said work.

in a drama expressed in words and the same work expressed in motion pictures, but it may well be doubted whether this was not also the law, prior to the passage of the amendment.

The section in cases where it may be utilized, merely furnishes a convenient and cheap method of copyright and attempts to stretch it beyond its patent scope should be discouraged, whilst its legitimate use should be favored.

§ 786 Copyright under Section 11 is not exclusive.

It scarcely need be said, although this was questioned, that motion pictures as well as the other works enumerated in Section 11, may be copyrighted under Section 9, instead of under Section 11, if they have been previously published.[78]

Except as to motion picture films, whatever the final construction which will be given to Section 11 in general, little practical difficulty can arise. With respect to such films, however, the need for abundant caution should be apparent to all proprietors who chose to register under the section.

§ 787 Re-registration of copyrights procured under Section 11.

Finally, by the express provisions of the section, copyrights procured thereunder must be re-registered by the deposit of copies under Section 12, if the work is reproduced in copies for sale, at any time, after initial copyright. The possible extended meaning of "sale" in this connection has been pointed out.[79] The original copyright is neither extended nor otherwise affected, by such re-registration. No time is specified within which such copies must be deposited on re-registration but it would appear, by fair implication, from the language of Section 12, that copies should be deposited "promptly," after they are so reproduced, placed on sale, sold or publicly distributed. No express penalty is prescribed for non-compliance with these requirements. The consequences of a failure to register in compliance with the statute, is a subject

78—Universal Film Co. v. Copperman, 212 F. 301.
79—See § 781.

which may most conveniently be dealt with as an entirety and is discussed elsewhere.[80]

(d) DEPOSIT OF COPIES OF WORK

§ 788
Deposit of copies, after copyright.

Section 12. *That after copyright has been secured by publication of the work with the notice of copyright as provided in Section* 9 *of this Act, there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work to be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in Section* 15 *of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction provided by Section* 11 *of this Act, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.*

§ 789
The question discussed as to what the effect of a

Under Section 4956 of the Revised Statutes, no person was to be "entitled to copyright," unless he made the required deposit of copies, on or before

80—Sec § 789.

failure to deposit copies is.

the day of publication. This language admitted of but one construction and the law was well settled that failure to make the required deposit defeated any alleged copyright.[81] The present Act differs, radically, both in scheme and language, from the former one and the initial question presented by this section is, what are the consequences of a failure to comply with the requirements of the present Act with respect to registration. This must be considered doubtful in the absence of express decision. While the general opinion appears to have been that the rules of law applicable to the question remain unchanged, there are statutory differences which do not appear to have been remarked.

Under the present Act, the deposit of the requisite copies or copy is required to be made "promptly," after publication, and persons entitled to copyright, are to "have it, upon complying with the provisions of the Act."[82]

It would seem probable that under this provision, if it stood alone, under the cases cited,[81] a failure to make the requisite deposit promptly, would defeat a copyright, even though it had previously vested. But the last sentence of Section 12 and the following Section (13), complicate the question.

§ 790 The prior English law.

The last sentence of Section 12 provides that no action or proceeding shall be maintained for infringement, until after compliance with the statutory requirements of deposit and registration. Under the former English Statute,[83] a somewhat similar provision was held to permit registration at any time before suit brought, without affecting a right of action for past infringement,[84] or the

81—Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; Callaghan v. Myers, 128 U. S. 245, 32 L. ed. 426; Belford v. Scribner, 144 U. S. 488, 36 L. ed. 514; Baker v. Scribner, 2 Blatch. 39.

82—Section 1.

83—5 and 6 Vict. c. 45, s. 13.

84—Goubaud v. Wallace, 36 L. T. N. S. 704.

validity of the copyright. Failure to register only affected the right to sue and in no way affected the copyright.[85] This result was, however, a necessary consequence of the express provisions of that Act, which, after requiring registration or entry, without, however, specifying any time within which it was requred to be made, said:

> "Provided always that the omission to make such entry shall not affect the copyright in any book but only the right to sue or proceed in respect of the infringement thereof as aforesaid."[86]

Under this statute registration on the same day as when suit was instituted, but at a time before the suit was started, was held sufficient.[87] In such a case, the actual hour of registration may be proven.[87] This is in accordance with the rule that where a statute provides that certain acts are to be done in a certain order, if they all appear to have been done on the same day, the Court will presume they have been done in the prescribed order.[88]

§ 791 The possible bearing of Section 13 upon the question.

Section 13 provides that should the copies called for by Section 12 not be deposited promptly, the Registrar of Copyrights may, on demand, require their deposit and if this is not made within three months, if sent from the continental United States, or, within six months, from any outlying territorial possession or foreign country, the copyright proprietor is to be liable to a fine, "and the copyright shall become void." Section 13 was, obviously, designed to ensure that copies of all published works

§ 792 Discussion of Section 13.

85—Effect failure to register. Low v. Rutledge, (1864) L. R. 1 Ch. 42; Stannard v. Lee, L. R. 6 Ch. 346; Hogg v. Scott, L. R. 18 Eq. 444; Chappell v. Davidson, 18 C. B. 194.

86—5 and 6 Vict. c. 45, s. 13.

87—In this respect the American Acts have always differed from the former British Act where it was held the object of registration was not notice to the public. See Cate v. Devonshire Newspaper Co., L. R. 40 Ch. D. 500.

88—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547.

should be available to the Library of Congress. The section is an amplification of Section 4960 of the former Revised Statutes but the earlier statute simply provided a fine for failure to make the requisite deposit, if required by the Librarian. The present Act, in this respect, marks a return to the provisions of the Act of March 3, 1865.

No cases have been found however, construing the provisions of that Act, in respect to the subject under discussion. If it still be the law that failure to comply with the provisions of the Act for the prompt deposit of copies, avoids any copyright, it appears difficult to understand why the copyright should, under Section 13, be treated as apparently still subsisting and only to become "void" at the expiration of a somewhat lengthy time, after a more or less problematical demand.

The object sought by compelling registration is that third persons, by inquiry, may ascertain whether, or, not, any proposed acts or works would violate any existing statutory copyright. The primary object of requiring the deposit of copies is that the subject matter of works in which copyright is claimed, may be made public and available, for purposes both of information and of avoiding infringement. A purely secondary object is the enrichment of the Library of Congress. The primary purpose would be entirely defeated unless the deposit were made "promptly." If the only necessary effect of failure to make the deposit, "promptly," were to prevent the institution of suit, until the deposit was made, the statute would become, as the former English one was justly called, a mere snare for the unwary, who were foolish enough to rely upon absence of registration as showing absence of copyright.

Having in view the patent objects sought to be realized by Section 12, the language of Section 1,

and the cases cited,[89] it might be deemed that, unless the language of the concluding portion of Section 12 and Section 13 prevents, the Courts would hold a failure to make the deposit promptly avoids the copyright.

In examining Section 13 critically, one is struck by the length of time afforded for compliance with it. The difference between "promptly" and three to six months is suggestive. So is the object of the section, which is not so much the affording of quick information to the public, so that infringement may be avoided, as that the work may be permanently accessible, if desired, in the Library of Congress. This object cannot be realized by mere deposits in the mails, especially foreign mails, but only on actual deposit in the Copyright Office. The section is, accordingly, barren of provisions permitting the deposit of copies in the mails in compliance with the demand authorized by the section and ample time is allowed for the actual deposit of copies in the Copyright Office. Section 12, on the other hand, permits mailing, as this, in the great majority of cases, will ensure the copies reaching the Copyright Office. Section 59 of the Act provides that of the articles, "deposited in the copyright office under the provisions of the copyright laws," the Librarian of Congress shall determine what shall be transferred to the permanent collections of the Library. If, then, Section 13 be construed to cover cases where copies are mailed, but do not reach the Copyright Office, the provision for avoiding copyrights in such cases, if copies are not furnished on demand, would be necessary and intelligible and, if limited to such cases, it would fit into the apparent general statutory scheme. It may also be suggested that a failure to comply with Section 12, under Section 1 renders the copyright unenforceable, by depriving

89—See § 789.

it of all the exclusive rights that alone give it value, thus protecting the public but that such copyright might remain technically in being, unless avoided under Section 13, for the purpose of enabling the National Library to be built up, without raising serious constitutional questions as to the right of Congress to require the deposit of works in which the copyright has ceased, but this appears doubtful. These suggestions are largely tentative. The language of these sections points one way; their object, another. The Courts have before this refused to follow the literal reading of the Copyright Act to effect its apparent object.[90] It may well be they will do so again in connection with this question. In view of these doubtful provisions, it would seem that an adjudication of the important question of the effect of a failure to comply with the provisions of Section 12 is most desirable, at an early date.

§ 793 Uncertainty of present law as to effect of failure to register before demand.

§ 794 Innocent infringement before registration.

If the Courts ultimately hold that non-compliance with Section 12 is only penalized by inability to sue before registration, the question will arise as to the status of persons innocently infringing a copyright in the interval between publication and ultimate registration. Since good faith is no defence to infringement, this cannot be regarded, but such matters, if they arise, may be disposed of on principles of estoppel[91] or, it may be held that the effect of failure to register, while it continued, would be to prevent acts which take place in the interval and which otherwise might be deemed to infringe, from being infringement. This does not however appear to have been the English rule,[92] and the English decisions would almost certainly be followed in such

90—American Tobacco Co. v. Werckmeister, 207 U. S. 384, 52 L. ed. 257.

91—See 29 Opinions of the Attorney General (U. S.) 65.

92—Goubaud v. Wallace, 36 L. T. N. S. 704; Talbott v. Judges, 3 T. L. R. 398; Schové v. Schminck6, 33 Ch. D. 546; Murray v. Bogue, 1 Drew 353.

case. These questions are merely suggested, as the present uncertainty of the main question involved, does not render their extended discussion, at this time, profitable.

§ 795 "Prompt" deposit defined.

The word "promptly," as used in this section, has been defined, says the Copyright Office,[93] as "without unnecessary delay." "It is not essential however that the deposit be made on the very day of publication." This quotation is probably a correct statement of the law and "promptness" would be, in each instance, a question of fact. While there are no copyright cases in point, it would seem that, except under extraordinary circumstances, the deposit should be made not later than the day after publication, to be safe, or, if this is not possible, within a reasonable time thereafter.[94] Whether this be law or not, common caution commends deposit as quickly after publication as possible in every instance.

§ 796 Actions brought before the deposit of copies.

The last sentence in this section was construed in two suits brought by the New York Times Co. against The Star Company,[95] and against the New York Sun Printing Association[96] in connection with Amundsen's discovery of the South Pole. The plaintiff's bill of complaint alleged publication with notice and that two copies of the best edition of its newspapers containing his account of his journey, when published, were about to be deposited by plaintiff in the mail. The suits, begun March 8th, where the copies were deposited March 9th, were held prematurely brought, under the express provisions of this section. These decisions were technically correct, were required by the very wording of the statute and caused by the apparent peculiarities

93—Regulations, 22.

94—See McCleskey v. Howell Cotton Co., 147 Ala. 537, a noncopyright case, holding "promptly" means within a reasonable time.

95—195 F. 110.

96—204 F. 586.

of plaintiff's procedure. The complainant's contention was expressly overruled, that suits could be begun under the section, before deposit, but not prosecuted before registration, that is, that "maintained" did not include, and hence bar, initiation.

§ 797 The protection of exclusive news features in general.

As has been previously pointed out, facts, news, cannot be copyrighted,[97] since they are public property, although the form in which they are expressed, i. e., the language in which they are clothed, may be copyrighted.[98] But the first publication of facts, from a journalistic standpoint, possesses great value. The only way such publication of such facts may, ordinarily, be prevented, if at all, is under the copyright law, although there are exceptional cases where the law of unfair competition has given relief. The cases, above cited, represent an effort, ineffectual as it was, to escape from the situation created for The Times, in the cases arising out of the discovery of the North Pole by Admiral Peary. Both the London Times and the New York Times had contracted with him for the right to publish his account of his journey in the first instance, simultaneously in England and the United States, respectively. Owing to the difference of time between London and New York, correspondents of the New York papers were enabled to cable synopses of the London Times' account before the editions of the same morning's United States papers had gone to press. The New York Times, however, had published the story in pamphlet, or book, form, before newspaper publication and had attempted to copyright this. A preliminary injunction issued by the United States District Court for the Southern District of New York, was dissolved, on hearing, on the ground that since the magazine and book rights in the account had, by the New York Times contracts, been reserved to Admiral

97—Davies v. Boes, 209 F. 53.
98—See § 601.

Peary, the New York Times had procured an unauthorized copyright, despite the fact that authority to protect the article in the United States, generally, had been conferred by the author on The Times. The United States District Court for Illinois, Grosscup, J., reached an opposite result, which, on the whole, appears sounder, since there could be only one copyright in the article in whatever form published and the parties appear to have intended that the Times protect the author's rights in this country.[99] Thus, the views underlying Judge Hand's decision appear to have been expressly disapproved, recently,[1] and on the other hand, in an earlier decision,[2] a copyright taken out in the publisher's name was held valid, where the contract between the author and the publishers contemplated copyright protection for the work and the publishers agreed to take the action necessary to secure their own rights, as well as those of the author. It is somewhat difficult to understand why copies of the newspapers in question, in the Amundsen cases, were not mailed before the affidavits were drawn, as, if this had been done, plaintiff might have obtained some protection.

798 Deposits by mailing.

The deposit required by the Section 12 may be made either directly in the Copyright Office, or in the mails. If made in the latter manner, and properly addressed, it is effectual from the time of mailing. No action on the part of the Copyright Office, or any of its officers, in refusing to receive the copies, or in returning them, or in refusing to register the copyright, can affect its validity, if the requisite deposit be made promptly in the mails. None of the machinery provided by the Patent Acts for quasi-judicial examination of inventions before patent, is

§ 799 Effectual when mailed.

99—These cases are reported in 76 Publisher's Weekly 643, 957.

1—Photo Drama Motion Picture Co. v. Social Uplift Feature Film Co., 220 F. 694.

2—Harper & Bros. v. M. A. Donohue & Co., 144 F. 491.

§ 800 Evidence of mailing.

to be found in the Copyright Acts. Thus it has been held,[3] that the uncorroborated, but unimpeached, testimony of the plaintiff, that he mailed the copies required by statute, is sufficient to sustain a copyright, even though they are never received by the Librarian of Congress.

§ 801 Receipts on mailing.

Receipts from the postmaster are provided for and the copies so deposited, are to be carried post free.

§ 802 The mailing must be done in the United States.

While there is no express provision that the mailing required by Section 12 must be done in the United States, Section 14 appears, quite clearly, to indicate that this is the construction to be given this provision.

§ 803 What is the "best" edition of a work.

Save in the exceptional cases mentioned, two copies of the work must be deposited and these must be of the best edition published. What such edition is, is a question of fact in every case. The question whether the copies filed must be absolutely exact copies or whether substantial copies will do, does not appear to have been raised as yet. In conformity with the doctrine of such cases as Black v. Henry G. Allen Co.,[4] it is probable that substantial copies, if part of the best edition, would suffice, but it would seem that the omission, changes, errata or differences involved, must only be trifling and not such as affect the essence of the work, in any degree, for the doctrine to apply. On the other hand, in a decision involving questions of pleading, it was held[5] that complete copies of a work are not necessarily copies of the "best edition thereof then published."

§ 804 Substantial copies.

§ 805 Complete copies: not necessarily of "best edition."

§ 806 Copies deposited need not be printed.

There is no requirement that the edition be printed.

Where separate articles were copyrighted and published in an encyclopedia, it was held the best

3—Patterson v. J. S. Ogilvie Pub. Co., 119 F. 451.
4—56 F. 764.
5—Crown Feature Film Co. v. Levy, 202 F. 805.

edition requirement was satisfied, by cutting out the pages of the compilation comprising the articles and depositing such pages.[6] The copies deposited, must of course, be complete and should, it seems, on principle, and under the wording of the present Act, despite a contrary decision under the former act,[7] bear notice of copyright. If later, or better, reprints are published after copyright, there is no need to deposit copies of these, unless the work requires to be re-copyrighted.

§ 807 Copies, part of other works.

§ 808 Copies must bear notice of copyright.

§ 809 Subsequent reprints.

The provision that, if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country is to be deposited, which, if the work is a book or periodical is to be produced in accordance with Section 15, is the most recent amendment to the copyright law.[8] The amendment also provides: "All Acts or parts of Acts in conflict with the provisions of this Act are hereby repealed." The scope, effect and intention of this amendment are not readily apparent. If it was purposed by this provision to couple Section 21, referring to ad interim copyrights, with the general section referring to deposits of copies, it would seem plainer language might have been used. This is also true if a similar intention existed in connection with books published abroad in foreign languages, copyrighted under so much of the Act of March 3, 1905, as may be still unrepealed.[9] If, on the other hand, this amendment was an effort to bolster up contentions that first publication abroad, save in cases of ad interim copyright, was equivalent to first publication in the United States, the place and manner of the amendment seem equally unusual.

§ 810 The Amendment of 1914.

6—Black v. Henry G. Allen & Co., 56 F. 764.
7—See § 877.
8—Act of March 28, 1914.
9—R. S. 4952 as amended, 1905.

The language used would also appear inapt for this purpose, as it does not refer to the foreign publication to which it alludes as being the initial, or first, publication, of the work. It should be remembered that this section primarily deals with the deposit of copyrighted works and not with their copyright. The deposit called for, is to be made *after* publication, with notice of copyright, "as provided in Section 9."[10] But, as previously pointed out, Section 9 only requires notices on works published in the United States.[10] This section it should be remembered, refers to a time succeeding the time when copyright vested or did not vest, under the previous sections. If a fundamental change in the law of domestic or foreign initial publication had been purposed, it would seem that a direct statement to that effect would have been inserted in the Act. A further curious feature of the amendment is that it is limited to works by foreigners, not citizens, published abroad. It does not include works of citizens of the United States, published abroad. It is inapplicable to proceedings under Section 11 of the Act and its reference to the manufacturing clause of the Act, excludes from its operation books published abroad in English.[11] Since American citizens are, apparently, discriminated against by this amendment, and such a construction should, if possible be avoided, it would seem that the amendment should be construed as narrowly as possible. This result might be effected by holding that it referred to the situation which might arise where there was a simultaneous, or subsequent, publication abroad, as well as a technical first publication in the United States. One of the oversights in the present statute is that no provision is made for ad interim copyrights in the case of books published abroad in foreign languages. Unless, as is extremely doubtful,

10—See § 729.
11—See §§ 838, 841.

the pertinent portion of the Act of March 5, 1905, remains in force, the proprietors of such works required relief. An interval of time may elapse between copyright and deposit of copies. Facilities for printing works in foreign languages, where special type are required, are more readily available abroad than here, as is recognized by the omission of such works from the clause making printing, etc., of other works in the United States compulsory. If the work is published abroad in such interval, this may be the publication to which allusion is made by the portion of the section under discussion. A technical first publication of such a work in the United States would satisfy the Statute. The subsequent actual publication of the work abroad (using the word in its business sense) will produce copies of the edition which, it may well be, Congress deemed should be deposited as the "best edition" of the work, rather than the flimsy makeshifts characteristic of technical publication. As the provision with its reference to the manufacturing clauses of the Act, can only refer to books in languages other than English, such a view of the clause may suggest reasons for its consequent construction within limits, which will not exceed the apparent statutory scheme of the Act as a whole. The fact that the language used may embrace foreign works other than books, will not vary this result, as the same considerations, *mutatis mutandis*, are deemed applicable to such works. It has also been suggested that the object of this clause was to lessen the deposit burden upon foreigners to induce them to procure American copyright more freely.

§ 811 The separate registration of contributions to periodicals.

If the work is a contribution to a periodical, and a special registration of the contribution, apart from the general registration of the entire contents of the periodical, is sought, one copy, of the issue, or issues, containing the contribution, is to be filed.

§ 812
The copyright of periodicals, in general.

A general copyright of a periodical can cover all its contents, which are copyrightable. The copyright in it will, normally, be taken out in the name of the publisher of the periodical. If he is the proprietor of all articles appearing in it, no further question can, of course, arise as to the validity of the copyright. If, on the other hand, he only has serial rights, or other limited rights, in any of the articles, or other matter, contained in his publication, a copyright can only be obtained in his name, if he is authorized to obtain copyright by the authors or proprietors of the matter so copyrighted on their behalf.

§ 813
Authority requisite for publisher to take out copyright, in his name, in contributions thereto.

§ 814
Serial and book publication.

Such authority may be express, or implied, and may be negatived by the necessary inference drawn from subsequent acts of the authors. Thus,[12] the copyright in "The Professor at the Breakfast Table" was held invalid, as Dr. Holmes, after the great bulk of the work had appeared serially in The Atlantic Monthly, without specific claim of copyright in the author's name, published the complete work, with copyright claimed in his own name, and then permitted publication of the remainder, serially, without reference to his, the author's, copyright. The same result was reached in connection with Mrs. Harriet Beecher Stowe's, "The Minister's Wooing," on similar facts.[13] Mr. Justice Brown, writing for the Court, in the White case,[12] pointed out that an authority to print in a periodical was not equivalent to an authority to copyright the matter so printed and that, while the latter authority might be presumed, it was negatived where the author himself attempted to copyright in his own name, after the publishers had attempted to copyright in their name. The Circuit Court of Appeals, in its opinion, had pointed out that there was no claim that the pub-

12—Mifflin v. R. H. White Co., 190 U. S. 260, 47 L. ed. 1040.
13—Mifflin v. Dutton, 190 U. S. 265, 47 L. ed. 1043.

lishers had acted as trustees, but rather that they had acted as agents.[14]

§ 815 The effect of general claim of copyright in a periodical.

In another case,[15] it was held that a general claim of copyright by a magazine company in one of its monthly publications would not be limited, with respect to all literary material owned by it in the magazine in question, in which the authors had reserved no rights, so as to give it only such protection as it needed as publisher of the magazine. It was said that there might be such a limitation of rights in connection with stories contained in it, in selling which the author had reserved rights of dramatization, that a general notice of copyright, in such cases, would be insufficient to protect the owner of the dramatic rights, unless some reference were made to such reserved rights, in the notice, or unless their owner copyrighted his rights, contemporaneously in his own name. These dicta were unnecessary, are contrary to authority [16] and appear erroneous. They confuse the right to a statutory copyright, with rights that might accrue under a common law copyright. The suggestion as to a reservation of rights by notice appears to read a requirement into the Act which does not exist. Such a notice would appear futile, as it is difficult to see how the consequences of publication could be avoided thereby. The point actually decided by the decision, however, appears entirely sound.

§ 816 Dicta with reference to cases of reserved dramatic rights in periodical contributions.

§ 817 Individual notice of copyright.

The difficulties suggested by these cases can, of course, be avoided by affixing individual notices of copyright to the various contributions in a periodical not owned by the publisher, in addition to the general notice of copyright in the aggregate. If, however, this is not done, but the authors of such contributions have authorized the publisher to copyright,[17]

§ 818 The nature of an author's rights where copyright is taken out in a periodical

14—Mifflin v. Dutton, 61 L. R. A. 134, 112 F. 1004.
15—Dam v. Kirk LaShelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902.
16—See §§ 470, 471.
17—See § 699.

by the publisher.

he would hold the copyright in their respective works as trustees,[17] subject to subsequent assignment to them, voluntarily, or by decree in equity.

After assignment, the name of the assignee may be substituted in the notice,[18] but until such assignment, the notice on all copies, by whomever published, should conform to the original notice and thus avoid the result of the Mifflin cases, *supra*.[19]

§ 819 Assignments of copyright in a single contribution covered by a blanket copyright.

There can be but one copyright in a given work.[20] But, as has been shown, there can be copyright in an aggregation of works, as an aggregation, which will protect any original individual component works contained therein.[21] Copyright is generally deemed indivisible.[22] If then the proprietor of a periodical who had taken out copyright in the entire publication, in his own name, were to attempt to assign the copyright in any of the individual contributions to its author, a question might be raised, although this point does not appear to have been made, in at least one decision where the question was involved,[23] whether such an assignment of part of the copyright would be effectual so as to enable the assignee to sue in his own name. This question can be avoided either by separate registration or, where permitted, by suit in the original proprietor's name. There is nothing, as pointed out by this section of the statute, to prevent the individual registration of such parts of a work in the name of their respective proprietors, and this would prevent any such questions, as have been discussed, from arising.

A further aspect of this matter, suggesting various possibilities, was dealt with in a case where

18—Section 46.

19—190 U. S. 260, 47 L. ed. 1040.

20—Mifflin v. Dutton, 61 L. R. A. 134, 112 F. 1004. And see § 644, *ante*.

21—See §§ 469, 454 *et seq*.

22—See § 1524.

23—Dam v. Kirk LaShelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902.

a preliminary injunction was refused.[24] The plaintiff, an author, had had dealings with Munsey's Magazine, which resulted in its publication of one of his stories, he receiving pay and signing a receipt in which he reserved all literary and dramatic rights in the story. The contents of the magazine were copyrighted by the publisher. Some years afterwards, the copyright in the story was sold by Munsey's, to the defendant. The Court was of opinion that Munsey's was a trustee of the copyright for the author but that the defendant, in the absence of fraud, or notice, actual or constructive,[24a] was justified in relying on the record legal title to ownership of the copyright, and hence could not be held liable, as an infringer, by the author.

§ 820 Third persons may deal with the proprietor, unaffected by secret trusts.

The Copyright Office Regulations [25] say that where special registration is sought for a contribution to a periodical, "the entire copy should be sent; sending a mere clipping or a page containing the contribution does not comply with the statute," and this appears a correct view of the Section.

§ 821 What is a copy of a contribution for deposit purposes.

Deposit of copies, without prior publication, would, in the case of works reproduced in copies for sale, appear [26] to be quite ineffectual, as there would not be the necessary precedent publication required by Section 9.[27]

§ 822 Deposit of copies before copyright.

No form for the claim of copyright required to be made by this section is provided for by the Act. The Copyright Office Regulations translate "a claim of copyright" into "application for registration." [28] This is in accordance with Section 5 of the Act, in cases covered by that Section.[29] A series of forms

§ 823 Forms for registration.

24—Brady v. Reliance Motion Picture Corporation, 229 F. 137.

24a—Brady v. Reliance Motion Picture Corporation, 232 F. 259.

25—Rules: No. 39.

26—Cf. Correspondent Newspaper Co. v. Saunders, 13 W. R. 804 (12 L. T. 540).

27—Cf. Henderson v. Maxwell, 5 Ch. D. 892.

28—Rules 22 and 24.

29—See § 528.

for different classes of works are issued by the Copyright Office. Copies are furnished free on request.[30] A list of the forms is contained in the Appendix.[31] The forms contain a specific claim of copyright, as required by the statute. The necessity for this is not stated in the Rules, however, so that if proprietors of copyright have occasion to formulate their own notices of claim, they should bear this in mind, in reading Rules 31 and 32 of the Copyright Office.

§ 824 Incorrect statements on registration.

Various English decisions have discussed the question as to what the effect was of an incorrect statement made in connection with the registration of a work. They universally held, such an incorrect statement would vitiate the registration.[32] Whether incorrect statements in applications for copyright under the present Act would have this effect, has not been considered in any reported American decision.[33] There is no statutory reference to the matter except in so far that mistakes of classification are not fatal.

§ 825 Affidavits of manufacture of books.

Reference should be made to Sections 15 and 16 of the Act, for information with respect to the affidavit of manufacture, required in the case of copyright registration of books and periodicals.[34]

§ 826 Compulsory deposit of works.

Section 13. *That should the copies called for by Section* 12 *of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any*

30—Rule 33.
31—See Appendix.
32—See Thomas v. Turner, 33 Ch. D. 292.
33—See § 590.
34—See §§ 829, 845.

part of the United States, except an outlying territorial possession of the United States or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.

This section is discussed elsewhere.[35]

§ 827 Postal receipts.

Section 14. *That the postmaster to whom are delivered the articles deposited as provided in Sections* 11 *and* 12 *of this Act shall, if requested, give a receipt therefor and shall mail them to their destination without cost to the copyright claimant.*

§ 828 Free postage of copies deposited in mails.

35—See § 791.

CHAPTER XIII

MANUFACTURING PROVISIONS APPLICABLE TO COPIES OF CERTAIN COPYRIGHTED WORKS

§ 829
The domestic manufacturing clause.

Section 15. *That of the printed book or periodical specified in Section* 5, *subsections (a) and (b) of this Act, except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this Act, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of type setting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo engraving process, then by a process wholly performed within the limits in the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photo engraving process, and also to separate lithographs or photo engravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art; but they shall not apply to works in raised characters for the use of the blind, or to books of foreign origin in a language or languages other than English, or to books published abroad in the English language seeking ad interim protection under this Act.*

§ 830 History of Section.

At the time when Congress made copyright possible to aliens, under certain conditions,[36] it amended R. S. 4956, so as to provide, amongst other things, that no person should be "entitled to copyright," unless he deposited copies of certain works, "*Provided,* That in the case of a book, photograph, chromo or lithograph the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom."[37]

That Section of the law, for reasons persuasively outlined in an opinion of the Attorney General of the United States,[38] was deemed to be prospective only, in its operation and deemed not to affect works which were copyrighted prior to its enactment.

§ 831 Retrospective nature of Act with respect to importation foreign books.

In an equally convincing opinion,[39] the Attorney General, deemed however, that the present Act, because of the striking changes of phraseology it made in dealing with the question of importation,[40] prevented the importation and, hence, protection of books, copyrighted prior to 1909, and subsequently printed abroad.

§ 832 Statutory changes effected by present Section: its scope.

It should be noted that this section changes the prior statutory rules in numerous respects. It is limited to the books and periodicals specified in Section 5 (a) and (b), thus expressly excluding other printed matter, whether in book form or not, comprised in other sub-divisions of Section 5. Thus, for example, dramatic compositions, lectures, etc., are not covered by it. In determining what the scope of the section is the rule of strict construction applies.[41]

§ 833 The Section to be construed strictly: dramatic compositions and music, in

36—See § 704.
37—Act of March 3, 1891.
38—23 Opinions Attorney General 373.
39—28 Opinions 91.
40—See § 31.
41—Hervieu v. J. S. Ogilvie Pub. Co., 169 F. 978.

book form excluded from its operation.

The decisions that music, although in book form [42] and dramatic works, were not within the Act of 1891, apply with additional force to cases governed by the phraseology of the present Act.

§ 834 Lithographs and photo-engravings, included.

This Section, in addition to applying to books, also covers lithographs and photo-engravings, whether bound in books as illustrations, or, apparently, if separate and in no way connected physically with books,[43] except in cases where the subjects represented are located abroad and are of a scientific and artistic nature. It may be deemed an open question whether the Courts will, in view of the rule of strict construction applicable to this Section, sustain the Attorney General's view that it applies to "separate" photo-engravings and lithographs, but it is deemed probable that in view of the apparent intention of the Section, his view [43] will prevail. Prints and pictorial illustrations, other than those produced by the two processes in question, are not covered by the Section nor are reproductions, by such processes, of copyrighted paintings, even though painted in the United States, for the palpable purpose of being reproduced by such processes and then sent abroad for such reproduction.[44]

§ 835 Exception.

§ 836 Effect of Section.

The type-setting, making of plates, lithographing, photo-engraving, printing and binding in cases covered by the Section must all be entirely performed in the United States. This changes the former law. But there is nothing in the Statute which prevent foreign rebinding of books, originally bound in the United States.[45]

§ 837 Rebinding.

§ 838 The books and periodicals covered by the Section.

All "books" and periodicals whether in English or not, written by a citizen or alien domiciled in the United States, published in the United States, must comply with this Section, except books intended for

42—Littleton v. Oliver Ditson Co., 67 F. 905.
43—See 28 Opinions Attorney General 150.
44—See 28 Opinions Attorney General 557.
45—See 28 Opinions Attorney General 209.

the use of the blind, the original text of books "of foreign origin," in languages other than English, and books in English published abroad, which seek ad interim protection in the United States.

§ 839
The meaning of "original text of books of foreign origin."

Mr. Bowker[46] states that he was the partial author of this Section when originally drafted. He calls attention to the possible difference between the phrases, "the original text of a book of foreign origin," and "books of foreign origin," in each case referring to non-English works, which are, among the works excepted from the operation of the Section. He deems it probable that these two phrases will receive the same construction,[46] but he appears to deem that such construction would be such as, for example, to limit it to the original work, strictly enough to bar even a translation of it by a foreigner, in a non-English language.[47] This would seem a doubtful result, in view of the penal nature of the Section.

§ 840
Books by resident aliens.

The words books "of foreign origin" used in this Section apparently refer to authorship. The Copyright Office deems them to exclude resident aliens,[48] but on the other hand to exclude also non-resident citizens of the United States. This view appears contradictory as, if nationality of the author is the test, his domicile would appear immaterial and, vice-versa, if domicile control, his nativity would appear non-essential. What the Courts would hold in such a case may well be doubted, but it would appear reasonable to assume that their construction will be such as not to discriminate against American citizens, in favor of aliens, wherever domiciled.

§ 841
Books by non-resident citizens.

The importation of copies printed in violation of this section would be unlawful, both as a result of inference from it,[49] and also by virtue of the pro-

§ 842
Section 31 and 11 of Act to be read with Section 15.

46—Page 156.
47—Page 155.
48—Rules: No. 29.
49—Harper Bros. v. M. A. Donohue & Co., 144 F. 491.

visions of Section 31 of the Act,[50] but would not invalidate a pre-existing copyright.[51]

It should be noted that the provisions of Section 31 except various works, and copies of works, from its prohibition against importation,[52] which are not excepted by Section 15 from the classes of works covered by it. The words in Section 15, excepting works from its operations, "as below provided,"[53] may possibly be used as a means for harmonizing the exceptions in the two sections, as meaning that in such cases Section 15 is to control.

§ 843 The Section does not require "books" to be printed.

Since the question was raised, it may be noted that there is, as the Attorney General apparently correctly deemed,[54] nothing in these sections which requires all books copyrightable under the Act to be printed, or which prevents the copyright of type-written copies of a work.

§ 844 Printing in Philippine Islands.

Under the prior Act, the Attorney General deemed that the requirements of the statute corresponding to this Section were not satisfied by manufacture of works in the Philippine Islands,[55] but this view appears doubtful under the decisions,[56] and for the reasons stated elsewhere.

The question as to what the effect may be of a failure to comply with the requirements of this Section is discussed elsewhere.[57]

§ 845 Affidavits of domestic manufacture.

Section 16. *That in the case of the book the copies so deposited shall be accompanied by an affidavit, under the official seal of any officer authorized to administer oaths within the United States, duly made by the person claiming copyright or by his*

50—See § 1368.
51—Bentley v. Tibbals, 223 F. 247.
52—See that section, (§ 1369) for a list of such exceptions.
53—See § 829.
54—28 Opinions 265.
55—25 Opinions 179.
56—See § 709.
57—See § 848.

duly authorized agent or representative residing in the United States, or by the printer who has printed the book, setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made within the limits of the United States from type set therein; or, if the text be produced by lithographic process, or photo-engraving process, that such process was wholly performed within the limits of the United States, and that the printing of the text and binding of the said book have also been performed within the limits of the United States. Such affidavit shall state also the place where and the establishment or establishments in which such type was set or plates were made or lithographic process, or photo-engraving process or printing and binding were performed and the date of the completion of the printing of the book or the date of publication.

§ 846 When affidavit required.

The affidavit required by this Section, is requisite only in the case of "books," within the meaning of that word, as used in Section 16, and not in the case of periodicals, or of separate lithographs, or photo-engravings. It must, where requisite, accompany the copies deposited on registration. Its detailed nature is readily apparent, from a reading of the Section.

§ 847 Books printed abroad.

Attention is called in the Copyright Office Rules,[58] to common mistakes in affidavits, prepared under this Section. The affidavit required by this Section is not possible, nor hence required, in the case of books printed or bound abroad, whether written in some foreign language or, where this is permitted, in English.

§ 848 Effect of failure to comply with provisions

No penalty is provided, in terms, for a failure to comply with the preceding Section or with this Section. It should be noted that the language used

58—Rule No. 35.

of manufacturing clause, etc.

in Section 15 is that copies accorded protection under the Act, shall be manufactured in accordance with its requirements. Whether "copies" means "works," and whether under Section 1, non-compliance with Section 15 would avoid a copyright, or whether this Section would only create an estoppal against actions for infringement in favor of persons copying, etc., from copies of a work produced in violation of this clause, is a matter for the future construction of the Courts. It may be noted that Section 15 both refers to the copies requisite for registration of copyright, and also to copies produced thereafter for the proprietor's general purposes. The problem of the proper construction of the Section, in the respect under discussion, is not, necessarily, essentially similar to the questions as to the effect of non-compliance with Section 12 which are discussed elsewhere.[59] It should be noted that Section 17 makes a copyright void,[60] if there is a conviction for making a false affidavit, under Section 16. Whether this in any way affects the question under consideration is also problematical.

In a very recent decision,[61] a defendant charged with infringement, claimed that plaintiff did not come into Court "with clean hands," where he had violated this section by importing copies of a work, which he had composed and printed in England, but which contained the substance of his prior work, copyrighted in the United States. The Court overruled this contention, but did not discuss the language of Sections 1, 15 and 17, to which attention has just been directed. The decision may, however, be deemed an authority to the effect that a violation of Section 16, after copyright has been secured in compliance with it, will not, *per se*, affect the validity of such copyright.

§ 849 Foreign printing, after copyright.

59—See § 789, *et seq.*
60—See § 851.
61—Bentley v. Tibbals, 223 F. 247.

§ 850 Pleading.

Under the Act of 1891, it was said that it was unnecessary for plaintiff to plead compliance with the manufacturing clause of the statute and that an omission to comply therewith, if necessary, was a matter for affirmative defence.[62] The same result was reached in considering plaintiff's prima facie proof under that Act.[63]

§ 851 False affidavits of manufacture.

Section 17. *That any person who, for the purpose of obtaining registration of a claim to copyright, shall knowingly make a false affidavit as to his having complied with the above conditions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, and all of his rights and privileges under said copyright shall thereafter be forfeited.*

§ 852 Criminal and civil consequences of the making of such false affidavits.

This Section has a harsh and drastic aspect, at first sight, in that it apparently provides for a forfeiture of copyright in cases where a false affidavit is made by one other than the proprietor of the work.

However, it should be observed that the forfeiture is only to result after a conviction in criminal proceedings, where the falsity of the affidavit, and the defendant's knowledge of its falsity, would have to be established beyond a reasonable doubt. In view of the fact that only the proprietor of a copyright could have "rights and privileges" to be forfeited, this result could only follow on his conviction and not upon the conviction of any of the other persons mentioned in Section 16. Thus viewed, it may be doubted whether the Section has any unreasonable, or unjust, possibilities inherent in it.

62—Osgood v. A. S. Aloe, etc., Co., 69 F. 291.
63—Patterson v. J. S. Ogilvie Pub. Co., 119 F. 491.

CHAPTER XIV

NOTICES OF COPYRIGHT

§ 853
Notices of copyright.

Section 18. *That the notice of copyright required by Section* 9 *of this Act shall consist either of the word "Copyright" or the abbreviation "Copr.," accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in sub-sections (f) to (k), inclusive, of Section* 5 *of this Act, the notice may consist of the letter C inclosed within a circle, thus:* ©, *accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: Provided, That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright is subsisting when this Act shall go into effect, the notice of copyright may be either in one of the forms prescribed herein or in one of those prescribed by the Act of June* 18, 1874.

§ 854
When notice of copyright requisite, in general.

The notice of copyright required by this Section must be affixed to each copy, published, or offered for sale, in the United States, by authority of the copyright proprietor.[64]

In connection with copyrights obtained on or after July 1, 1909, the requirements of the Act are as follows:

64—Section 9.

§ 855
Form of notice for books, motion pictures, dramatic and musical works, etc.

In the case of books, periodicals, lectures, sermons, addresses or dramatic, dramatico-musical or musical compositions and motion pictures, photo-plays or otherwise, the word "Copyright" or the abbreviation "Copr.," accompanied by the name of the then copyright proprietor, must be affixed to each published copy of the work.

§ 856
When the year of copyright must be added.

If such work be a *printed* literary, musical or dramatic work, the year in which the copyright was secured by publication, must be added.[65] The word "literary," as used in this section, would probably be given a broad and inclusive definition, to avoid the necessity for a judicial assumption of the role of critic.[66] It is probable, in fact, that "literary," and "dramatic" works would be deemed to cover most printed literate works, capable of copyright. While the language used in this connection is broad enough to cover the case of motion-picture photo-plays, which are both dramatic compositions and printed from negatives, it does not appear that the year is required to be added in notices of copyright of photo-plays,[67] although common prudence suggests that this be added, until such time as this clause is judicially construed. The term "printed," however, will undoubtedly be construed to include books whether printed from type or produced by lithography, photography, electro or stereotyping or any other mechanical process,[68] but probably would not be held to include manuscript copies.

§ 857
Form in other cases.

In the case of works of art, or reproductions thereof, maps, models, or designs for works of art, drawings, plastic work, photographs or pictorial

65—The decision in Mathieson v. Harrod, L. R. 7 Eq. 270, where it was held the day of publication was required to be stated, rests in the particular language of the statute involved and does not apply to the present Act.

66—Cf. § 19, which appears to indicate the printed works mentioned are those which are paginated.

67—See § 853.

68—See § 532.

illustrations, the notice may consist of the form of notice just discussed, or of the letter C enclosed in a circle, thus ©, accompanied with the initials, monogram, or usual mark or symbol of the proprietor.

Where this latter optional form of notice is used, the name of the copyright proprietor must be placed on some accessible portion of the copy itself or on the margin, back, permanent base, pedestal or substance on which it is mounted.

§ 858 Form of notice for works copyrighted under prior Acts.

In the case of works copyrighted before July 1, 1909, the foregoing forms of notice may be used or, in the alternative, one of the following:

"Entered according to act of Congress, in the year....., by....., in the office of the Librarian of Congress, at Washington,"[69]

or

"Copyright, ..., by....."

the first blank, in each instance, to be filled with the year in which the copyright was entered, for example, 1891, and the second blank, with the name of the person by whom it was taken out.

§ 859 The name to be inserted in such notices.

The name to be inserted in the notices required by the statute on first publication, is that of the proprietor of the right to copyright for the time being. This means the holder of the legal title to such right.[70] The name of the author should not be inserted, unless he is still the proprietor of the copyright at the time when the notice is affixed. If the right to take out a copyright has been assigned prior to publication, the notice should be in the name of the person or persons in whom such right is vested at the time when the copyright vests. If the copyright is assigned after it is secured, the assignment must be recorded[71] and, after record, the assignee's

§ 860 When assignee's name may be substituted.

69—Act of June 18, 1874.
70—See § 691.
71—Section 44.

name may be substituted for the assignor's, in the notice.[72] Unless, however, there be a recorded assignment, the assignee's name may not be substituted, and the name of the record proprietor of the copyright must continue to be printed in such notices. It has been intimated that if there be a partial assignment, the partial assignee's name may not be substituted,[73] or added. The question as to whether there can be a partial assignment is discussed elsewhere.[74]

§ 861 Essential elements in valid notices.

There are two essential elements in copyright notices, the absence of which will vitiate the notice, that is (I) the word Copyright, or the abbreviations "Copr." or ©, where the use of the latter is allowed,[75] and (II) the proprietor's correct, but not necessarily full,[76] name must be inserted. Thus[77] inserting the name of the proprietor as N. Sarony instead of Napoleon Sarony, the former being his usual trade name, was held sufficient; but an incorrect corporate title, differing widely from the corporate proprietor's actual title, was held insufficient.[78] And the use of the word "Registered" for "Copyright," with the registry number instead of the proprietor's name, was held doubly bad.[79]

§ 862 Initials of proprietor's first name.

§ 863 Incorrect trade name.

§ 864 "Registered" for copyrighted.

§ 865 Trade names.

The proprietor's trade name may be inserted in the notice,[80] even though an alien,[81] and if these decisions be sound, if the author be the proprietor, no good reason can exist why such author's pen name, or pseudonym, cannot be inserted, the Copy-

§ 866 Pen names.

72—Section 46.
73—Bowker, p. 136.
74—See § 1517.
75—Higgins v. Keuffel, 140 U. S. 428, 35 L. ed. 470.
76—Mifflin v. R. H. White Co., 190 U. S. 260, 47 L. ed. 1040.
77—Sarony v. Burrow-Giles Lith. Co., 17 F. 591.
78—Record & Guide Co. v. Bromley, 175 F. 156.
79—Higgins v. Keuffel, 30 F. 627, aff'd 140 U. S. 428.
80—Griggs v. Perrin, 49 F. 15; Scribner v. Clark, 50 F. 473; Scribner v. Henry G. Allen Co., 49 F. 854; Rock v. Lazarus, L. R. 15 Eq. 104.
81—Werckmeister v. Springer Lith. Co., 63 F. 808.

right Office to the contrary notwithstanding, as such author's trade name, unless some state statute be violated.[82]

§ 867 Trustees.

The Copyright Office Regulations [83] correctly state that the notice should not state that *A* takes it out for the benefit of *B*, although it may be doubted whether such a notice would be deemed fatally defective under the rule [84] that surplusage in a notice of copyright may be disregarded, if the essentials are contained in such notice, but the Copyright Office's further deduction [85] that the beneficiary's name is to be printed, rather than that of the person taking copyright out for such beneficiary, is liable to be misconstrued. While the result indicated by the Copyright Office is desirable, it is not at all necessary, as a trust would arise if this were not done and the name of the trustee in the notice, though without reference to any trust, is sufficient.[85] Similarly it would seem an agent might take out a copyright in his own name for his principal if authorized to do so under circumstances which might cause a trust to arise, but not otherwise.[86]

§ 868 Surplusage in notices.

§ 869 Trusts, continued.

§ 870 Stating the proprietor's name.

In an English case,[87] it was held the name of one member of a partnership which owned a given work might be stamped on it as proprietor, where he was its author, without affecting the validity of the copyright, but this decision is unsupported by other authority. In a further case,[88] it was held a statement that a work was published by a given individual satisfied the requirements of a statute which provided that the name of the proprietor must be stated.

82—Haas v. Leo Feist, Inc., 234 F. 105.

83—Rules, § 26.

84—See § 873.

85—See Lawrence v. Dana, 4 Cliff. 1.

86—Cf. Petty v. Taylor, (1897) 1 Ch. 465; London Printing & Publishing Co. v. Cox, (1891) 3 Ch. 291.

87—Britain v. Hanks Bros., 86 L. T. 765.

88—Graves v. Ashford, L. R. 2 C. P. 410. See also Hills & Co. v. Austrich, 120 F. 862.

It was also held [89] that where the proprietor's name actually appeared on the work, he need not be designated as proprietor, even though another name also appeared on it.

§ 871 Dates in notices.

Where a reference to the year of publication is required, the date of publication, not of printing, should be inserted.[90] Thus, a notice of copyright, where a date is required, was held [91] insufficient, where there is a date on the periodical copyrighted but this is the date of the issue and is separated from the balance of the notice by a complete line. If this be done, it is immaterial whether, or not, the imprint date correspond with the date in the copyright notice or not. The date may be in Roman numerals,[92] as well as Arabic, and may be abbreviated, according to one case [93] although the doctrine of this decision should, it would seem, be applied with caution.

§ 872 Incorrect dates.

Where a notice incorrectly gave the date "1846" where "1847" was the correct date, the variance was held immaterial, since it shortened, rather than extended, the copyright term.[90] Conversely, and applying the same reasoning, it would seem if the notice had given the date "1848," this would have invalidated the notice, as an attempt to extend the copyright term by deceiving the public.

§ 873 Surplusage: addition of the names of third persons in notices.

In the same case,[90] it was held insertion of the names of two persons as proprietors, where, in fact, only one person was the proprietor, was immaterial, in the absence of proof that any one was misled thereby. This is in accordance with the theory, running through various cases, that the inclusion of extraneous, or additional, words into a notice which con-

89—Newton v. Cowie, 4 Bing. 234.

90—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547; overruling Baker v. Scribner, 2 Blatch. 82.

91—Record & Guide v. Bromley, 175 F. 156.

92—Stern v. Jerome H. Remick Co., 175 F. 282.

93—Snow v. Mast, 65 F. 995.

tains all the essential elements, will not invalidate it but will be treated as surplusage.[94]

§ 874 Substantial, not exact compliance, essential.

"Careful" compliance with the Section, "in substance," is essential.[93a] The object of the inscription is to give notice of the copyright to the public, and when the letter of the law is not violated by the form of notice adopted, and the object of the statute accomplished, that is enough.[95]

§ 875 Test as to sufficiency of notices.

The test as to notices, as laid down by the Supreme Court, may be found in the following language:[96]

> "It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained, since the right being purely statutory the public may justly demand that the person claiming a monopoly of publication shall pursue in substance, at least, the statutory method of securing it. Thompson v. Hubbard, 131 U. S. 123. In determining whether a notice of copyright is misleading we are not bound to look beyond the face of the notice and inquire whether under the facts of the particular case, it is reasonable to suppose an intelligent person could actually have been misled."

Substantial compliance with the Act in good faith is all that is necessary,[97] subject to an inclusion of essential words. Thus 1889, Copyrighted by B. J. Falk was held a substantial compliance with a statute requiring "Copyright, 1889 by B. J. Falk."[98] But if the date is required it must be made part of the notice and if this is lacking it cannot be supplied

93a—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547.

94—Heftel v. Whitely Land Co., 54 F. 179; Hills & Co. v. Austrich, 120 F. 862; Same v. Hoover, 136 F. 477.

95—Sarony v. Burrow-Giles Lith. Co., 17 F. 591.

96—Mifflin v. R. H. White Co., 190 U. S. 260, 47 L. ed. 1040, per Brown, J.

97—Myers v. Callaghan, 5 F. 726.

98—Falk v. Shumacher, 48 F. 222.

because of an imprint date elsewhere on the same page although immediately above the notice and only separated from it by a printed line. The case last cited contains a collection of cases decided under the Act of June 18, 1874.

§ 876 Possible bearing of statutory changes on the foregoing doctrine.

It should be noted that the decisions, which took the view of liberal construction of copyright notices, were decided under the prior statutes, which made the deposit of copies of a work, a condition precedent to copyright.[99] The question that exists under the present Act, with respect to the consequences of a failure to register a given work,[1] could not arise under such statutes, provided that the requirements of the statute were observed. Any sort of a notice which directed the attention of third persons to inquiry at the Copyright Office was all that was essentially necessary to the purposes of such Acts. Whether if the Courts hold that a failure to deposit copies under the present Act will not avoid a copyright,[1] they will, in turn, adopt a more rigid standard for copyright notices, for the protection of the general public, whose only means of information as to the details of copyright these might then be, is a question lying in future decision.

§ 877 Notices on copies deposited in Copyright Office.

As has been previously pointed out, the notice should be on copies deposited in the Copyright Office, as these are "published," within the Act.[2] The *dictum* to the contrary in a case under the prior Act,[3] appears inadvertent.

§ 878 When notice of copyright essential.

Under the present Act, only copies of a work, as distinguished from the original, appear to require notice of copyright,[4] but a notice is required on every copy published, or offered for sale, in the

99—See § 731.

1—See § 789.

2—See § 324.

3—Osgood v. A. S. Aloe & Co., 69 F. 291.

4—This follows, *a fortiori*, from American Tobacco Co. v. Werckmeister, 207 U. S. 384, 52 L. ed. 257.

§ 879 Many copies on one sheet.

§ 880 Composite works.

§ 881 Copies published or sold abroad.

§ 882 Unauthorized copies.

§ 883 Unauthorized omission of notice by licensee.

§ 884 Reprints.

§ 885 New versions.

United States. Thus where twelve complete copies of a painting were lithographed on one sheet, the painting having been fashioned so that this might be done and make a harmonious whole, it was held that a separate notice of copyright was requisite for each of such twelve copies, and one for the entire sheet was insufficient.[5] On the other hand, only one notice is required in the case of an original composite work.[6]

No notices are required on copies of a work published or sold abroad, even with the direct consent of the copyright proprietor,[7] or on copies that are published without the copyright proprietor's authority. Thus in a case, where the result appears to have been very harsh,[8] it was held that the proprietor of a copyrighted article did not lose any rights to sue one who copied it from a reproduction by a licensee, who had been authorized to publish it in a limited territory, upon express condition of affixing the usual copyright notice,[9] but who, inadvertently, omitted this, even though defendant acted in good faith, without any knowledge of the existence of the copyright.

Where copyrighted matter is republished in its original form, the original copyright notice with original date unchanged, must be placed upon it.[10] If, on the other hand, there has been any alteration or addition to a copyrighted work, since the work plus such alterations and additions is subject to a new copyright, the Circuit Court of Appeals for the Second Circuit, despite its evident agreement with

5—Louis De Jonge & Co. v. Breuker & Kessler Co., 182 F. 150, aff'd 235 U. S. 33, 59 L. ed. 113.

6—Edison v. Lubin, 122 F. 240.

7—See § 760.

8—American Press Publishing Co. v. Daily Story Publishing Co., 66 L. R. A. 444, 120 F. 766.

9—Cf. West Publishing Co. v. Edward Thompson Pub. Co., 169 F. 833.

10—Record & Guide v. Bromley, 175 F. 156.

the technical correctness of Mr. Drone's[11] views to the contrary, felt constrained to hold[12] that the new notice of copyright on the work is all that is requisite, without printing the notice of the prior copyright. Careful practitioners will, however, despite this decision, affix both notices of copyright to such works, as Section 6 of the Act, which the Circuit Court of Appeals deemed controlling, expressly states the effect of the publication of such new work shall not affect the force or validity of any subsisting copyright upon the old matter employed in the new work, or "secure or extend copyright therein," and it may, hence, well be that the Supreme Court, were the question to come before it, might take a view of the matter contrary to that of the Circuit Court of Appeals.

§ 886 Works in multiple parts.

The notice should be placed in each volume of a work, if more than one, and on each reel of film in a motion picture.[13]

§ 887 Exclusive nature of requirement for notice.

No other notice than that required by this section is necessary to the validity of American copyright, although to reserve foreign rights, notices under foreign statutes are sometimes added. It is unnecessary to reserve rights of translation, performance or dramatization under the present Act, by notice of reservation. No notices are required where a copyrighted work is publicly performed or represented, either orally or by printed notice, except the notices on published copies required by this section.

§ 888 Reservation of rights.

§ 889 Notices in a work protected by several copyrights.

The suggestion has been made that if a work is protected by various copyrights, obtained in various years, these may be conveniently combined, for example, thus "Copyright 1909, 1911, 1914 by A. B." but this appears a dangerous practice, as the result

11—Drone, p. 270.

12—West Publishing Co. v. Edward Thompson Co., 176 F. 839. See also Lawrence v. Dana, 4 Cliff. 1.

13—See § 902.

is only one notice, and this is too uncertain to be effectual.

§ 890 Illegible notices.

The notice if so badly blurred and indistinct as to be illegible, is insufficient.[14] The same result obtains where the copyright proprietor's symbol, if on a work, is so small that the average observer could not discover it.[15]

§ 891 Indefinite notice.

Where a copyright notice merely directs attention to the fact that a compilation includes copyrighted material, without stating, or indicating, where it is included, or what it is, such a notice is insufficient, as one into whose hands it comes, is not bound to purchase a copy of the original work, if he can, and make his own comparison.[16]

§ 892 Civil effect of false notice.

A false notice of copyright on a book [17] will work an estoppel to prevent a denial that it has been published.[18]

§ 893 Where notice of copyright to be affixed: printed matter.

Section 19. *That the notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical, either upon the title page or of the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music: Provided, That one notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.*

§ 894 Music.

§ 895 Single notice sufficient.

One notice of copyright is sufficient to cover everything copyrightable in a given work, even though it consist of individual parts, in so far as he who affixes the notice has the right to copyright such

14—Strauss v. Penn Printing & Publishing Co., 220 F. 977.

15—Alfred Decker, Cohn Co. v. Etcheson Hat Co., 225 F. 136.

16—Bentley v. Tibbals, 223 F. 247. See § 665 for the form of notice held bad in the case cited.

17—See § 1348.

18—Larrowe-Lorsette v. O'Loughlin, 88 F. 896.

parts.[19] On copyrighting the contents of a magazine, one notice of copyright is sufficient [19] and it is unnecessary to affix a separate notice to each story,[20] or to each illustration,[21] in it.

§ 896 Notices on periodicals, where contributions owned by more than one person.

While only one notice of copyright is required under this section, to protect the contents of an entire single number of a periodical, the question as to whether such a copyright is one single copyright of the contents, in combination, as an entirety, or an aggregation of copyrights in the separate articles, would probably necessarily be answered in favor of the first view. In cases then, where individual contributors own contributions so included, the important question whether the copyright proprietor could assign to them the copyright procured by him, in their contributions, that is, make an assignment of such portion of the copyright as covers their contribution, with the technical difficulties this conception involves,[22] may be most serious. The absence of decisions discussing the question, would seem to recommend the separate and individual copyright of important contributions, or at least the placing of a separate notice of copyright upon the title page of each contribution, as well as the usual general notice of copyright upon the periodical, as an entirety.

§ 897 Composite works.

If the copyright of parts of a work is owned by more than one, and there is no copyright in the entirety, each proprietor must, it would seem, be named in a notice of copyright. Thus registration of a book in the name of the author of the letterpress, would not, it was held, confer copyright protection with reference to illustrations made by, and belonging to, others.[23]

19—Harper & Bros. v. M. . Donohue & Co., 144 F. 491.

20—Dam v. Kirk La Shelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902.

21—Mail & Express Co. v. Life Publishing Co., 192 F. 899.

22—See §§ 819, 1524.

23—Petty v. Taylor, (1896) 1 Ch. 465.

§ 898 Meaning of various words in Section.

What the word "printed" means, as used in this section, has been discussed in connection with the previous section. "Book or other printed publication," appears, possibly, to be somewhat broader, than "printed literary, musical or dramatic work," but in view of the references, in the section under discussion, to pagination and the evident legislative intention shown by the Sections 18 and 19, when read together, it is deemed that the two phrases would be construed as identical.

§ 899 Works in several volumes.

It should be noted that each volume of a work consisting of several volumes, requires a separate notice of copyright. Each number of a periodical requires a separate notice.

§ 900 Illustrations.

Separate notices are not required on illustrations forming part of a printed work. The general notice of copyright of the work will protect them, equally with the text of which they form an integral part.[23a]

§ 901 Parts of a work, not connected physically.

This rule has been extended to cover the situation where a directory was issued with a detached map in a pocket in the cover. More copies were printed of the map than of the directory. The two could be, and in some instances were, sold separately. The map referred to the directory but was capable of independent use and sale. There was but one valid notice of copyright, to-wit, on the directory. The notice on the map was deemed insufficient. The Court was precluded by stipulation from considering whether there had been an abandonment of copyright. It was held[24] that the map was a part of the book and that, hence, the notice on the directory was sufficient to protect the map as well. The result of this decision may be doubted. The dissenting opinion appears the sounder. The majority view seems to ignore the purpose of the statutory notice, which is to warn the public against infringement. It would be absurd to require sepa-

23a—See § 895.

24—Lydiard-Peterson Co. v. Woodman, 204 F. 922; on rehearing, 205 F. 900.

rate notices to be put upon parts of a work, if physically connected, merely because such parts can be severed. Such a result is not intended by the copyright proprietor nor is it normal. But if a work be so constructed that it is issued with separated parts, with the knowledge that these may, and will, be used separately, each such separate part may well come into different hands, and since each might be copyrighted separately, if the proprietor chooses to copyright the parts as an entirety, consideration of the practical purpose of notices of copyright would seem to require that one such notice be on each part of the work issued separately.

§ 902 Motion pictures.

Under the prior Act, it was held [25] that notice of copyright need only appear at the end of a motion picture film. There appears, however, to have only been one reel of film in question and it may well be doubted whether the decision would have been the same had there been more than one reel.

§ 903 Title page.

The question as to what is the title page of a book, was discussed in a decision [26] where it was held that a notice not printed on the title page of a work, as required by statute, was entirely ineffectual, for any purpose.

§ 904 Inadvertent omissions of notices.

Section 20. *That where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the*

25—Edison v. Lubin, 122 F. 240.

26—Freeman v. The Trade Register, 173 F. 419.

innocent infringer his reasonable outlay innocently incurred if the Court, in its discretion, shall so direct.

§ 905 Prior law as to omission of notices.

This provision is an innovation in copyright law. Under the previous law, the omission of the prescribed statutory notice from even a single copy of a work, by the owner or his agents,[27] prevented any action for infringement of the copyright. This was true even where the defendant had actual notice of the copyright. Thus, in one case,[28] a contract had provided for the sale and transfer of a copyright and regulated the relations of the parties. The transferee omitted copyright notices on some of the editions of the work published by him. The transferor published copies. It was held that the transferee, the copyright proprietor, could not maintain suit for infringement. The Court said:

> "The plain declaration of the statute is, that no person shall maintain an action for the infringement of his copyright, unless he shall give notice thereof by inserting the prescribed words in the several copies of every edition published. That means, copies which he, as controlling the publication, publishes. His failure to give such notice debars him from maintaining an action for the infringement of his copyright. The word 'action' means either in law or equity."

§ 906 Effect of change in prior law.

The prior statute[27] prevented the application of the maxim, *de minimis lex non curat,* to the most trifling omissions of notice. The effect of the change effected by the enactment of the section of the Act under discussion, in changing the prior statutory rule, is, as will be shown,[29] substantially to write this maxim into the Act, in so far as the Act applies to notices of copyright.

27—R. S. § 4962.
28—Thompson v. Hubbard, 131 U. S. 123, 33 L. ed. 76.
29—See §§ 908-912.

§ 907
Omission of notice from first copy published.

The Section has, however, definite limitations. Thus, there can be no real question, that its saving clause would not apply in cases where, even through accident or mistake, the first copy published did not bear the prescribed notice, as statutory copyright hinges on the question whether such initial publication was made with, or without, notice,[30] and this section is only effective in cases where a valid copyright has been obtained.

§ 908
Preliminary proof necessary for Section to apply.

The Section states that it only applies to cases where it can be shown that the copyright proprietor has sought to comply with the provisions of the Act concerning notice. This can only be proven by testimony that he has obtained a copyright, involving at least one correct notice, and, further, it would seem, by proof that an indeterminate number of the great bulk of the copies issued, bore the prescribed notice. Use of the words "the particular copy or copies," in the Section, appears to indicate that the copies from which the notice was omitted were to be the exception, not the rule.

§ 909
Pleading and proof as to omitted notices.

It is a matter for defense that copies did not bear the prescribed notice of copyright. Thus,[31] it has been held that while the plaintiff must plead and prove that all copies of the copyrighted work, issued by him bore the statutory notice, separate, distinct and specific proof as to each copy was not requisite to make a prima facie case, but that a general allegation and general proof was sufficient for that purpose. But in the same case,[32] reported elsewhere, it was said that testimony given in connection with a defense that the plaintiff had failed to inscribe the statutory notice on the copy which the defendant had copied, should be scrutinized, with unusual care. It was also held that, in connection with such a defense, it was necessary to show that

30—See § 729.
31—Falk v. Gast Lithographing & Engraving Co., 40 F. 168.
32—48 F. 262.

such copies did not bear such notice when they left the hands of the copyright proprietor.[33] It is not sufficient to show that given copies did not bear the notice when they came into the hands of third persons, not dealing directly with the copyright proprietor.[33] His rights could not be prejudiced by removal of the notices by third persons, unconnected with him, at some time after they left his hands, but before the copies reached the defendant.[33]

§ 910 Burden of proof under present Act.

It would seem that under the present Act, if the defendant establish that a given copy, or copies, of a work did not bear the requisite notice when they left the copyright proprietor's hands, the burden would be upon the latter of proving facts, if he could, which would bring him within this Section.

§ 911 Nature of such proof.

To do so, it would appear necessary for him to establish that he had sought, in good faith, to comply with the Act and that the particular copy, or copies, which did not bear the requisite notice, failed to bear it as a result of accident or mistake.

§ 912 Mistakes of law.

Whether such mistake would include a mistake of law is a question upon which the Act sheds no light. As the juridical meaning ordinarily attached to the word "mistake," limits it to mistake of fact, it is improbable that the word as used in this Section would be given a different construction.

§ 913 Application of Section hinges on facts.

Whether the omission of the notice was due to accident, or mistake, or otherwise, would present a question of fact in each case. Where a copyright notice affixed to a work was so badly blurred and indistinct as to be illegible, it was held[34] the resultant situation brought the proprietor within the scope of this Section. A notice legible only by an expert and not by the ordinary man, received the same treatment.[35]

The result of this portion of the Section is, then,

33—Falk v. Gast Lithographing & Engraving Co., 54 F. 890.
34—Strauss v. Penn Printing & Publishing Co., 220 F. 977.
35—Alfred Decker Cohn Co. v. Etchison Hat Co., 225 F. 136.

§ 914
The present law as to effect of omitting notices.

that an otherwise valid copyright will not be invalidated by the accidental or mistaken omission, either in whole, or *a fortiori*, in part, of the prescribed notice from any particular copy or copies. Intentional, or negligent, omission, or omission from all or, perhaps, substantially all copies would, it seems, not permit the application of the saving provisions of the Section. Unless the omission of the notice is such as described in this Section, its omission would, it seems, quite clearly, under Section 1, and well settled rules of law, invalidate the copyright, or, at least, prevent suit for its infringement.[36]

In cases which are saved by the operation of Section 20, a two-fold situation may exist. Since the copyright in such cases is not invalidated by the failure to give the prescribed notice, anyone who has violated it is an infringer. This Section at this place makes a further important distinction and innovation in the law of copyright. In view of human frailty, and since perjury and piracy may well go hand in hand, the law in the past, wisely, has been that innocence in infringement was no defense to an action for violation of copyright.[37] Since, however, this rigorous, if salutory, rule was mitigated in practice by requiring the copyright proprietor to give notice of his rights, upon every copy of a work leaving his hands, the mitigation of the latter rule, in his favor, required a corresponding relaxation in favor of such persons as infringed his rights, in good faith, because of his omission of the prescribed notice.[38] As against anyone who deliberately infringes a copyrighted work or who does so with actual knowledge of the existence of the

§ 915
Innocent infringement.

§ 916
Deliberate infringement.

36—Cf. Thompson v. Hubbard, 131 U. S. 123, 33 L. ed. 76; Record & Guide Co. v. Bromley, 175 F. 156.

37—See § 1047.

38—In connection with the present English law, it should be noted that the whole machinery of registration and notice was swept aw y by the Act of 1911, but that this contains a provision, § 8, which prevents any relief, save by injunction in cases where the defendant

copyright, its proprietor may still, as far as concerns this Section, pursue any remedy given him by the Act, as freely as if he had not accidentally, or mistakenly, omitted notice from a particular copy or copies of his work. His excusable omission will not change the character of an act of inexcusable commission.

§ 917 Status of innocent infringers, under present Section, in cases of omitted notices.

In respect to innocent infringers, however, a different situation exists. While the intention of the framers of the Act probably was to do exact justice between the copyright proprietor and the innocent infringer, the language actually used appears to fall short of this effect.

§ 918 Damages not recoverable.

The proprietor cannot recover damages, either actual or stipulated, it would seem, against such innocent infringer for anything done or begun before notice of the copyright proprietors' rights is brought home to him. It would seem he could, under this Section, recover no damages for the completion of infringing acts, innocently "begun." Infringement rarely consists of an isolated act. For example, an infringing book is (a) printed, (b) published, and (c) sold. Let the case be assumed of an innocent infringer who has printed an edition of a work which did not bear the requisite notice of copyright, on all its copies. If he cannot sell these, they are valueless and he loses the moneys laid out by him in the printing.

§ 919 Permanent injunction only procurable conditionally.

The Section expressly provides that no permanent injunction shall be awarded, unless the copyright proprietor shall, if the Court in its discretion so direct, reimburse to an innocent infringer, his reasonable outlay innocently incurred. Such proprietor, however, is not bound to pray for an injunction in suing an infringer. Unless, however, such an innocent infringer were permitted to dispose of such infringing copies as he had on hand,

proves he did not know and had no reasonable ground to suspect, that copyright existed in the work infringed by him.

without being exposed to an action for damages by reason of such sale, there would be no need for an injunction, as the liability for damages would, theoretically at least, have the same effect. This was not the intention, it seems, of the framers of the Act and this result may be avoided by construing the word "begun" accordingly. It is believed that an entire transaction, though consisting of separable acts, or stages, each of which might be deemed infringing, if independently performed, should be treated as an entirety, if innocently "begun," for the purposes of this Section, and that in connection with such transactions, there can be no relief by way of damages. This is no hardship to the copyright proprietor, as he can always stop the further activities of such originally innocent infringer, by injunction if he be willing, if the Court deem proper, to reimburse him for his reasonable outlays, previously made in good faith.

§ 920 "Reasonable outlay."

Save in exceptional cases, appealing to the conscience of the Court, "reasonable outlay" would appear to mean the amount actually expended. It could not include prospective profits, nor moneys voluntarily expended after notice of the plaintiff's rights, save, it would seem, in connection with the completion of works previously "begun." It may be doubted whether the expense of litigation could be included. It would seem that whatever defendant's innocence, he would have to defray this and also to pay the costs of any action for an injunction brought against him, in which the plaintiff is successful, even though on condition of reimbursement for innocent outlay.[39] Under such circumstances, it would seem that what discretion the Court has should be exercised in favor of such defendant.

§ 921 Costs in cases of innocent infringement.

§ 922 Writs of seizure.

Curiously enough, no provision is made for the relief of innocent infringers, if the plaintiff proceeds

39—Section 40.

by writ of seizure under Section 25 of the Act and Rules 3–5 of the Supreme Court Rules of Copyright Practice and Procedure, unless the Courts will hold that the copies, plates, molds, etc., made by an innocent infringer in cases covered by Section 19 are not infringing copies, etc., within the meaning of Section 25, subdivisions (c) and (d). There are no adjudicated cases bearing upon any of these questions.

§ 923 Profits.

It has, however, been held, that [40] the profits made by an innocent infringer may be recovered in a case covered by this Section, although not damages actual or fixed. This decision, unjust as its result appears to be, seems to have been required by the language of the Act and to be sound, from a technical point of view.

§ 924 Temporary injunction.

While no check is placed by this Section, upon the issuance of preliminary or temporary injunctions, it is deemed the Court will be slow to grant temporary relief, save upon carefully prescribed terms, where it would apparently only grant final relief, upon the compensatory basis contemplated by the statute.

§ 925 Application of Section considered with respect to innocent infringement generally.

The point may be raised, at some future time, that the provision of this Section with respect to the discretion of the Court to require re-imbursement of outlays in the case of innocent infringement, is not limited to cases where there has been an absence of the prescribed notice, on a particular copy, or copies, but that the concluding portion of the Section refers to all cases of innocent infringement. While such an extension of judicial discretion might be beneficial, it is considered that the Section will be limited to apply only to cases of notices, defective or absent on issue, by application of the maxim *noscitur a sociis*, in its construction.

In cases of defective notices, as distinguished

40—Strauss v. Penn Printing & Publishing Co., 220 F. 977.

§ 926
Defective notices.

from cases where there are no notices at all, it may well be doubted whether there can be innocent infringers, save where the inquiry entailed by the defective notice, though reasonably diligent, is fruitless.[41]

§ 926a
Presumption in cases where omission trifling.

In a very recent case[42] it was held that where only a very few copies of chromos did not bear notice of copyright and defendant was not misled by the omission, it would be presumed that such copies had been sent out as samples and did not require notices to be affixed thereon.

41—Cf. Alfred Decker Cohn Co. v. Etchison Hat Co., 223 F. 247.

42—Stecher Lithographic Co. v. Dunston Lithographic Co., 233 F. 601.

CHAPTER XV

AD INTERIM COPYRIGHTS

§ 927
Ad interim copyright.

Section 21. *That in the case of a book published abroad in the English language before publication in this country, the deposit in the Copyright Office, not later than thirty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book, shall secure to the author or proprietor an ad interim copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of thirty days after such deposit in the Copyright Office.*

§ 928
General copyright after ad interim copyright.

Section 22. *That whenever within the period of such ad interim protection an authorized edition of such book shall be published within the United States, in accordance with the manufacturing provisions specified in Section* 15 *of this Act, and whenever the provisions of this Act as to the deposit of copies, registration, filing of affidavit, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book for the full term elsewhere provided in this Act.*

§ 929
Ad interim copyrights under prior law in non-

The legislative history of these sections is instructive. The former Act[42] provided for ad interim copyrights in books printed abroad, in lan-

42—R. S. 4952, as amended by Act of March 3, 1905.

guages other than English. A special form of notice was to be inserted, as follows:

English works only.

"Published nineteen hundred and.... Privilege of copyright reserved under the Act approved March third, nineteen hundred and five by....."

That Act did not provide for ad interim copyrights, in the case of foreign works published in English.

§ 930 Early drafts of Sections under discussion.

When the present Act was introduced, it differed widely, as has been pointed out elsewhere,[43] in its general scope, from the Act as passed. Sections 16 and 17 of the proposed Act,[44] were the sections corresponding to the ones under discussion. The proposed sections provided for ad interim copyrights in books both in foreign languages, in the English language, or partly in one, or the other.

§ 931 Reason for proposed change in law.

For many years there had been great complaint on the part of English authors because the United States, one of their great markets, was necessarily closed to them, for copyright purposes, as they were required to be citizens of the United States, or resident therein, to obtain copyright and, if they published there first, could not obtain British copyright. When the restrictions as to alienage were removed, the restriction as to place of publication remained.

§ 932 Policy underlying ad interim copyrights.

It has been a marked attribute of governmental policy, at all times, and in all countries, if possible, to ensure that the first publication of copyrightable works take place in such countries, so that their nationals might have the earliest and surest opportunities for apprehending the ideas contained in such works. The original draft of the present Act provided for the deposit of copies for registration within 30 days after the publication which initiated copyright.[44] The Section under discussion, as originally drafted, was undoubtedly intended to conform

43—See § 777.

44—S. 6330, H. R. 19853, 59th Congress, 1st Sess., § 11; Copyright Office Bulletin No. 12.

§ 933
Further discussion of drafts of sections.

to Section 11 of the Act, *as originally drafted*,[45] so as to permit initial foreign publication of works, whether written in English or not. It has been previously pointed out, that it is questionable whether an act conferring copyright upon works published abroad would be constitutional,[46] or whether its enactment could, without any requirement for speedy American publication, be, in any event, deemed within the constitutional powers of Congress. This situation, as well as the necessity for conciliating the American printing, and allied, trades, undoubtedly influenced the draftsmen of the Act, in its various forms.

§ 934
The expressed intention, as distinguished from the effect of this Section.

In the Report of the House Committee which accompanied the bill, it was said that non-resident authors, writing in English, wished the same rights as those writing in foreign tongues.[47] But the present Act eliminated ad interim copyright, save in the case of works written in English. Congress accordingly acceded to this wish by depriving authors writing in foreign tongues of the right to ad interim copyrights and by conferring such rights upon writers in English. Thus a plea based upon equality, was met with a favorable answer, but also by a simple shifting of the non-equality. In view of this legislative history, it becomes difficult to contend that any portion of the Act of March 3, 1905, is still in force, no matter how desirable a contrary result would be.[48] The somewhat astonishing result of this desire to confer equality may have been partially induced by the effort, made in the draft bill, to enlarge the term of ad interim copyrights in books in foreign languages to two years, which would not, apparently, have promoted "the progress of science and of the useful arts" in the United States.

§ 935
Ad interim copyright now possible only in works in English.

45—See § 777.
46—See § 750.
47—See House Report 2222, cited elsewhere, § 78.
48—See § 810.

A countervailing complication is introduced by the passage in Section 15 which refers to books of foreign origin in a language, or languages other than English.[49] These need not be printed in the United States. This provision may furnish a slender basis for argument, to those who would contend that there may be ad interim copyrights in works published abroad in non-English languages.

§ 936 Filing of copy essential to secure ad interim copyright.

Turning to the language of Section 21, it is to be noted that the foreign-produced copy must be filed in, and cannot be mailed to, the Copyright Office, in order to procure ad interim copyright under these sections, but that subsequently produced American copies may be mailed, if extension of the original copyright is sought.

§ 937 Duration.

The maximum period that an ad interim copyright can endure is sixty days after the initial foreign publication.

§ 938 Who may obtain such copyright.

The general language of the Section with respect to persons who can obtain such copyrights, is to be deemed limited by Section 8, referring to the classes of foreign authors, in whose works copyright may be obtained.[50]

§ 939 Notice of such copyright.

No form of notice of copyright appears to be prescribed in connection with ad interim copyrights under the present Act. Under the express provisions of Section 9, no notice is required on the copy deposited to procure ad interim copyright under these sections.[51] Whether, however, affixation of the statutory notices is not requisite in the case of copies of such work imported during the duration of an ad interim copyright, if such importation is permissible, as it seems to be, is an open question.

The word "book," as used in Section 21, would probably be given a reasonable construction.[52]

49—See § 829.
50—See § 675.
51—See § 730.
52—See §§ 532, 537.

§ 940
In what books such copyright may inhere.

Works, partly in English, partly in foreign tongues, would probably be held to be included in the scope of the Section, provided that the English portion of the text preponderated. It is a question, in the case of songs with English words, what the scope of an ad interim copyright would be, if obtainable. While the Courts will probably hold such a copyright may be obtained,[53] it seems such copyright would not be in the music or in anything connected with the work, except in the words of the song, if original.

§ 941
Songs.

§ 942
Requirements where general copyright desired after ad interim protection.

It is to be noted that under these sections, the proprietor of an ad interim copyright need not publish an edition in the United States himself, to procure general copyright: such edition need only be an authorized edition. Whether a translation would comply with this requirement, is a subject for future judicial determination. Copyright notices in cases where the proprietor himself does not publish in the United States, should contain his name as copyright proprietor and the year of first American publication.

§ 943
Effect of sections on question of foreign first publication.

On the principle of *inclusio unius, exclusio alterius est,* all books published abroad in which an ad interim copyright is not procured, become incapable of American copyright. This would follow from these sections of the statute, even if this result would not be worked by their becoming part of the public domain, on publication, without statutory copyright.[54] The same rule of construction lends weight to the argument that since there can be no ad interim copyright, save in the case of books, and no American copyright in books, published abroad, unless ad interim copyright be obtained, that there can be no American copyright in works other than books, first published abroad.[55]

If a copy of an English novel were purchased

53—See § 191.
54—See § 265.
55—See also § 736, *et seq.*

abroad, on first publication, imported and reprinted before an ad interim copyright were secured in this country, the question might arise what the rights and liabilities of the printer would be. Since no notice of copyright is required in many foreign countries, such reprint might be made in perfect good faith, without any knowledge or means of obtaining knowledge, as to whether thirty (30) days had, or had not, expired after the time of initial publication. It is not believed, however, that the question of good faith would affect the result. Since the statute is plain, the copyright when obtained, would prevent further sales of the reprinted work by such third person, but since statutory copyright is not retroactive, he would not be compelled to account for profits or respond in damages, for past sales.[56]

§ 944 Effect of ad interim copyright on prior innocent publication by third persons in United States.

56—See Monckton v. Pathe Freres Pathephone, (1914), 1 K. B. 395.

CHAPTER XVI

DURATION AND RENEWAL OF COPYRIGHT TERMS

§ 945
Duration of copyright.

Section 23. *That the copyright secured by this Act shall endure twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: Provided, That in the case of any posthumous work or of any periodical, cyclopaedic or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopaedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and exten-*

§ 946
Renewal of copyright.

sion of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in default of the registration of such application for renewal, and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

§ 947 Date of the inception of copyright.

The date of first publication, which initiates statutory copyright, is defined elsewhere,[57] in the case of works reproduced in copies for sale or distribution, as the earliest date when copies of the first, authorized edition were placed on sale, sold or publicly distributed, by the proprietor of the copyright or under his authority. The question of what constitutes a publication, in cases not covered by this definition, is discussed elsewhere.[58] The effect of this Section in its application to copyrights secured under Section 11, is also discussed elsewhere.[59]

§ 948 Duration of copyright.

Copyright under the Act runs for 28 years after first publication and not from the date of registration save in cases of ad interim copyrights.[60] While the length of the initial term is the same as in previous statutes,[61] except that the term granted by these ran from registration,[62] not publication, the length of the renewal term, where authorized, has been doubled.[63] The term "renewal," is used in the discussion of this Section, for purposes of convenience, although, as pointed out subsequently,[64]

§ 949 Renewal term.

57—Section 62.
58—See §§ 348–400.
59—See § 777.
60—See §§ 927, 928.
61—R. S. 4953.
62—R. S. 4954.
63—Cf. R. S. 4954.
64—See § 951.

§ 950 Meaning of "renewal" of copyright.

the second copyright term to which it refers is to be deemed a new one rather than a strict renewal of the initial copyright in a given work.

§ 951 Who is entitled to renewal of copyright.

Every proprietor of a copyrightable work is entitled to a copyright therein but every proprietor of a statutory copyright is not entitled to a renewal of such copyright, on the expiration of its initial term. As pointed out in an excellent opinion,[65] citing and comparing the various statutory provisions bearing on the subject matter of the succeeding section, it has been a uniform legislative policy, manifested in all of the American statutes, to differentiate between proprietors, who were not the authors of copyrighted works, and such authors, or their families, when renewals of copyright were involved.

§ 952 When a proprietor, not the author, may have a renewal.

The present statute makes the following provisions as to when the proprietor, as distinguished from the author of a work, may obtain a renewal: the proprietor may have it with respect to

(a) posthumous works,

(b) periodicals, except as to contributions copyrighted separately, and

(c) cyclopaedic, or other composite works, with the exception noted under (b).

But renewals in cases (b) and (c) may only be obtained where the original copyright was obtained by "the proprietor thereof." Whether this means proprietor at the time of renewal, or not, or proprietor of the work and its contents, as distinguished from a mere publisher, or mere technical proprietor, of the copyright in such publication, as an entirety, is not entirely clear. It is deemed however, the words mean entire proprietor of the work and of its contents, at the time of original copyright. The proprietor may also obtain a renewal, in cases

65—White-Smith Music Publishing Co. v. Goff, 180 F. 256 (Brown, D. J.), aff'd 187 F. 247.

depending on his, or its, character—that is, in cases of works copyrighted by

(d) a corporation—except as assignee or licensee, or by

(e) employers, whether corporate or not, for whom the work was made, for hire.

In no cases other than those specified above, is a copyright proprietor entitled to a renewal term, by mere virtue of his ownership of the original copyright of the work in which the copyright subsists, or by mere force of the statute. It seems this must be equally true, though the proprietor became such before publication, or copyright, as no matter when or how, he became the owner of the work, unless he was its author, the clear distinctions made by the statute between authors and those claiming under them, militate against him.

§ 953 When author, his family, etc., entitled to renewal.

Except in the cases which have been specified, where the proprietor is entitled to a renewal copyright, the persons hereinafter named are entitled to a renewal or extension, if living, in the order named: the author, his widow or her widower, the author's children, or executors, or next of kin, if there be no will.

§ 954 Rights to renewal are not assignable.

The contingent rights created by this Section (other than those reserved to copyright proprietors) are strictly personal and hence, incapable of assignment, before they have crystallized into new copyrights. The machinery of the statute so contemplates. Hence an assignee cannot obtain a renewal copyright, merely in his capacity of assignee. It is difficult to see how the proprietor of a work, not coming within the catagory of those in which a proprietor has renewal rights, can obtain any certainty of obtaining such renewal rights, by any form of contract he may make with the author. If the author be living when a copyright expires,

§ 955 Effect of this rule, in connection with efforts to secure future renewal rights by contract with author.

he may, it seems,[66] be compelled, in a proper case, to assign the renewal copyright to the proprietor of the original copyright, if the contract between them so provided. But the difficulty is, that, while by proper contractual machinery, matters may, hence, be so arranged that renewal rights will ultimately vest in the proprietor of the original copyright, if the author be living at the end of the original copyright term, the author cannot bind his widow, children or next of kin, effectively, by contract.

The provision giving renewal rights to the author's executors, in certain contingencies, is obscure in that it is not made entirely clear, whether it was designed that such rights were to be for the benefit of testamentary legatees, although this seems more probable, or for the next of kin. It may be considered doubtful to what extent a contract to make a testamentary disposition in favor of the publishers could be enforced, specifically, and with what results, since, as pointed out, the inchoate rights of renewal are not assignable.[67] Such a contract could not give executors or legatees precedence over the author's widow, widower, or children, if living.

§ 956 The question as to estoppel to claim renewal copyright discussed.

It has been suggested that by an "outright" sale of his manuscript, an author might estop himself and his family from claiming renewal rights.[68] The suggestion involves two questions, not necessarily the same, and of doubtful merit. While the nomenclature used in connection with the second copyright term, refers to "renewal" or "extension," what is, in reality, conferred is a new copyright.[67] This is shown by the provisions differentiating between the proprietor of the original copyright and the persons, other than he, who are entitled to the so-called

66—Cowen v. Banks, 24 How. Pr. 73.
67—White-Smith Publishing Co. v. Goff, 187 F. 247.
68—Drone: Copyright, p. 327.

renewal. "Renewals" of rights, in favor of persons, who did not have the rights so "renewed," would certainly be of a curious legal nature. By selling the rights which he had, an author cannot fairly be said, by implication, no matter how absolute his language, to dispose of rights he may never have, or which if he has, he cannot assign before he obtains them. Something more than a bare sale of existing rights, no matter how absolute, would appear necessary to divest him of future renewal rights. His behavior may undoubtedly be such that a Court of Equity will lend him no aid in enforcing a renewal copyright. But whatever his behavior, it is difficult to see how it can affect the statutory [69] rights of his family to a renewal, if he die, unless they actively participate in his inequitable behavior.

Mr. Drone [70] has expressed a view contrary to the foregoing, in his discussion of Section 4954 of the Revised Statutes. His argument is that, if an author has sold his work and all rights therein, he cannot thereafter obtain any rights in connection therewith, that the rights of his surviving family, if any, are dependent upon his rights and, hence, they cannot, in such a case, obtain any rights in connection with such work. It is not deemed, however, that this view, with the natural justice of which one would not be disposed to quarrel, will bear examination. The difficulty with this argument is that it fails to recognize that the rights involved are purely statutory, and hence dependent not on the ownership of a work, not on authorship, but on the statute. Authorship furnishes the foundation for the legislation under which copyrights are granted, but it does not furnish the measure of rights granted by the statutes. The distinction is between the occasion for, and the results of, legislation. He can only sell what he has, that is, the right to apply for

69—Rundell v. Murray, Jac. 311; Paige v. Banks, 7 Blatch. 153.
70—Drone: Copyright, p. 326.

rights, and if, as a result of such application, future rights arise in him, or in third persons, this is the result of machinery which comes into play, independently of his authorship. The buyer cannot complain. He has everything the author can sell. An author can only sell rights which he has. When he sells his work before publication, he has no right to renewal of a copyright as no copyright exists and, *non constat* that any ever will exist, to be renewed. When copyright does arise, it may not arise in the author at all. Since, if he were to attempt to assign his inchoate renewal right, the assignee, as Mr. Drone himself concedes[71] could not obtain it, as such assignee,[72] the author, it would seem, cannot be deemed to have assigned, or sold, something he does not have, may never have and which could not avail the purchaser if sold to him.

The greatest care should be exercised, in all contracts involving copyrights, to make definite provision,[73] as far as possible, with respect to renewal rights, to avoid the questions which may otherwise arise if the work has a permanent worth, giving value to the privilege of renewal.

§ 957 Notices of renewal copyright.

The Act is curiously defective, in making no definite requirements for notice of copyright in connection with renewals. It would seem that if the renewal term be deemed a mere continuation of the original term, the original copyright notice must continue to be published, subject to the rule as to substituting the assignee's name, where assignments of copyright are recorded. If on the other hand, the renewal and extension be deemed a separate and distinct copyright, it would seem a new notice of such new copyright would be essential. The original

71—See Drone, p. 261.

72—28 Opinions Attorney General 162. The dictum to the contrary in Carnan v. Bowles, 2 Brown's Ch. 65, would almost certainly not be followed.

73—Pierpont v. Fowle, 3 Wood & Min. 23.

notice, especially if it bore the date of the original publication, would be quite misleading, after the expiration, by lapse of time, of the original copyright term. A careful reading [74] of Section 18 of the Act would seem to lead to the conclusion that, on the whole, a notice is requisite on copies published or sold under a renewal copyright, which should contain the name, in the first instance, of the original proprietor of the renewal copyright, and in addition, thereafter, be subject, as to names to be inserted therein, to the same rules as copyright notices generally. Since the only date required in a copyright notice is, in the cases where requisite, "the year in which the copyright was secured by publication," it may be thought questionable whether any date is requisite in notices in renewal cases, renewal copyrights *not* being obtained by publication. If any such date is requisite, the date when the original copyright was so secured would seem to be the date required. There are no adjudicated cases bearing upon this question, although the theory of White-Smith Music Publishing Co. v. Goff [75] would appear to sustain the view that, despite the apparent meaning of the language employed, if taken in its ordinary sense, the second copyright contemplated by the section under discussion, is an entity, separate and distinct, from the original copyright.

In view of the uncertainty as to how these questions will finally be adjudicated, and the necessaril fatal consequences of improper notice of copyright,[76] it is suggested that, if the original notice of copyright be printed on all copies, and in addition, a notice referring to the copyright renewal, thus "Copyright, 1909, by A. B., Copyright, Renewed, 1937, by C. D.," such notice would suffice, whatever view were taken of the pertinent statutory require-

74—See § 853.
75—180 F. 256, aff'd 187 F. 247.
76—See § 905.

ments. This discussion as to notices also applies to similar questions, in connection with renewals of copyright obtained under the following section.

§ 958 Formalities necessary to secure renewal copyright.

The practice on renewal is simple. An application for renewal must be made to the Copyright Office within one year before the expiration of a subsisting copyright. If the person, or persons, entitled thereto apply, the right to renewal is absolute and the Copyright Office is vested with no discretion as to granting or refusing it. Similarly, the Copyright Office cannot confer a renewal copyright upon any one not entitled to receive it. Its function in respect to renewals is simply to act as a depository and recording office for renewal claims. No judicial or quasi judicial powers are conferred on that Office.[77] Such application must be filed and a mere deposit in the mails will not suffice, as in the case of original registrations.

There can be no renewal copyright, unless there be a subsisting copyright at the time when the renewal term accrues.

§ 959 Renewal certificates.

There is no provision made in the Act, apparently, for renewal certificates.

§ 960 By whom application for renewal must be made.

Since, under certain contingencies, the rights of renewal may be in more than one person, interesting questions may arise, if such persons are averse to concerted harmonious action in connection with obtaining a renewal. The Act only contemplates one, and not several applications for renewal, in connection with any given copyright. But it does not seem absolutely essential that the application be made by all the persons entitled to the renewal: otherwise, very difficult and harsh situations might arise. Copyright renewals can only become effective on the termination of the original copyright. The persons entitled to such renewals appear to be those who would be entitled thereto at the time when the original copyright terminates. But applications for

77—See §§ 544, 1613.

renewal must be made before that time and there can be no certainty that the person or persons, apparently entitled to renewal at the time of application, will be living, at the time when the renewal would become effective.

§ 961 Unauthorized erroneous applications.

If the application for renewal does not refer to the person, or persons, actually entitled to the renewal, it would probably be held a nullity. The same result would probably follow if the application were made by some one not authorized to make it on the claimant's behalf. If more than one person be entitled to the renewal, they would take as tenants in common.[78] The interesting complications which may arise if there is more than one proprietor of a copyright are discussed elsewhere.[79] Since, as shown elsewhere,[80] a copyright owned by several is practically worthless in the absence of harmonious action between the owners,[80] the fact that, apparently, if all persons entitled to a given renewal of copyright do not care to apply for it, personally or by agent, none of them can obtain renewal rights therein, is less severe than it appears. This however, would appear to be the law, since it is impossible to conceive of an individual portion of a copyright, as having fallen into the public domain, and the other portions continuing to exist as a monopoly, under a partial renewal.

§ 962 Renewal where several entitled to it, but one or more averse to securing it.

§ 963 Rights of proprietor of original copyright, after renewal copyright by another.

The question as to whether the proprietor of a renewal copyright, could prevent the proprietor of the original copyright from continuing to publish the work, after the renewal, if the author have sold the work outright, is discussed by the lower Court in White-Smith Music Publishing Co. v. Goff.[81] That the proprietor would have the right to dispose of all copies printed by him during the lifetime of the

78—Cf. Carter v. Bailey, 64 Me. 458.
79—See §§ 424, 693.
80—See § 693.
81—180 F. 216.

original copyright must be conceded.[82] His position would seem, however, to be in no way different, after the expiration of the original copyright, from that of any other person who was the possessor of lawful copies of the work[83] and his rights and liabilities after the termination of the initial copyright would appear to be the same as such persons would be, unless there be something in the contractual or other relation of the parties to work a different result.

This result may arise as where,[84] the plaintiff had given the defendant, a publisher, a book of cookery receipts, as a free gift. He copyrighted and published it, and it proved profitable. At the end of the copyright term, she attempted to take out a renewal copyright and to enjoin him from continuing to publish it. The Court refused her an injunction on the ground that, even if she had a renewal copyright, a point upon which the Court did not pass, Equity would refuse her aid, under the circumstances in evidence in the case.

In another case,[85] it was held that where an author sold the rights to publish a work, without binding the purchasers to take out statutory copyright, he could not, on taking out a renewal of the copyright taken out by them, prevent their selling the work during such renewal term.

These decisions simply apply ordinary doctrines of equity to special facts, and are not, necessarily, authorities which bear on the legal rights of the proprietors of renewal copyrights.

§ 964 Renewal of copyrights obtained under prior Acts.

Section 24. That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for

82—See § 41.
83—See § 1476 *et seq.*
84—Rundell v. Murray, Jac. 311.
85—Paige v. Banks, 7 Blatch. 153.

under existing law, be renewed and extended by the author of such work if still living, or the widow, widower or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period; Provided, however, That if the work be a composite work upon which the copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this Section; Provided, That application for such renewal and extension shall be made to the Copyright Office and duly registered therein within one year prior to the expiration of the existing term.

§ 965 Who may obtain such renewals.

This Section applies to copyrights obtained prior to the passage of the present Act. It limits renewal copyright in cases covered by it entirely to an author, or designated persons, other than the mere proprietor of the original copyright. Even the proprietors of copyrights in periodicals, posthumous, cyclopaedic or other composite works (unless "authors," by virtue of being employers, in the case of works made for hire [86]) cannot obtain renewal, by virtue of ownership of the original work and original copyright, if this was obtained under Acts prior to the present one.[87] With this exception, the discussion of Section 23 applies to Section 24.

§ 966 Renewals of previously renewed copyrights.

It is to be noted that the copyright terms provided in R. S. 4953-4, as in earlier statutes, were 28 years with renewal of 14 years. Under this Section it has been considered by the Copyright Office,—

86—See § 1634 *et seq.*

87—White-Smith Music Pub. Co. v. Goff, 180 F. 256, aff'd 187 F. 247.

correctly, it seems,—that even where a renewal had been taken out under prior Acts for 14 years, if these had not expired, proceedings could be taken under this Section to make the total renewal term 28 years.

§ 967 Duration of protection of commercial prints and labels.

It may be noted at this place that the Patent Office has deemed, probably also correctly, that the periods of protection of prints or labels, designed to be used for other articles of manufacture, conform to those of the then prevailing Copyright Law.

CHAPTER XVII

INFRINGEMENT AND THE REMEDIES PROVIDED IN CONNECTION THEREWITH

§ 968 Infringement and remedies when it occurs.

Section 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable,

§ 969 Exclusiveness of remedies.

to the various civil proceedings enumerated in heavy type, in succeeding paragraphs of this work.[88]

Such remedies are exclusive, and where such statutory remedies are insufficient, this does not permit a resort to common law procedure to vindicate rights under the statute.[89]

§ 970 General observations on law of infringement.

Before proceeding however to a discussion of such remedies, the question as to what constitutes infringement requires consideration. A great and underlying difficulty with this branch of the law is its intimate inter-relation with questions as to the nature and scope of copyright, both in general and as applicable to different media of expression. It is essential, therefore, before proceeding to a detailed examination of the authorities and to the exposition of the rules of law which peculiarly pertain to questions of infringement, that certain general observations be made, introductory to the consideration of the problems there presented, when these are considered as entireties, in connection with related branches of the law of copyright. The particular authorities which bear on these questions will be found on subsequent pages of this work.[90] A

88—See § 1227 *et seq.*
89—Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096.
90—See §§ 987–1226.

proper realization of the subject, however, requires a constant understanding of general and underlying principles, which are best discussed in the abstract, before proceeding to detail. Unless these are kept in mind, the decisions often will appear irreconcilable, and the quasi-metaphysical statements found in the authorities render frequent error almost certain.

§ 971 The nature of copyright, from the point of view of infringement.

Every copyright proprietor is the owner of certain general, and more or less well defined, rights.[91] These depend partly on the language of the statute under which they have been secured, and, partly, upon what he has actually copyrighted, that is, the original portion of the specific work involved.[92] In the course of the exercise, or in connection with the accrual of such rights, he makes, or has made for him, one or more copies, concrete replicas or physical reproductions of the copyrighted work. By the very act of publication, which initiates his statutory rights, he parts with the possession of one or more of such copies.[93] The copies are intended for, and are capable of, use. Use alone gives them value and the producer of the copies may, and, theoretically at least, does, obtain value for every reasonable use of which they are capable. The nature of a given work largely determines the use which may be made of its copies. Thus dictionaries and novels, for example, obviously stand on a different practical basis. The nature of the copies may also be significant in this connection. A design for a work of art, for example, a book of legal forms, or a moving picture film, stand on quite a different basis from a volume of original poems. It is elementary that every man is presumed to intend the necessary consequences of his acts. He cannot close his eyes, nor attempt to ignore known and established business or social usages. If he sells a copy of a book, he cannot

§ 972 The effect of reproduction of copies.

91—See § 134.
92—See § 484.
93—See §§ 729, 766.

say he did not expect it to be read:—if he sells a motion picture film, he cannot say he did not expect it to be publicly "run off" or presented. But, on the other hand, he may fairly say, he did not expect either to be copied, nor the book to be dramatized nor the film, if a play, to be turned into a novel, merely because he had sold a copy of it. The use that he necessarily intends to be made of copies of the work, is called "fair use:" the use that cannot be made, is called infringement. The former deals, primarily, with individual copies, with the possession of which the owner has voluntarily parted; the latter involves the wrongful utilization of one or more of the general rights which exist, not in mere copies, but which arise under the statute in connection with the work of which copies are made.

§ 973 Permissable use of copies, as opposed to infringing use.

§ 974 General nature of infringement.

Fundamentally, then, the question of infringement partly depends on the question, also discussed elsewhere,[94] as to what is really copyrighted, viz: given intellectual concepts formulated, for convenience, in one or more media of expression, or the forms of expression themselves. To illustrate: an author may express given ideas in verse, or prose, in the form of a drama, a novel, a moving picture scenario, a moving picture, a drawing or series of drawings or a song. If he copyrights his work in one of these forms, what does he copyright in essence: the work or the form, and—for the question is not necessarily the same—in which does his copyright, as measured by his rights, subsist after it is taken out?

§ 975 Infringement depends on the true subject matter of copyright.

Classical language descriptive of copyright is that "the subject of property is in the order of words in the author's composition, not in the words themselves, they being analogous to the elements of matter which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone which are not capable of

§ 976 Classical definition of early copyright.

94—See § 504.

appropriation."[95] This language, while technically correct, is readily misunderstood. Its inadequacy to cover many cases of modern copyright is patent. No one could, for example, question the accuracy of these remarks as applied to dictionaries, translations, compilations, or, *mutatis mutandis,* to a portrait or other graphic representation of existing objects or beings. But except in these cases, which rest upon the mental effort expended in selection, arrangement, or exemplification, while the "subject of the property" may be as stated, the property itself, as measured by the rights of which it consists, is, as will be shown, not so much in the "order of words," as in the "order of ideas." Since there cannot be copyright in a simple idea or thought, save in combination, this really means the property is in the group or aggregate of copyrightable ideas which make up the work. That this is true appears from the numerous cases which hold that copying need not be literal, to be infringing.[96]

§ 977 Copyright exists in order of ideas.

§ 978 Infringing adaptations.

It is further illustrated by various decisions[97] where it was held that an unauthorized adaptation that contains the plot or theme of a copyrighted story, if this was original, is an infringement. Thus, also, the mere alteration of words in a piratical version of a play was held[98] no defence to a charge of infringement, where there was a substantial use of one play, in the composition of another.

§ 979 Verbal alterations.

§ 980 The expression of ideas measures copyright therein.

It is necessary that words, or other media of expression, be used to formulate ideas before the latter can be appropriated.[99] It is necessary that such expressions be reduced to tangible form before the ideas embodied therein can become the subject

95—Mr. Justice Erle in Jefferys v. Boosey, 4 H. L. C. 867; quoted with approval in Holmes v. Hurst, 174 U. S. 83, 43 L. ed. 904.

96—See § 1024 *et seq.*

97—Dam v. Kirk La Shelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902.

98—Bouccicault v. Wood, 2 Biss. 34.

99—See Holmes v. Hurst, 174 U. S. 83, 85, 43 L. ed. 904, 905.

of property rights.[1] Ordinary considerations of public and private necessity require this result. But the expression of the ideas must never be confused with the ideas themselves: the title deeds are not comparable to the property to which they refer. Each serves its proper purpose. The tangible expression of an author's ideas fixes the boundaries of his property and marks it off from other properties. Just as deeds must be recorded, so copies of the work are required to be deposited but no one would claim because of such record of a deed that the rights of an owner existed in the language of the deed or were limited to it, nor can any similar claim be made in all cases of copyright.

§ 981 The distinction between rights constituting copyright and its subject matter.

Similarly, the "subject matter of copyright" must not be confounded with the rights which constitute copyright.[1a] The rights which arise on compliance with the statute, are wholly distinct from the material object copyrighted.[2] These rights, once they come into existence, necessarily are self-measuring and define and mark the limits of the so-called property created by the statute.[1] To a limited extent, they, apparently, differ according to the form of the copyrighted work but the actual differences will be found to exist according to the essential nature of a work and not according to its form. That the copyright is not merely in words or the order of their expression, is best shown by cases which involve the violation of copyright, and which will be discussed on the following pages of this work.

§ 982 Such rights measure a given copyright.

It should also be borne steadfastly in mind, that if a work is not entirely original, there is no copyright in the unoriginal part, which will prevent its use, separately, or in combination, with matter not covered by copyright.[3] Hence, of course, any inquiry

§ 983 Permissible reproduction of non-original portions of a work.

1—See §§ 138, 505.

1a—See Holmes v. Hurst, 174 U. S. 83, 85, 43 L. ed. 904, 905.

2—Section 41.

3—See §§ 460, 504, 612.

as to infringement must exclude permissible reproduction of such non-original matter.[4] If the originality is merely in the order of words, "that is, in the method or manner of expression," copyright in that work is only in the thought manifested in creating such order of words. If, on the other hand, there are truly original thoughts embodied in the word,—not merely in the expression of thought, but in the thought so expressed, then copyright exists in such intellectual creation throughout. The scope of copyright is, then, always measured by the extent of, and nature of, the original work embodied in a creation.

§ 984 Originality measures scope of copyright.

§ 985 Nature of rights constituting copyright.

A right may consist either in the power to exclude others from a given field of activity, or it may consist in the sole liberty of utilization of something, tangible or intangible. A right may, but need not necessarily, comprehend both of such ordinary manifestations of its essence. Thus under the statute it will be found that, at various places, copyright takes either one or the other or both of such typical forms of right. The right to vary the form of the copyrighted work will be found everywhere in the Act, although at places, subject to possibly unintentional limitations. This right of variation, of re-birth, although it may necessitate a new copyright to protect the result of the exercise of such right,[5] is only consistent with the conception that copyright is in ideas rather than in their expression. This is further shown in that where such a new copyright is necessary, no one can obtain it except the proprietor of the original copyright or one claiming under him.[6]

§ 986 Theoretical copyright in order of ideas,

But the fact that copyright exists in the intellectual conceptions embodied in a given work and that

4—Lillard v. Sun Printing & Publishing Co., 87 F. 213. Cf. Henderson v. Tompkins, 60 F. 758; De Berenger v. Wheble, 2 Stark. 548.

5—See §§ 464, 610, 662.

6—See § 646.

these, in certain cases, will be protected according to their essence, can only be a source of misunderstanding, unless properly understood. For the rights which we call copyright are themselves limited rights[7] and they, in turn, limit, qualify and define the boundaries of the property in the ideas so copyrighted. The measure of these limitations, in many instances, are such that the fundamental conception of copyright property may be overlooked, if attention is concentrated only on such limitations; and, conversely, if the nature of the right be regarded without noticing how partial its protection is, as a result of its statutory birth, equal confusion of mind is certain.

limited by partial nature of statutory rights therein.

§ 987 Examples of limited nature of copyrights.

§ 988 Pattern for woolwork reproduction of painting.

Thus, in one instance,[8] a pattern, consisting of a mosaic of small colored squares, for making woolwork reproductions of a painting, was held not to be a copy of a copyrighted engraving of the painting, although concededly made from the engraving, as it did not copy or imitate anything which was the work of the engraver. Similarly, it has been held that although engravings are made from a painting, this does not render other engravings, made from the same painting, a piracy of the first engravings.[9]

§ 989 Engravings, severally made from same painting.

In another case,[10] it appeared that *A* had been employed by *B* to engrave plates from drawings belonging to *B*. He took off a number of impressions from such plates and sold them. This was held no violation of the statute then in force as this only applied to impressions of engravings pirated from other engravings, and not to prints taken from lawful plates.

§ 990 Cases not infringing rights under particular statutes.

An early English case,[11] furnishes a further illustration of the point under discussion. The first English statute referring to sculpture,[12] forbade the

7—See § 140.
8—Dicks v. Brooks, L. R. 15 Ch. D. 22.
9—De Berenger v. Wheble, 2 Stark. 548.
10—Murray v. Heath, 1 Barn. & Ad. 804.
11—Gahagan v. Cooper, 3 Camp. 111.
12—38 Geo. 3, c. 71, § 2.

making of casts of copyrighted sculpture with additions or changes and also the selling of unchanged copies. It did not specifically mention the sale of changed copies. It was held that, under this statute, a case of infringement was not made out by merely proving that defendant sold a cast of a copyrighted work, with changes in it, without proof as to who made the cast. The two decisions last cited are no longer law, but this is only because the statutes involved have been broadened.

§ 991 Use of similar system or contrivance for city maps.

In another decision,[13] it was held that a map of certain wards in the City of New York, marked with arbitrary colorings and signs, explained by a reference or key, so that one looking at the map could readily ascertain the characteristics of the buildings located in the territory in question, was not infringed by a similar map of Philadelphia. This result followed since the copyright was in the map of New York, not in the system or contrivance used to facilitate its use and while the latter was copied, the former was not.

§ 992 Independent translations of common work.

In a case involving,[14] "The Two Orphans," it was held copyrightable in the form of a translation from the French, but the copyright therein was held not to be infringed by the performance of an independently made translation.

§ 993 Repetition of facts.

In another case,[15] it was held not to be infringement for defendants to communicate the contents of letters to the world, in their own way, where they did not reproduce the language of such letters. The facts in the letters were not subject to copyright, although the language in which they were expressed was.

§ 994 Exhibition of pirated work of art.

In an English case, it appeared,[16] a poster was made from a reproduction of a copyrighted photo-

13—Perris v. Hexamer, 99 U. S. 675, 25 L. ed. 308.
14—Shook v. Rankin, 6 Biss. 477.
15—Philip v. Pennell, (1907) 2 Ch. 577.
16—Bolton v. London Exhibitions, 14 T. L. R. 550.

graph. It was held this was infringement but the subsequent exhibition of the posters by one who did not know of or authorize the copyright was not infringement, as there was nothing in the statute involved which gave sole rights of exhibition to the copyright proprietor.

In a case involving an unusual English Statute,[17] the plaintiff had made a fine line drawing for an advertisement and sold it to the defendants. They had it copyrighted and then had it enlarged and colored and reproduced it in copies, in poster form, with the artist's name on them, but without his special consent. It was held this was a violation of the Fine Arts Copyright Act (1862) Sections 7, 4, as an unlawful alteration of the work. There are no corresponding provisions in the United States Statute and the decision is not law here.

The cases instanced in the preceding paragraphs illustrate that although the subject matter of copyright may be in ideas expressed, the nature of that expression, its sources, and the extent of the rights constituting copyright under a given statute, limit or define the scope of the proprietor's property rights in connection with such subject matter.

§ 995 Copyright, not monopoly in ideas.

As has been previously pointed out,[18] statutory copyright does not give a *monopoly* in ideas, however expressed, but merely protection against their unlawful reproduction.[19] Thus, a booklet entitled "Opera Stories," in which the author gave a brief sketch of the scenario of various operas was held[20] not to be an infringement of the copyrights on the librettos, as neither an abridgment, a copy nor "other version thereof," although, of course, the ideas constituting the original plots were outlined

17—Carlton Illustrations v. Coleman & Co., (1911) 1 K. B. 771.

18—See § 499 *et seq.*

19—See Corelli v. Gray, 29 T. L. R. 570 (1913, Ch. D.). See also Johnson v. Donaldson, 3 F. 22.

20—G. Riccordi Co. v. Mason, 201 F. 182, 184, aff'd 210 F. 277.

§ 996 Limited monopoly in use of expression of ideas.

§ 997 Reasons for limited nature of monopoly.

in the booklet. That is to say, the property, *such as it is*, is in the ideas but the monopoly conferred is not in the ideas, but rather in certain uses which may, or may not, be made of the author's expression of the ideas. This is because, despite perversions necessarily incident to a commercial civilization, as reflected in inadequate statutes, copyright remains founded on the conception that thought is labor which creates ideas, which, in turn, when reduced to tangible form, may become property. Thought is individual. Every laborer in the vineyard is entitled equally to a reward for his labor but not to a reward for another's labor. This last phrase is no denial that he may use, in a proper case, the results of another's labor in facilitating his own thought, if it be his own thought, and not another's, just as wares made with another's tools do not lose their characteristics of property because made with tools fashioned by another.[21] The copyright laws give no monopoly of use and no absolute monopoly based on preemption, as the patent laws do.[22] If *A* produce identically the same work as *B*, by independent thought, in good faith, without hearing of, or seeing, *B's* work, both *A* and *B* would be entitled to individual copyrights in their individual works. Such cases of substantial duplication are, of course, out of the ordinary, although asserveration of such claims is not unusual. The Courts justly look upon such contentions with well founded suspicion,[23] and require rigid proof before sustaining them, but instances of such successful proof are not unknown.[24] Recognition of this situation is occasionally found in connection with media, where

§ 998 Identical works not copied from one another.

21—See § 2.

22—See § 156. See also Bachman v. Belasco, 224 F. 815.

23—See Lawrence v. Dana, 4 Cliff. 1.

24—Robl v. Palace Theatre, Ltd., 28 L. T. R. 69 (K. B. Div. 1911); Reichardt v. Sapte, (1893) 2 Q. B. 308; Glaser v. St. Elmo, Inc., 175 F. 276; Bachman v. Belasco, 224 F. 815.

independent duplication might not ordinarily be expected. Thus in one case,[23] Fry, L. J., said:

"I must also bear in mind the fertility of the human mind in the production of designs. We constantly in life meet with coincidences which suggest a common origin, but which, when investigated are found to be nothing but coincidences."

§ 999 Duplicate uncopied designs.

Independent, or accidental, duplication is further discussed under the heading of proof of infringement.[26] The point which is involved at this place is that the monopoly given by the Act is subject to definite limitations and that there can be no violation of a copyright proprietor's rights where no forbidden use is made of the copyrighted work. Thus, maps made by drawing from the verbal descriptions in a book of roads were not infringements of it.[27] And it was said that a design made from reading letter-press could not be a piracy of a print illustrating this, where the print was not copied.[28]

§ 1000 No infringement where no forbidden use.

§ 1001 Drawings from verbal descriptions.

The protection to be afforded a right is necessarily measured by the scope of the right itself. So in the original draft of the Act, infringement was defined as "doing or causing to be done," without the consent of the copyright proprietor first obtained in writing, any act the exclusive right to do or authorize which, was by the copyright law, reserved to such proprietor."[29] This comprehensive definition which, save for the requirement of written authority, was declaratory, but not especially helpful, was stricken out before the Act was enacted. There is a similar provision, with numerous exceptions, however, in the British statute.[30] As is well

§ 1002 Statutory definitions of infringement, proposed and enacted.

25—Lucas v. Cooke, L. R. 13 Ch. D. 872, 879.
26—See §§ 154, 488, 1117, 1151, 1207.
27—Carnan v. Bowles, 2 Brown's Ch. R. 65.
28—Rowarth v. Wilkes, 1 Camp. 94.
29—Copyright Office Bulletin No. 12, p. 41.
30—See Appendix.

§ 1003 Judicial refusal to define infringement.

known, the Courts have steadfastly refused to define fraud lest human ingenuity should devise fraudulent schemes which would not fall within such definition. Influenced doubtless by similar considerations, as well as the impracticability of framing a comprehensive definition, the Courts have refused to attempt to define infringement,[31] but have instead dealt with each case that has arisen, on its own facts. The rules of law involved appear often to hover on the metaphysical; the facts frequently are of the utmost difficulty.

§ 1004 General nature of rights comprised in present United States copyright.

Generally speaking, a copyright proprietor's rights are to prevent unlawful reproduction of his work either in its original form or in those forms of expression enumerated or covered by the Act,[32] or, if the nature of the work be such that it is capable of public performance, exhibition or presentation, to prevent unauthorized performances, exhibitions or presentations, to the extent forbidden by statute.[33] A more exact statement of these rights is found elsewhere in this work.[34] While certain general rights inhere in the proprietor of every work copyrighted under the present statute, by virtue of its provisions, special rights may, or may not, inhere in him, according to the nature of the copyrighted work.

§ 1005 Every violation of such right not subject to redress.

Rights are only of value if their exercise is undisturbed. Every disturbance of a right is, however, no just cause for setting judicial machinery in motion.[35] The maxim "*de minimis lex non curat,*" may apply if the injury is trifling.[36] The invasion of the right may be the result of an active or passive attitude on a third person's part. It may be actual

31—Chilton v. Progress Printing & Pub. Co., L. R. (1894) 2 Ch. 29. (Lord Halsbury.)

32—See Dicks v. Brooks, L. R. 15 Ch. D. 22.

33—See § 134.

34—See §§ 159-244.

35—Lawrence v. Dana, 4 Cliff. 1, 83.

36—Chatterton v. Cave, 3 A. C. 483; Webb v. Powers, 2 Wood & M. 497.

or threatened. It may be permissive or arise from the necessary results of a train of events set in motion, in the very first instance, by the owner of the right himself. It is readily apparent that the legal situation of the owner of a given right would not be the same under such varying circumstances, yet each disturbance of his right, each infraction thereof, in a broad sense, infringes upon it. Infringement in the law of copyright, however, is limited to substantial invasions, actual or threatened, of the right or rights of a copyright proprietor, without his permission, express or implied.

§ 1006 Infringement involves substantial violation of copyright.

First and foremost, in every case of asserted infringement, the right alleged to have been violated must be measured, before it can be determined whether it has been violated. This can only be done by an examination of the statute under which it is claimed to have arisen, and of the work itself, if its copyrightability in whole or part, is attacked. Thus in a case decided under prior Acts,[37] the question arose whether the rights of the owner of a copyright in a musical composition were violated by one who made a paper roll which, when inserted in an instrument designed for that purpose, played the musical composition. It appeared that while experts might be able to read the perforations on the roll, only exceptional persons could do so and that the perforations were not made in any form of recognized musical notation. The rights of the copyright proprietor under the then existing statute prevented copying but not reproduction save by copying, nor performance public or private. It was, accordingly, held, that there was no infringement. While the case has been overruled by statute,[38] on the point actually decided, the general doctrine underlying the decision has never been questioned.

§ 1007 Infringement determined by measuring right alleged to be infringed: method of measurement.

§ 1008 Examples of method.

§ 1009 Mechanical music, under prior Act.

37—White-Smith Music Publishing Co. v. Apollo Co., 209 U. S. 1, 52 L. ed. 655.

38—Section 1.

§ 1010
Songs copyrighted under prior Statute; effect of present Act.

It appears, however, recently to have been misunderstood. In M. Witmark & Sons v. Standard Music Roll Co.,[39] it appeared two songs had been copyrighted, the one under the Act of 1909, the other under the prior statute. Each song consisted of words and music. The music was reproduced mechanically by the defendant, who also enclosed a printed copy of the words of the composition, with each music roll containing the songs. The Court held there was no infringement of the earlier copyright involved.

§ 1011
The foregoing decision criticised.

This view of the law was sustained on appeal.[40] The appellate court commented on the ruling of the Copyright Office, under the prior Act, that a "musical composition" covered words and music and that the words of a song could be copyrighted either as part of a musical composition, or alone, as a "book." It deemed that since the copyright proprietor had chosen to copyright the work as a "musical composition," he had precluded himself from asserting that his rights had been infringed by reproduction of the words without the music. A copyright in a musical composition and in a book were identical under the statute in question. Hence, the Court's view appears to involve the proposition that since the copyright proprietor protected the whole work and not only a part of it, his rights could only be infringed by copying the whole and not part of the work, which would seem to be indefensible.[41]

§ 1012
Directions for use of music.

In Boosey v. Whight,[42] the English mechanical music case, it was held that printed directions of a composer of music as to how to use it, were not subject to copyright, except in connection with the use of the musical scores. There is nothing

39—213 F. 532.

40—221 F. 376.

41—See Ager v. Peninsular Oriental S. S. Co., 26 Ch. D. 641; Belford v. Scribner, 144 U. S. 488, 36 L. ed. 514.

42—(1900) 1 Ch. 122.

in that decision or in White-Smith Music Publishing Co. v. Apollo Co.,[43] which justifies the decision of the Court in the Witmark case. Directions for use of a work, as mere directions, stand on a very different basis from the words of a song, since there can be no suggestion that such words could not be copyrighted. The decision in the Apollo case did not deal with the reproduction of words of a song but went on the ground that a mechanical music record, which could not be read by the ordinary reader, was not a copy of a work in musical notation, which could be so read. The decision in the Witmark case appears palpably erroneous and it may well be doubted if it would be followed in Circuits, other than that in which it was decided. The Court was probably led into its apparent error by a view that the pertinent portion of Section 3 of the present Act represented an innovation in copyright law, instead of realizing that it was really declaratory of the rules of case law which have always been deemed to control partial copying.[44]

§ 1013 Further illustrations of method of determining infringement.

Two instructive English cases may be here considered. Copyright existed in certain paintings. Under the statute involved, it included the exclusive right of "copying or reproducing by any means" but no right of performance. The proprietor of a theatre caused tableaux vivants to be performed which were supposed to represent the paintings. The actors were dressed and postured as in the pictures. There was held to be no infringement.[45]

§ 1014 Living pictures.

Mr. Lord Justice Kay[46] pointed out that there was a difference between reproduction and actionable reproduction, the latter apparently implying something capable of forfeiture, that is, something tangible and reasonably permanent. The Court fur-

43—209 U. S. 1, 52 L. ed. 655.
44—See §§ 1023-1029, 1031.
45—Hanfstaengl v. Empire Palace, (1894) 2 Ch. 1.
46—Hanfstaengl v. Empire Palace, (1894) 2 Ch. 1.

ther deemed the object of Copyright Acts to be "to restrain people from producing something which would compete in the market with the originals or with authorized copies" and that this object rendered proper the construction of the statute involved, which resulted in the finding that plaintiff's rights were not violated.

§ 1015 Sketches of living pictures.

The proprietor of a periodical made sketches of the tableaux vivants and published them. In an action brought against him the lower court (Lindley, L. J.) held there was no infringement as the sketches were not intended to be copies or reproductions of the paintings but of the stage scenes and in fact copied and reproduced the latter and not the former.[47] This case was affirmed by the House of Lords[48] upon the ground, however, that owing to differences in detail the drawings were not copies, or reproductions, of the originals. It was pointed out that the copyrighted paintings treated general subjects, such as "Courtship" for example, and that there could be no copyright in the conceptions, which were not novel, but were utilized as the basis for the paintings. The proprietor of the theater had a perfect right therefore to represent a similar conception of "Courtship" by human actors even though this was suggested by the copyrighted work. The facial differences, those of dress and fore and background were also enlarged upon. The Court also deemed the defendants' intent in the special case was a circumstance which, while not controlling, was entitled to consideration. It may well have influenced the decision, as the situation presented serious logical difficulties to doing apparent justice.

It has been deemed law that copying need not be direct[49] and need not be exact duplication.[50] It

47—Hanfstaengl v. Empire Palace, (1894) 3 Ch. 109.
48- Hanfstaengl v. Baines & Co., (1895) A. C. 20.
49—See § 1045.
50—See §§ 1028, 1040.

appears impossible to escape the conclusion that the sketches were copies of the paintings and the decision is only sustainable, if at all, on the theory that the copyright proprietors' rights were so limited under the statute there involved, that their scope was not invaded by the defendant. The decision may be compared with advantage to that in an American case.[51] There a sketch or study had been made for a painting. The latter was produced and copyrighted. Publication of copies of the sketch was, thereafter, restrained at the instance of the copyright proprietor, for since such differences as existed between the two were only as to details, the Court deemed the sketch and painting were not different and independent, but were the same work.

§ 1016 Publication of preliminary study for subsequently copyrighted painting.

It is to be noted that so-called "living pictures," since they are entirely devoid of action, lack dramatic quality, although under the statute involved in the cases cited, the presence of action would have made no difference, as the copyright proprietor had no dramatic rights. The difficulty of calling such tableaux "copies" is obvious and the doctrine of the first cited cases would probably be followed under the present American Act. In England, the first decision is overruled by statute.[52] The importance of these three cases is to illustrate that it by no means followed necessarily that because the tableaux vivants were not infringements of the paintings that sketches copied from the stage representation might not infringe.

§ 1017 Living pictures under present Act.

Under the present statute the right to dramatize non-dramatic works is conferred.[53] The question as to whether such right is limited to literary non-dramatic works is discussed elsewhere. Cases where a painting of musical composition could be dramatized would of course, from the nature of

§ 1018 Dramatic compositions, etc., based on subject matter of songs.

51—Beifeld v. Dodge, 198 F. 658.
52—See Appendix.
53—Section 1(b).

such media, be rare. The words of a song, as previously pointed out, may be a dramatic composition.[54] The interesting question has been suggested whether, if the central thought of a popular song be taken and acted out, either by human actors, with appropriate words embodying such thought but differing in every detail from the detail of the song, if any, or were performed by gesture and action in moving pictures, this would infringe a copyright in such song. In the last analysis, this would depend largely on whether the song could, as far as its words are concerned, be deemed a dramatic composition and if so, what was the detailed nature and scope of the defendant's production. This result appears to follow from the contrast between Hanfstaengl v. Baines, *supra*,[55] and a recent decision.[56] In the latter case the librettist of a copyrighted "comic opera," so-called, had conceived scenes where in a rural English neighborhood there had been talk about a French invasion, arrangements made to arouse the countryside, if this occurred, entrance of a moving picture producing company for the purpose of making a moving picture of Napoleon reviewing his troops, an appeal by a young woman for the life of her lover, condemned by him as a spy,—the ringing of the alarm bell and the onset of the whole neighborhood who thought the moving picture actors were the dreaded French invaders. An injunction was granted against the production of a later comic opera where the action was laid in the United States and Japanese substituted for French, the scenes being otherwise alike in conception. In this case there was not only substantial identity between the two works but also the subject comprised a novel

§ 1019
Effect of novelty of conception of plot as contrasted with novel use of old matter.

54—Russell v. Smith, 12 Q. B. 236; Clark v. Bishop, 25 L. T. N. S. 908.

55—See § 1015.

56—Chappell v. Fields, 210 F. 864.

series of ideas, while in the Hanfstaengl case, the requisite originality in the work lay in the treatment given an old subject.[57]

§ 1020 Indirect uses of copyrighted works, as suggestions for others.

As has been previously shown, the rights we call copyright exist not merely in the precise form in which a work is formulated, but rather in the intellectual concept or conceptions which are embodied in such work. But ideas are fecund. They breed ideas. Lord Byron, in writing of this very matter of infringement, said there was nothing new under the sun. Allowing for reasonable rhetorical exaggeration, it must be admitted that truly original ideas are epoch making. The copyright laws are not made for genius, but for the far humbler productions of the average author.[58] They are made for everyday use and not reserved for those great and solitary moments when that is said which had never been thought before by any man other than he who said it. The average copyright work, then, is simply a reformulation or regrouping, conscious or unconscious, of thoughts which have been thought before, at various times, by others. If this be an unconscious process, inherent, necessary limitations in property resting in ideas prevents complaint. The copyright proprietor obtained his material from prior sources. His thoughts, save in the most exceptional cases, originally came to him, from without.[59] He cannot, hence, complain, if others produce their works in this very same way, provided they do not take forbidden short cuts to achieve the same results. Of these interdicted practices, copying is the chief. But here again one is confronted

57—Cf. London v. Biograph Co., 233 F. 609. See § 1015.

58—See, Spiers v. Brown, 6 W. R. 352; Bouccicault v. Fox, 4 Blatch. 87.

59—See Mr. Justice Story's remarks in Emerson v. Davies, 3 Story 779, as illustrating the essential unoriginality of the average work which is more or less a combination of what other men have thought or read.

§ 1021
Limit on foregoing use.

by the difficulty that originality for copyright purposes and true novelty are not synonymous.[60] Authorship and originality, for copyright purposes, are questions of fact and are in effect one question.[61] To prove copying, in the absence of direct evidence, is a somewhat difficult task, for if the ideas which are comprised in the copyrighted work, and in which no copyright can exist, be refurbished, redressed and regrouped, who can say in the absence of direct evidence, that the second author did not "do his own thinking," or his own "research" work? Plagiarism and copying are not the same. They cannot well be and plagiarism is the price paid by authors for the fact that copyright is permitted in works which do not consist of totally novel or unique thoughts. The law, however, endeavors to strike a work-a-day balance between the necessities of the public and the transgressions of the individual. That plagiarism goes unpunished is not due to the theory of the law but to the hard realities of evidence.

§ 1022
Plagiarism.

§ 1023
Copying.

Having considered infringement, in general, it may now be considered in detail. The right to multiply and sell copies of that which is original, in a given work, is one of the chief features of all copyrights. The infractions of this right, which are actionable, will now be discussed.

§ 1024
Paraphrasing.

Literal repetition would, of course, be infringement. But there may be more subtle, but equally actionable, copying. Thus, paraphrasing may be infringement.[62] That is to say, colorable changes or variations in works will not prevent the one from being a copy of the other.[63] In fact colorable variation of language tends to establish unfair use.[64]

§ 1025
Colorable changes.

60—See § 482.

61—Byrne v. The Statist Co., (1914) 1 K. B. 622.

62—West Publishing Co. v. Edward Thompson Co., 169 F. 833 (semble).

63—West v. Francis, 5 B. & Ald. 737.

64—Jarrold v. Houlston, 3 Kay. & J. 708.

In a leading case, James, L. J., said:[65]

§ 1026
Open and secret copying defined.

"Open piracy is publication of an unauthorized edition of a copyrighted work or unauthorized importation and sale of such a work; literary larceny is the illegitimate appropriation of the fruit of a previous author's literary labor by one who pretends to be the author of the work."

§ 1027
Copying and compilation distinguished.

"The true test whether there is piracy or not," said Blatchford, J.,[66] "is to ascertain whether there is a servile or evasive imitation of plaintiff's work or whether there is a bona fide, original compilation made up from common materials and common sources, with resemblances which are merely accidental or result from the nature of the subject."

For, as is well said, by another great judge:[67]

§ 1028
Disguised copying.

"Copying is not confined to literal repetition but includes also the various modes in which the matter of any publication may be adopted, imitated or transferred, with more or less colorable alteration, to disguise the source from which the material was derived nor is it necessary that the whole or even the largest part of the work should be taken to constitute an invasion of the copyright."[68]

§ 1029
Copying substance of original portion of a work.

"In considering whether there has been piracy, the questions are has there been an illegal appropriation of the substantial part of a copyrighted work or the results of the original conception, not as a matter of quantity, but of quality and value,"

said Townsend, J.[69]

65—Dicks v. Yates, 18 Ch. D. 76, 90.
66—Daly v. Palmer, 6 Blatch. 256, 270.
67—Lawrence v. Dana, 4 Cliff. 80.
68—See also Greene v. Bishop, 1 Cliff. 186.
69—Falk v. Donaldson, 57 F. 32. See also Farmer v. Elstner, 33 F. 494.

§ 1030
What is a copy.

Mr. Justice Bailey defined a copy as

"that which comes so near to the original as to give to every person seeing it, the idea created by the original."[70]

This language, said Lord Watson:[71]

"comes nearer to a definition of what constitutes copying than any thing which is to be found in the books."

Lord Watson, however, criticised the use of the word "idea" in the definition, as there can be no monopoly in the idea, and hence, if this definition were applied literally, the measure of the copyright proprietor's protection would be made too large. In a third case,[72] Mr. Justice Kekewich suggested as a "rough" definition of "copy,"

> "A copy is that which comes so near the original as to suggest that original to the mind of every person seeing it."

The difficulty with this definition is that it is entirely too vague. Many things, quite different from one another, may suggest one another. Connotation cannot be infringement. Both these definitions overlook the fact that for a copy to be a copy, it must be derived, or taken from, the original, and not reproduced independently.[73] It may be that the following suggested definition would obviate these and various other[74] objections:

> "A copy is that which, having been derived or taken from the original, comes so near to the original as to make the same or a substantially similar impression, as was made or would be made by the original, upon the mind of every average, reasonable person seeing it."[74]

70—West v. Francis, 5 B. & Ald. 737.
71—Hanfstaengl v. Baines & Co., (1895) A. C. 20, 27.
72—Hanfstaengl v. H. W. Smith & Sons, L. R. (1905) 1 Ch. D. 524.
73—See §§ 154, 488, 998.
74—Cf. Daly v. Palmer, 6 Blatch. 270. A copy of a musical com-

Partial copying may be infringement.

§ 1031 Partial copying.

"To multiply copies of a material portion of a work, which is entitled to copyright, is as much a breach of the law, though differing in degree, as to multiply copies of the whole work."[75]

§ 1032 Infringement limited to substantial or material copying of original part of a work.

The question, in every case of asserted copying, is, merely, has the substantial part, or any substantial part, of that which is original and distinctive in the copyrighted work[76] been appropriated,[77] directly or evasively?[78] Or, to put it another way, is the part which has been copied, a material part of the original work?[79] If so, there has been infringement, no matter how little has been taken, if not there has been no infringement, no matter how much has been appropriated. The question is never one of quantity, but rather one of the quality or value of that which has been copied.[80] The test as to whether there was piracy, where part only of a copyrighted work is copied, has been said to depend on whether "so much is taken that the value of the original is materially diminished or the labors of the original author appropriated to an injurious extent."[81]

§ 1033 Quality or value of part appropriated.

§ 1034 Injurious appropriation.

§ 1035 Value also may be determined by looking at defendant's work.

Other cases[82] have, on special facts, looked at the matter from a different angle and held that a test of piracy may be less how much of plaintiff's work is taken, than how much the proportion so taken bears

position was, *under the prior Act*, defined as a written or printed record of it in intelligible notation. White-Smith Music Publishing Co. v. Apollo Co., 209 U. S. 1.

75—Ager v. P. & O., etc., Co., 26 Ch. D. 641; Story v. Holcombe, 4 McLean 306.

76—Fishel v. Lueckel, 53 F. 499. See also Trusler v. Murray, 1 East 362 (n).

77—Moore v. Clark, 9 M. & W. 692; Falk v. Donaldson, 57 F. 32.

78—Emerson v. Davies, 3 Story 768.

79—Chatterton v. Cave, 3 A. C. 483.

80—Falk v. Donaldson, 57 F. 32; Bramwell v. Halcomb, 3 Myl. & Cr. 737.

81—Greene v. Bishop, 1 Cliff. 186.

82—Neale v. Harmer, 13 T. L. R. 209. See also Kelly v. Hooper, 4 Jur. 21.

to the rest of defendant's work. These cases merely arrive at the same result as the other cases, in a different way, as they arrive at the conclusion that what was copied was substantial, by noting the way it bulks up in defendant's work.

§ 1036 Copying, a question of fact.

What the substantial or material part of a work is, and whether or not there can be shown to have been appropriation, are questions of fact.[83] Whether there is substantial identity, in whole or in part, between two works and whether the later one has been produced independently or merely taken, in essence, from the earlier, are also questions of fact. Sir William Page Wood, V. C., said that where the defendant claims resemblances in two works are due to common sources, the Court must examine these, itself, to determine the truth of this defense.[84]

§ 1037 Infringement, a question of law and fact.

Clifford, J., deemed [85] infringement to be a mixed question of law and fact—the former being, was defendant's use of plaintiff's materials, if established, allowable, or was it of such a character and extent as to be non-allowable,—the question of fact being, what, if any, use did defendant make of plaintiff's property. In a very recent case,[86] it was said to be purely a question of fact, whether there is infringement or not. This, however, appears erroneous, as it ignores situations where the question involved is as to the scope of copyright. In the latter class of cases, as pointed out by Judge Clifford,[85] questions of law exist with respect to the admeasurement of rights under the statutes, as well as questions of fact when the specific matter copyrighted, that is the original portion of a work, is in process of ascertainment. The burden of establish-

§ 1038 Burden of proof.

83—Chatterton v. Cave, 3 A. C. 483.

84—Jarrold v. Houlston, 3 Kay. & J. 708.

85—Lawrence v. Dana, 4 Cliff. 1.

86—Francis, Day & Hunter v. Feldman & Co., L. R. (1914) 2 Ch. 728.

ing appropriation, of course, always rests upon the plaintiff.[87]

§ 1039 Differences of media.

If the substance of a work be taken, the fact that the work in which it was copied was produced in a different medium, or by a different process or that it differs in size,[88] shape, or details,[89] or was intended for a different purpose [90] is no defense. This rule was well illustrated in a case where an [91] engraving portrayed a child and animals in a certain grouping, and with certain surroundings, to illustrate a definite conception of the author's. The work was copied, but other animals were substituted for the child. This change was held not to prevent the copying from being infringement.

§ 1040 Detail, size, purpose, etc., immaterial.

Similarly, in a recent case,[92] it was claimed that a song entitled, "I Hear You Calling Me," was infringed by another song entitled, "Tennessee, I Hear You Calling Me." The first composition was of a "dignified character," having as its "basic theme a living person standing on the grave of his loved one and hearing her voice." The second song, set to "ragtime," expresses the desire of a negro to go back to his old home in Tennessee. Repetition of the characteristic words, "I hear you calling me," with a practically identical musical phrase accompanying them, was deemed by the Court to constitute the main feature of each song that impressed the ordinary auditor or "uninformed and technically untutored public." The one composition was, accordingly, held to be an infringing copy of the other.

Reproducing printed copyrighted matter, in type-

87—Corelli v. Gray, 29 T. L. R. 570.
88—Graves v. Ashford, L. R. 2 C. P. 410.
89—Falk v. Brett Publishing Co., 48 F. 678; Springer Lithographing Co. v. Falk, 59 F. 707.
90—Reed v. Holliday, 19 F. 325.
91—Brooks v. Religious Tract Society, (1897) W. N. 25.
92—Boosey v. Empire Music Co., 224 F. 646.

§ 1041 Typewritten, stenographic and photographic copies.

writing [93] or in shorthand characters was held to be copying.[94] A photograph of a piece of sculpture [95] was held a copy as was one of an engraving.[96] A drawing made from a photograph was a copy.[97]

§ 1042 Drawings and stamped copies.

The stamping of an enlarged imitation of a copyrighted photograph in raised figures upon leather chair bottoms and backs was held to be copying.[98] Judge Coxe said, in the case last cited:

> "Differences that relate merely to size or material are not important. They may affect the question of damages but not the question of infringement."

§ 1043 Miniature copies.

Printed reproductions in miniature of a copyrighted painting as part of the labels on pill boxes were, without discussion, held an infringement.[99]

§ 1044 Rough copies.

In a subsequent case [1] it was shown that a magazine had published rough reproductions, in miniature, of parts of well known advertisements in a so-called guessing contest, wherein participants were to endeavor to guess what the original advertisements were. One of these fragmentary advertisements contained the central figure of a copyrighted painting. The publication was held an infringement.[1]

§ 1045 Indirect copying.

The case last mentioned, in addition to illustrating that the purpose or medium of a copy as well as its imperfection and size will not affect the question of infringement, also shows that copying need not be direct [2] to be actionable. Copying from a copy, if it

93—Warne & Co. v. Seebohm, 39 Ch. D. 73.
94—Nicols v. Pitman, 26 Ch. D. 73.
95—Bracken v. Rosenthal, 151 F. 136.
96—Rossiter v. Hall, 5 Blatch. 362; Graves v. Ashford, L. R. 2 C. P. 410; Gambart v. Ball, 4 C. B. N. S. 306.
97—Bolton v. Alden, 65 L. J. R. Q. B. D. N. S. 120.
98—Falk v. T. P. Howell & Co., 37 F. 202.
99—Hanfstaengl Art & Pub. Co. v. Holloway, (1893) L. R. 2 Q. B. 1.
1—Hanfstaengl v. W. H. Smith & Sons, (1905) 1 Ch. D. 520.
2—Cf. Turner v. Robinson, 10 Ir. Ch. 121, 510. See § 1078 for a further discussion of this point.

actually be a copy, is none the less infringement, even though the original were never seen by the infringer,[3] and he did not know it was copyrighted.[4]

§ 1046 Lawful intended use of copy, no defense.

Nor would the situation be altered if the purpose for which the copy was made was lawful.[5] Thus, one who intending to make a mechanical music record of a copyrighted musical composition, as he lawfully might, made a copy of a copyrighted song, had it orchestrated and made the record, was held to have infringed by making the copy of the song and all the records of the song made by him from his copy were held infringing copies.[6]

§ 1047 Innocent infringement.

Subject to the exception of cases covered by Section 20 of the Act,[7] ignorance of the vendor that what he sold, copied or reproduced, was an infringement is no defense.[8] One of the reasons for this is that, in the words of Blackburn, J.,[9] "in almost every case, a man who copies a work without the authority of the owner must know that he is pirating the work of somebody."

§ 1048 Intent to infringe.

Intention to infringe is not a necessary ingredient to actionable infringement.[10] In one case,[11] it appeared that a newspaper solicited the printing of a foreign governmental report, as an advertisement for pay. On procuring it, it had it translated and published the translation. Another newspaper solicited the advertising and on being employed by the government in question copied the translation, without making its own version. It was held the first newspaper had a copyright in its translation

§ 1049 Copying paid translation for lawful use.

3—Ex parte Beal, L. R. 3 Q. B. 387.

4—Millett v. Snowden, 1 West. L. J. 240.

5—Warne & Co. v. Seebohm, 39 Ch. D. 73.

6—Chappell v. Columbia Gramaphone Co., 30 L. T. R. N. S. 554, aff'd 31 L. T. R. N. S. 18.

7—See § 904.

8—West v. Francis, 5 B. & Ald. 737; Gambart v. Sumner, 5 Hurl. & N. 5.

9—Ex parte Beal, L. R. 3 Q. B. 387, 392.

10—Roworth v. Wilkes, 1 Camp. 94.

11—Byrne v. The Statist Co., (1914) 1 K. B. 622.

§ 1050 Reprint of part of advertisement.

§ 1051 Reprint from licensed publication.

and that there had been actionable infringement. In another case,[12] the reprint by a newspaper, in good faith, of copyrighted matter, part of an advertisement, and, in a third one,[13] the reprint of a short story, in publishing which a licensee had wrongfully omitted notice of copyright, were held not to be excused by the good faith or ignorance of the defendants of the existence of copyrights in such works.[14]

It should be noted in connection with the decisions just cited, that while infringement and piracy are generally deemed synonymous terms, the latter expression seems a very harsh term to apply to innocent infringement.

§ 1052 Unoriginality of part of work.

It is no defense that part of a work is unoriginal, if the whole, or a substantial part, of the original work in it, unless trifling, be copied.[15] So new additions and corrections in an old work may not be copied, even if the old work is unprotected.[16]

§ 1053 Improvement of copyrighted work.

It is no defense that a work which has copied the substantial part of a copyrighted work is an improvement upon it.[17] The very fact that it be so, and hence would tend to drive the earlier work out of use, would seem to aggravate the copying. It is immaterial whether the improvement consists of alterations, additions, or what not, the result is the same.[18] Similarly the fact that a copy omits details, is imperfect,[19] ignorant,[20] vulgar,[19] crude,[19] blundering,[21] or unsuccessful,[20] would seem an aggravation

§ 1054 Imperfect or unsuccessful copying.

12—Green v. Irish Independent, L. R. (1899) 1 Ir. R. 386.

13—American Press Association v. Daily Story Pub. Co., 66 L. R. A. 444, 120 F. 766.

14—See also Hanfstaengl v. W. H. Smith & Sons, (1905) 1 Ch. D. 520.

15—Millett v. Snowden, 1 West. L. J. 240.

16—Cary v. Longman, 1 East. 357.

17—Reed v. Holliday, 19 F. 325.

18—Shook v. Daly, 49 How. Pr. 366.

19—Hanfstaengl v. W. H. Smith & Sons, (1905) 1 Ch. D. 520.

20—Caird v. Sime, (1887) 12 A. C. 326.

21—Bracken v. Rosenthal, 151 F. 136.

of infringement, rather than a defense, as it might tend to cast ridicule upon the original work, or prevent its sale.

§ 1055 Nominal infringement.

It is not deemed infringement, however, where the injury to the copyright proprietor is purely sentimental, or merely, and necessarily, nominal. This rule, appears, however, to be misapplied, at times. Thus, where the proprietors of copyright in a group copyright of an athletic team complained that defendants had copied individual portraits, it was held there was no infringement.[22] The Court held that to constitute infringement what was done must of necessity injure and supersede the sale of the original work while what had been done by defendant could not be said, necessarily, to have any such probable effect. Persons who wished group photographs would not be deterred from purchasing because of the defendant's sale of portraits of individual members of the group. While there was copying in the case in question, the Court evidently deemed what was copied was not a substantial part of the copyrighted work. The decision is sustainable, if at all, only on the ground that, on its facts, there was no substantial copying and, hence, that there could only be nominal damage to the copyright proprietor. This was held not actionable. The language in the decision lays down a test of doubtful utility but is in line with another English decision,[23] where it was laid down that the test of piracy was whether the work would serve as a substitute for the original. This also appears doubtful, if not plainly erroneous, as it appears to ignore infringement by partial copying and violation of the copyright proprietor's potential, but unused, rights.

§ 1056 Substitutability as test of piracy.

§ 1057 Commercial injury, as

Commercial injury,[24] actual, probable, or reasonably possible, it has been deemed, must, however, be

22—Guggenheim v. Lang, 12 T. L. R. 491.
23—Roworth v. Wilkes, 1 Camp. 94.
24—Hanfstaengl v. W. H. Smith & Sons, (1905) 1 Ch. 520.

element in infringement.

shown for an action to lie. Such commercial injury may result from vulgarization of a work, and in numerous other more direct ways. In practice, it is readily presumed.

§ 1058 Non-competitive nature of copy, no derense.

In spite of the rules which the decisions cited in the previous paragraphs purport to lay down, it should be pointed out in this connection, however, that it is not necessary that an infringing article be competitive to the original to be forbidden.[25] The

§ 1059 Infringement of unused rights.

fact that a copyright proprietor may not exercise his positive rights of reproduction, etc., will not prevent his exercise of his negative rights[26] "to prevent the appropriation of the labors of an author by another."[27] Thus, as he has the right to vary the form of his work in various stated ways, any copy which would be an invasion of his rights to vary the form of his work, or to adapt it for different markets, or classes, by, for example, publishing cheaper or more expensive editions, or a work of art as a painting, print, photogravure, photograph, transparency, advertisement, etc., that is, any interference with the potential markets or customers he could thus reach, is an infringement of his copy-

§ 1060 Publication of cartoons in history of caricature.

right. These rules were well illustrated by a decision[28] where the proprietor of a copyright in caricature of Napoleon, which had appeared in "Punch," brought suit against one who published eight reduced facsimiles of these in a work on the history of the period, as shown in caricature. It was held there had been material and substantial infringement, and that neither the purpose or form of the reproduction, nor the fact that plaintiff had not chosen to make the use of his work in question, were defenses. But the mere fact that a given

25—Reed v. Holliday, 19 F. 325; Walter v. Steinkopff, (1892) L. R. 3 Ch. D. 489; Weatherby v. International Horse Exchange, 26 T. L. R. 30; Falk v. Donaldson, 57 F. 32.

26—Bradbury v. Hotten, L. R. 8 Ex. 1.

27—Corelli v. Gray, 29 T. L. R. 570.

28—Bradbury v. Hotten, L. R. 8 Ex. 1.

article can be used for the same purpose as a copyrighted one will not make it a copy.[29] Its purpose or utilitarian characteristics do not affect the question of infringement, although they may the question of damages, if infringement be shown.

§ 1061 Similar capacity of use, not necessarily copying.

In another case,[30] defendant had prepared a so-called key or commentary and elucidation of a copyrighted text book, containing copious excerpts from the original. It was held no defense in an action for infringement that the works were non-competing or that defendant thought his work would increase the sale of the other work or that he did not intend to infringe. It was further held that, the fact having been established that material portions of the copyrighted work had been appropriated, no proof of damage was necessary to establish infringement, as this might be presumed. The same result was reached where the copyrighted work was intended for adults and the infringing one for children only.[31]

§ 1062 Commentaries or explanations of quoted works.

§ 1063 Damage from infringement presumed.

§ 1064 Juvenile editions.

That copies are intended for private circulation will not prevent their being infringing. There can be no privilege in piracy. Thus in one case,[32] it appeared defendant was a professional, but unofficial, tutor in a University town. He prepared outlines of a copyrighted book, supposed to be read by students at the University. The outlines contained memoranda as to the contents of the book, occasional quotations and catch words constituting a skeleton of the work. It was held to infringe, nor was this result avoided because the number of defendant's pupils was limited and they were supposed to return the copies to him. So where copies were made of a musical composition for members of

§ 1065 Private circulation no defense.

29—Mabe v. Connor, (1909) 1 K. B. 525, quoting from Boosey v. Wight, (1900) 1 Ch. 526.

30—Reed v. Holliday, 19 F. 325.

31—Gilmore v. Anderson, 38 F. 846.

32—McMillan v. King, 223 F. 862.

a singing society who were only to use them in their exercises, this was held infringement.[33] The same result was reached where copies of arbitrary words used in a cable code were made by a shipping company for the use of its various branches,[34] even though the meaning of such words was changed, in defendant's code.[35] In principle, at least, the same result would follow if an individual made copies for his personal use, even in his own handwriting, as there is no rule of law excepting manuscript copies from the law of infringement. That the copies are intended for gratuitous distribution is no defense[36] and should, it seems, aggravate rather than palliate defendant's offense, as, ordinarily, assuring a wider circulation of copies than if the copies were to be paid for. This is true whether the copies were intended for advertising purposes[37] or not.

§ 1066 Copies for personal use.

§ 1067 Gratuitous circulation, for advertising and other purposes.

§ 1068 Impermanent or impalpable reproductions.

It would seem that a copy involves the conception that it must have some degree of permanency[38] or the maxim *de minimis* would apply. Thus, while the making of a single copy may be infringement, if this copy were destroyed almost as soon as made, as, for example, if a vaudeville artist drew with colored chalks, or if a verse were cast upon a screen through a stereopticon, it may be doubted whether such a temporary production could fairly be called a copy.

§ 1069 Copying by mechanical means invented after passage of Act.

The fact that a copy be made by some mechanical process or in some manner not known at the time a copyright arose, will not prevent it being an infringement. The rights created are broad enough

33—Novello v. Sudlow, 12 C. B. 177.

34—Ager v. Peninsular & Oriental S. S. Co., 26 Ch. D. 637.

35—Ager v. Collingridge, 2 T. L. R. 291.

36—Novello v. Sudlow, 12 C. B. 177; Ager v. Peninsular & Oriental S. S. Co., 26 Ch. D. 637.

37—Farmer v. Elstner, 33 F. 494; Hansen v. Jacquard Jewelry Co., 32 F. 202 (semble; contra, is a doubtful opinion).

38—Hanfstaengl v. Empire Palace, L. R. (1894) 2 Ch. 1, 3.

to prevent copying by known, or subsequently invented, or devised processes.

§ 1070 Attempted or incomplete copying.

A distinction must be drawn between copying and attempted copying. There is no infringement where steps merely preliminary to copying are taken, no matter whether subsequent copying was intended or not. Thus the solicitation of orders for a contemplated piratical work[39] or the partial preparation of lithographs for that purpose, are not actionable on the ground of copying.[40]

§ 1071 Extra-territorial copying.

Since copyright laws can have no extra-territorial effect, the making of copies, without the United States, is not an infringement of copyright[41] nor would their possession in the United States be so, although their importation[42] and sale in the United States might well be.[41]

§ 1072 Status of such copies.

Thus in a decision bearing upon the questions,[43] the plaintiffs, it appeared, had ordered the defendant to print copies of a painting for them. He printed more copies than were ordered, abroad, and sent them into England before the work was registered for copyright, as required by the statute then in force. It was held that it was implied in the contract between the parties that the defendant would not print copies, save for the plaintiff, that there was a breach of his contract, warranting injunctive relief, and also that while the importation of copies, before registration was not infringement, their sale after registration was. The importation of piratical copies has, however, elsewhere been held to be in-

§ 1073 The importation and sale of foreign copies.

39—Britain v. Kennedy, 19 T. L. R. 122.

40—Morrison v. Pettibone, 87 F. 330.

41—Tuck & Sons v. Priester, 19 Q. B. D. 629.

42—Cf. Millar & Lang Ltd. v. Polak, (1908) 1 Ch. 433; § 30 of the Act of 1909.

43—Tuck v. Continental Printing Co., 3 T. L. R. 826 (19 Q. B. D. 629).

fringement.[44] This now appears to be the statutory rule in the United States.[45]

§ 1074 Foreign completion of domestic substantial reproductions of copyrighted works.

A decision under the prior Act,[46] is instructive, in this connection. In that case defendants purchased copies of copyrighted engravings and etchings. They then delivered them to a third person who reproduced them in the United States, except that he omitted the title, tint and plate work and then, pursuant to an agreement with the defendants, sent the copies to London where the latter were put on and the completed pictures were delivered to defendants. The copies were held piratical, as made in the United States, in that they contained "substantial reproductions of that which was original and distinctive" in the copyrighted works, and, hence, it was immaterial whether they were marketable and where completed. Defendants' agreement provided the manufacturer was to take the risk of infringement, but this clause, of course, was held quite ineffectual to protect defendants as against plaintiffs. In another case[47] it was said that if an English work were lawfully translated abroad into a foreign tongue, if re-translation of the work were made in England, from such a foreign copy, the re-translation would infringe the English copyright.

§ 1075 Agreements by manufacturer as to risk of infringement.

§ 1076 Domestic retranslation of foreign translation.

§ 1077 Non-user by proprietor, no defense.

It would seem clear that it would be no answer to a claim of infringement that the author did not utilize the right infringed.[48] He is not bound to make use of any of his rights and there is no power which can make him do so. Hence he is not to be penalized by permitting others to do what he need not do.

Copying may be either direct or indirect. The artist who, after seeing a copyrighted painting,

44—Tennyson v. Forester, 43 Scottish Jur. 278, quoted in Copinger Copyright, 195.

45—See § 31.

46—Fishel v. Luckel, 53 F. 499.

47—Murray v. Bogue, 1 Drew 353.

48—Cf. Bradbury v. Hotten, L. R. 8 Ex. 1.

§ 1078 Copying from copies and from memory, with or without models.

posed his own model in accordance with the painting and then reproduced it, from his model, was held an infringer.[49] The same result was reached where defendant copied infringements, even though he did not know they were infringements.[50] This point was further illustrated by the decision in a recent case.[51] There copyrighted photographs of the same nude model were involved. Both were made by the same artist, two years apart. She had developed physically, to a considerable degree, in the interval. The pose in each was the same, the backgrounds were different, and there were other slight variations between the two resultant photographs. The second photograph was held to be an infringement, by indirect copying, of the artistic conception embodied in the first photograph, in that the second work could not be regarded as an independent conception. The Court evidently deemed that the first photograph was used to produce the second one and said it was immaterial whether the artist had a copy or used his recollection of the first in making the second.

§ 1079 Independent investigation preceding copying.

In a case involving a fruit catalogue, it was held piracy for a later writer to copy plaintiff's descriptions of fruits, after comparing them with actual specimens and seeing that they were correct.[52]

§ 1080 Copying from electro-plates.

Copying from a mechanical contrivance, such as electro-plates, made for the production of a copyrighted work, was held to be infringement.[53]

§ 1081 Copying from compilation.

It was also held to be infringement of copyright[54] in several digests, to copy from a compilation of such digests.

49—Turner v. Robinson, 10 Ir. Ch. 121, 510.

50—Gilmore v. Anderson, 38 F. 846.

51—Gross v. Seligman, 212 F. 930. See also Rooney v. Kelly, 14 Irish L. R. N. S. 158.

52—Hogg v. Scott, L. R. 18 Eq. 445.

53—W. Marshall & Co. Ltd. v. A. H. Bull Ltd., 85 L. T. 77; Cooper v. Stephens, (1895) 1 Ch. 567.

54—Cate v. Devon, etc., Newspaper Co., L. R. 40 Ch. D. 500.

§ 1082
Copying common original.

Cases may well occur where copying the original would not be infringement. Thus where two publishers jointly obtained information for making up rival directories, a copyright obtained by the one would not prevent the other from issuing his directory, since nothing would be done by him which would infringe any right of the copyright proprietor.[55]

§ 1083
Successive copyrights in painting and photographic copy.

In one case,[56] a painting had been copyrighted. Later a photograph of the painting was copyrighted by other persons. In a suit for infringement of the copyright on the painting it was proven the piratical copies were made from a copy of the photograph. The plaintiff did not attack the validity of the copyright of the photograph. There was, accordingly, held to be no infringement of the copyright of the painting. Had it not been for the double copyright, the contrary result should have been reached.[57]

§ 1084
Precedent piracies, no defense, unless by plaintiff.

It was held[58] no defense to a charge of infringement that some of the copied parts had been copied by third persons, from whose works, the defendant took them. On the other hand, relief was refused to one who had copyrighted matter which he himself had pirated as against one who, in turn, copied from him.[59] The distinction between these cases lay in the personal conduct of plaintiff in the second case.

§ 1085
Copying matter in public domain.

It was also held that there was no infringement where an alleged infringing print was designed from a foreign publication circulated in the United States before plaintiff obtained his copyright.[60] The alleged infringer had merely used his rights to use matter in the public domain.

55—Maloney v. Foote, 101 F. 264.

56—Champney v. Haag, 121 F. 944.

57—Ex parte Beal, L. R. 3 Q. B. 387; Schumacher v. Schwenke, 30 F. 690.

58—Gilmore v. Anderson, 38 F. 846.

59—Edward Thompson Co. v. American Law Book Co., 62 L. R. A. 607, 122 F. 922.

60—Johnson v. Donaldson, 3 F. 22.

§ 1086 Copying uncopyrighted matter and thus reproducing the equivalent of copyrighted works.

In an instructive decision,[61] it appeared the plaintiffs were manufacturers of church furniture. They published and copyrighted a book of engravings, illustrating their goods, with price list attached. The defendant manufactured similar goods from designs taken from these engravings and then published a similar book in which copies of its furniture appeared. The two pamphlets were necessarily similar. It was held there was no infringement. The copyright was in the depiction of the furniture, not in the furniture. Hence, defendant could lawfully reproduce the furniture,[62] and being at liberty to do so, could make pictures of the furniture so made. Had the defendant, however, copied its catalogue from the first catalogue, or made drawings, or other pictorial copies, of individual designs in the catalogue to aid it in producing its furniture, a different result would have followed. Similarly, the copyright of a chart showing sections of human gums, with artificial teeth arranged in a novel way, to enable the placing of orders for latter by dentists, was held not to be infringed by copying the plan of the chart, with entirely different teeth and numbers upon it, and otherwise dissimilar details, since there was no copyright in the plan of the chart.[63] So of a book describing a system of stenography,[64] and of the form in which credit information was issued.[65] These are all cases applying and developing the doctrine of Baker v. Selden.[66]

In that case [66] the complainant claimed copyright in a book or series of books, each consisting of an introductory essay with forms of blanks annexed, consisting of ruled lines and headings, illustrating a

61—Lamb v. Grand Rapids Furniture Co., 39 F. 477.
62—Cf. Baker v. Selden, 101 U. S. 99, 25 L. ed. 841.
63—S. S. White Dental Co. v. Sibley, 38 F. 751.
64—Griggs v. Perrin, 49 F. 15.
65—Burnell v. Chown, 69 F. 993.
66—101 U. S. 99, 25 L. ed. 841.

system of bookkeeping and showing how it was to be used in practice. The defendant made account books using the same plan, as far as results were concerned, but with a different arrangement of columns and headings and with the omission of the essays. It was held that complainant's copyright was not infringed. The plaintiff's copyright was not in the art or system described in his work but only in his description of it. By utilizing the former, then, there was no infringement of copyright, since it did not subsist in that which was copied.

§ 1087 Copying a common subject.

In cases where the subject is free to all, direct reproduction of the subject is not infringement, although reproduction of a prior reproduction would be.[67]

In Bleistein v. Donaldson Lithographing Co.,[68] one of the grounds on which the validity of the copyrights in question was attacked, was discussed as follows:

"It is obvious also that the plaintiff's case is not affected by the fact, if it be one, that the pictures represent actual groups—visible things. They seem from the testimony to have been composed from hints or a description, not from sight of a performance, but even if they had been drawn from life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez, or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. . . . The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in

67—Press Publishing Co. v. Falk, 59 F. 324.
68—188 U. S. 239, 47 L. ed. 460.

handwriting and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act."

§ 1088 Republishing news.

This subject is further illustrated by a decision in which[69] it appeared that the London Times had made a contract with the Chicago Tribune by which the latter was given the right to publish, in the United States, such telegrams and editorials appearing in the Times as it might choose to cable over. The Times "abandoned" in favor of the Tribune, its copyright in such matter, in so far as its publication in the United States was concerned. Both the Times and Tribune were copyrighted daily. It was held these copyrights would not prevent anyone reading the Times, from cabling the substance of the matter copyrighted, over to other newspapers in the United States, for republication there.

§ 1089 English decisions holding copying uncopyrighted works may be infringement of copyrighted ones.

The cases of Reade v. Conquest[70] and Boosey v. Fairlie[71] which, in effect, protected copyrighted works, as against works not copied from the copyrighted works but made from material in the public domain, have not been followed in the United States,[72] and appear demonstrably unsound.[73] In the first mentioned case, it appeared that Charles Reade had written a play, "Gold," and procured the dramatic copyright in it under the English statute giving performing rights. He also took out a copyright in the play as a book. He then turned it into a novel which he copyrighted separately. He obtained no dramatic rights in connection with the last mentioned copyright. The defendant made a play out of the novel, without knowing of the existence of the original play, and without hearing or seeing its con-

69—Tribune Co. of Chicago v. Associated Press, 116 F. 126.
70—11 C. B. N. S. 479.
71—7 Ch. D. 301, aff'd L. R. 4 A. C. 711.
72—Bentley v. Tibbals, 223 F. 247.
73—See Drone, p. 457.

tents. The Court held his act was not a violation of any right in the novel, but that since by copying from the novel, he had indirectly copied the play, he thereby infringed the copyright in the play. A different result was reached under similar circumstances in the later case of Toole v. Young [74] where the work was first published as a book, the alleged distinction, under the then existing English statutes, being that copyright of a dramatic composition as a book, barred any right to dramatic copyright, but that dramatic copyright would not bar a subsequent literary copyright. In Boosey v. Fairlie, a dramatic representation in which a substantial part of the music of a copyrighted opera was performed, was held to infringe the sole right of publicly performing that music, although the music, as performed, was obtained by independent labor on an unprotected arrangement of it, made by another. The decision rests upon the peculiar language of the English statute then in force, and is not law in the United States.[75] This decision was followed in a New Jersey case,[76] without noting the effect of the statute involved in it. The Court in the latter case [76] held that a donation of literary property to the public for one purpose would not authorize the public to use it for all purposes, if the author show, unmistakably, that he did not intend to abandon all rights in it, but simply to give limited rights to use of it to the public. This erroneous [77] view rests in misconceptions of the law of publication.[78] The correct rule undoubtedly is that if a work becomes *publici juris*, and contains a copyrighted work, this renders the latter work also public property, free to anyone to copy.[79]

§ 1090 Right to copy copyrighted work when part of uncopyrighted one.

74—9 Q. B. 523.
75—See § 1110.
76—Aronson v. Baker, 43 N. J. Eq. 365.
77—Bentley v. Tibbals, 223 F. 247.
78—See § 310.
79—Bentley v. Tibbals, 223 F. 247.

§ 1001 Copying in cases of works in nature of compilations.

In the case of works in the nature of compilations, digests, directories, etc., embracing matter or works in the public domain, copying may be looked at from a somewhat different angle. Here the materials are common and any one may utilize common materials. The copyright rests upon skill in selection and arrangement, that is in the combination. If both the same selections and arrangements are reproduced, there is, of course, no question that this is copying, if taken the one from the other.[80] If the same selections are taken and reproduced in a different order or arrangement, this may also be said to be copying, as the subsequent author is not only doing what he is entitled to do, that is, use common materials as he sees fit, but is also copying plaintiff's selective labor, which he cannot lawfully do.[81] "The true principle in all these cases," said Sir Charles Hall, V. C., "is, that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man's labour, or, in other words, his property."[82] If different selections are taken and made in accordance with the same arrangement as in an earlier work, this would not be copying as the right alleged to be invaded is not in the plan of arrangement but in the materials in combination or arrangement.[83]

Even if the same materials and arrangement are employed, it would seem, theoretically, that if the second author could show this was purely fortuitous and that he had made his work from common sources, by original effort, it would seem there could

80—Emerson v. Davies, 3 Story 793.

81—Moffat & Paige v. George Gill & Sons Ltd., 86 L. T. N. S. 465. The dictum to the contrary in Harper v. Schoppell, 26 F. 519, appears inadvertent or is based upon the language of the prior statute.

82—Hogg v. Scott, L. R. 18 Eq. 456.

83—See §§ 460, 466, 613 *et seq.*

not be said to be copying, but such a case is almost incredible in practice and one alleging such an accidental occurrence, should be held to the strictest proof. The questions involved in such cases are really questions of what use may be made of such works and are discussed in more detail elsewhere.[84]

The case of Mead v. West Publishing Co.,[85] which ignores these rules, appears open to just criticism. In that case, Stephens' well known work on "Pleading" was in the public domain. Plaintiff owned a copyright on a new edition which had brought the work down to date, both by adding the newer authorities and additional chapters on topics not treated in the original. Defendant was properly held not to infringe merely because he treated the same new topics, in different language, in a further new edition of the work, but it also appeared he had reproduced the identical new citations which appeared in the first new version and had very apparently copied them, as common mistakes were reproduced.[86] Citations showing where the same cases appeared in unofficial reports were annexed and this routine editorial work appeared to the Court, sufficient "internal evidence" of an independent examination of the authorities, for it to hold there was no infringement. If this aspect of the case be law, which may well be doubted, it behooves every author making such a work diligently to hunt out every place where a given case is reported, as, otherwise, he may find himself in the unfortunate position of the plaintiff, in the case under discussion.

Lord Herschell, in considering this subject, said [87] that in dealing with compilations of common materials, it should be clearly established that looking at the copyrighted and alleged infringing works as a whole, there has been a substantial appropriation

84—See §§ 1130-1163.
85—80 F. 380.
86—See § 1210.
87—Leslie v. Young, (1894) 4 A. C. 335.

by the one party of the independent labor of the other, before any proceeding can be brought, based upon copyright grounds.

§ 1092 Resemblance in the case of works dealing with same subject matter.

On the other hand, works handling common subjects must necessarily resemble one another, so that mere resemblance in such cases is not ground for deeming that there has probably been copying[88] and the use of collections of common materials as literary tools is freely sanctioned by the doctrines of fair use.

§ 1093 Maps and charts.

Thus, in discussing copyrights in marine charts,[89] it has been held that such copyrights cannot subsist in the general subject matter of the charts. The natural objects and public records from which they are made may be observed, and set down, by anyone. As was pointed out in an early case,[90] two maps, if both correct, and made by persons of equal skill, on the same scale, would be fac-similies, but this would not cause one to infringe the other. Hence, a copyright of a chart is violated only by actual copying,[89] but if there is such copying, it is no defense that what is so copied, represents actualities open to everyone for independent reproduction.[91]

§ 1094 The number of copies as affecting infringement.

It would seem to make no difference how few copies are made. Even the making of one copy would seem an infringement.[92] In the case of a dramatic production, or a moving picture drama, for example, large financial profits might be realized by the possession of a single unauthorized copy, and its maker, not the person using it, might alone be financially responsible. A single copy of advance sheets of a novel might, if communicated to the public, totally destroy its value. Legal responsibility

88—Pike v. Nicholas, L. R. 5 Ch. 251; Blunt v. Patten, 2 Paine 397.

89—Blunt v. Patten, 2 Paine 397; Chapman v. Ferry, 9 Sawy. 395.

90—Nichols v. Loder, 2 Coop. Ch. R. 217.

91—Farmer v. Calvert Lithographic Co., 5 Am. L. T. 168.

92—Butterworth v. Kelly, 4 T. L. R. 430.

is, of course, subject to being checked, in proper cases where there is no apparent damage, and very few copies were made, by the doctrine of "*de minimis.*"[93]

§ 1095 Binding copyrighted with uncopyrighted matter.

Copyrighted articles cannot be copied merely because they are bound with uncopyrighted matter.[94]

§ 1096 Copying non-literate works.

The rules laid down with respect to copying apply equally to cases of copyright in literary, artistic or dramatic or musical works.[95]

§ 1097 Mimicry.

Mere mimicry is not infringement, as there can be no copyright in the voice, manner or gestures of a performer[96] and this has been held to be true even though an insignificant part of a copyrighted song is sung, in good faith, in connection with such mimicry.[97] But if in the course of such mimicry, copyrighted material is used, such as the substantial part of a song, such use is none the less infringement[98] because used in connection with a lawful purpose. So mere stage business or properties, or the plan of an entertainment[99] cannot be protected by copyright, and hence, their imitation is not infringement.[1] Nor can there be copyright in characters in a work so as to prevent others from using the same characters, under the same names but in different situations.[2]

§ 1098 Stage business and properties.

§ 1099 Plan of entertainment.

§ 1100 Characters.

§ 1101 Scenes and scenic effects distinguished.

In a leading case,[3] the great scene of the play depicted an individual fastened to a railroad track, an approaching train, and a rescue by a third person

93—Cf. Lawrence v. Dana, 4 Cliff. 84.

94—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618.

95—Guichard v. Mori, 2 Coop. Ch. R. 216.

96—Savage v. Hoffman, 159 F. 584; Bloom & Hamlin v. Nixon, 125 F. 977.

97—Bloom & Hamlin v. Nixon, 125 F. 977; Greene v. Minzesheimer, 177 F. 286.

98—Green v. Luby, 177 F. 287.

99—Barnes v. Miner, 122 F. 480.

1—Serrana v. Jefferson, 33 F. 347; Daly v. Webster, 56 F. 483 (semble).

2—Munro v. Smith, 42 F. 266.

3—Daly v. Palmer, 6 Blatch. 256.

who surmounted various obstacles and succeeded in releasing him at the last moment before the train went by. This combination or series of events, as a "scene," was fully protected by the Courts, according to its essence,[4] as against colorable alterations. These cases may well be contrasted with a decision cited,[4a] *supra,* where the scene which it was sought to protect rested upon the substitution of real water, for previous textile expedients, in a tank scene, and this was not protected, as not subject to copyright, where actually copied. The situations of the latter play, as distinguished from its apparatus, were old, while in the first mentioned play they were both novel. This fact is a distinguishing feature of Daly v. Palmer[3] which must be understood to appreciate its true meaning.

§ 1102 Copying stage-business, make-up and scenic effects.

It may also be contrasted with the decision in an English case,[5] where rival vaudeville sketches, had dialogue differing essentially in substance but novel scenic effects, make-up of actors and stage business of the one were copied in the other. It was held that there was no infringement, since what was copied could only be protected in connection with the words and incidents of the piece, and, hence, that it was legitimate to use them in a different, distinct dramatic production.

§ 1103 When and how old basic situations may be re-used by others.

Where plays were dissimilar in plot, characters, text and situations, there was held to be no infringement because both made use of an old situation, there being no direct evidence of copying.[6] On the other hand, though the central situation in each play was old, there was held to be infringement, where there was striking similarity of characters, plot, action, situations, dialogue and scenes, although the names of the plays and characters were dissimilar.[7]

4—Daly v. Webster, 56 F. 483.
4a—Seirana v. Jefferson, 33 F. 347.
5—Tate v. Fullbrook, (1908) 1 K. B. 821.
6—Hubges v. Belasco, 130 F. 388.
7—Eisefeldt v. Campbell, 171 F. 594; Harper v. Ranous, 67 F. 904.

§ 1104 When common use of a novel central situation is not proof of piracy.

In a recent decision,[8] it was held that mere similarities of phraseology, somewhat similar characters and a novel central situation would not outweigh testimony that it was an independent work, where its theory and method of execution entirely differed from the earlier work. A reading of the opinion, in this case, would appear to lead to the conclusion that, if sound, it should be limited to its special facts.

§ 1105 Piratical dramatization.

A playwright who appropriates the theme of a story cannot escape liability by adding to, or slightly varying, its incidents, by making omissions, changing names, adding characters [9] or by omitting to use any of the language of the story.[9]

§ 1106 Test of dramatic piracy.

> "It is piracy if the appropriated series of events when represented on the stage, although performed by new and different characters, using different language is recognized by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order." [10]

§ 1107 Piratical dramatic adaptation.

Any adaptation of a copyrighted work which contains its plot or theme, if novel, is thus an infringement. The cases which have just been discussed are cases of copying, with changes of form and, in some instances, of the purpose of a work, but with an unlawful utilization of its copyrightable, intellectual concepts.

§ 1108 Copying in case of music.

The same rules apply to the copying of musical compositions.[11] Certain of the so-called music roll and mechanical music cases have been discussed else-

8—Vernon v. Shubert, 220 F. 694.

9—Dam v. Kirk La Shelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902.

10—Blatchford, J., in Daly v. Palmer, 6 Blatch. 256, 270. See to same effect, Martinetti v. Maguire, 1 Abb. U. S. R. 356.

11—Millett v. Snowden, 1 West. L. J. 240.

where.[12] An interesting case under the present law holds,[13] without discussing the constitutional questions considered elsewhere, which apparently were not raised, that while a maker of mechanical music records may use copyrighted music to make such records, he may not copy other mechanical music records. This case is open to serious question, in other respects,[14] but seems correct on this point. The English case [15] holding that copyrighted music may not be copied to make mechanical records is cited elsewhere.

§ 1109 Copying mechanical music records.

A group of cases dealing with various aspects of light opera may be considered at this point. In the first of these [16] the plaintiff was the proprietor of the "American rights" in Gounod's "Redemption," an oratorio or cantata. Gounod had permitted the words of his work and the vocal parts set to piano accompaniment to be published, with marginal references to instruments used in playing with full orchestra. He had retained his orchestration of the work in manuscript. It was held a new orchestra tion, made from the piano score, infringed the plaintiff's rights, on the ground that the composer's publication was a limited one, which did not divest his common law rights, in the orchestration. This case seems clearly erroneous [17] unless it be treated as an unfair competition, and not a copyright, case.[18] In the "Iolanthe Case," a diametrically opposite result was reached, even though the original title and composer's name were used, since there was coupled with this use, a statement that the orchestration was not the original composer's. The Iolanthe Case

§ 1110 Re-orchestration of music published without copyright in un-orchestrated form.

12—See §§ 1009-1012.
13—Aeolian Co. v. Royal Music Roll Co., 196 F. 926.
14—See §§ 152, 153.
15—See § 1046.
16—Thomas v. Lennon, 14 F. 849.
17—Aronson v. Fleckenstein, 28 F. 76 (The Ermine Case).
18—Carte v. Ford, 15 F. 439.

was followed in the "Mikado" Case,[10] but a different result was reached in a subsequent case[20] involving the "Mikado" where it appeared that a piano arrangement of the orchestral score had been copyrighted and the facts with respect to the publication of the libretto and songs were not brought out. These cases furnish interesting illustrations of the principles that if a work in any form become public property, any use may be made of it, that such use cannot be deemed infringing, and that an attempted copyright in one form may become entirely ineffectual if it be published in another form.[21] This is also illustrated by two English cases. Under prior English statutes, copying was forbidden, but dramatization was not. It was, accordingly, held that turning a copyrighted novel into a drama and performing it was no infringement of the copyright in the novel.[22] Nor could the author of the novel prevent the operation of this rule of law, by himself dramatizing the work.[22] But if, in the course of dramatization, any part of the novel was actually copied, this was infringement and the dramatist was liable for invasion of copyright.[23] This rule was applied where the proprietor of the drama made copies of a dramatization containing much of the language of the novel, for the sole purpose of registration of the drama and of its performance by his employees. The making of such copies was held an infringement, although performance and dramatization were not.[24]

§ 1111
Decisions illustrate permissible uses of public property.

§ 1112
Former English law as to dramatization of novels.

19—Carte v. Duff, 25 F. 183.

20—See also Goldmark v. Kreling, 35 F. 661; Carte v. Evans, 27 F. 861.

21—See also Bentley v. Tibbals, 223 F. 247.

22—Toole v. Young, L. R. 9 Q. B. 523; Reade v. Conquest, 9 C. B. N. S. 755; Schlesinger v. Bedford, 63 L. T. N. S. 762; Coleman v. Walthen, 5 T. R. 245; Murray v. Elliston, 5 B. & Ald. 657.

23—Reade v. Conquest, 11 C. B. N. S. 479.

24—Warne v. Seebohm, 39 Ch. D. 73. See also Tinsley v. Lacy, 1 H. & M. 747.

§ 1113
Attempted reservation of rights on publication of one version of work.

No attempted reservation of rights can alter this result. In an interesting case,[25] it appeared that Richard Wagner had sold the exclusive right of publication of "Parsifal" to B. Shotts Sons, the "absolute possession" or "unconditional ownership" of the composition and libretto having been previously transferred to them, but, in the contract, reserved the acting rights of the opera to himself. The publishers sent copies to the United States, to their New York agent, for sale to whomsoever would buy. The copies contained a notice, "This copy must not be used for production on the stage." The notice was held entirely ineffectual in the United States, whether effectual in Germany, or not, and public performance of the opera was held no infringement, as the publication of the work was complete, defeating any copyright. This result, required by the United States statutes, is sound, theoretically. The decisions to the contrary[26] rest upon the provisions of foreign statutes.[26]

§ 1114
Transposition and translation.

Mere transposition of the key of a song is, of course, copying[27] just as much as merely changing the language of a novel by unauthorized translation would be,[28] a decision,[29] to the contrary notwithstanding. The last cited case is, in no event, law under the present Act and its fallacies under the Act involved in its decision, have been clearly demonstrated by Mr. Drone.[28]

The similarity between translation and transposition directs attention to a further phase of musical compositions. The individual notes are comparable to the letters of the alphabet, chords to syllables and bars to words. Merely changing the order of the bars of a musical composition would, ordinarily,

25—Wagner v. Conreid, 125 F. 798.

26—Chappell v. Boosey, 21 Ch. D. 232. See also Schlesinger v. Turner, 63 L. T. N. S. 762.

27—Hein v. Harris, 175 F. 875.

28—See Drone, p. 450.

29—Stowe v. Thomas, 2 Wall. Jr. 564.

not render the result anything but a copy of the original, any less than merely changing the order of the words of a composition would do so. If, however, the bars of music constituting the original were interspersed with other bars, or chords, drawn from other sources, or with original matter, the result might well be so radically different as to prevent it from being an infringement. In a leading case[30] the plaintiffs, who were the proprietors of an opera and the copyrights in it, in its overture, and in its airs, sued for infringement, the defendant having republished some of the airs, with alterations, as dance music. It was held that there was piracy since the original airs were republished, although with adaptations and harmonics, for performance on different instruments, and that under no stretch of the law of abridgment could one, in the case of music, take enough of the airs to incorporate bars in consecutive order, or the same air substantially. The test of piracy, in such cases, was said to be whether the same music though adapted to a different purpose from that of the original, might still be recognized by the ear. The question is one of degree of similarity, in every case, and of the value of the part taken, as well as of the permanence of its identity, if combined with other musical matter. It should always be remembered that there can no more be a copyright in mere sounds, than there can be in mere words, which are only conventional sounds, affording a means of communicating ideas. By proper appreciation of the nature of copyright in musical compositions, which is identical, in essence, with copyright in written compositions, consisting of words, errors, such as that set forth in a relatively recent opinion,[31] may be avoided. In that case the Circuit Court of Appeals, in a *per curiam* opinion, said that a contention that a later

§ 1115
Other versions of copyrighted music.

§ 1116
A test of musical piracy.

30—D'Almaine v. Boosey, 1 Young & Collyer's Exch. R. 288.
31—Hein v. Harris, 183 F. 107.

§ 1117
Discussion of view that independent accidental duplication of music is infringement.

musical composition was produced in ignorance of the existence of an earlier copyrighted one, was no defense to an action for infringement, under a statute giving the copyright proprietor the "sole liberty" of copying, vending, etc., "the same."[32] The Court evidently overlooked the effect of the last mentioned words, which mean the composition composed by the author and not all compositions by whomsoever composed. Since the Court was, undoubtedly, familiar with the various decisions in non-musical cases, which hold independent duplication is not infringement,[33] its decision can only be explained on the ground that it deemed that there was something in the nature of a musical composition requiring, or justifying, an exception to the general rule. But the same language, in the statutes, is used in connection with musical compositions, as is used in connection with the classes of works which include directories, digests, dramatizations, translations, or portraits, landscapes, maps, charts, etc. The same sentence refers to all and yet it cannot be contended, successfully, that ignorant original production of any of the last mentioned works, *if established,* would be an infringement of a work of a prior author which is substantially identical with such later production, even though an earlier copyright existed.[33] No Court is bound to accept statements in affidavits or proofs without the closest scrutiny and the defense of ignorant original production is so obviously calculated both to embarrass the other side and is so simple of fabrication that it is, legitimately, subject to the strongest suspicion. But though this be so, this is not the equivalent of saying that the defense does not exist, if satisfactorily proven,[34] and the decision under discussion, which is unique in its doctrine, and

32—R. S. 4952, as amended by the Act of March 3, 1905.
33—See §§ 154, 488, 998, 999.
34—Cf. Lawrence v. Dana, 4 Cliff. 1.

contrary to all other judicial opinion, may be deemed open to the most serious question.

Methods in which copyright may be infringed, other than copying, will now be considered.

§ 1118 Piratical changes of *form.*

Since the right to change the form of a copyrighted work is, in cases where it is given, part and parcel of the copyright, any unauthorized violation of such right, whether by making a translation, other literary version, dramatization, novelization, arrangement, or adaptation of a musical work, or an abridgment, would be an infringement of copyright under the present Act.

§ 1119 Abridgement, dramatization and translation, as infringement.

The cases[35] holding a fair abridgment was not infringement, which were the subject of just criticism,[36] must accordingly be deemed overruled. Discussion of earlier cases bearing on this point and upon the question whether in the absence of statute, unauthorized dramatization or translation is infringement,[37] is rendered unnecessary by the express language of the statute.

The cases of infringement heretofore discussed have all been cases of physical reproduction of the copyrighted work in whole or in part. Another aspect of the question will now be considered.

§ 1120 Infringement of rights of public performance, etc.

Under the Statute, copyright proprietors have rights of public delivery of lectures and other works intended for oral communication to hearers and also the exclusive direct, and indirect, rights of public performance of dramatic and musical compositions. The nature and scope of these rights have been explained elsewhere.[38] Very little requires to be added at this place. Any material violation of such rights constitutes infringement, provided the violation consists of the exercise, or partial exercise, of a

35—See Story v. Holcombe, 4 McLean 306; Dodsley v. Kinnersley, Amb. 403; Newberry's Case, Lofft. 775.

36—Drone, p. 440 *et seq.*

37—See §§ 351, 650-665.

38—See §§ 210-228.

§ 1121
Private and gratuitous performances.

right reserved to the copyright proprietor by the Act. In contradistinction to the law of infringement by copying, however, there can be no infringement by performance, unless this be public, nor, save in the case of dramatic compositions, unless this be for profit. The making of copies for private or gratuitous distribution has always been deemed infringement equally with the making of such copies for profit or public distribution.[39]

§ 1122
Partial performance.

Since copyright protects the whole of a work, and every copyrightable component part thereof, partial performance of a copyrighted work would seem infringing, if the part performed be a substantial part of the work, just as partial copying may be infringement. The same principles as to extent and manner govern, as in the case of physical copying.[40]

§ 1123
Dramatizations under present Act.

The right to dramatize is a more comprehensive one than the right to prevent unlawful copying. Where rights of dramatization are not expressly conferred, it may be questioned to what extent protection would be secured to the author of a non-dramatic work against dramatizations, which while plagiarizing a portion, or the whole, of the plot, entirely differed in language, details, scenes, and characters.[41] A novel is not usually a dramatic work, although exceptional cases are to be found, where a preponderance of dialogue in the subject matter may well lead to a different result. The average novel, however, requires considerable changing in order to dramatize it and the right to make such changes, where requisite, is comprehended in the right of dramatization. Such dramatization may be either in words, to be spoken, or in the form of a moving picture or directions for pantomime. Any

39—See § 1065.

40—See § 1023 *et seq.*

41—Cf. Toole v. Young, 9 Q. B. 523, under the former English law.

substantial encroachment on such rights would be infringement.

§ 1124 Performance of motion pictures as infringement, though the pictures themselves are not infringements.

It has been pointed out[42] that, infringement of a copyrighted drama may not, necessarily, be infringement of a copyrighted novel, from which the plot of the drama is taken and *vice versa*. This is certainly true if the copyrights are obtained under different statutes, as the rights under the different copyrights may be quite different and may also be so on the facts. In the case under discussion (1), a moving picture film was held not to be an infringement of either a drama or the novel from which it was taken, as the pictures on it merely expressed an artist's conception of what the novelist and dramatist expressed in their works,[43] and was not a copy of either. But the performance given by running off such motion picture, for profit, on a machine devised for the purpose, was an infringement of both the drama and the novel, where it conflicted with the rights owned by each proprietor in his work.

§ 1125 Dramatizations of plays made from common sources.

What was said by the Court in the case last cited is illustrated, in a somewhat different manner, by another case.[44] There a copyrighted play, "The Two Orphans," which was translated from the French, was held not infringed by the performance of another authorized translation of the play, independently made. The same result was reached in the case of a dramatization from a work in the public domain, even where the second play reproduced unimportant scenes, added to the original theme by the author of the first play.[45] That the latter case must not, however, be unduly extended, is shown by later English cases.[46] Thus in one of

§ 1126 Reproduction of trivial additions.

§ 1127 What not trivial.

42—Harper Brothers v. Kalem Co., 169 F. 61.
43—Cf. Munro v. Smith, 42 F. 266.
44—Shook v. Rankin, 6 Bissell 477.
45—Chatterton v. Cave, 3 A. C. 483.
46—Tree v. Bowkett, 74 L. T. N. S. 77; Nethersole v. Bell, (not officially reported), (1903) Chancery.

them,[47] taking three slight incidents from a play was, on the facts in evidence, held piratical.

The scope of copyright under the present Act, which is more comprehensive than under its predecessors, must be steadily borne in mind in considering the cases cited.

§ 1128 Public exhibition of copies of work of art.

While unauthorized public performance of a musical or dramatic work for profit are patently infringement, public exhibition of a copy of a work of art would not be infringement, no right being invaded, although the person making the copy and its possessor would be guilty of infringement.[48]

Having considered the question of what may not be done without infringing the rights of a copyright proprietor, there remains for consideration what may be done without incurring liability.

§ 1129 Fair use.

As has been previously pointed out, the author of every work who sells, or publicly distributes it in copies, intends certain uses to be made of such copies.[49] Such use may either be physical, or of the contents of the work. The latter will be discussed first.

§ 1130 Meaning of "fair use" in copyright law.

Anyone may make "fair use" of a copyrighted work, without being held an infringer. This rule is a necessary consequence of the extension of copyright protection to works essentially utilitarian in character. What such "fair use" has been deemed to be, has been gradually enlarged, as this result has received judicial cognizance. It is considered that it will be established by a consideration of the decisions which will be cited, that "fair use" simply means a use which is legally permissive, either because of the scope of a copyright, the nature of a work, or by reason of the application of known commercial, social or professional usages, having the effect of custom, insofar as these do not

47—Beere v. Ellis, 4 L. T. 330.
48—Cf. Bolton v. London Exhibitions, 14 T. L. R. 550.
49—See § 971.

expressly run contrary to the plain language of copyright legislation.

§ 1131 Tests of fair use other than by quotation.

The question as to whether a defendant can claim to have made a fair use of a copyrighted work, said Lord Eldon,[50] depends, on the whole, on whether what he has done involves "the fair exercise of a mental operation deserving the character of an original work," such action "not being merely colorable," added Lord Cottenham.[51] Thus it is not a fair use of a lecture, composed of common materials, simply to paraphrase it and publish the result;[52] and where a work has been pirated, it has been held[53] an unfair use of the work to take it and a pirated copy, to compare them, crossing out the pirated matter and then, with this still physically before one's eyes, to endeavor by paraphrase, and otherwise, to construct a non-piratical version of the work.

§ 1132 Unfair uses: paraphrasing, etc.

§ 1133 Public or private readings.

The author of every printed work intends it to be read, and whether it is read silently, or aloud,[54] in public or in private, can make no difference, save in the class of cases where rights of performance or presentation, inhere in the copyright.

§ 1134 Reviews and quotations.

Since such has been the custom for decades, the author who hopes his work will be of sufficient interest to be reviewed in print, intends, that fair quotations may be made for the purpose of such review.[55] This is a "fair use" of the work. He does not, however, intend that his work shall be substantially reproduced, under guise of reviewing it,[56] or that it be attributed to somebody else.[57] If his

50—Wilkens v. Aiken, 17 Ves. 422.

51—Bramwell v. Halcomb, 3 My. & Cr. 737.

52—Chautauqua School of Nursing v. National School of Nursing, 211 F. 1014.

53—Moffat & Paige v. George Gill & Sons Ltd., 86 L. T. N. S. 465.

54—Tinsley v. Lacy, 1 H. & M. 747 (semble).

55—Chatterton v. Cave, L. R. 3 A. C. 492.

56—Roworth v. Wilkes, 1 Camp. 94.

57—West Publishing Co. v. Edward Thompson Co., 169 F. 833.

work is of a technical nature, such as for example, a medical or legal treatise, he, subject to the limitation last expressed, intends it may be quoted for professional purposes,[58] even in subsequent works on the same subject.[59] What is or is not fair quotation, or fair selective reproduction, is a question of degree, to be determined on the facts in each case.

§ 1135 Fair quotation, a question of degree.

The general rule has been well summarized as follows:

> "In short we must in deciding questions of this sort look to the nature and objects of the selection made, the quantity and value of the material used and the degree to which the use may prejudice or diminish the profits or supersede the objects of the original work."[60]

§ 1136 Unfair quotation.

If the excerpts be so extensive as to be copying, rather than quotation, or if they be used for any unauthorized purpose, the fact that quotation marks are used, or their authorship stated, would, obviously, be no defense.[61]

§ 1137 Use quotation marks, etc. Newspaper custom.

Customs, which would supersede the copyright acts, cannot control their application. Thus in an English case, the Court said it would refuse to hold valid a custom of newspapers to copy matter from one another, on giving credit to the source.[62] Admitted infringement would be infringement none the less because admitted.

§ 1138 Compilations of quotations.

Similarly, a volume endeavoring to prove that Thackeray's works were autobiographical, in large degree, by copious extracts from his works, was

58—Cf. Wilkens v. Aiken, 17 Ves. Jr. 422.

59—See Cary v. Kearsley, 4 Esp. 168; Folsom v. Marsh, 2 Story 100; Wilkens v. Aiken, 17 Ves. Jr. 422.

60—Story, J., in Folsom v. Marsh, 2 Story 100, 116, cited with approval in Scott v. Stanford, L. R. 3 Eq. 718.

61—Scott v. Stanford, L. R. 3 Eq. 718; Gilmore v. Anderson, 38 F. 846; Bohn v. Bogue, 10 Jur. 420.

62—Walter v. Steinkopff, (1892) L. R. 3 Ch. D. 489.

held [63] to exceed the limits of "fair use," as superseding, to a damaging extent, the works so quoted.

§ 1139 Quantity quoted.

The quantity reproduced, however large, is not necessarily determinative of the question, if the purpose of its reproduction be clearly for criticism only.[64]

§ 1140 Test as to fair quotation.

It has been said, however, that "one test which when applicable . . . would seem to be ordinarily decisive, is whether or not so much has been reproduced as will materially reduce the demand for the original," unless as the result of adverse criticism.[65]

§ 1141 Unfavorable reviews.

It would make no difference whether the reviews in which quotations occur were favorable or not, as copyright is not concerned with aesthetic, or intellectual merit.

§ 1142 Parodies.

A recognized form of review, although its nature is not always fully appreciated by its victims, is parody. It is entirely within the limits of fair use to make parodies or literary perversions of copyrighted works,[66] even, it seems, in the form of drawings or cartoons.[65]

§ 1143 Scope of copyright as determining fair use.

The scope of the copyright in a work may determine the use which may be made of it. Thus if a work describe an art, plan, method, forms, or something else that can be utilized, if put in action, fair use permits the use of that which is so described,[67] although it would not permit the copying of the book, as there is no copyright in the subject matter of the work so utilized.[68]

The purpose of a copyrighted work may also enlarge the scope of its legitimate use. Many classes

63—Smith v. Chatto, 3 L. T. N. S. 775.

64—Bell v. Whitehead, 8 L. J. Ch. 141 (where nearly one-quarter of a work was reproduced); Whittingham v. Wooler, 2 Swanst. 428 (three-twentieths reproduced)

65—Hill & Whalen v. Mart , Inc., 220 F. 359. Cf. also Story v. Holcombe, 4 McLean 310.

66—Cf. Bloom & Hamlin v. Nixon, 125 F. 977.

67—See § 508.

68—See § 509.

§ 1144
Purpose of work as bearing on fair use: utilitarian works.

of works are strictly utilitarian in character. A map may be used for finding one's way. A directory, to find a person. A digest, to find a case. Books may be intended to have portions of their contents copied, as in the case of legal form books, etc.[69] It would seem persons who use works for the purpose for which they are sold cannot be deemed infringers.[70] Thus in one instance,[71] the work copyrighted was a manual of instruction, consisting of a system of salesmanship, designed to teach dealers how to advertise. It contained "copy" in the shape of forms, models, diagrams and text designed to be used in advertisements. It was held that the use of such material for advertising purposes, was no infringement, as that was just what the material was intended for.

§ 1145
Uniform principles of law applicable to all utilitarian works.

"It would seem," said Lacombe, J., in an especially well considered opinion,[72] "that all books which are not purely literary, that is, are not works of creative or imaginative literature, but merely compilations of statements found elsewhere, should be treated alike in applying the principles of the law of copyright. Legal digests, algebras, arithmetics, etc., statistical year books, directories, gazetteers, business or social registers, are all produced by the same methods and by the use of skill which is merely clerical."

§ 1146
Utilization of prior dictionaries in making subsequent ones.

Similarly, in an excellent and suggestive opinion, delivered by Wood, V. C.,[73] it was held that the compiler of a dictionary, in which absolute originality is of necessity excluded, was entitled to make use of preceding works on the subject, where, although he has the other works before him, he

69—Stover v. Lathrop, 33 F. 348.
70—Brightley v. Littleton, 37 F. 103.
71—Stone & McCurnach, Inc., v. Dugan Piano Co., 210 F. 399.
72—Colliery Engineer Co. v. Ewald, 126 F. 843.
73—Spiers v. Brown, 6 Weekly R. 352.

bestows such mental labor upon what he has taken and subjects it to such revision and correction as to produce an original result, provided that he does not deny the use made of such preceding works, and that the alterations he makes are not colorable only. This opinion should be read by everyone interested in this subject.

§ 1147 Admission of such use.

§ 1148 Utilization of works of information in general.

"The really difficult question in cases of this description, where it must be admitted that the matter is not original, is how far the author of the work in question can be said to have made an unfair or undue use of previous works protected by copyright. As regards all common sources, he is entitled to make what use of them he pleases; but as Lord Langdale said, in Lewis v. Fullarton, 2 Beav. 6, he is not entitled to make any use of a work protected by copyright which is not what may be called a fair use. . . . In publishing a work in the form of question and answer, on a variety of scientific subjects, 'the author' had a right to look at all those books which were unprotected by copyright and make such use of them as he thought fit, even though possibly if he had not read plaintiff's book, he would not have thought of reading such books or utilizing the information in them. He might also see if he had forgotten any topics after writing his work by reference to the copyrighted works. He cannot, however, simply colorably adopt the work of the earlier author."[74]

§ 1149 Ascertainment of sources and facts.

§ 1150 Checking up results.

§ 1151 Use of compilations of information.

Suggested distinctions[75] between works of the nature and purpose discussed in these opinions will, on analysis, be found to be based on commercial, not legal grounds.[76] All such works have one common foundation: their contents are intended for use.

74—Wood, V. C., in Jarrold v. Houlston, 3 Kay & J. 708.
75—Sampson-Murdock Co. v. Seaver-Radford Co., 140 F. 539.
76—See Spiers v. Brown, 6 Weekly R. 352.

They are tools in printed form and are intended to be used according to this essential purpose. There is normally no copyright in their contents, as they usually embrace facts or figures which are common property. Anyone may reproduce their facts and they, themselves, are primarily intended to apprise others of such facts. Frequently their arrangement is not novel. In the average directory, for example, names must be arranged alphabetically and, in digests, subjects must be arranged under the headings where those consulting the digests would expect to find the information they are seeking.

Similarity of subject matter and of form, rather than difference, is to be expected in rival works of this character. It is difficult to see why a purchaser of such work should be limited in the use he may make of it merely because such use may result in a rival publication, provided he only makes a use of it that persons not intending to make such rival publications might make. On the other hand, in the absence of artifice, such as printing an occasional false name and address or erroneous citation, it might be almost impossible to prove actual copying. Furthermore, the cost of the initial canvass resulting in a directory, or the original discovery of common sources of information, is frequently very great, and the results of this money expenditure and labor may frequently be gained at trifling expense, unless restrained by law. The harshness of applying logical rules of law in these cases is recognized [77] but what is not so generally appreciated is that it was only by a great stretch both of the Constitution and of the theory of copyright that such works were originally held copyrightable at all,[78] that he who seeks the far-reaching benefits of copyright cannot

77—Colliery Engineering Co. v. Ewald, 126 F. 843.

78—See remarks of Platt, J., in Hartford Printing Co. v. Hartford Directory Co., 146 F. 332.

justly complain of its limitations,[79] and that it is within the power of the copyright proprietor, by fixing his sales prices at an adequate figure, to ensure, to a degree, financial recoupment for his expenditures.

§ 1152 Use of law digests in making subsequent law books.

The principles underlying this class of cases are well illustrated by a series of decisions which were rendered in a succession of actions which arose between rival makers of law digests. In the first of these causes, it appeared that the defendant furnished its editors with copies of decisions, prefixed by syllabi made by the plaintiff. Common errors were shown; and while the defendant and its editors denied that they had read the syllabi before making their own subsequent ones, the proof in this respect was not very persuasive. The Court held[80] that where notes, suitable for use in a digest, had been made from common sources of information, and copyrighted, subsequent compilers in the same field were not permitted to avail themselves of this original work and save time and labor by copying from their predecessors. They might use these as a guide to the original sources and make their own notes. They might also use the prior work to detect errors, omissions and other faults in their work, but they could not "exclusively or evasively use those already collected and embodied by the skill, industry and expenditures of another"[81] and that the unfair appropriation of the labor of another constituted infringement, in such a case, irrespective of whether his original language was used, or was paraphrased. While this was actually a case of copying, it will be noted stress is laid in the language quoted, upon appropriation of labor, but such language should be

79—Dejonge & Co. v. Breuker & Kessler Co., 235 U. S. 33, 37, 59 L. ed. 113, 116.

80—West Pub. Co. v. Lawyers Cooperative Pub. Co., 25 L. R. A. 441, 64 F. 360, aff'd 35 L. R. A. 400, 79 F. 756.

81—Page 761.

considered strictly in connection with the facts of the case. The necessity for such caution in considering the language of the opinion is shown by the next case on the subject. It was there held[82] that a copyrighted law book was not infringed by a subsequent work on the same subject, where the only accusation against the second author was that he had collected all available citations, including those found in the copyrighted work, and, after examining them, used those he considered applicable, in footnotes to support his own text. "If," said the Court, "it be held an author cannot consult the authorities collected by his predecessors, the law of copyright enacted to promote the progress of science and the useful arts will retard that progress." In a third case,[83] it appeared the plaintiff was in the business of digesting law reports and of reporting judicial opinions, unofficially. The defendant was engaged in the business of publishing legal encyclopedias. In the course of a most voluminous opinion, the lower Court, whose judgment was, subsequently, modified in other respects, but affirmed in general, held that, with reference to the directory, map and dictionary cases infringement depended more on the idea of unfair use in the unlawful saving of labor, to avoid unnecessary original research, than upon the appropriation of literary ideas, or arrangement, based upon literary ability, or studied plan. Fair use included the right to consult the copyright work for the purpose of obtaining clues to other decisions, or the meaning of the cases discussed in such digests, to collect the cases cited, if verified, and even to arrange and reprint them under the same heads, if the "literary arrangement" of the work was not appropriated thereby. But merely to read the head notes, verify their correctness and

82—Edward Thompson Co. v. Am. Law Book Co., 62 L. R. A. 607, 122 F. 922.

83—West Publishing Co. v. Edward Thompson Co., 169 F. 833.

then reprint them would be unfair use, as intellectual labor is involved in the making of such headnotes, even though the copies were appended as footnotes to original text and even though they could properly, and without criticism, have been made, independently, from the original sources.

§ 1153
The nature of such works as tools and the physical uses which can be made of copies recognized.

The Circuit Court of Appeals,[84] in a sound and instructive opinion, held that digests were mere tools: that, accordingly, from their nature, and from the fact of ownership of the individual copies, lists of cases could not only be made from these but this might be done by cutting out printed references to them from plaintiff's work. This was merely a "cheap and convenient method of transcription" and was within the limits of fair use, provided there was no copying, or paraphrasing, of copyrighted language, that is to say, of the plaintiff's version of the points decided by the cases digested.

§ 1154
The English directory cases.

This opinion appears to embody a sensible and salutary view of the essential purpose of this class of copyrighted matter, and of the scope of copyright therein.[85] It may be compared with advantage with the English directory cases where, after flatly denying that any use could be made of directories, by a subsequent author, save to check up his own researches as to the persons named therein,[86] it was finally held,[87] after a decision[88] in a compilation case had rendered this rule a logical absurdity, that although the compiler of a new directory was not justified in using slips, cut from one previously published, for the purpose of deriving information from them for his own work, or, in other words, copying them, he might use them for the purpose of directing him to the parties named in the direc-

84—176 F. 839.

85—See also Dun v. International Mercantile Agency, 127 F. 173.

86—Kelly v. Morris, L. R. 1 Eq. 697. Cf. Morris v. Ashbee, L. R. 7 Eq. 34; Hogg v. Scott, L. R. 18 Eq. 444.

87—Morris v. Wright, L. R. 5 Ch. App. 279.

88—Pike v. Nicholas, L. R. 5 Ch. App. 251.

tory, from whom he could obtain information about themselves. It is not doubted that, if cited, the views as to digests prevalent in the Second Circuit would, at present, be followed by the English Courts, with reference to directories.

§ 1155 Growth of doctrine of fair use of such works discussed and illustrated.

Both the American and English cases, just cited, show the extension of the doctrine of fair use which has taken place, as a result of clearer perceptions as to the inherent limitations of copyright, in works of strictly utilitarian character, produced as a result of mechanical or clerical, rather than by imaginative, effort. Other decisions are to the same effect.

Thus, it has been held [89] that a subsequent author might copy and use in the same order citations found in a prior work, provided he examines and verifies the decisions before he does so.

§ 1156 The doctrine as applicable to maps and directories.

It is quite impossible, logically, to differentiate cases where digests of common materials are involved, from cases of maps or directories,[90] except to the advantage of the former, in so far as these contain original digesting. Since there can be no property in the subject matter of either, this consisting of common facts and only valuable in so far as it is not the product of thought, but the statement of actualities, it would seem that there can be no infringement of such works, save by actual copying.[91] There can be no infringement by merely utilizing the information contained in such works. Such contemplated use is their reason for being.

Much of the doctrine of unfair use, so-called, will, then, appear on examination to be mere aspects, either evidentiary or substantive, of the law of infringement by copying. Much of it further fails to distinguish between the work protected by copy-

89—White v. Bender, 185 F. 921

90—Colliery Engineer Co. v. Ewald, 126 F. 843; Bullinger v. Mackey, 15 Blatch. 558; Spiers v. Brown, 6 Weekly R. 352.

91—Cf. Pike v. Nicholas, 5 Ch. App. 251.

right and physical copies of such work, or recognizes this distinction.

§ 1157
Unfair use of selective quotations.

Thus, one English case [92] involved rival annotated editions of "As You Like It." Each contained character sketches illustrated by quotations. The compiler of the second work verified the quotations and then copied them into his work. This was held to be infringement. The unfair use lay in the fact that the quotations had been selected and used for definite illustrative purposes. The copyright was predicated upon such selective labor and use and hence was invaded when the same illustrative use was made of the quotations, as a result of seeing and utilizing the selections in the first work.

§ 1158
Fair reproduction of common materials.

In another case,[93] the defendant had been enjoined from further publishing certain educational text books which he had copied from plaintiff's work, which in turn had been largely copied from prior publications. Defendant went through the works, kept all the matter plaintiff had copied, struck out all plaintiff's original matter and republished the work, as revised. This was held no infringement of copyright and not a violation of the injunction.

The distinction between these two cases is that the first involved construction by duplication of the plaintiff's selective labor and by paraphrasing, and the second, avoidance of infringement, by elimination.

§ 1159
Reproduction of original sources as illustrating common and unoriginal thesis.

In a third case,[94] the plaintiff had written a work illustrative of the theory that the English were descended from the ancient Britons, rather than from the Anglo-Saxons. He quoted excerpts from various prior authors, for the purpose of illustrating such theories. It was held that a subsequent author could note the authorities cited, examine them and make

92—Moffat & Paige v. George Gill & Sons, Ltd., 86 L. T. N. S. 465. Cf. Social Register Association v. Murphy, 128 F. 116.

93—Colliery Engineer Co. v. Ewald, 126 F. 843.

94—Pike v. Nicholas, L. R. 5 Ch. App. 251.

the same excerpts, for the purpose of illustrating the same theory. This decision may be compared to advantage with that in Moffat & Paige v. George Gill & Sons Ltd., *supra*. The distinction between the two cases would appear to be that the Court must have deemed there was actual copying in the latter case, or that the different purposes of the works involved, the varying degrees of originality contained therein and the contrasting scope of the copyrights involved, justified the divergent results reached in their decision.

§ 1160 Various erroneous *dicta* as to fair use collated and discussed.

It will appear plain from an examination of the cases cited that many of the *dicta* contained in the books are either inadvertent or erroneous. Some of these will now be considered.

In an English case[95] it was said that no man is entitled to avail himself of the previous labors of another for the purpose of conveying to the public the same information, although he may append additional information to that already published. That this is not an accurate or helpful statement of the law appears from the cases bearing on legal digests, etc., which have been cited.[96] Although much repeated in earlier English cases,[97] its fallacies appear to have been recognized by the English Courts and its application limited by subsequent decisions of the higher English Courts.[98]

In an early case[99] it was held that if one correct an erroneous chart, this is not servile copying and, hence, not infringement. This decision appears questionable, as it seems contrary to the many cases

95—Scott v. Stanford, L. R. 3 Eq. 718 at 724.

96—Edward Thompson Co. v. American Law Book Co., 62 L. R. A. 607, 122 F. 922; West Publishing Co. v. Edward Thompson Co., 176 F. 839; Pike v. Nicholas, 5 Ch. App. 251.

97—Lewis v. Fullerton, 2 Beav. 6; Murray v. Bogue, 1 Drew. 353; Kelly v. Morris, L. R. 1 Eq. 697; Morris v. Ashbee, L. R. 7 Eq. 34.

98—Morris v. Wright, L. R. 5 Ch. App. 279; Pike v. Nicholas, L. R. 5 Ch. App. 279.

99—Sayre v. Moore, 1 East. 361 (n).

which hold that a work cannot be improved against the copyright proprietor's will.

It is in line with the views entertained by Lord Ellenborough, however, as expressed in another early case.[1] He appears to have thought that if parts of a work of non-imaginative character were copied, in good faith, in connection with the compilation of a useful book, for the benefit of the public, making a totally new arrangement of such facts, this, to "avoid putting manacles on science," was not to be deemed piracy, unless merely colorable, with a view to stealing plaintiff's copyright. Unless this view be limited to fair quotation,[2] it is unsupported by later authority.

"Examined as a question of strict law, apart from exceptional cases," said Clifford, J., "the privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication."[3] The difficulty with this statement of the law is that the cases which are regarded by it as exceptional are so numerous as to destroy the value of any general rule which excepts them from its conclusion, without identifying them with more precision than by merely grouping them, as exceptions. As an enunciation of the law forbidding infringement by copying, the statement appears sound, but as a formulation of the law of "fair use," to be pregnant with misunderstanding. Judge Clifford also said, in the same case, that fair use will not permit the borrowing of materials, nor the use of their plan, or arrangement and mode of combination with the text, as fair use only applies to the use of materials, and not to plan, arrangement and mode of combination.

This statement appears too broad. Thus it has been held[4] that where an author produced a new

1—Cary v. Kearsley, 4 Esp. 168.

2—See § 1134 *et seq.*

3—Lawrence v. Dana, 4 Cliff. 1, 83.

4—Mead v. West Publishing Co., 80 F. 380.

book by bringing a standard uncopyrighted work down to date, a process involving the addition of newer authorities and of chapters on topics not treated in the original, it is not an infringement, for one using the same original, to treat the same new topics, provided he does not reproduce his predecessor's language.

§ 1161 Fair use of plan, arrangement or suggested new topics for discussion.

The rule appears to be that if the literary labor on which a copyright rests has included selection and arrangement, this may not be copied,[5] unless the nature of the work is such as to render a use of such arrangement or selection permissible. Whether a subsequent author may do so, depends on the circumstances and nature of the works involved, including their subject matter.[6]

§ 1162 Works suggested by copyrighted works.

Works of literature or art, as distinguished from merely utilitarian assemblages of facts, are addressed largely to the imagination and emotions of the public which they reach. If successful, they will frequently stimulate, or engender, original creative thought, in their turn, and it would seem that even though such works were used for that very purpose, such use would be a fair one, although the results may be somewhat startling or damaging to a copyright proprietor. This was illustrated by the decision in a case where[7] the parties were rival publishers of so-called detective stories, written by an author using the pen name of "Old Sleuth," and dealing with the doings of an imaginary personage going under that name. The plaintiff had a fanciful picture of "Old Sleuth," the character, not the author, upon the covers of its series. The State Courts had held that the plaintiff had no trade mark, or trade name, in the picture, nor in the name "Old Sleuth." The Court held that, assuming there

§ 1163 Illustrations of fair use of works, as suggesting others.

5—West Publishing Co. v. Edward Thompson Co., 169 F. 833.
6—White v. Bender, 185 F. 921.
7—Munro v. Smith, 42 F. 266.

was copyright in the picture as part of the books, it was not infringement for the defendant to appropriate the plaintiff's conception of "Old Sleuth," as portrayed in the drawing, where the picture defendant made for his cover was entirely dissimilar from that on the covers of plaintiff's books.[8]

This point was also illustrated by a decision in which[9] it was held not to be infringement to borrow the plan of a motion picture play where the resultant second picture was entirely different, save for this, from the earlier one. This decision is an extreme one, however, and its future application, even on its facts, would appear doubtful.[10]

§ 1164 Fair use of physical copies of a work.

The law is well settled that the owner of a copy of a copyrighted work may make such physical use of it, as a physical object, as he pleases. Thus he may rebind it, and sell it as rebound, bind it, if unbound, clean it, cut it up, and though there are no decisions on the point, may doubtless extra-illustrate or annotate it for personal use.

§ 1165 Binding and sale of sheets sold as waste paper: lawful copies.

In a decision, in point,[11] it appeared that unbound sheets of a copyrighted work were sent to a binder. A destructive fire occurred and, thinking them worthless, they were sold as waste paper, under a contract by which the purchaser bound himself that they were to be utilized as paper stock and not placed upon the market as anything else. They were resold to a third person who had no knowledge of the contract, but put them on the market in book form. It was held that the plaintiff could not claim they were infringing copies or restrain their sale, being limited to remedies for breach of contract.

§ 1166 Rebinding second hand copies.

In another case,[12] it appeared that the defendant purchased copies of books published by plaintiffs

8—See § 1183.

9—American Mutoscope Co. v. Edison Mfg. Co., 137 F. 263.

10—Chappell v. Fields, 210 F. 864; Daly v. Palmer, 6 Blatch. 256.

11—Harrison v. Maynard, Merrill & Co., 61 F. 689. See also Universal Feature Film Co. v. Copperman, 218 F. 578 (motion pictures).

12—Doan v. American Book Co., 105 F. 772.

from third persons who had lawfully acquired them. It then cleaned and rebound the books in exact imitation of the original binding, including the original publisher's name. It was held that nothing done by defendant violated the copyright in the books but plaintiff was given limited relief, by requiring that the books be stamped as second hand, on principles of the law of unfair competition. This was the limit of relief possible to complainant.[13]

§ 1167 Unfair competition with second hand copies.

In a third case,[14] it was held that the purchaser of unbound copyrighted sheets had, in the absence of contract, the unrestricted right to bind and sell them as he saw fit and might make an index for them, even though the index contained words and phrases found in the text. It was further held there was nothing in the copyright law which would bind the purchaser from an agent, with respect to binding and reselling the same, because of some agreement between the copyright proprietor and his agent, not known to the purchaser.

§ 1168 Annexation of indices, in binding sheets.

§ 1169 Secret limitations on agent's authority in selling sheets.

In the exercise of these rights he may not do anything which would be deemed unfair competition, but whether he does this depends on legal principles other than the law of copyright.[15] He may also not violate any of the copyright proprietor's rights, in the course of his physical handling of the work. Thus, he may not reprint missing pages and insert them in copies, for such reprinting is infringement.[16]

§ 1170 Limits on physical use: unfair competition.

§ 1171 Copying by reprinting missing pages.

A decision apparently contradictory of various rules laid down in the text is Sampson & Murdock Co. v. Seaver Radford Co.[17] The opinion of the Circuit Court of Appeals contains various more or less doubtful *dicta* but the point actually decided was sound. In that case rival city directories were

§ 1172 Copying for verification.

13—See § 1183.

14—Kipling v. G. P. Putnam's Sons, 65 L. R. A. 873, 120 F. 631.

15—See §§ 1173-1183.

16—Ginn & Co. v. Apollo Publishing Co., 215 F. 772 (an instructive opinion).

17—140 F. 539, rev'g 134 F. 890.

involved. After the publisher of the second had completed its canvas, it checked up its list of names with those in plaintiff's publication, as it concededly, had a right to do,[18] and copied the names not turned up by its canvass, upon slips of paper which it turned over to canvassers for verification. Some were verified and some were not. The reproduction of the latter was an infringement which certainly exceeded the limits of fair use, constituted copying and necessitated judgment for the plaintiff.

This was entirely sound, as copying is copying, whatever its purpose. As for the *dicta*, the *dicta* and decisions to the contrary in the Second Circuit[19] appear based upon sounder legal principles. The decision illustrates the narrow distinctions which obtain in this class of cases, as the Court was much influenced by the initial physical copying, where it could not well be denied that, if, instead of writing down the names for verification, the book had been cut up for that purpose, such cutting and distribution of resultant slips would not have been copying.

§ 1173
Instructing employees not to copy.

All these cases hold that merely instructing employees not to copy, if such instructions are violated, is no defense.

§ 1174
Fair use of motion picture films.

The physical uses to which copies of books may be put without infringement have been discussed. Interesting questions remain with reference to the physical use which may be made of other copyrighted articles. A copy of a motion picture photoplay is only adapted for performance. Under present conditions the seller of such a film must be taken to intend that it will be performed, or run off, for profit in public. It may, accordingly, be used for that purpose and such use is not infringement.[20]

In the case of a printed drama, no such use is

18—Dun v. International Mercantile Agency, 127 F. 173.
19—See §§ 1145, 1152, 1153.
20—Universal Feature Film Co. v. Copperman, 218 F. 578.

contemplated and mere purchase of a copy of a book would not give rights of public performance. In the case of music, the matter is more doubtful, as music is ordinarily played in public to a great extent, as well as in private. On the whole, however, it is deemed that, having due regard to existing customs, no right of public performance, for profit, accrues to the purchaser of a copy of a musical composition, in the absence of express agreement. This view is strengthened by the omission from the Act, as finally passed, of a proposed provision found in the early drafts of the Act,[21] that it should be requisite to print a reservation of the right of public performance on musical compositions, unless remedies for the prevention of public performance were waived. It has recently been held that when the proprietor of a musical copyright sells printed copies, the right of performing them publicly goes with them, and that rendition of the work by hotel orchestras is not an infringement, if no admission fee be charged. This decision,[22] however, was reversed on appeal upon the ground that such a performance was for profit.

§ 1175 Fair use of music: performance.

How far fair use may be made of a title is an open question, as various cases hold that there can be no copyright in a title[23] separately from the work to which it refers. These cases are founded on statutes which conferred copyright upon books, and are, hence, deemed inapplicable under the present statute, which covers "original writings," whether books, or not. However, even where the titles were

§ 1176 Fair use of titles.

§ 1177 Protection of titles under law of unfair competition.

21—Copyright Office Bulletin 12, § 14.

22—John Church Co. v. Hilliard Hotel Co., 221 F. 299, reversed, — U. S. — (N. Y. Law Journal, Feb. 2, 1917).

23—Maxwell v. Hogg, L. R. 2 Ch. 307; Kelly v. Hutton, L. R. 3 Ch. 703; Dicks v. Yates, 18 Ch. D. 76; Licensed Victuallers v. Bingham, 38 Ch. D. 139; Kelly v. Byles, 40 L. T. N. S. 623; Crotch v. Arnold, 45 Solic. J. 49; Broad v. Meyer, 57 Solic. J. 145. Contra, Mack v. Petter, L. R. 14 Eq. 431; Weldon v. Dicks, 10 Ch. D. 247.

held not subject to copyright, they are frequently protected on grounds akin to the law of unfair competition.[24] Thus, in one case,[25] the defendants were restrained from publishing the "Blue Bird Valse" upon the ground that the use of this title would reasonably lead to the belief that the music of the valse was taken from the score of a musical play called "The Blue Bird." But in another case,[26] an injunction was refused the publishers of "Punch" against use of the title "Punch & Judy," by a rival publication, on the ground it was not calculated to deceive; and the title "Charity" for a play was refused protection, where there was no unfair competition and the parties acted in good faith.[27]

§ 1178 Proprietory rights in titles resting in user.

The amount of such protection is always uncertain. The English cases[28] go on the theory of a common law proprietary right in the title, created by user, as distinguished from rights resting in principles of deceit or fraud.[29] The English cases hold even an innocent use of a title is actionable, if it has become another's by use and is calculated to cause a man of ordinary intelligence[30] to be deceived into believing he is buying one work, when he is buying another. That is, that it is not necessary to show fraudulent intent to restrain use of a misleading title, in a proper case.[31]

§ 1179 Wrongful passing off.

Furthermore, it has been said[32] to be a common law fraud to sell a work under the name and title of another man or of another man's work; and, in

24—Harper v. Holman, 84 F. 222; Estes v. Williams, 21 F. 189; Estes v. Leslie, 27 F. 22; Aronson v. Fleckenstein, 28 F. 75.

25—Elkin v. Francis Day & Hunter, London Times, Jan. 1910.

26—Bradbury v. Beeton, 21 L. T. N. S. 323.

27—Isaacs v. Daly, 39 N. Y. Super. (1 J. & S.) 220.

28—Ingram v. Stiff, 5 Jur. N. S. 947; Prowett v. Mortimer, 2 Jur. N. S. 414.

29—Borthwick v. Evening Post, 37 Ch. D. 449. See also Primrose Press Agency Co. v. Knowles, 2 L. T. 404.

30—Bradbury v. Beeton, 39 L. J. Ch. 57.

31—Clement v. Maddock, 1 Giff. 98.

32—Dicks v. Yates, 18 Ch. D. 76, 90 (semble).

another case,[33] publication of a work which purported to be continuation of another's work, though not purporting to be by the same author, was restrained, as tending to deceive purchasers.

§ 1180 Protection of works subject, or not subject, to copyright, under law of unfair competition.

Cases may arise where protection may be granted on principles of the law both of copyright and of unfair competition.

Thus, in one case,[34] early editions of a manual of musical instruction were in the public domain. There was a copyrighted fifth edition. The defendant compiled a work from the first four editions in the manner and form of the fifth edition, some of which he also copied. He was enjoined both on the ground of violating copyright and of unfair competition.

Various English decisions[35] gave protection to companies engaged in furnishing news, over telegraph tickers, upon equitable principles, distinct from copyright. The same result has been reached in the United States, copyright protection there having been judicially denied such matter.[36]

It is not deemed within the scope of this work to discuss the law of unfair competition at any length. A number of cases may, however, be mentioned to advantage, where the effort has been made, with varying success, to eke out the copyright laws by invocation of the principles of the law of unfair competition and allied branches of the law.

The doctrines of unfair competition apply to musical compositions.[37]

33—Hogg v. Kirby, 8 Ves. 215.

34—Hutchings v. Sheard, 1881 W. N. 20.

35—Exchange Telegraph Co. v. Central News Ltd., (1897) 2 Ch. 48; Exchange Telegraph Co. v. Howard, etc., Press Agency, (1906) 22 T. L. R. 375. The decision in Exchange Telegraph Co. v. Gregory & Co., (1895) L. R. 1 Q. B. 147, in so far as it granted relief on copyright grounds, may be deemed doubtful.

36—National Telegraph News Co. v. Western Union Co., 119 F. 294.

37—Chappell v. Sheard, 2 K. & J. 117; Chappell v. Davidson, 2 K. & J. 123.

§ 1181
Instances where such protection has been granted or refused in uncopyrighted works and titles.

A series of decisions have dealt with efforts to control the exclusive use of the words "Webster's Dictionary," after the expiration of the original copyright in that work in 1847.

In the first of these,[38] it was held that this title became public property, free for use by anyone, on the expiration of the original copyright. It was also held the words in question could not be protected, as a trade-mark and that no publisher could obtain the exclusive right to make a book of a certain form or size. But it was alleged that, a subsequent new copyrighted edition of the work was published in 1864, that the defendants made a cheap photo-lithographic copy of the 1847 edition, omitting the preface which contained its history, represented in their advertisements that their edition was a copy of one selling at a price descriptive of the 1864, and not of the 1847 edition, which was not only cheaper, but had long been out of print, and that the public was deceived thereby and the plaintiff damaged. It was held that the plaintiff had pleaded a cause of action for unfair competition.

In a subsequent suit,[39] it was said that attempts to protect literary property in books which have become *publici juris* upon the expiration of copyrights, must prove futile, but that there might be a commercial property in books, as well as a literary property, and that when a publisher has imparted peculiar characteristics to his products, which enables the public to distinguish them from other books embodying the same literary property and to recognize them as his products, he might, in a proper case, receive protection on principles of the law of unfair competition, although his copyrights had expired. It was, accordingly, held that an answer which did not deny that the word

38—Merriam v. Famous Show & Clothing Co., 47 F. 411.
39—G. & C. Merriam v. Straus, 136 F. 477.

"Webster's" had acquired a secondary meaning to distinguish plaintiff's product, was bad.

In a third case,[40] it was held that even though the title of a work has acquired such a secondary meaning, anyone might use it, despite any alleged principles of trade-mark, trade name or unfair competition to the contrary, provided that the public was unmistakably informed that it was not the product of the former copyright proprietor, and provided there was no unfair advertising or holding out of the work as the other's product. Putting the name of the second publisher on the back of the work and on its title page was enough to inform the public of its origin, even though the size and form of the two books were similar.

In a fourth case,[41] protection sought for the title was granted on principles "akin" to the law of trade-marks.

The long struggle for pre-emption of the title in question appears to have been ended, for all except the most incautious, by the recent decision rendered by the Supreme Court,[42] where protection was refused the plaintiff on principles of the law of trade-mark, and it was held that anyone, after the expiration of a copyright, might use any generic word, or name, by which the publication had been known during the existence of the copyright.

In another case,[43] the "essential portion" of a title was protected on principles of the law of trade-mark, even though this had theretofore been used by others than the plaintiff.

40—Ogilvie v. G. & C. Merriam Co., 149 F. 858. See also Glaser v. St. Elmo, Inc., 175 F. 276.

41—G. & C. Merriam v. Saalfield, 198 F. 369.

42—Merriam Co. v. Syndicate Publishing Co., 237 U. S. 618, 59 L. ed. 1148.

43—Harper v. Holman, 84 F. 225. See also Potter v. McPherson, 21 Hun (N. Y.) 559.

The word "Oxford," used in connection with Bibles, has been protected as a trade-mark.[44]

In the first of "The Chatterbox" cases,[45] one Johnston had published compilations for children, under that name, which had attained great popularity. He did not attempt to copyright his works. The defendant thereupon began to publish a similar series of works so like the first as to lead purchasers to think they were the same. Johnston assigned the exclusive right to use the name "The Chatterbox," in the United States, for ten years, to plaintiff. It was held Johnston had the right to be protected against unfair competition, by the defendant, that he could assign his rights to such protection, and an injunction was ordered accordingly.

In a subsequent case involving the same work,[46] the defendant showed that there had been laches in the application for an injunction, that the license to use the name was terminable at plaintiff's will and that the plaintiff had used the name for some time before he obtained the license. An injunction was accordingly refused him.

§ 1182 Proof necessary where protection granted.

It has been held[47] that there could be no injunction on grounds of unfair competition where there was no deceit, and that proof that the publication as to which complaint is made, is calculated to deceive the public and would probably injure the plaintiff, is essential to such an action.[48]

§ 1183 Limits of doctrine.

The limitations underlying the doctrine of unfair competition were forcibly illustrated in a case[49] where the plaintiff was shown to have published

44—Chancellor, etc., of Oxford v. Wilmore-Andrews Publishing Co., 101 F. 443.

45—Estes v. Williams, 21 F. 189.

46—Estes v. Worthington, 22 F. 822.

47—Fisher v. Seeley, 11 Sim. 581.

48—Borthwick v. The Evening Post, 37 Ch. D. 449; Walter v. Turner, 54 L. J. Ch. N. S. 1059.

49—Atlas Manufacturing Co. v. Street & Smith, 47 L. R. A. (N. S.) 1002, 204 F. 398.

uncopyrighted detective stories for a long period of time. They had various titles but were characterized by the general name of "Nick Carter," the principal personage in their action. The defendant had a scenario prepared, which appropriated neither the title, plot nor situations of any of the plaintiff's stories, and then had a moving picture film made from this scenario, which it called, "Nick Carter, the Great American Detective, Solving the Ten Million Dollar Jewel Mystery." The plaintiff had attempted to register the words "Nick Carter," as a trade-mark. Its registration was held bad, for technical reasons, but the Court deemed that even had it been good, it would have furnished no protection, as moving picture films and books are not in the same class of merchandise and that this was equally fatal to a claim of unfair competition. The Court further deemed that protection could not be given uncopyrighted works under guise of any doctrine of trade-mark or unfair competition. The Court, in an elaborate and instructive opinion, reviewed the authorities at length and came to the conclusion that in cases of literate works, the doctrines of unfair competition had been limited to cases of magazines, periodicals, newspapers, Bibles, dictionaries and works of like nature, where the name under which they went, had been used to designate productions of a given origin, for so long a period, that the only purpose of the use of the name by another could be to deceive the public.

In a very recent decision,[50] it was, however, held that where a play had been produced with success and a large expenditure, under the title "A Fool There Was," its proprietors could subsequently restrain the use of the same title in connection with a dissimilar motion picture, on the ground that the plaintiffs had acquired an exclusive proprietory

50—Klaw v. General Film Co., 154 N. Y. Supp. 988.

right in the nature of trade-mark and trade name in this title.

§ 1184 Separate acts of infringement.

That each sale of piratical copies, though on the same day, may be a separate act of infringement, is indicated by at least one decision.[51]

§ 1185 Breach of license as infringement.

If a limited license to copy, print, or perform a copyrighted work be given, it would seem any act exceeding that license would be both a breach of contract and an infringement, as with respect to such unauthorized proceeding, the licensee would not be a licensee, but in the same position as any other stranger.[52] Similarly, that an actor memorizes the lines of a play or learns its stage business, while in the employ of its proprietor, will, of course, give him no rights to use them after his employment terminates.[53]

In an English case,[54] electro-blocks of copyrighted designs were purchased from the copyright proprietor with a view to their use, for printing, by the purchaser. This was held to confer a license upon the purchaser to make such use of them, but that this implied license was non-assignable, and any one else purchasing the blocks from the original vendee and using them, was an infringer of the copyright.[55] This case may be contrasted with another decision,[56] where the proprietors of copyright in a painting gave a license to a publisher to publish reduced facsimiles of it in a catalogue, provided that acknowledgment of the license was printed on it. The defendants cut out the copies, mounted them on

51—Brooke v. Milliken, 3 T. R. 509.

52—Fenning Film Service v. Wolverhampton, etc., Cinemas, Ltd., (1914) 3 K. B. 1171; Duck v. Mayer, 8 T. L. R. 339; F. A. Mills v. Standard Music Roll Co., 223 F. 849.

53—Fleron v. Lacknye, 14 N. Y. Supp. 292.

54—Cooper v. Stephens, (1895) 1 Ch. 567.

55—See also W. Marshall & Co. v. A. H. Bull, Ltd., 85 L. T. N. S. 77.

56—Frost v. Olive Series Publishing Co., 24 L. T. R. 649.

cards and sold them. This was held not to violate any of the copyright proprietor's rights.

§ 1186 Licensee of joint proprietor.

If there be more than one proprietor of a copyright, any one may, it seems, give a valid license and such licensee could not be treated as an infringer by such of the copyright proprietors as had not joined in the license. The English rule to the contrary [57] appears, however, based upon sounder technical reasoning.[58] On the other hand, where there is a license, limited in its scope, such licensee cannot recover for infringement, in the absence of proof that the infringing copies fall within the scope of his license and were produced from his copies and not from the original.[59]

§ 1187 Proof requisite in action by non-exclusive licensee.

§ 1188 Who is an infringer.

Anyone who participates in an infringement is liable to the copyright proprietor for such infringement.[60]

§ 1189 Manufacturer of infringing film.

Thus it has been held that [61] the manufacturer of a motion picture film was an infringer, as well as the parties who actually performed it, since he, necessarily, knew it was intended for performance and his manufacture of it enabled that performance to be held. Knowledge, actual or imputable, appears essential, for the doctrine to apply.[62] An English case to the contrary [63] was based on the language of the English Statute involved, which fairly led to a result other than that reached in the Kalem case.

§ 1190 Seller of infringing play.

Unlicensed sale of an infringing copy of a drama, "with a view to its public representation," makes the seller a participant in causing the play to be publicly represented.[64]

57—Powell v. Head, 12 Ch. D. 686; Strahan v. Graham, 16 L. T. 87.

58—See § 694.

59—Lucas v. Cooke, L. R. 13 Ch. D. 872.

60—Baschet v. London Illustrated Standard Co., (1900) 1 Ch. 63; Belford v. Scribner, 144 U. S. 488, 36 L. ed. 514; Greene v. Bishop, 1 Cliff. 186; Stevens v. Gladding, 1 Curtis (U. S.) 608.

61—Kalem Co. v. Harper Brothers, 222 U. S. 55, 56 L. ed. 92.

62—Harper v. Shoppell, 26 F. 19. Cf. same v. same, 28 F. 613.

63—Karno v. Pathe Freres, 100 L. T. 260.

64—Daly v. Palmer, 6 Blatch. 256 at p. 271.

§ 1191 Employers.

A master is responsible for infringement by his employees on ordinary principles of, and in accordance with, the law of agency.[65] He is not liable to penalties, under statutes awarding these, unless he has knowledge, or expressly sanctioned, the infringement.[66]

§ 1192 Employees.

An employee would also be liable if he performed an infringing act and it would be no defense that he acted under his employer's instructions, as these could not give sanction to an unlawful act, nor would it be a defense to his employer that he disobeyed instructions.[67]

§ 1193 Disobedience, no defense.

§ 1194 Discretionary relief.

Discretionary relief may, however, be refused, where an employee is sued rather than a financially responsible employer.[68]

§ 1195 Joint and several infringement.

Frequently, various persons may each perform a part of an operation which results in an infringing work. Thus the printer of an infringing work would infringe the sole right of printing reserved to the copyright proprietor; the publisher, for whom he printed, would infringe the sole right of publication and the bookseller, who sold the resultant product, would violate the sole right of vending given by the Statute.

§ 1196 Proprietors of theatres.

This leads to the question whether the proprietor of a theatre is liable, as an infringer, if an infringing play is produced in his theatre by others. Under

§ 1197 English statutory rule.

the English act he is liable if he allows the use of the theatre for profit, "unless he was not aware, and has no reasonable ground for suspecting, that the performance would be an infringement of copyright."[69] This mild statutory liability is practically limited to cases of culpable infringement.

65—Monaghan v. Taylor, 2 T. L. R. 685. Cf. French v. Day, 9 L. T. R. 548.

66—Schreiber v. Sharpless, 6 F. 175; Taylor v. Gilman, 24 F. 632; McDonald v. Hearst, 95 F. 656.

67—Trow Directory Co. v. Boyd, 97 F. 586.

68—Stuart v. Smith, 68 F. 189.

69—British Copyright Act 1911 (§ 2) (3).

There is no corresponding provision in the United States Statutes and there are no American cases which discuss the question but, on the whole, it may be doubted whether the proprietor of a theatre, unless he participates in the acts constituting infringement, merely by reason of his ownership of the place where infringement takes place, incurs any greater liability than the owner of any real property in which an unknown or known act of infringement takes place, in which such owner does not participate.[70] In general, it would seem[71] that anyone would be held an infringer who either directly violates a copyright or, knowingly, provides the means for such violation and it is possible that facts might be adduced in an effort to hold the proprietor of a theatre where an infringing play had been performed, which might bring the matter within the doctrine of that case.

The result of the cases is, then, that anyone performing an act, or manufacturing an article, not necessarily infringing in itself, which can only result in infringement and is intended to be used for that purpose, is deemed to intend the necessary consequences of his acts, and is held to be a joint participant in such resulting infringement.[71a]

§ 1198 Evidence of infringement.

Evidence of piracy may be both direct and indirect. Since in the nature of things infringement, like all violations of rights, tends to secret ways, it is difficult to obtain direct evidence of copying. Indirect evidence is apt to be abundant and convincing. As to the latter, comparison tests piracy. Such comparison should be made primarily with the naked eye, in the case of works of art, or with the ear, in cases of musical compositions, since that which impresses the eye, or ear, as being substantially similar

§ 1199 Comparison.

§ 1200 Test of comparison.

70—Monaghan v. Taylor, 2 T. L. R. 685. Cf. French v. Day, 9 L. T. R. 548.

71—Kalem Co. v. Harper Brothers, 222 U. S. 55, 56 L. ed. 92.

71a—Gross v. Van Dyke Gravure Co., 230 F. 743.

to the material, original part of a copyrighted work, will be found to be an infringement.[72]

§ 1201 Expert evidence.

Compilations of alleged points of infringement may be made by experts, in written form, and introduced in evidence. When so received, however, they have no probative force, but are treated merely as aids to the Court, in the nature of statements of facts in the briefs of counsel.[73]

The Court, or other triers of the facts, must determine whether or not the fact of infringement is proven and the opinions of experts cannot be substituted for those of the Court.[73] It is not a question of whether persons skilled in the arts can differentiate the two works or consider them dissimilar, but of whether the ordinary reasonable man would do so.[74]

§ 1202 Sequence of ideas; as evidence of copying.

There may be such a sequence of ideas or language as to furnish internal evidence of copying.[75] It has also been held,[76] where there were no common errors

§ 1203 Identity, presumptive evidence.

present, that substantial identity, or striking resemblance between two works, created a presumption of unlawful copying, which must be overcome by defendant, his naked denial being insufficient to overturn the presumption.

§ 1204 Failure to bring later work down to date, as evidence.

The fact that in a later legal text book, subsequently decided cases were not cited, and attention was not called to reversals of decisions, mentioned in the earlier one, or changes in the law as laid down by it, was deemed persuasive evidence of copying.[77]

§ 1205 Parallel omissions.

It would seem[78] that omissions to treat certain

72—Falk v. Donaldson, 57 F. 32; Boosey v. Empire Music Co., 224 F. 146; Hein v. Harris, 175 F. 875.

73—Encyclopedia Britannica Co. v. American Newspaper Assn., 130 F. 460; West Publishing Co. v. Edward Thompson Co., 169 F. 833.

74—Hein v. Harris, 175 F. 875; Falk v. Donaldson, 57 F. 32.

75—West Publishing Co. v. Edward Thompson Co., 169 F. 833.

76—Encyclopedia Britannica Co. v. American Newspaper Assn., 130 F. 460; Haas v. Leo Feist, Inc., 234 F. 105.

77—White v. Bender, 185 F. 921.

78—Frank Shepard Co. v. Zachary P. Taylor Pub. Co., 185 F. 941.

topics or portions of topics in rival works might also, if marked, lead to a presumption of unlawful use.

§ 1206 Presumption of general copying from proof of partial copying.

Proof of the copying of one or more copyrighted cuts, is sufficient to support a finding that all the copyrighted cuts involved were copied, in the absence of a satisfactory denial or explanation, in connection therewith.[79]

§ 1207 Resemblance as evidence of copying.

Reference has been made to the unlikelihood of two independent thinkers formulating the same result in various classes of works covered by copyright. This unlikelihood may approach a moral certainty in the case of an epic or a great novel. From cases where original imaginative effort and a skilled use of words concur, the gamut of copyrightable works runs down to such depths as a list of battles, catalogues of utilitarian objects, tables of logarithms, or rehashes of works in the public domain, with a steady corresponding diminution of the unlikelihood of independent duplication. The question, then, as to how far mere resemblance should afford ground for a holding of infringement, depends in each instance upon the nature and quality of the copyrighted work. In many cases, where, for example, common materials are treated, resemblance is to be expected rather than to be deemed suspicious.[80] In other cases, the reverse is obviously true.

In a recent case,[81] a dramatic composition was based upon the conception that a young woman had a dual personality, one serious and conventional, the other frisky and highly unconventional. It was held a subsequent play based upon the same motif was not an infringement of the earlier one, where the material similarities were readily accounted for,

79—Da Prato Statuary Co. v. Giulani, 139 F. 90.

80—Pike v. Nicholas, 5 Ch. App. 251; Glaser v. St. Elmo, Inc., 175 F. 276.

81—Bachman v. Belasco, 224 F. 817.

both by reference to a common source and also by the fact that the motif would naturally suggest to each author similar situations.

§ 1208 Trifling resemblances.

An inference of copying cannot be raised merely because each work employs similar colloquialisms, or other inconsequential similarities.[82]

§ 1209 Reproduction of matter not in a common original.

A claim of independent dramatization from common sources was held, necessarily, to fail, where the work contained incidents, characters and scenes found in another version of it, which were foreign to the original work.[83]

§ 1210 Common errors.

One kind of resemblance, however, is almost invariably fatal to a defense of independent accidental reproduction. That is the ascertainment of common errors in both works. Their presence exceeds the limit of credibility. In rare cases, they may be accounted for on the score of errata, occurring in the original sources of information, or as likely to arise out of common efforts of the parties,[83] but, except in such very unusual instances, common errors, in the absence of satisfactory explanation, are, properly and necessarily, held to be conclusive evidence of copying.[84]

§ 1211 Effect of ascertainment of common errors.

In the nature of things, the number of errors in a work worth copying must be few. Extensive reproduction of such errors cannot be expected. On the other hand, where found, it is, accordingly, a legitimate inference that there has been copying of non-erroneous matter. Part of a work may unlawfully be a copy of another and the other parts not.[85]

§ 1212 Burden of proof to show what not copied, shifted.

The law is, accordingly, thoroughly well settled that if common errors be shown the burden is on the defendant to show, by clear and satisfactory proof, that the remainder of the later work was not

82—Bachman v. Belasco, 224 F. 817.

83—Simms v. Stanton, 75 F. 6.

84—List Publishing Co. v. Keller, 30 F. 772; Frank Shepherd Co. v. Zachary P. Taylor Co., 185 F. 941; Jewelers Mercantile Agency v. Jewelers Weekly Publishing Co., 155 N. Y. 241, 41 L. R. A. 846.

85—Story v. Holcombe, 4 McLean 306.

§ 1213
Effect of failure to meet burden.

copied.[86] In the absence of such proof, the whole work will be deemed infringing and, ordinarily, be subject to injunctive restraint.[87] The same rules apply where there is evidence that part of a non-imaginative work was pirated, although common errors are not shown.[88] If the defendant establish that portions of the work were not copied, these will be excepted from the injunction.

§ 1214
Non-imaginative works: same rule, though no common errors.

The rule was expressed, as follows, by Lord Eldon:[89]

§ 1215
Statement of foregoing rules.

> "If the parts which are copied, cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which does not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix the literary matter which belongs to me, he must be restrained from publishing the matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction which restrained the publication of my literary matter, prevents the publication of his own literary matter, he has only himself to blame."

§ 1216
Proof necessary to account for common errors.

Clear, convincing and satisfactory proof, preferably documentary, is essential to counterweigh the presumption of copying created by common errors.[90]

86—West Publishing Co. v. Lawyers Cooperative Publishing Co., 35 L. R. A. 400, 79 F. 756; Frank Shepherd Co. v. Zachary P. Taylor Publishing Co., 185 F. 947.

87—Lewis v. Fullerton, 2 Beav. 6. See also § 1408.

88—Lewis v. Fullerton, 2 Beav. 6.

89—Mawman v. Tegg, 2 Russ. 385.

90—List Publishing Co. v. Keller, 30 F. 772.

The original manuscripts,[91] notes, and other incidental, written tools, or adjuncts, to the production of the work, should be produced.[92] If the work was the product of more than one mind, each author should give direct, unequivocal and detailed testimony as to how far, if at all, common errors affect his share of the work.[93]

Instructions to employees to make personal investigations and not to copy would be no defense if disobeyed, although, it was said, such instructions would be considered on striking out the work of the dishonest employees only.[94]

§ 1217 Bare denials.

Bare sworn denials of copying, and assertion of original research, will not avail in the presence of such demonstrated common errors.[95] He who does not respect the property of others cannot be expected to respect the truth. Or, to put it another way, a full denial, not impugned by intrinsic, or extrinsic, facts nor the suppression of evidence, will, it seems, meet the plaintiff's prima facie case based upon such common errors, but mere denials, however full, will not avail, where the circumstances are such as to show some piracy by the deniers.[92]

§ 1218 Previous piracy.

Evidence of prior piracies on defendant's part is a circumstance, having force, to be considered in this connection.[96]

§ 1219 Insufficient capital.

So is patently insufficient capital for the task in hand, if legitimately conducted.[92]

§ 1220 Number of common errors needed for rule to apply.

Just how large a percentage of common errors must be shown for the rule to apply is not entirely clear. In one directory case,[96a] thirty-nine (39)

91—Hotten v. Arthur, 1 H. & M. 747.

92—Chicago Directory Co. v. United States Directory, 122 F. 192.

93—West Publishing Co. v. Lawyers Cooperative Publishing Co., 25 L. R. A. 441, 64 F. 360; Trow Directory & Printing Co. v. Boyd, 97 F. 586.

94—Trow Directory Co. v. Boyd, 97 F. 586.

95—Chicago Dollar Directory v. Chicago Directory Co., 66 F. 977; George T. Bissel Co. v Welch, 131 F. 586.

96—Park & Pollard Co. v. Kellerstrass, 181 F. 431; Jewelers Mercantile Agency v. Jewelers Publishing Co., 155 N. Y. 241, 41 L. R. A. 846.

96a—List Publishing Co. v. Keller, 30 F. 772.

errors in 2,800 names published; in another, 67 out of 6,000[97] and in a third, 12 names and addresses[97a] were held to put defendant to its proof. In another case,[97b] errors and other asserted instances of piracy, involving less than 1% of the subject matter, led to the same result.

On the other hand, it was held that where the trial Court had found as a fact that the proportion of infringing matter was "insignificant," as compared with the volume of independently acquired information, which was contained in the later compilation, which represented a great expenditure of time and money, an injunction would be refused, the plaintiff being remitted to a Court of law to recover such actual damages as could be proven.[98] The last cited case is based upon general equitable principles[99] and not upon any especial doctrine of copyright law.

§ 1221 Admission of use of copyrighted work.

The English Courts have been much influenced in such cases by consideration of whether the defendant has frankly avowed making some use of the prior work or not.[1] If use has been admitted, this has been deemed a factor in defendant's favor and if use has been denied, but some use deemed established to the satisfaction of the Court, this has been deemed fatal to defendant's case. So a denial by the defendant that he had done any copying, or that he had taken any ideas, or language from an earlier work, was held[2] inconsistent with a claim that he had made a fair use only of such work, where the

97—Trow Directory Co. v. Boyd, 97 F. 556.

97a—Trow Directory & Printing Co. v. United States Directory Co., 122 F. 191.

97b—West Publishing Co. v. Lawyers Cooperative Pub. Co., 79 F. 756, 35 L. R. A. 400.

98—Dun v. Lumberman's Credit Association, 209 U. S. 20, 52 L. ed. 663.

99—See also Record & Guide Co. v. Bromley, 175 F. 156.

1—See Spiers v. Brown, 6 Weekly R. 652; Wilkins v. Aiken, 17 Ves. Jr. 422.

2—Jarrold v. Houlston, 3 Kay. & J. 708.

Court found, that some of the ideas of the earlier work had been taken by him.

§ 1222 Proof of original to show copying.

It is unnecessary to produce the original copyrighted work to prove copying. The testimony of one who has seen it, is sufficient for that purpose.[3]

§ 1223 Burden of proof as to prior publication.

In an English case,[4] prior publication of the work or transfer of the title thereto to one other than the plaintiff, were held defenses to be proven by defendant, if possible. Similarly, if defendant asserts prior foreign publication as a defense to an action for infringement, the burden is upon him, not only to prove such publication, but that it was authorized by the proprietor of the work or his predecessor in interest, while he held title to it.[5]

§ 1224 Various defenses to infringement: use of new title.

Where a work was copyrighted under one title, but produced under another, this was held [6] to be no defense, to one who infringed with full knowledge of the facts, although it was intimated it might have been otherwise had there been absence of such knowledge.

§ 1225 Estoppel by conduct.

In an early case,[7] it was held that an author, who first published his work abroad, and, who instead of using due diligence to publish it in England, forebore doing so until some other person did so, "fairly and without blame," could not, at a distance of time, stop such publication, or treat its continuance as a piracy. This decision rests upon the theory that that cannot be made unlawful which was lawful when begun; but for this to apply, if sound, in the United States, the question must first be answered as to what the effect of a foreign first publication is,[8] as, if it is not equivalent to a domestic first publication, in any of its consequences, it would

3—Lucas v. Williams, (1892) 2 Q. B. 113.
4—Kenrick v. Danube Collieries etc. Co., 39 W. R. 473.
5—Shook v. Neuendorff, 11 N. Y. Daily R. 985.
6—Collier v. Imperial Film Co., 214 F. 27.
7—Clementi v. Walker, 2 Barn. & Cr. 861.
8—See § 736 *et seq.*

appear immaterial and the result of the case not law here.

A further defense to what otherwise would be infringement, may exist in the relations or contracts of parties to the controversy. Thus they may have precluded themselves by agreement from either attacking the validity of a copyright or from asserting rights against one another on principles of copyright law.[9]

§ 1226 Estoppel by contract.

Other questions of procedure and pleading in copyright causes are discussed elsewhere.[10]

Having now considered what constitutes infringement, the remedies provided against it, may be taken up, in their turn. We thus find a copyright proprietor whose work has been infringed is entitled:

§ 1227 The remedies for infringement.

Section 25 (Continued):

(A) To an injunction restraining such infringement.

§ 1228 (1) Injunction.

The general principles of equity apply. This subject is also covered by Section 36 of the Act, in connection with which the matter is discussed at length.[11]

An infringer is further liable

§ 1229 (2) Damages and accounting for profits.

(B) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the Court shall appear to be just, and in assessing such damages the Court may, in its discretion, allow the amounts as hereinafter stated, but in case of a

9—Widmer v. Greene, 14 N. Y. Daily R. 529.
10—See §§ 1316 *et seq.*, 1291 *et seq.*, 1229 *et seq.*, 1406 *et seq.*
11—See § 1404.

newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and in the case of the infringement of an undramatized or non-dramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of one hundred dollars; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in Section 5 of this Act, except a painting, statue, or

sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon or address, fifty dollars for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance.

§ 1230 Changes effected in prior law by section.

This subdivision makes radical changes in the prior statutory law [12] and cases decided under former Acts are, to a considerable extent, overruled. Under the prior Acts, damages as distinguished from profits, could not be recovered at Equity; [13] plaintiff was required to prove net profits, not merely gross receipts on sales; [14] and penalties were awarded only in cases where copies were found in the possession of the defendant, through judicial seizure,[15] prior to the institution of the suit for penalties.[16] This has all been changed by the present Act.

§ 1231 Monetary remedies.

A copyright proprietor now has three means of monetary compensation afforded him, where his rights are infringed.

§ 1232 Accounting for profits.

First. He may recover all profits made by the infringer as a result of such infringement.

§ 1233 Actual damages.

Second. He may recover his actual damages in addition to such profits, and

§ 1234 Amounts.

Thirdly. He may, in lieu of profits and actual

12—R. S. 4964, as amended by Act of March 3, 1891; R. S. 4965 as amended by Act of March 2nd, 1895.

13—Social Register Association v. Murphy, 129 F. 148; Stevens v. Gladding, 17 How. 447, 15 L. ed. 155.

14—Gilmore v. Anderson, 43 F. 267.

15—Bolles v. Outing Co., 175 U. S. 262, 44 L. ed. 156; Boston Traveller Co. v. Purdy, 137 F. 717.

16—Falk v. Curtis Publishing Co., 102 F. 967; aff'd 107 F. 967; Bolles v. Outing Co., 175 U. S. 262, 44 L. ed. 156.

§ 1235
Arbitrary or fixed damages.

damages, if he so elects, recover arbitrary, fixed damages, "not by way of penalty," as follows:

(a) In the case of paintings, statuary or sculpture, $10 per copy made, or sold by, or found in the possession of, an infringer;

(b) as to all works enumerated in Section 5 of the Act, not included in (a), $1 per copy found in the possession of the infringer, or made, or sold by him;

(c) in the case of lectures, sermons or addresses, $50 per infringing delivery;

(d) in the case of dramatic, dramatico-musical, choral or orchestral compositions, $100 for the first, and $50 for each subsequent, infringing performance; and

(e) in the case of other musical compositions, $10 for each infringing performance.

§ 1236
Limit of recovery of fixed damages.

Such arbitrary, fixed damages cannot be less than $250, nor more than $5,000, in any case, except that in the case of newspaper reproductions of copyrighted photographs, such arbitrary damages shall not in any instance exceed $200 nor be less than $50 and except further, that in the case of innocent infringement, by motion pictures, of a non-dramatic or undramatized work, such fixed damages shall not exceed $100. These limitations, however, do not apply to cases of infringement, after written notice.

§ 1237
Decisions holding the minimum fixed damage provisions not binding upon Court.

Various recent decisions appear, to take the view that even in cases of conceded infringement, where plaintiff seeks the fixed damages in question, the Court is not bound by the minimum amount. Thus in one case [17] six cents damages only were allowed where the injury to plaintiff was nominal, infringement had been discontinued, and no profits had been made by defendant directly from the infringement. The Court does not appear to have considered that if there had not been indirect profit in this infringe-

17—F. A. Mills v. Standard Music Roll Co., 223 F. 849.

ment, by increasing defendant's sales, the piracy would almost certainly not have been committed.

There is a *dictum* in another case [18] that the Court may go below even the minimum of fixed damages in making an award to plaintiff, if its discretion so decrees.

In a third decision,[19] the Court held that for the minimum damage clause of the Act to apply the plaintiff must show actual substantial damage, at least equalling $250, but that, if this is not done, the Court will disregard the minimum damage clause and fix its own measure of damages, arbitrarily, if it deems fit, in a lesser amount. If plaintiff can show "actual, substantial" damage, there is no need for him to invoke the provision as to fixed damages. He can then recover his actual damages. The provision was intended to cover cases, where such damage could not be proven.

§ 1238 Discussion of foregoing cases.

None of these decisions refers to the others, and none cites any authority for its conclusions. It is deemed, with all due respect, that they misapprehend the language and purposes of the portion of the section under discussion, and that they are erroneous. It is of course plain, that the Court, in its discretion, may refuse to give any fixed damages at all, under this section. But this is not the equivalent of saying that if it finds, after having exercised that discretion, that some fixed damage should be allowed to plaintiff, that it may transcend *either* of the limits fixed by this section, for the allowance of such damages. If it is not bound by the provision as to minimum, logically, it would not be bound by the provision as to the maximum allowable. There is no difference in the language used in either connection. It would scarcely be contended that the Court is not bound by the limitation fixed as to the maximum of such fixed damages and this is deemed destructive

18—Alfred Decker Cohn Co. v. Etchison Hat Co., 225 F. 136.
19—Woodman v. Lydiard Peterson Co., 192 F. 899.

of the asserted right to disregard the minimum provision. It is considered that, looking at the matter from the broad point of view which inspired this legislation, there is no injustice in this result. The minimum is low: the maximum, not over high. Cases doubtless will occur where adherence to the latter must work individual injustice. So instances where the former may do so must be expected.

Neither, however, furnishes any sound legal basis for ignoring the patent intention of Congress, and, in the long run, adherence to this, will, doubtless, result in reaching satisfactory results, when the general run of copyright litigation be considered.

§ 1239 Amount of actual damages recoverable unlimited.

The difficulty of proving actual damages in copyright cases is readily recognizable[20] but is diminishing with the spread of more liberal modern doctrines which allow the recovery of what a few years ago would have been regarded as purely speculative damages.[21] It is to be observed that while there is a limit as to the arbitrary or fixed damages recoverable under the statute, there is no limit as to the actual damages recoverable, if proven.

§ 1240 The measure of actual damages.

The actual damages recoverable are all the damages which are the direct result of the infringer's wrongful act.[22] In one instance,[23] it was held that the measure of plaintiff's damages was only for proven diminution of his sales up to the time of filing suit and not thereafter, since there was no competent evidence showing the number of infringing copies sold by the defendants and the profits realized thereon. In another instance,[24] the

§ 1241 Cost of production an element.

owner of unpublished pictures and designs suitable for advertisements recovered the cost of producing them, as damages, from an innocent infringer who

20—Brady v. Daly, 175 U. S. 148 at p. 154, 44 L. ed. 109, 112.

21—Hough, J., in Universal Feature Film Co. v. Copperman, 218 F. 580.

22—Brady v. Daly, 175 U. S. 148 at p. 154, 44 L. ed. 109, 112.

23—Chils v. Gronlund, 41 F. 145.

24—Mansell v. Valley Printing Co., (1908) 2 Ch. 441.

§ 1242 License value.

had purchased them in good faith from a surreptitious copier. In a third case,[25] the damage incurred for unlawful performance of a play was deemed to be the value of a license to use the play, at the time and place of its infringing performance. The comparative rarity of cases on this point is unquestionably due to the, ordinarily, superior remedial value of other procedure open to plaintiff.[26]

§ 1243 Accounting.

Relief, by way of an accounting for profits wrongfully obtained by infringement, was, even in the absence of statute, granted freely as incidental to a final injunction,[27] even where the occasion for the injunction had passed.[28] The entire net profits are awarded plaintiff in such a case.[29]

§ 1244 Net profits awarded.

§ 1245 Profits and damages distinguished.

While these profits are sometimes loosely spoken of as damages,[30] the inaccuracy of expression[31] is readily perceptible when cases involving, for example, cheap reprints of expensive works are considered, where it may well be the copyright proprietor had no facilities for reaching the public

25—Keene v. Wheatley, 4 Phila. 157.

26—The decisions which involve the conversion of works in which there is common law copyright and hold the measure of damages is their value to their owners, to be fixed in the sound discretion of the jury, may be consulted to possible advantage in certain cases. See Taft v. Smith Gray & Co., 134 N. Y. S. 1011.

27—Stevens v. Gladding, 17 How. 477; Fishel v. Lueckel, 53 F. 499; Falk v. Gast Lithographic Co., 54 F. 890; Dam v. Kirk La Shelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902.

28—Hartford Printing Co. v. Hartford Directory Co., 146 F. 332; Gilmore v. Anderson, 38 F. 846.

29—Pike v. Nicholas, 5 Ch. App. 260, reversed on another point, 5 Ch. App. 251; Social Register Association v. Murphy, 129 F. 148. In Muddock v. Blackwood, (1897) 1 Ch. 58, the actual proceeds of the sale of copies were allowed the plaintiff as damages with no allowance for the selling expense, apparently on the theory, as expressed in the argument of counsel, that the sale of infringing copies was a tortious conversion of the same, but the report of the decision is too brief to render it clear.

30—Delfe v. Delamotte, 3 K. & J. 581.

31—Social Register Association v. Murphy, 129 F. 148.

to which these appeal nor even a remote intention of essaying the task.

§ 1246 Defendant's actual, not plaintiff's possible, profits awarded.

Thus, in one case,[32] it appeared the copyrighted work was sold at $1.75 a volume. The profit on this was about 56c a volume. The infringing volumes were sold at 50c and 10c a volume respectively. The plaintiff contended he was entitled to 56c for each volume sold, that is what his profits would have been, had he sold a corresponding number of volumes of his edition. It was held, however, he could only, on accounting, recover the profits realized by defendant, on the basis of defendant's prices.

§ 1247 The contrary view adopted in England.

This case cites and attempts to distinguish the rule of damages announced in an English case,[32a] where the lower court said its view of the "damages" in cases of literary piracy was "that the defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's and to pay the plaintiff the profit which he would have received from the sale of so many additional copies."

§ 1248 Discussion of the two views.

The injury to the copyright proprietor by infringement, through copying, is the reduction of his potential market for the sale of copies. Since this is demonstrably limited in every case, although the precise limits cannot be ascertained, every sale made by an infringer, in theory at least, since the person so purchasing will usually not purchase again from anyone, prevents a sale by the copyright proprietor. But it is normally impossible to show conversely, that any such sale would have been made to any given person by the copyright proprietor. His copies may be far less attractive in form,—he, or his salesmen, much less persuasive or enterprising, his prices (since he may have to pay royalties and other honest charges) much less attractive than the infringer's. He probably never heard of the pur-

32—Scribner v. Clark, 50 F. 473.
32a—Pike v. Nicholas, 5 Ch. App. 260.

chaser of the piratical copy and whether or not he would ever have heard of him, is entirely a question of chance. To say, then, that he would have sold him a copy of his work, if the infringer had not done so, is to substitute mere chance for even a degree of probability. In the Scribner case, the Court deemed it improbable that as many copies of an expensive edition would have been sold as of a cheap one.

This may or may not be true in a given case. Value, and selling power, is not necessarily a matter of price and many works are caviare to the general, whether they are produced in cheaper form or not. If, however, the Court's view be deemed sound, it is merely additional conjecture added to the conjecture that even if the edition had been of equal price the copyright proprietor might not have sold as many copies as the infringer did. The Scribner case appears indistinguishable, on principle, from Pike v. Nicholas, the cases differing, if at all, only in degree. It is unnecessary, however, to attempt to determine which case is correct, as an exposition of the law of damages, if the language of both is not erroneous in confusing profits with damages.[33] The present Act sharply differentiates between the two but allows *both* to be recovered, as one recovery, in a proper case. It would scarcely be contended that on infringement, a double measure of profits could be recovered, to wit, defendant's actual, and plaintiff's conjectural, ones, based on the number of infringing sales and on plaintiff's cost and sales prices. The language of the section elsewhere shows the profits referred to are the defendant's profits and are to be calculated on the basis of his sales and cost prices, not upon plaintiff's.

§ 1249 Method of determining profits.

The general rule for accountings is to deduct from the selling price, the actual and legitimate manufacturing cost.[34] This rule makes no allow-

33—Cf. Social Register Association v. Murphy, 129 F. 148.

34—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547.

§ 1250 Stereotyping.

§ 1251 Salaries paid defendants.

§ 1252 Resales.

§ 1253 Profits on books, which infringe in part.

§ 1254 Cost of unsold copies.

§ 1255 Production cost of unsold copies.

§ 1256 Advertising receipts.

ance for the cost of making sales but it may well be questioned if this is not properly deductible, as was held in at least one instance.[35] The cost of stereotyping, where this is undertaken, since not a necessary incident of the printing and publishing of a book, the cost of editorial work on it and the amounts paid the defendants, as salaries, for their services in connection with the publication, are not deductible from the gross profits.[36]

Profits are recoverable on each sale of a book which is sold several times by the infringer, after being repurchased by him.[36]

If an infringing volume contain both copyrighted and uncopyrighted matter, the two necessarily go together on sale, being sold as a book, and not as fragments of a book, and, as profits result from the sale of the book as a whole, the owner of the copyright can recover the entire profits on the sale of such book.[37]

The cost of unsold volumes, which are not returned, or offered to be returned, to the copyright proprietor is not deductible.[36]

On the other hand, even though he does not sell all infringing copies printed by him, it has been held that the defendant is entitled to the deduction of all items comprised in the necessary cost of producing the infringing copies which would have been the same, irrespective of the number of copies sold, as for example, the expense of procuring copy, of obtaining type and cuts, and composition work in connection with the printing.[38]

If the defendant realizes money by his infringement, in addition to the sale price of copies, as for example, from advertisements inserted in his work, he must account for such moneys.[38]

35—Hartford Printing Co. v. Hartford Directory Co., 148 F. 470.
36—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547.
37—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547; Belford v. Scribner, 144 U. S. 488, 36 L. ed. 514.

§ 1257 Nominal profits.

Where the actual reasonable expense of producing the copies exceeded the gross receipts, the plaintiff was awarded the sum of six cents as profits.[38]

§ 1258 Discovery.

For the purposes of such an accounting, the defendant may be compelled[36] to produce both his books and papers, unless he make oath that these have been destroyed.[39]

§ 1259 Profits on infringement by performance.

The same rules obtain in the case of infringing performances. It has been held[40] that where such performances were spread over more than one theatrical season, the profits and losses should, in the absence of special circumstances, be calculated on the basis of each season, as a unit, so that losses incurred in a given season could not be charged against net profits of a different season. On such an accounting, the defendant is entitled to credit on the gross receipts all the direct expenses of presentation of a play, together with such a proportion of his general expenses, as is fairly to be appropriated to it. Under this rule, however, a defendant who is not the author of the infringing play, is not to be allowed royalties payable to the author, where the author has sold the play, nor anything for the use of the author's name, nor the whole purchase price of the play itself, but only the reasonable value of an exclusive license for the times of representation and, if a close corporation, not the salaries actually voted its officers but merely the proper proportional part of the reasonable value of their services. This case affords an illustration of the unfortunate effect the corporate fiction may have in cases of infringement, when contrasted with the opposite result reached in the case previously cited,[41] where the infringers were partners, not a corporation.

§ 1260 Calculation of profits, by seasons.

§ 1261 Proportion of overhead deductible from gross profits.

§ 1262 Miscellaneous items allowed, or not, on such accounting.

38—Hartford Printing Co. v. Hartford Directory Co., 148 F. 470.

39—Gilmore v. Anderson, 43 F. 267 (this case is not law on its main point under the present Act).

40—Dam v. Kirk La Shelle Co., 189 F. 842.

41—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547.

§ 1263 Commissions as profits.

Commissions earned by merchants who sold a pirated article for the publisher were held profits for which they were compelled to account.[42]

§ 1264 General equitable rules apply.

The general principles of equity apply to such accountings[42a] and in doubtful cases, patent decisions dealing with questions of accounting may be consulted with profit.[43]

§ 1265 Statutory rule as to method of proof on accounting.

Great difficulties of proof are avoided by the provisions of the Act requiring the plaintiff merely to prove actual sales to show profits, leaving it for defendant to prove such items of cost as he claims to be properly deductible from the gross sales. Prima facie, therefore, under the Statute, the profits recoverable on proven infringement are the moneys representing the defendants' gross sales. This while technically merely a matter of the burden of proof, since it had been held sufficient for a prima facie case to show selling price and the usual manufacturer's cost, leaving it for defendant, if not satisfied, to undertake the burden of proving his actual legitimate expenses[44] nevertheless, marks a substantial remedial advance in the law applicable to such matters.[45]

§ 1266 Fixed damages.

Cases will frequently arise, however, where actual damages cannot be proven legally and where there were no profits. The frequency of such cases has been suggested to have occasioned the first copyright legislation.[46] But while proof of damage is difficult, infringement almost invariably results in actual injury.[47] To meet this situation, copyright legisla-

42—Stevens v. Gladding, 1 Curtis U. S. 608.

42a—Haas v. Leo Feist, Inc., 234 F. 105.

43—"There is such an analogy between actions under the patent laws and actions under copyright laws that like rules of practice should be applied in both cases," said Lacombe, J., in Scribner v. Straus, 130 F. 389.

44—Myers v. Callaghan, 24 F. 636.

45—Cf. Gilmore v. Anderson, 43 F. 267 (overruled by section).

46—Millar v. Taylor, 4 Burr. 2303.

47—Fishel v. Lueckel, 53 F. 499.

tion, from the earliest times, has provided for penalties, which, as legislators became more experienced with judicial doctrines of construction, in the case of penal statutes, have been changed to arbitrary, or fixed, damages. These, as fixed in the present Act, are expressly stated not to be penalties, and, although such a statement is not controlling on the courts, the result indicated will probably be reached, if the matter comes up for actual decision. The fact that the award of such damages is, expressly, made discretionary and that any amount, within indicated minimum and maximum limits, may be awarded would appear to lead to this result.[48] The discretion contemplated is, of course, a judicial one and not a merely arbitrary or capricious action. The rules which guide the Court in such a case are set forth in a recent decision.[48a] Such damages, as distinguished from actual damages, appear recoverable in equity, as they are to be assessed by the Court, in "lieu of" accounting and damages. It may be doubted, accordingly, whether they may be recovered at law. This appears to change the prior rule that damages, as distinguished from penalties, were not recoverable in equity.[49]

§ 1267 Not penalties under present Act.

§ 1268 Award discretionary.

§ 1269 Judicial discretion.

§ 1270 Such damages recoverable in equity.

However, the Court may submit any question of fact in a suit for infringement, to a jury, for advisory action, or subject to setting the verdict aside, if it deem it unsatisfactory, as against the weight of evidence. It was so held with respect to issues of infringement and identity in one case,[50] and in another,[51] it was held that the Court may allow a jury to assess damages, within the prescribed maximum and minimum limits. The jury in such

§ 1271 Submission of question of damages to jury.

48—See Brady v. Daly, 175 U. S. 148, 44 L. ed. 109.
48a—Gross v. Van Dyke Gravure Co., 230 F. 412.
49—Chapman v. Ferry, 12 F. 693.
50—Maxwell v. Goodwin, 93 F. 665.
51—Mail and Express Co. v. Life Publishing Co., 192 F. 899.

cases appears to act merely as an aid to the Court by expressing its view on the facts.

§ 1272 Limits on award of fixed damages.

The limits put upon such fixed or arbitrary damages are general, except in case of infringement after written notice, where there is no limit, and in cases of newspaper reproduction of photographs, or of innocent infringement, by motion pictures, of undramatized or non-dramatic works.

§ 1273 After notice. Other exceptions.

§ 1274 Discussion of language of the special limitations.

It would seem that these exceptions, which appear arbitrary, should be strictly construed, from the very fact of being exceptions, in a section which Congress has studiously sought to render non-penal. Thus "newspaper" would not appear to include the usual magazine, pictorial, weekly, or similar periodical publications, even when largely devoted to commentaries on current events, as distinguished from narration of the events themselves. So an infringer by means of motion pictures who claims he was not aware that he was infringing an undramatized or non-dramatic work and could not reasonably have foreseen that he was infringing, should be held to very strict proof of diligent inquiry and good faith or much money may be earned with little compensation to the copyright proprietor. Whether "non-dramatic work" means non-dramatic in form or in essence, and whether undramatized work refers to all works in non-dramatic form or only to such literary works as are incapable of being put in that form, are questions that may well be left to the Courts.

§ 1275 "Newspaper."

§ 1276 Degree of proof of innocent infringement.

§ 1277 "Non-dramatic work."

§ 1278 The special limitation in the case of motion picture manufacturers.

Provision is made in the case of innocent infringement of a dramatic or dramatico-musical work, by a "maker" of motion pictures and "his distributing agencies," for a somewhat different exception to the general rules laid down by the Act. The effect of innocent infringement where there is an inadvertent or accidental omission of copyright notices from one or more copies is discussed elsewhere.[52] In every

52—See § 904 *et seq.*

other instance of infringement, each and every infringer is liable, personally, to the maximum limit of fixed or arbitrary damages, applicable to the particular infringement in question.[53] Since infringement is in the nature of a tort, the fact that an infringer acted as agent or employee for another, should be no defense to an action against him, if he personally actually participated in the infringing act.[54] This is in accordance with general rules of law and appears to follow from the express language of this section. It does not necessarily follow from this rule that more than one recovery may invariably be had in such a case of principal and agent, as in many instances, the law of joint tort feasors would apply. The exception under discussion is designed, apparently, to cover a somewhat different situation. If *A* duplicated a copyrighted film and sells a copy to *B*, he infringes both by copying and by selling a copy. *B* participates in neither act of infringement. If, however, *B* were to resell the copy he would infringe and *A* would not participate in *B's* infringing act. If *A* made a motion picture play from a novel or drama, he would not infringe by copying, although he might infringe rights of dramatization in the case of the novel. If he sold something that was not a copy, the bare fact of the sale would not be infringement; but if he must be taken to know the article so made and sold by him was made and sold in order to be used for public performance he would be an infringer, equally with the person who used the film for public performance.[55] It would seem, if analyzed, however, that his infringement and the infringement of the exhibitor are not on all fours. Whether the copyright proprietor could recover the maximum arbitrary damages separately, from each, even though the Court, in its discretion,

53—Gross v. Van Dyke Gravure Co., 230 F. 412.
54—See §§ 1188–1198.
55—See § 1189.

might deem this just, may be considered an open question. Such cases however, are not covered by the exception under discussion, which relates to makers of films, and their agencies for distribution, not for exhibition. What the word "agencies" means as used here, has not been decided, and the exact scope of this exception is hence not yet determined. For the rest, it would appear more in harmony with the evident intention of the Act to hold that several recoveries of maximum damages may be had in all cases outside of the exception noted, against all infringers in all cases where they are not strictly joint infringers, actors in one and the same infringing transaction. The discretionary power, afforded the Court by the Act, to refuse any such recovery, in any case, where it would deem its allowance unjust, would furnish the needed check on such doctrine. It has been held that the "infringement" for which discretionary damages lie is that conduct of the defendant which, being one act or many, which constitutes a connected and fairly unitary invasion of the proprietor's rights, and that only one recovery for such "composite" infringement is permissible, altho the acts constituting it occur at separate times, when separate parts of the work appear.[56]

§ 1279 Multiple recoveries of fixed damages.

§ 1280 Fixed damages cover all prior infringement, except of common law copyright.

For the purposes of the section, in applying the minimum and maximum of fixed damages, the recovery permitted must be deemed to be for all infringing acts, prior to suit. Such recovery would not apply, however, to cases where there had been infringement before the statutory copyright vested. In an early case,[56a] it was held that the taking out of a statutory copyright does not deprive an author of the right to sue for infringement of his common law copyright committed prior to publicatio:

56—L. A. Westermann Co. v. Dispatch Printing Co., 233 F. 609.
56a—Bouccicault v. Wood, 2 Biss. 34.

§ 1281
Only one award of fixed damages for one infringing act.

It has been deemed that the fixed damages can only be given once for a given act of infringement, no matter how many parties aggrieved thereby there may be. This seems sound and just.[57]

§ 1282
Limitations of section apply solely to arbitrary damages.

It is further to be observed that the exceptions, made in this section, which have been noted, do not apply to cases where a copyright propritor may elect to recover actual damages and profits. This follows from the grammatical structure, verbiage and evident intent of the section.

§ 1283
In connection with what copies penalties allowed under prior Acts.

Under former Acts, the penalties or fixed damages as the case might be, for which those sections made provision, were collectible only with respect to copies found in the possession of the infringer.[58] The Courts held this phrase meant found in the posession of the infringer, by writ of seizure or some similar process, prior to suit brought for the penalties or fixed damages in question.[59] The mere fact that they were actually in the possession of one of his employees was not enough,[60] and if he had been fortunate enough to sell them and get them out of his hands, the copyright proprietor was remediless. One case even went so far as to hold a copy purchased from an infringer was not found in his possession.[61] In another case, it was held that where simultaneous suits were brought, one for seizure and the other for penalties, the first rendered the latter premature.[62]

These rules were somewhat relaxed by later decisions.

Thus in one instance it was held [63] that under the

57—New Fiction Publishing Co. v. Star Co., 220 F. 994.

58—R. S. § 4965 as amended.

59—Thornton v. Schreiber, 124 U. S. 612, 31 L. ed. 577; Bolles v. Outing Co., 175 U. S. 262, 44 L. ed. 156, Hegeman v. Springer, 110 F. 374.

60—Thornton v. Schreiber, 124 U. S. 612, 31 L. ed. 577.

61—Child v. New York Times Co., 110 F. 527.

62—Falk v. Curtis Publishing Co., 102 F. 967, aff'd 107 F. 126; Child v. New York Times Co., 110 F. 527.

63—Stern v. Jerome H. Remick & Co., 164 F. 781.

prior statute, a writ of seizure and a summons might be obtained simultaneously and in another,[64] a writ obtained before the issuance of a summons was sustained.

§ 1284 The present law.

The present Act cures the difficulties which resulted from this interpretation of the law, as it provides for recovery not only for copies found in the infringer's possession but also for copies made or sold by him, or his agents, or employees.

§ 1285 Demand for damages.

No demand or refusal were held necessary to recovery penalties under R. S. 4965.[65]

§ 1286 Discovery to lay basis for fixed damages.

If the damages in question are held not to be penalties, an infringer, doubtless, could be compelled, by subpoena, to produce his books to show how many infringing copies he had made or sold. The rule was to the contrary in actions for penalties under former statutes.[66]

§ 1287 English rule as to who liable for penalties.

In an English case,[67] it was held that an author whose copyright was infringed was entitled to recover separate penalties from every infringer, principal or agent, master or servant.

§ 1288 Other cases under prior statutes.

Various decisions based upon the peculiar language of former statutes, appear to have no present importance. Thus in one case,[68] it appeared that a newspaper had been copyrighted as a book. It contained a cut or engraving, not copyrighted separately. There were two sections of the Revised Statutes 4964, 4965, which governed the award of damages and penalties on infringement. The first referred to books. The second referred to infringements taking place "after the recording of the title" of various other works including cuts or engravings. The one gave damages; the other, penalties. It was held that a defendant, who copied the cut or engrav-

64—Richardson v. A. C. Bosselman Co., 164 F. 781.
65—Hegeman v. Springer, 100 F. 374.
66—Johnson v. Donaldson, 3 F. 22; Chapman v. Ferry, 12 F. 693.
67—Baschet v. London Illustrated Standard Co., (1900) 1 Ch. 73.
68—Bennett v. Boston Traveler Co., 101 F. 445.

ing from the newspaper in question could not under the circumstances be held for penalties under R. S. 4965, although he could have been sued under R. S. 4964. In another instance,[69] the decision turned upon the fact that the statute gave penalties per "sheet" and not per copy, and, hence, only one penalty was awarded where 2,400 copies were printed on one sheet. In a third case [70] recovery was refused because the necessary judicial forfeiture had not taken place before the running of the Statute of Limitations. These cases are inapplicable under the present statute.

An infringer is further liable

Section 25 (Continued)

§ 1289 The third remedy for infringement.

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the Court may prescribe, all articles alleged to infringe a copyright;

§ 1290 Temporary or final, delivery up of infringing articles.

(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices or other means for making such infringing copies as the court may order.

§ 1291 Final relief.

The first of these subdivisions deals with interlocutory relief; the second, with final relief. The latter may be disposed of the more briefly. Delivery of articles found to be infringing may be made either to the plaintiff or to the marshal, for destruction, as the Court may order. Such articles are no longer forfeited to plaintiff, as under the prior Act. The "means" for making infringing copies, to which reference is had in the section, would appear to mean such apparatus as is peculiarly adapted to reproduce the infringing matter and not to include apparatus capable of innocent use. This subdivision of the law is constitutional [71] and largely declara-

§ 1292 Destruction of enumerated infringing articles.

69—Falk v. Heffron, 56 F. 299.
70—Wheeler v. Cobbey, 70 F. 487.
71—Universal Feature Film Co. v. Copperman, 206 F. 69.

tory, as a Court of Equity has been held to have inherent power, aside from statute, to order the destruction of infringing copies.[72]

§ 1293 Preliminary seizure of infringing copies.

The interlocutory relief authorized is very sweeping. The Supreme Court of the United States, pursuant to the requirement of the concluding paragraph of this section, has adopted certain rules of procedure and practice in connection with the administration of the section. Nine, out of the thirteen Rules so adopted, deal with the subdivision of the section under discussion. The Rules provide that upon the institution of suit, or thereafter before final judgment, the plaintiff, or his agent, or attorney, may file, with the Clerk of any Court having jurisdiction, an affidavit stating, "upon the best of his knowledge, information and belief," the number and location and value, as near as may be, of the articles alleged to infringe and a bond, executed by at least two sureties, approved by the court or a commissioner thereof.[73] The bond is to be at least twice the reasonable value of the articles sought to be seized, the specific amount to be fixed by the Court.[74] It is to be conditioned for the prompt prosecution of the action, suit or proceeding; for the return of said articles to the defendant, if they, or any of them, are adjudged not to be infringements or if the action abates or is discontinued before they are returned to the defendant, and for the payment to the defendant of any damages which the court may award to him against the plaintiff or complainant.

§ 1294 Practice.

§ 1295 The affidavit.

§ 1296 The bond.

§ 1297 Determination of damages on seizure bond.

In the only American reported case in point, where defendant was successful, the Court, after decision and prior to the entry of judgment, directed witnesses to be heard before it, on notice, upon the

72—Hole v. Bradbury, 12 Ch. 886.
73—Rule 5.
74—Rule 4.

question of damages.[75] The cause involved a motion picture photoplay and the damages awarded were the profits lost to defendant by reason of his being unable to exhibit the film after seizure.[76]

§ 1298 The writ of seizure.

Upon the filing of the affidavit and bond, and the approval of the bond, the Clerk issues a writ directed to the marshal of the District where the infringing articles are stated in the affidavit to be, which writ runs also generally to any marshal of the United States, directing such marshal forthwith to seize and hold such alleged infringing copies, subject to the order of the Court issuing the writ or of the Court of the District where the seizure is made. In practice, an order of the Court directing the Clerk to issue the writ and copies of the proposed writ prepared by the plaintiff's attorneys or solicitors should, in most districts, accompany the affidavit and bond to insure speedy action.

§ 1299 Nature of requisite affidavits.

The affidavits requisite are simple. The affiant who swears to the value of the alleged infringing articles, must show some experience tending to furnish a basis for his valuation of the infringing articles, but the affidavits as to infringement may be, and usually are, of the scantiest description.

§ 1300 Service of papers.

A copy of the affidavit, writ and bond are furnished, which the marshal serves, on making the immediate seizure required by the Rules.[77]

§ 1301 Exceptions to security and practice in connection therewith.

Within three days after the seizure, the defendant may file notice of exceptions either to the amount of the bond, or the sureties, or both.[78] Unless such exceptions are filed within the time stated, the sufficiency of the bond cannot be questioned. If the exceptions are sustained, the Court may order a new bond filed and that, if this be not done within a time

75—Universal Feature Film Co. v. Copperman, 218 F. 580.
76—See also Novello v. James, 5 De G. M. & G. 876.
77—Rule 5.
78—Rule 7.

named, that the property seized be returned to defendant.

Notice of justification of sureties must be given within ten days after notice of exception is filed.[79] If the defendant excepts to the bond, he may not thereafter, before final judgment, apply to the Court for the return of the articles seized.[80]

§ 1302 Application for return of seized copies.

If he has not excepted to the bond, he may make such application upon an affidavit containing proof that the articles seized are not infringing.[81] On such application, the Court may, in its discretion, and after such hearing as it may direct, order the return of the seized articles upon the filing of a satisfactory bond conditioned "for the delivery of said specified articles to abide the order of the Court."[82]

§ 1303 Bond.

§ 1304 Practice on such applications.

Since the whole object of the writ of seizure is to prevent the use of alleged infringing articles or facilities and such use, if the articles are returned, is not a breach of the bond required for their return, it would seem, that such return should only be ordered in the clearest cases,[83] upon strong and satisfactory proof of non-infringement. This is the general practice in the Second Circuit, although reported decisions are not to be found, and such applications, founded on affidavits alone, are almost invariably denied. On the other hand, since the Rules authorize a summary hearing, it would seem that if the real question at issue between the parties is one of law as to the validity of the copyright, much expense and loss might be saved by determining this question on such hearing, where there is no dispute as to the facts. Issues of fact, however, cannot, profitably, be disposed of on such summary hearings and where they are involved such applications should be denied.

79—Rule 8.
80—Universal Feature Film Co. v. Copperman, 206 F. 69.
81—Rule 9.
82—Rule 10.
83—Crown Feature Film Co. v. Bettis Amusement Co., 206 F. 362.

§ 1305 Amount of recovery by successful defendant.

From the analogies to be drawn from cases dealing with bonds furnished in other provisional remedy proceedings, it may be doubted whether a successful defendant can recover any damages sustained by him in excess of the bond, or bonds, furnished on the seizure. These considerations, however, give force to the view that upon a reasonable showing, the bonds furnished by plaintiffs who have seized defendants' goods, should be increased, freely and liberally, to protect such defendants against loss. No one who invokes the radical remedy of seizure can justly complain against such a rule and by its application some little injustice may be prevented.

§ 1306 Counsel fees costs, not damages.

Counsel fees where recoverable, are allowed as part of the successful party's costs,[84] not as damages within the meaning of that word,[85] as used in the bond for seizure.

Where a writ of seizure is vacated, defendant may recover the probable profits he has lost as a result of such seizure,[86] but where relief was refused plaintiff on the ground that his work was partially indecent, but infringement was proven, the defendant was not allowed the damages sustained by the issuance of a preliminary injunction in the cause.[87]

§ 1307 State replevin laws.

The procedure on seizure is not in the nature of replevin and State replevin laws do not apply to it.[88]

§ 1308 Attachments.

No attachment against property can issue in a copyright cause because the United States statutes limit its issuance to actions at law.[89]

84—See judgment in Universal Feature Film Co. v. Copperman, 218 F. 578.

85—Oelrichs v. Spain, 15 Wall. 211, 21 L. ed. 43; Ludberg v. Howard, 146 F. 467.

86—Universal Feature Film Co. v. Copperman, 212 F. 580. Cf. Novello v. James, 5 De G. M. & G. 876.

87—Broder v. Zeno Mauvais Music Co., 88 F. 74.

88—Rinehart v. Smith, 121 F. 148; Gustin v. Record Publishing Co., 127 F. 603; Hills & Co. v. Hoover, 142 F. 904; Richardson v. A. C. Bosselman & Co., 164 F. 781.

89—Dixon v. Corinne Runkel Stock Co., 214 F. 418.

Section 25 provides further that

Section 25 (Continued):

§ 1309
Remedies for infringement of musical copyright, by mechanical reproductions.

(e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the Court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in Section 1, *subsection (e) of this Act: Provided also, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this Act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the Copyright Office, sending to the Copyright Office a duplicate of such notice; and in case of his failure so to do the Court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by Section* 1, *subsection (e), by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.*

§ 1310
Discussion of sub-section.

There appear to be no reported cases construing this subsection. Its precise scope is not readily apparent. On its face, it appears to provide a

special class of remedies for infringement of musical copyright by mechanical means, in cases which would fall within the compulsory license system, and to exclude cases of such infringement from the general provisions with reference to infringement found in the preceding subdivisions of the Section. The subdivision has no application to cases of infringement, where the compulsory license system established by Section 1, subdivision (e), does not apply. Aside from the remedy by injunction contemplated by the Section, the Section, apparently, is drawn to permit the recovery of a sum not exceeding three times the amount of royalties due, plus such royalties, in lieu of profits and damages, if the infringer has not filed the prescribed notice of intention to rely upon the compulsory license system with reference to mechanical music records. If he has filed such notice of intention, and he infringes, he need only pay the royalties due, "in lieu of damages and profits." Since an accounting is incident to injunction, and since the royalties are due irrespective of this Section, under Section 1, it should not be difficult for a party aggrieved to determine which method of procedure against such an infringer will probably net him larger returns. This subdivision must be compared with Section 1, subdivision (e). In view of the grave doubt as to the constitutionality of the latter subdivision, it is deemed no good purpose can be subserved by an extended discussion of the present subdivision.

In conclusion, Section 25 provides that

Section 25 (Concluded):

§ 1311 Supreme Court Rules of Practice and Procedure under Section 25.

Rules and regulations for practice and procedure under this Section shall be prescribed by the Supreme Court of the United States.

The bulk of the Rules prescribed under this

§ 1312 Equity practice prescribed.

§ 1313 Profert of copies prescribed.

Section have been discussed.[90] The remaining Rules of importance include the first rule, which makes the existing rules of equity practice, so far as they may be, applicable in proceedings under this Section and the second rule, which requires copies of the copyrighted work and of the infringing work, where feasible, to accompany the petition or their absence explained. The latter requirements need not be observed in cases of infringement by performance or public representation or in cases involving sculpture or similar works, but compliance in other cases may be compelled on motion.[91]

§ 1314 Pleading in copyright cases.

There are a number of decisions which involve questions of pleading under various provisions of copyright acts, past or present.

§ 1315 Allegations essential to complaint or declaration.

Copyright, if asserted, must, of course, be pleaded.[92] It has been deemed essential to plead that the copyrighted work is the result of original, intellectual production, thought and conception.[93] A complaint must show that the person who took out a copyright was entitled to do so and owned the copyrighted work.[94] An allegation that the copyrighted work has been published, is essential in a complaint for infringement.[95] It has been held [96] a complaint for infringement of copyright must allege performance, in detail, of the acts which, by statute, are conditions precedent to the obtaining of a copyright and a mere general allegation that the copyright was taken out by plaintiff, previous to the publication of the work, in full compliance with the requirements of the laws of the United States, is

90—See § 1293 *et seq.*

91—Lesser v. George Borgfeldt & Co., 188 F. 864.

92—Stover v. Lathrop, 33 F. 348.

93—Falk v. City Item Printing Co., 79 F. 321.

94—Ford v. Blaney Amusement Co., 148 F. 642.

95—Bouccicault v. Hart, 13 Blatch. 47.

96—Trow City Directory Co. v. Curtin, 36 F. 829; Burnell v. Clow, 69 F. 993; Ford v. Charles E. Blaney Amusement Co., 148 F. 642.

insufficient, as a mere conclusion of law. An allegation that the plaintiff was "the author, inventor, designer and proprietor of a certain photograph and negative thereof, known and entitled" etc., was held sufficient without giving a detailed description of how the photograph was produced and although no copy was attached.[97]

§ 1316 Registration.

Pleading that a work was not duly registered, is a mere allegation of a conclusion of law.[98]

§ 1317 Originality.

An allegation that a song was "written or composed" by a given man is sufficient to satisfy the rule that there must be an allegation that the specific part of a work infringed was original.[99] It was said that, under the prior Act, no allegation was necessary in the complaint that books in which copyright was claimed, had been printed in the United States, but that if they had not, this was a matter for defense.[1]

§ 1318 Domestic manufacture.

§ 1319 Negativing license by co-owner.

In a State court decision,[2] it was deemed necessary in an action by one joint author only against an alleged infringer, to plead that the latter was not a licensee of any of the co-owners of the copyright.

§ 1320 Pleading proprietorship.

An averment that the plaintiff was the proprietor of a book prior to securing copyright, was held a sufficient allegation that he was the proprietor of an article and engraving therein.[3] This seems a very liberal rule to apply in compilation or periodical cases, where the precise reverse, is, actually and notoriously, frequently the fact.

§ 1321 Averments to recover fixed damages and as to jurisdiction.

It has been held,[4] in an action to recover penalties under R. S. 4965, that it was sufficient to plead generally that copies of the photographs were found, in the defendant's possession, within the Court's territorial jurisdiction. It was held unnecessary to

97—Falk v. Shumacher, 48 F. 222.
98—Collette v. Goode, L. R. 7 Ch. D. 842.
99—Henderson v. Tompkins, 60 F. 758.
1—Osgood v. A. S. Aloe Co., 69 F. 29.
2—Herbert v. Fields, New York Law Journal, May 20th, 1915.
3—Lillard v. Sun Printing & Publishing Association, 87 F. 213.
4—Falk v. Curtis Publishing Co., 100 F. 77.

aver what specific officer or agent of defendant, if a corporation, had them, or that the precise time when found be specified or that it be alleged that infringement continued, at the time suit was instituted.

§ 1322 Deposit or registration under present Act.

A bill under the present Act need not allege registration or entry of copyright, as this vests on the mere act of publication.[5] A decision to the contrary,[6] apparently failed to note the statutory changes involved. The case last cited is sustainable on the other points decided, however, that is, that the law remains unchanged, that an assignee must plead the facts, showing his right to copyright, and that facts showing that a work is copyrightable must also be pleaded.[6]

§ 1323 Assignees.

§ 1324 Alternative averments.

It has been held [7] that an allegation, *in the alternative*, that the plaintiff deposited or mailed copies to the Librarian of Congress was insufficient to tender an issue and rendered the bill of complaint bad.

§ 1325 Miscellaneous cases on pleading.

It has been held [8] that an allegation that the defendant did not copyright a work, was not the equivalent of pleading he had no copyright in it, since he might have obtained copyright by assignment.

It was unnecessary to plead the names of the employees who made an encyclopedia, in a bill brought by its "author and proprietor," a corporation.[9]

It was held unnecessary to plead affirmatively special facts [10] which might make an exhibition of a

5—National Cloak & Suit Co. v. Kaufmau, 189 F. 215.

6—Crown Feature Film Co. v. Levy, 202 F. 805.

7—Falk v. Howell, 34 F. 739. Cf. Scribner v. Henry G. Allen Co., 43 F. 680 (where it was held that where a complaint alleges both a mailing aud a filing of the copies required to be mailed or deposited, the plaintiff would neither be required to amend his bill by leaving out one of these allegations nor to elect upon which he would proceed); Brady v. Reliance Motion Picture Co., 232 F. 791.

8—Rigney v. Raphael Tuck & Sons, 77 F. 173.

9—Edward Thompson Co. v. American Law Book Co., 119 F. 218.

10—Werckmeister v. American Lithographic Co., 126 F. 244.

painting not a publication; these could be proven under a general denial of a plea of prior publication.

§ 1326 Validity of copyright at time of trial controls.

The Court may, in determining the validity of a copyright, take into consideration, facts affecting its validity which arise subsequent to suit, but prior to decree.[11] The normal equity rule in this respect governs such cases.[11]

§ 1327 Supplemental bill, under foregoing rule.

Thus, it has been held that a plaintiff might file a supplemental bill [12] alleging, if the facts warranted it, that subsequent to suit there has been further specific infringement of the same general character as that set forth in the original bill, and that, subsequent to suit, there has been a further assignment of copyright to plaintiff, in the nature of a confirmation or ratification of prior assignments under which it claimed title.

§ 1328 Joinder of causes of action.

It has been held not to be multifarious to join in one complaint, a suit based on copyrights in cartoons and in a play based thereon.[13] In another case [14] it was held that several causes of action for penalties might be joined in one bill of complaint.

§ 1329 Demurrer for want of originality.

Where the copyrightability of a given production is challenged for want of originality, the Court will rarely, if at all, determine this, on demurrer, by taking judicial knowledge of other prior works.[15]

In one reported instance,[16] however, a demurrer to a complaint charging infringement was sustained as to a copyrighted article, where by comparison of the original and alleged infringing works, both of which were filed with the bill, the Court deemed that the original, a description of a prehistoric animal, was evidently a compilation and had only been used to a fair extent. The demurrer was overruled, as

11—Record & Guide Co. v. Bromley, 175 F. 156.

12—Banks Law Publishing Co. v. Lawyers Cooperative Publishing Co., 139 F. 701.

13—Empire Amusement Co. v. Wilton, 134 F. 132.

14—Snow v. Mast, 65 F. 995.

15—Henderson v. Tompkins, 60 F. 758.

16—Lillard v. Sun Printing & Publishing Co., 87 F. 213.

to a picture or cut representing the animal which was part of both articles, even though the Court deemed it probable that it would appear, on final hearing, that this was not original with plaintiff. Where profert of a copyrighted work is made in a bill, it may be treated as part of the bill and examined on demurrer.[17]

§ 1330 Evidence as to originality.

In a leading case,[18] the Supreme Court, after pointing out that there is no provision in the copyright system for examination of works, prior to grant of copyright, as in the case of patents, says:

> "It is therefore much more important that when the supposed author sues for a violation of his copyright, the existence of those facts of originality of intellectual production, of thought and conception on the part of the author should be proved than in the case of a patent right."

§ 1331 Copyright, as evidence, of authorship.

In one case,[19] it was held a copyright was prima facie evidence, that he to whom it was issued was the author of the work involved and that the burden of proof to the contrary was on the defendant. No authority was cited for this ruling and it may well be doubted whether it is law.[18]

§ 1332 Proof of publication or non-publication.

It may be necessary for the plaintiff to prove publication of the work to show that he has a valid copyright. Where an assignee sues for infringement of copyright, the burden is on him to prove that his assignor was the author of the work and that neither the assignee, nor the author, published the paintings before copyright.[20]

On the other hand, defendant may seek to prove prior publication of the contents of a work, to prove that they were not copyrightable by plaintiff.

17—American Mutoscope etc. Co. v. Edison Mfg. Co., 137 F. 263.

18—Burrow-Giles Lithographing Co. v. Sarony, 111 U. S. 53, 59, 28 L. ed. 349, 351.

19—Reed v. Carusi, 1 Taney 73.

20—Bosselman v. Richardson, 174 F. 622.

§ 1333 Burden of proof as to fact that prior publication authorized by plaintiff.

The burden is on the defendant who claims a work was published, as a defence to infringement, not only to show it was published, but that this was done by authority of the proprietor.[21] In the latter case, there had been a publication of a French play in Austria by a person to whom the author had sold the Austrian rights of representation, but it was not shown that such person was authorized to do anything, save to perform the play.

In an unreported case,[22] the United States Circuit Court, in 1869, appears to have held that where it was shown pirated copies of a play were on public sale, this showing would shift the burden on the plaintiff to show they were not being sold with his assent.

§ 1334 Proof as to such prior publication.

Where the defendant seeks to prove prior publication of a work, in uncopyrighted circulars, newspapers or periodicals, etc., a copy thereof should be produced.[23]

A defense of prior publication is not made out in a musical copyright case, merely because a subsequent composer has borrowed, in general, from the style of his predecessor, unless there is substantial identity to the ear of the average person.[24]

§ 1335 Pendency of other action.

The pendency of a suit for penalties, was held to be a bar to one for an injunction.[25]

§ 1336 Injunction refused: profits awarded.

Even if an injunction be refused for laches, Equity may retain jurisdiction to award profits, in a case of proved piracy.[26]

§ 1337 Evidence of actual damage in action for penalties.

In a decision under the prior Act (27), it was held immaterial, in an action for statutory penalties, whether or not the plaintiff had suffered actual damages and, hence, evidence of the effect of the infringement on plaintiff's sales was excluded. A

21—Bouccicault v. Wood, 2 Biss. 208; Shook v. Neuendorff, 11 New York Daily Reg. 985.

22—Palmer v. McDonough. See Drone, p. 579.

23—See Da Prato Statuary Co. v. Giuliani, 189 F. 90.

24—Hein v. Harris, 175 F. 875.

25—Schumacher v. Schwencke, 25 F. 466.

26—West Publishing Co. v. Edward Thompson Co., 176 F. 839.

charge in an action for infringement,[27] under prior statutes, is reproduced, in extenso, in the opinion.

§ 1338 Joinder of parties.

In an English case,[28] it was held that the plaintiff cannot join persons not in privity with one another, as parties defendant, where separate and distinct piracies are involved.

§ 1338a Interrogatories.

Interrogatories under Equity Rule 58 in copyright causes are discussed in a recent case.[28a]

§ 1339 Judicial powers conferred.

Section 26. That any Court given jurisdiction under Section 34 of this Act may proceed in any action, suit, or proceeding instituted for violation of any provision hereof to enter a judgment or decree enforcing the remedies herein provided.

§ 1340 Joinder of remedies.

Section 27. That the proceedings for an injunction, damages, and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action.

§ 1341 Nature of action contemplated by Act.

These provisions refer to the judicial administration of the remedies for infringement provided by Section 25 of the Act.[29] The first section requires no comment. The latter section changes the previous law.[30] The Act contemplates one comprehensive action in Equity in a case of infringement. Whether an action at law may be brought to recover anything beyond actual damages may be considered doubtful, as the fixed or arbitrary damages, which are the only other item conceivably recoverable at law, by the express language of the Act, lie in the discretion of the Court and, hence, not of a jury.[31]

27—Springer Lithographing Co. v. Falk, 59 F. 979.

28—Dilly v. Doig, 2 Ves. Jr. 486.

28a—Rodman Chemical Co. v. E. F. Houghton Co., 233 F. 470.

29—See §§ 1227–1310 inclusive.

30—Trow City Directory Co. v. Curtin, 36 F. 829; Taft v. Stephens Lithographic Co., 3 L. R. A. 192, 38 F. 284. Cf. Schumacher v. Schwencke, 25 F. 466.

31—See §§ 1269–1271.

CHAPTER XVIII

CRIMINAL INFRINGEMENT

§ 1342
Criminal infringement.

Section 28. That any person who wilfully and for profit shall infringe any copyright secured by this Act, or who shall knowingly and wilfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the Court: Provided, however, That nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses, by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

§ 1343
Certain performances rendered non-infringing.

This section deals with two separate and distinct matters. First: It provides for criminal liability, in certain cases of infringement. Second: It legalizes certain otherwise unlawful performances.

§ 1344
Non-infringing performances of musical works for charitable or educational purposes.

The curiously inapt phraseology of the portion of the Section dealing with the latter is striking but its purpose is plain. The classes of dramatico-musical or musical compositions enumerated, if performed by any of the organizations enumerated, after having been obtained from any of the sources specified in the Section, will be no infringement of the copyright therein, if the performance be for educational or charitable purposes and not for personal pecuni-

ary profit. In view of the language employed in this connection, and the unpleasant consequences of infringement, it cannot be safely advised, however, despite the general reference to secular works of the character indicated, that any such secular works may be safely performed, under the permissive provisions of this Section, unless they are purely musical, as distinguished from dramatico-musical or dramatic works, or unless they may be characterized as "cantatas" or "octavo choruses."

§ 1345 Concerts for charity.

This portion of the Section is discussed in a recent case [32] where the Court said, by way of *dictum*, that it permitted high-class, religious and educational compositions to be performed, at public concerts, where an admission fee was charged, provided the proceeds were devoted to a charitable purpose.

§ 1346 Reproduction of copyrighted matter in school books.

The interest for musical education betokened by this Section emphasizes the omission, from the Act under discussion, of a provision similar to that found in the English Act, legalizing the publication, within carefully prescribed limits, of excerpts of copyrighted matter in school books.[33] It may be, however, that such a use might be deemed a fair one under the law of quotation.[34]

§ 1347 Nature of criminal responsibility for infringement.

The remaining portion of the Section deals with criminal liability for infringement. It is properly restricted to wilful infringement, which must also be for profit, for the Section to apply. Innocent infringers, or those who do not derive pecuniary, or other material, benefit from their violation of copyright, while they remain civilly liable for the consequences of their acts, do not come within this Section. It should also be noted that the Section does not apply to the case of infringement of musical copyrights by mechanical reproductions, specified in Section 25 (e).[35]

32—John Church Co. v. Hilliard Hotel Co., 221 F. 229.
33—British Copyright Act, (1911) § 2, IV.
34—See §§ 1134–1139.
35—See § 1309.

CHAPTER XIX

FALSE NOTICES OF COPYRIGHT

§ 1348
False notices of copyright.

Section 29. That any person who, with fraudulent intent, shall insert or impress any notice of copyright required by this Act, or words of the same purport, in or upon any uncopyrighted article, or with fraudulent intent shall remove or alter the copyright notice upon any article duly copyrighted shall be guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars and not more than one thousand dollars. Any person who shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country, or who shall knowingly import any article bearing such notice or words of the same purport which has not been copyrighted in this country, shall be liable to a fine of one hundred dollars.

§ 1349
Removal or alteration of copyright notices.

§ 1350
History of legislation dealing with false notices of copyright.

Section 4963 of the Revised Statutes, as originally enacted,[36] provided that any person who should insert, or impress, the notice of copyright prescribed in the Act, or words of the same purport, upon any article for which he had not obtained a copyright shall be liable to a penalty, half to go to the United States, and half to the person suing therefor. This provision was preserved in the amendatory Act of March 3, 1891. The latter Act was passed to overrule various decisions,[37] which had construed the pertinent earlier statutory provision. It extended the prohibition of the Section to insertion or impression of false claim of copyright on articles not subject to

36—Act of June 18, 1874.

37—See footnotes to this section.

copyright, made the knowing issuance, importation or sale of articles bearing false notice of copyright, unlawful, prohibited the importation of such articles and gave the Federal Courts jurisdiction to restrain violations of the Section by injunction, at the suit of any person complaining of such violation of the law.

§ 1351 Changes in law effected by present Act.

It should be noted that the present Act strikes out much of the remedial portion of the latter amendment and changes the prior law radically in other respects. It provides that a fraudulent intent on defendant's part must be shown. It changes the liability it imposes from a civil, to a criminal, responsibility. It strikes out the provision empowering the granting of injunctive relief. It provides a different fine for the person inserting or impressing a false notice, from that to which one renders himself liable, if he issues, sells or imports a work bearing such notice.

§ 1352 False notices on uncopyrightable matter.

In other respects, this Section restores the law, in large degree, to the condition in which it was prior to the amendment of 1897. Prior to the passage of that amendatory Act, it had been held that the affixing of a false notice of copyright to articles which could not be copyrighted, was not actionable.[38]

§ 1353 Notices on advertisements of works intended for copyright.

§ 1354 Affixation through third persons.

It was held[39] that there was a violation of the statute where notice of copyright was attached to an uncopyrighted cut or print which was an imperfect reproduction of an original painting, which it was intended to copyright. The fact that this was printed in a trade paper, as an advertisement of the painting, for trade purposes, and that the defendant did not physically insert or impress such notice, where he caused it to be circulated, thus publishing it, did not alter the situation. But there was no violation of the statute where the painting was copyrighted, although the cut or print of it, to

§ 1355 Prints of paintings.

38—Rosenbach v. Dreyfuss, 2 F. 217.
39—Rigney v. Dutton, 77 F. 173.

which the notice was affixed was not copyrighted separately.

§ 1356 Notices not on title page.

A false notice anywhere in a book violated the statute, its inhibition not being limited to notices on title pages.[40]

§ 1357 Notices by persons not entitled to copyright.

If an article was copyrightable, it was held[41] a violation of the statute to affix false notice of copyright, even though the author was not a person who could obtain copyright therein.

§ 1358 Single or separate violations of Act.

In one decision under the prior Act,[42] it was held that the printing of many copies of a work, bearing false notice of copyright, was a single continuous act, though done on different days and that only one penalty might be recovered, but where such copies, although otherwise identical, were printed in batches, each lot bearing the name of a different firm, for use as advertising matter by it, the printing of each such batch was a separate violation of the law.[43]

§ 1359 Cases under penal provisions of prior Act.

Pleadings in actions for such penalties were construed with great strictness. Thus where a complaint described a print, and showed it to be copyrightable, but alleged it was uncopyrightable, it was held that the latter allegation controlled and the complaint was bad.[44] Similarly, an allegation that defendant did not copyright the article on which he impressed the notice was held insufficient, as he might have obtained copyright in it by assignment.[44] The doctrine of these cases appears applicable to prosecutions under the present Act.

§ 1360 Foreign affixation of notice.

Since there is no extraterritorial effect to the statute, the affixing of a false notice of copyright abroad, was held to be no offense[45] but the importa-

40—Rigney v. Raphael Tuck & Sons Co., 77 F. 173.

41—Rigney v. Dutton, 77 F. 176.

42—Taft v. Stephens Lithographic Co., 3 L. R. A. 192, 38 F. 284. But see Hildesheimer v. W. & F. Faulkner, (1901) 2 Ch. 552.

43—Taft v. Stephens Lithographic & Engraving Co., 39 F. 781.

44—Taft v. Stephens Lithographic Co., 3 L. R. A. 192, 38 F. 284.

45—McLoughlin v. Raphael Tuck Sons & Co., 191 U. S. 267, 48 L. ed. 178.

§ 1361 Importation of forbidden works.

§ 1362 Form of notice forbidden.

§ 1363 Action on case for false claim of copyright.

§ 1364 Estoppel from false notice to deny publication.

§ 1365 Intent essential to violation of Act.

§ 1366 Removal or alteration of notices.

tion, knowingly of an article bearing such false notice, if the article is of a copyrightable nature, is within the present Act. The false notice, for the Section to apply, must be a notice which would be held a sufficient notice under the Act, if true.[46]

In an English case[47] it was said that a civil action might enure in favor of a copyright proprietor against one who made a false claim of copyright on the work in question, if this was so phrased as to be a statement of fact and not a mere conclusion of law.

A further possible consequence of affixing a false notice was illustrated by a decision holding that a party who affixes a notice of copyright to a work, estops himself from claiming that the work has not been published, even though the notice be false.[48]

It should be noted that there is no violation of this Section, unless a fraudulent intent in affixing the false notice can be proven, but that on the other hand, where such an intent can be shown, the removal or alteration of the notice is within the prohibition of the Section, equally with the affixing of a false notice. This represents a remedial change in the law.

46—Hoertel v. Raphael Tuck Sons & Co., 94 F. 844.
47—Dicks v. Brooks, L. R. 15 Ch. Div. 22.
48—Larrowe-Lorsette v. O'Loughlin, 88 F. 891.

CHAPTER XX

IMPORTATION OF INFRINGING AND OTHER COPIES

§ 1367
Importation of piratical copies or those bearing false notices forbidden.

Section 30. *That the importation into the United States of any article bearing a false notice of copyright when there is no existing copyright thereon in the United States, or of any piratical copies of any work copyrighted in the United States, is prohibited.*

§ 1368
Importation of copies not produced in accordance with manufacturing clauses of Act, forbidden.

Section 31. *That during the existence of the American copyright in any book the importation into the United States of any piratical copies thereof or of any copies thereof (although authorized by the author or proprietor) which have not been produced in accordance with the manufacturing provisions specified in Section* 15 *of this Act, or any plates of the same not made from type set within the limits of the United States, or any copies thereof produced by lithographic or photo-engraving process not performed within the limits of the United States, in accordance with the provisions of Section* 15 *of this Act shall be, and is hereby, prohibited: Provided, however, That except as regards piratical copies, such prohibition shall not apply*

§ 1369
Exceptions.

(a) To works in raised characters for the use of the blind;

§ 1370
Works for use of blind.

(b) To a foreign newspaper or magazine, although containing matter copyrighted in the United States printed or reprinted by authority of the copyright proprietor, unless such news-

§ 1371
Foreign periodicals, with authorized reprints.

paper or magazine contains also copyright matter printed or reprinted without such authorization:

§ 1372 Certain works in foreign tongues.

c) To the authorized edition of a book in a foreign language or languages of which only a translation into English has been copyrighted in this country;

§ 1373 Authorized copies, for individual use; for United States, or educational purposes.

(d) To any book published abroad with the authorization of the author or copyright proprietor when imported under the circumstances stated in one of the four subdivisions following, that is to say:

First. When imported, not more than one copy at one time, for individual use and not for sale; but such privilege of importation shall not extend to a foreign reprint of a book by an American author copyrighted in the United States;

Second. When imported by the authority or for the use of the United States;

Third. When imported, for use and not for sale, not more than one copy of any such book in any one invoice, in good faith, by or for any society or institution incorporated for educational, literary, philosophical, scientific, or religious purposes or for the encouragement of the fine arts, or for any college, academy, school or seminary of learning, or for any State, school, college, university or free public library in the United States;

Fourth. When such books form parts of libraries or collections purchased en bloc for the use of societies, institutions, or libraries designated in the foregoing paragraph, or form parts of the libraries or personal baggage belonging to persons or families arriving from foreign countries and are not intended for sale: Provided, That

§ 1374 Copies part of personal effects of travellers.

copies imported as above may not lawfully be used in any way to violate the rights of the proprietor of the American copyright or annul or limit the copyright protection secured by this Act,

and such an unlawful use shall be deemed an infringement of copyright.

§ 1375
Seizure and disposition of wrongfully imported copies.

Section 32. That any and all articles prohibited importation by this Act which are brought into the United States from any foreign country (except in the mails) shall be seized and forfeited by like proceedings as those provided by law for the seizure and condemnation of property imported into the United States in violation of the customs revenue laws. Such articles when forfeited shall be destroyed in such manner as the Secretary of the Treasury or the Court, as the case may be, shall direct: Provided, however, That all copies of authorized editions of copyright books imported in the mails or otherwise in violation of the provisions of this Act may be exported and returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury, in a written application, that such importation does not involve wilful negligence or fraud.

§ 1376
Joint Customs and Postal Rules to be made to prevent wrongful importation.

Section 33. That the Secretary of the Treasury and the Postmaster General are hereby empowered and required to make and enforce such joint rules and regulations as shall prevent the importation into the United States in the mails of articles prohibited importation by this Act, and may require notice to be given to the Treasury Department or Post Office Department, as the case may be, by copyright proprietors or injured parties, of the actual or contemplated importation of articles prohibited importation by this Act, and which infringe the rights of such copyright proprietors or injured parties.

§ 1377
Notice by injured parties.

§ 1378
Discussion of foregoing Sections.

Of the Sections just cited, Sections 30, 32 and 33 are sections which refer, generally, to all classes of

copyrighted articles, while Section 31 refers only to books.

It is readily apparent that since copyright statutes, save by treaty, can have no extraterritorial effect, an act which would be an invasion of the copyright if done in the country under whose laws a copyright is obtained, would be no violation of the proprietor's rights if done without such country.[49] Copies might thus be made of any work not protected by domestic copyright, without infringing foreign copyright. But unless some provision were made to the contrary, a copyright proprietor would be damaged by the introduction of such copies into the country issuing his copyright, as his potential market would diminish with each copy so introduced. This situation has been recognized by appropriate preventative legislation.

§ 1379 Copyright Act contemplates both private and public relief for wrongful importation.

Control over commerce and the gateways of a country is a governmental function. The necessary machinery for its supervision exists independently of copyright matter, but private activities may supplement its effective administration. While no express right is given copyright proprietors, to prevent the importation of any articles, infringing or otherwise, contravening private legal rights, and suitable provision is made, on the other hand, for governmental prevention of unlawful importation, it would seem that under Section 34 of the Act, appropriate relief may be granted the injured parties to whom reference is made in Section 33.

§ 1380 Copyright confers no exclusive right to import.

No exclusive right of importation is given the author, for this, if unlimited, in the case of books at least, would contravene the settled governmental policy of requiring printing and binding to be done in the United States.

The importation of all piratical copies of a work is forbidden. "Piratical" is synonymous with "in-

49—See §§ 1071–1074.

fringing," in the law of copyright,[50] and, in so far as appertains to copies, is defined in the Treasury Department Circular of July 17, 1911, as meaning "the printing, reprinting, publishing, copying, or reproducing, without authority, of the copyright proprietor, of an article legally copyrighted and upon which the copyright is still in force."[51]

§ 1381 Meaning of "piratical copies" in Sections.

"Piratical copies" cannot refer to copies piratical because of anything done abroad, as the Act can have no extraterritorial effect. The provision must, then, be deemed to mean copies which would be piratical had they been made within the United States, and to render such copies unlawful, if imported.

§ 1382 Importation of lawful copies.

Lawful copies of any work, except books, may be imported, without let or hindrance, by the copyright proprietor or otherwise, subject only to general legislation, such as tariff laws, etc., applicable to imports in their character of imports. Lawful copies of books, whether authorized by the copyright proprietor, or not, can only be imported, if they conform to the requirements of the manufacturing clauses of the Act,[52] save in the exceptional cases specified in Section 31. If imported for a lawful purpose, a copy of a book becomes infringing, if used for an unlawful purpose,[53] and the copyright proprietor has the same remedies with respect to it, as in any other case of infringement.

§ 1383 Use of lawful copies for unlawful purposes.

§ 1384 Law of place of importation, not purchase, governs.

The rights of the purchaser of books bought abroad and imported, depends on the law of the country into which he imports and not that of the place of sale.[54]

§ 1385 Sale of lawful imported copies, ren-

In a recent English decision,[55] it was held that even though the importation of mechanical music

50—See § 1051.
51—Regulation 2.
52—See §§ 829, 845, 851.
53—See Tuck & Sons v. Priester, 19 Q. B. D. 629.
54—Pitt-Pitts v. George & Co., (1896) 2 Ch. at 876.
55—Monckton v. Pathe Freres Pathephone, (1914) 1 K. B. 395.

dered unlawful by subsequent legislation.

records was lawful, when made, this would not prevent their subsequent sale from being unlawful after the passage of an act reserving the right to make such records to the proprietor of the copyright in the musical composition, placed upon such records.

The result of this decision appears harsh. Since no right was infringed when the records came into England, they were lawful property in the hands of their owner. If seems difficult to see how their status as such could be affected by subsequent legislation, without destroying their essential property characteristics. The United States Act contained a saving clause,[56] which obviated the possibility of a similar construction of the present Act, with respect to such records, but the same question might arise with respect to a copy purchased abroad and imported, before application for American copyright.

§ 1386
Unlawful importation, no bar to action for infringement.

A violation of Section 31 will not, it seems, necessitate the application of the doctrine that a plaintiff must come into equity with clean hands, so as to deprive a copyright proprietor of equitable relief.[57]

The Treasury Circular, a portion of which has been quoted, and the Joint Treasury and Post Office Regulations, governing the administration of these Sections of the law, are set forth elsewhere.[58]

§ 1387
Retroactive effect of Sections.

The Treasury Department, acting upon the opinion of the Attorney General of the United States,[59] has construed these Sections to apply to copyrights obtained both before, and subsequent, to the passage of the present Act. This is contrary to earlier Treasury Decisions,[60] but appears sound.

56—See § 134, Section 1 (e).
57—Bentley v. Tibbals, 223 F. 247.
58—See Appendix.
59—Treasury Decisions No. 30316.
60—Treasury Decisions No. 22781.

CHAPTER XXI

JURISDICTION IN COPYRIGHT CAUSES

§ 1388
Jurisdiction of United States Courts.

Section 34. That all actions, suits or proceedings arising under the copyright laws of the United States shall be originally cognizable by the Circuit Courts of the United States, the District Court of any Territory, the Supreme Court of the District of Columbia, the District Courts of Alaska, Hawaii, and Porto Rico, and the Courts of first instance of the Philippine Islands.

§ 1389
Subject matter of Federal jurisdiction.

The cases contemplated by this Section are those where the validity, or violation of copyrights, or other rights under this Statute, are themselves directly involved and not matters where copyrights are merely incidental to the litigation, as for example, actions involving contracts, the subject matter of which is copyrights. In the latter class of actions, the United States Courts would be without jurisdiction, if this were sought to be invoked under this Section, unless some point as to the validity of the copyrights, their scope or infringement, were involved.

§ 1390
Jurisdiction where complaints deny validity of copyrights.

Thus it has been held that the United States Courts have no jurisdiction in a case where the bill alleges that the plaintiff was the author of a song, that the defendant without his knowledge and consent copyrighted it and prays an injunction and a decree compelling the assignment of the copyright to plaintiff.[61] Similarly, where a copyright was held invalid, and the Court's jurisdiction was invoked under this Section, the bill must be dismissed for

61—Hoyt v. Bates, 81 F. 641.

§ 1391 Jurisdiction where validity of copyright, in doubt.

want of jurisdiction.[62] But a suit for infringement is within the jurisdiction of the United States Courts, although it incidentally involves questions as to the validity, interpretation and effect of a contract through which the complainant derives title, and the contract may be properly set out at length, in the complaint, for the purpose of showing such derivation of title.[63] Actions in a State Court which involve the title to copyright cannot be restrained in a suit brought for that purpose in the Federal Courts, if there is no charge of infringement.[64]

§ 1392 Action to restrain State Courts.

§ 1393 Exclusive jurisdiction, as to published works.

Where a work has once been published, State Courts have no jurisdiction to render relief either as to statutory or common law copyright claimed in it; but, otherwise, if unfair competition be shown.[65]

The jurisdiction of the Circuit Courts has now been transferred to the United States District Courts and the Act should be read accordingly.

§ 1394 Federal jurisdiction in unfair competition cases.

Of recent years, there has been a growing tendency to grant protection, where there is no valid copyright, on principles analogous to the law of unfair competition. Jurisdiction for this purpose, where it exists, must, however, be found outside of the provisions of the Copyright Act, under other provisions of the Judiciary Act,[66] such as diversity of citizenship, etc. If grounds for jurisdiction exist apart from the subject matter of the action, the Court can, of course, act.

§ 1395 Amendments to confer jurisdiction, for relief for unfair competition.

Leave was given the plaintiff to amend his complaint by inserting allegations necessary to give the Court jurisdiction of a cause, as an action for unfair competition, where the Court deemed that the facts necessary to give it jurisdiction in such an

62—Larrowe-Lorsette v. O'Loughlin, 88 F. 896.
63—Wooster v. Crane & Co., 147 F. 515.
64—Carl Laemmle Music Co. v. Stern, 209 F. 129.
65—Potter v. McPherson, 21 Hun 559.
66—Corbett v. Purdy, 80 F. 901.

§ 1396
Other jurisdictional amendments.

action existed, although not pleaded, and it had held that there was no infringement of copyright.[67] Jurisdiction will not be assumed under guise of amendment, in every case, however. Leave was refused the plaintiff to amend the complaint, in an action brought under the prior Act, for the seizure of infringing copies and plates, by inserting a claim for penalties, where suit for the latter was barred by the statute of limitations, upon the ground that these claims involved independent causes of action.[68]

§ 1397
Extraterritorial jurisdiction.

Extraterritorial jurisdiction would also not be assumed. Thus, in England,[69] it was held that an English Court had no jurisdiction to restrain infringement of a work outside of England, even though it had jurisdiction of the persons involved and no question was made as to the infringement.

§ 1398
Districts where suit may be brought.

Section 35. *That civil actions, suits or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found.*

§ 1399
Discussion of section.

This Section gives much needed flexibility to the Act. The summary nature of the preliminary relief available,[70] which is essential, if justice is to be done, in cases of infringement by persons not pecuniarily responsible, has been considered elsewhere.[71] By permitting suits or proceedings to be brought in any district in which any defendant, or his agent, is an inhabitant, or may be found, Congress has manifested its further appreciation of the frequent necessity for quick action in such causes, and remedied a conflict in the decided causes.[72]

§ 1400
Place of suit.

§ 1401
"Found."

"Found" in this Section would appear to mean,

67—Bureau of National Literature v. Sells, 211 F. 379.
68—Hills & Co. v. Hoover, 211 F. 241.
69—"Morocco Bound" Syndicate v. Harris, (1895) 1 Ch. 534.
70—See § 1289.
71—See § 1293 *et seq.* See also § 1406 *et seq.*
72—Lederer v. Ferris, 149 F. 251; Fraser v. Barrie, 105 F. 787.

found judicially, that is, present, personally or by agent, so that a writ may be served. The Section does not dispense with the necessity for personal service, as it applies only to jurisdiction, not to procedure.

§ 1402 Several defendants.

If there be more than one defendant, it would seem that suit may be instituted in any district, in which any one of the proposed defendants is an inhabitant, or found.

§ 1403 Service on agent, not an infringer.

Service of process on an agent who did not participate in the infringing act of his principal, made in a district other than that in which the infringement occurred, has, however, been held bad.[73]

73—Wagner v. Wilson, 225 F. 912.

CHAPTER XXII

INJUNCTIONS IN COPYRIGHT CAUSES

§ 1404
Injunctions.

Section 36. *That any such Court or Judge thereof shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said laws, according to the course and principles of Courts of Equity, on such terms as said Court or Judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this Act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other Court or Judge possessing jurisdiction of the defendants.*

§ 1405
Their service, scope and enforcement.

This section, in so far as it confers the power to issue injunctions, is a re-enactment of former R. S., Section 4970. Since the practice with respect to injunctions is, by express enactment, to be in accordance with the course and principles of Courts of Equity, the general principles of the law of Equity govern. These have been applied in a great variety of cases. Thus preliminary, or temporary, injunctions have been refused, where the plaintiff's rights were not clear;[74] that is, where there was, either, doubt as to the validity of the copyright,[75] as to the

§ 1406
When preliminary injunction refused.

74—Savage v. Hoffman, 159 F. 584; Hoffman v. LeTraunik, 209 F. 375; Sheriff v. Coates, 1 Russ. & My. 159; Lowndes v. Duncombe, 2 Coop. Ch. R. 216.

75—Savage v. Hoffman, 159 F. 584; West Publishing Co. v. Edward Thompson Co., 169 F. 833 (modified on other points, 176 F. 839).

title of the alleged copyright proprietor,[76] or of asserted infringement;[77] where the alleged piracies were trifling, in comparison with the amount of original matter in a work;[78] where the probable injury to plaintiff was small, and the loss to defendant would be great,[79] if an injunction issued; or where the plaintiff did not come into Court with clean hands.[80]

§ 1407 Effect of bare denials or claim of innocent reproduction.

Mere denials of the equities,[81] or a claim of independent innocent duplication,[82] if not resting in the probabilities, or corroborated by documentary proof,[83] will not defeat an application for an injunction.

§ 1408 Injunctions where presumption of general copying.

In cases where the presumption of general copying has arisen, as a result of unexplained mistakes, common to two works,[84] an injunction will issue embracing the entire infringing work,[85] with leave to the defendant to prove what is not infringing, if he can, and then obtain a modification accordingly.[86]

§ 1409 Dramatic infringement.

It has been said that temporary injunctions issue more freely in cases involving dramatic copyright than in other causes.[87]

§ 1410 Doubtful cases.

Many cases say that such injunctions will only

76—Lowndes v. Duncombe, 2 Coop. Ch. R. 216.

77—Photo Drama Motion Picture Co. v. Social Uplift Film Co., 213 F. 374; Howell v. Miller, 91 F. 129.

78—Record & Guide v. Bromley, 175 F. 156.

79—Dun v. Lumberman's Credit Association, 209 U. S. 20, 52 L. ed. 663.

80—T. B. Harms & Francis Day & Hunter v. Stern, 231 F. 744; Heine v. Appleton, 4 Blatch. 125.

81—Chicago Dollar Directory v. Chicago Directory Co., 66 F. 977.

82—Hein v. Harris, 183 F. 107; Chappell & Co. v. Fields, 210 F. 864.

83—Bobbs-Merrill Co. v. Equitable Motion Pictures Corporation, 232 F. 791. See § 1216.

84—See § 1210 *et seq.*

85—Encyclopedia Britannica Co. v. American Newspaper Association, 130 F. 460; aff'd 134 F. 831.

86—Williams v. Smythe, 110 F. 961; Park & Pollard v. Kellerstrass, 181 F. 431.

87—Chappell & Co. v. Fields, 210 F. 864.

issue in clear cases [87a] or where the Court is not in doubt, on the whole, either as to the law or facts.[88] It should be noted, however, that the modern tendency is to issue temporary injunctions more freely than in earlier times, and that each case, really, at bottom, rests upon its own peculiar facts.

§ 1411 Combination of facts leading to denial of preliminary injunction.

Thus, in one case, where infringement was conceded, the Court, in refusing a preliminary injunction, was influenced by the facts that the defendant was financially responsible, that the copyrighted work had been intended for gratuitous distribution, as an advertisement,[89] that, hence, no probable substantial damage to the work was shown, that the infringement was innocent [90] and that third persons, advertisers in defendant's publication, would have been affected by the injunction.[91] Reference is made to this decision solely to show how far combinations of circumstances may affect a decision, none of which, standing alone, could justify the result.

§ 1412 Ephemeral works.

Thus, it would appear, the ephemeral nature of the work would be a reason for granting,[92] rather than for refusing an injunction, and that the inability to show substantial damage, or profits, should also (in the absence of a case calling for the application of the doctrine of *de minimis*) lead to the award of injunctive relief.[93]

§ 1413 Inability to show substantial damage.

§ 1414 Breach of agreement as defense to preliminary injunction.

In another instance [94] the plaintiff had entered into a contract with an authoress by which she bound herself to furnish the manuscript of a proposed work and not to cause anything to be published

87a—See p. 513, note 74.

88—Benton v. Van Dyke, 170 F. 203; Nicol v. Stockdale, 3 Swan. 688; Littleton v. Fisher, 137 F. 684.

89—But see Farmer v. Elstner, 33 F. 494.

90—But see Chappell & Co. v. Fields, 210 F. 864.

91—Hansen v. Jacquard Jewelry Co., 32 F. 202.

92—Hildesheimer v. Dunn, 64 L. T. N. S. 452.

93—Farmer v. Elstner, 33 F. 494; Encyclopedia Britannica Co. v. American Newspaper Association, 130 F. 460; aff'd 134 F. 831.

94—Worthington v. Batty, 40 F. 479.

which might injure, or interfere with the sale of the work. He bound himself to publish this on a royalty basis and to use his best exertions and efforts to secure its speedy sale, etc. After he had ceased his efforts to push the work, and its sales had nearly or entirely, ended, the defendant published a copy, emanating from her, in a newspaper. On these facts, the Court, in its discretion, refused a preliminary injunction.

§ 1415 Injunction refused where no likelihood of passing off and amount of copying unsubstantial.

Where some infringement was shown, but the later book was not a copy of the earlier one, no great amount of original matter was copied, just how much was copied was in doubt, the parties appeared responsible, there was no proof that the later work was likely to supersede the former, nor that anyone would be misled into buying the later work, believing it to be the other work, a preliminary injunction was refused.[95]

§ 1416 Obsolete or unsaleable works.

Where a work from its nature becomes obsolete,[96] or unsalable,[97] during the suit, it was held no injunction would issue.

§ 1417 Innocent infringement.

While innocence in infringement is no defense to an action,[98] it may be considered, it seems, on the question whether a preliminary injunction should issue.[99]

Mere denials of knowledge that the work copied was copyrighted are, however, of course, no bar to an injunction.[1]

§ 1418 Trifling infringement.

That while ordinarily the doctrine of *de minimis* may be applied,[2] this is a circumstance affecting

95—White v. Bender, 185 F. 921.

96—Hartford Printing Co. v. Hartford Directory & Publishing Co., 146 F. 332.

97—West Publishing Co. v. Edward Thompson Pub. Co., 169 F. 833.

98—See § 1047.

99—Lawrence v. Dana, 4 Cliff. 1.

1—Chappell & Co. v. Fields, 210 F. 864.

2—Webb v. Powers, 2 Wood & M. 497; Baily v. Taylor, 1 Russ. & My. 73.

judicial discretion and not necessarily controlling, was shown in an English case,[3] where an injunction was granted against infringement where only one piratical copy had been sold and there was no evidence of the existence of any other.

§ 1419 Sale of single copy.

In various cases where infringement was proven, preliminary injunctive relief was refused, where monetary damages appeared adequate. Thus in a case where piracy was established, it was held that in view of the fact that the defendant was not attempting, in any way, to pass off his publication as the plaintiff's and this, a mercantile directory with credit standings and ratings, was of the class of works which rely for acceptance upon the reputation of their compilers and publishers, an injunction would only issue if the defendant did not file a bond to pay to the plaintiff all moneys, other than costs, ultimately decreed to him in the final judgment.[4]

§ 1420 Injunction refused in certain cases, where monetary damages adequate and bond filed.

In another directory case,[5] in spite of a strong showing made on behalf of the plaintiff, and that defendant failed to furnish the testimony of the canvassers whose work was attacked or the lists they made, it was held, nevertheless, that since awarding a preliminary injunction would, in effect, have determined the action and worked irreparable injury to the defendant, such injunction would be refused, on condition that a bond be filed, as well as monthly sworn statements of sale, giving names and addresses of purchasers.

§ 1421 Bond and sworn statements required to prevent injunction.

The Court may also make the denial of a motion for a preliminary injunction, contingent in a proper case, upon the giving of a boud for plaintiff's protection, if successful on final hearing, where it

§ 1422 Bond required, where plaintiff's rights doubtful.

3—Butterworth v. Kelly, 4 T. L. R. 430.

4—Ladd v. Oxnard, 75 F. 703.

5—Trow Directory Printing etc. Co. v. Boyd, 97 F. 586.

refuses the injunction because it is doubtful, on the evidence before it, as to plaintiff's rights.[6]

§ 1423 Consent to preference required, to prevent injunction.

In some cases the Court may even go further. Thus where the work alleged to infringe was of an ephemeral nature, appealed to the taste of a public other than that to which the copyrighted work was addressed, and the defendant was, apparently, financially, responsible, an injunction *pendente lite*, was suspended on defendant's giving an appropriate bond, filing statements of sales, and assenting to a preference of the cause for early trial.[7]

§ 1424 Delay in applying for injunction.

Mere delay in bringing suit, if less than the statute of limitations, will not bar injunctive relief,[8] where there is no proof of acquiescence, nor will failure to object to infringement do so, where there was no inducement to infringe, nor variation of liability by reason of plaintiff's acts.[9] Where, however, defendant can be said to have changed his position, in apparent reliance on inaction by the copyright proprietor, and the latter has, or should have had,[10] knowledge of the infringement, unexplained [11] delay in applying for injunctive relief, will lead to its denial.[12] Delay in the assertion of rights, coupled with probable damage to defendant, entirely out of proportion to any possible damage to plaintiff was deemed a ground for permitting defendant, in a case where, to a small extent, at least, similarity of language almost conclusively showed copying, to fill its contracts for the supply of its work, future sales being restrained and defendant required to give a

§ 1425 Laches.

6—Louis DeJonge & Co. v. Breuker & Kessler Co., 147 F. 763.

7—Boosey v. Empire Music Co., 224 F. 646.

8—Mawman v. Tegg, 2 Russ. 385.

9—Gilmore v. Anderson, 38 F. 846.

10—Lewis v. Chapman, 3 Beav. 133.

11—Buxton v. James, 5 De G. M. & G. 876; Mawman v. Tegg, 2 Russ. 385.

12—Baily v. Taylor, 1 Russ. & My. 73.

bond to keep account of prior sales, and to pay damages as finally awarded to plaintiff.[13]

Delay with knowledge that the defendant was altering his position and incurring heavy expenses in preparing for an operatic production, where defendant claimed a verbal license, and plaintiff admitted the pendency of negotiations for one, was deemed sufficient reason for refusing a preliminary injunction.[14]

§ 1426 Injunction, after infringement has ceased.

Infringement furnishes the ground for injunctive relief. That it has ceased, may take away the necessity for, but not the right to it.[15] The good resolutions of defendant may be confirmed by writ or judgment. Thus where copyright has been infringed, a promise not to do it again, is no bar to an injunction.[16]

§ 1427 Injunctions near, or after expiration of copyright.

A temporary injunction may issue although a copyright is soon to expire.[17] It seems a preliminary injunction may even be made permanent after the expiration of a copyright,[18] but such injunction, if granted should be so limited in terms, as not to foreclose the defendant from the exercise of any rights available to the public generally, after the expiration of the copyright.[19]

The doctrine of these decisions, is especially applicable where future wrongs may be prevented by injunction.[20]

§ 1428 Estoppel.

A copyright proprietor may preclude himself by his prior conduct, from applying for an injunction.

13—Encyclopedia Britannica Co. v. American Newspaper Association, 130 F. 460.

14—G. Riccordi & Co. v. Hammerstein, 150 F. 450.

15—West Publishing Co. v. Lawyers Cooperative Pub. Co., 53 F. 265.

16—Savory v. The World of Golf, (1914) L. R. 2 Ch. 566.

17—Sheriff v. Coates, 1 Russ. & My. 159.

18—West Publishing Co. v. Edward Thompson Pub. Co., 169 F. 833 (semble).

19—Dickens v. Lee, 8 Jur. 183 (semble).

20—West Publishing Co. v. Edward Thompson Pub. Co., 169 F. 833 (semble).

Thus, permitting various other third persons to infringe,[21] leaving a work for many years, without inquiry, in the hands of third persons, not in contractual privity with the owner,[22] or proof of facts creating an estoppel,[23] will prevent an injunction. Such conduct, however, may only deal with specific works, and furnish no basis for permissive general infringement. Thus a magazine proprietor who has permitted copying of stories out of it, for a period of years, may end this, for the future, at any time he sees fit.[24]

§ 1429 Limit of doctrine.

§ 1430 Threatened or anticipated infringement.

An injunction will not, it was held,[25] issue to stop a projected work, tho advertised, before actual printing and publication, but anticipated infringement may, in a proper case, be restrained.[25a]

§ 1431 Attempted vindication of legal rights at equity.

Some ground for the interposition of Equity must be shown in all cases. This follows from the language of the Section under discussion. In one case,[26] the plaintiff claimed that, by fraud and wrong, she had been deprived of the plates for publishing a manuscript and that this had been wrongfully published by defendants. She did not seek an injunction or claim any privity or contract between defendants and herself. It was held her only rights were at law and that she could not obtain an accounting. This decision would not appear, necessarily, to apply to cases of statutory copyright, but should be noted for its general bearing on the subject.

On a motion for a preliminary injunction, all dis-

21—Platt v. Button, 19 Ves. 437.

22—Southey v. Sherwood, 2 Merriv. 435 (The libellous nature of the work, Southey's "Wat Tyler," influenced the decision).

23—Rundell v. Murray, Jacob. 311.

24—Maxwell v. Somerton, 30 L. T. N. S. 11.

25—Brooke v. Chitty, 2 Coop. Ch. R. 216.

25a—Historical Publishing Co. v. Jones Bus, etc., Co., 231 F. 638.

26—Monk v. Harper, 3 Edw. Ch. 109.

puted, or doubtful, questions of fact must be resolved against the plaintiff.[27]

§ 1432 Disputed or doubtful facts.

A demurrable complaint will prevent a preliminary injunction.[28] The only allegations essential to confer jurisdiction upon the Court, in a bill seeking an injunction are, however, appropriate allegations showing that the plaintiff is the proprietor of a copyright and that it has been infringed by the defendant.[28a]

§ 1433 Essentials of bill of complaint for injunction.

The proof requisite to obtain a preliminary injunction where the copyrighted work is one dealing with common materials, was discussed in an English case.[29] It was there said the plaintiff's affidavits must satisfactorily show that the defendant's work was not produced by his own labor, employed on material and aided by information, common to him and to plaintiff but was, instead, actually copied, with perhaps colorable and evasive alterations, from plaintiff's work. To obtain a preliminary injunction, proof must be adduced that the work copied was a true copy of the copyrighted work.[30]

§ 1434 Essentials of affidavits to procure temporary injunction.

Under an earlier statute, it was held that while, on application for a preliminary injunction, it was essential for plaintiff to plead and prove that all copies of the copyrighted work issued by him bore the statutory notice, when they left his hands, separate, distinct and specific proof as to each copy was not requisite for purposes of a prima facie case but that a general allegation, and general proof, were sufficient for the purposes of such prima facie case.[31] This decision would probably be followed under the present Act, subject to the right of a

§ 1435 Proof as to notice of copyright.

27—Photo-Drama Motion Picture Co. v. Social Uplift Feature Film Co., 213 F. 374.

28—Ladd v. Oxnard, 75 F. 703.

28a—Photo-Drama Motion Picture Co. v. Social Uplift Feature Film Co., 213 F. 374.

29—Nichols v. Loder, 2 Coop. Ch. R. 217.

30—Humphreys Homeopathic Medicine Co. v. Armstrong, 30 F. 66.

31—Falk v. Gast Lithographing & Engraving Co., 40 F. 168.

plaintiff relying on the provisions of Section 20 of the Act, with respect to accidental or inadvertent omissions of notice, to frame his pleading and proof accordingly.

§ 1436 Proof of damage unessential to final injunction.

Final injunctions will issue even if there is no proof of damage,[32] as this presumed,[33] or even if there was no substantial damage[34] to the plaintiff, it seems, if infringement be established.

§ 1437 Infringing matter expungable, or separable.

Where the Court apparently deemed infringing matter in a work might be expunged, it issued a special injunction restraining the sale of matter so found to be infringing and not a general injunction.[35]

So where copyrighted matter was intermingled with uncopyrighted matter, an injunction issued on infringement should, it was held, only refer to the copyrighted matter,[36] but this is only true where the two are patently, and easily, separable.[37]

§ 1438 Interlocutory decree for injunction and accounting.

A decree awarding a final injunction and ordering an account, was held interlocutory, and hence not *res adjudicata* between the parties.[38]

§ 1439 Applications in aid of injunction.

While application may be made in aid of an injunction, to any court which would, under Section 34, have original jurisdiction at the time of application, if suit were desired to be brought in it rather than in the Court issuing the injunction, yet, proceedings to dissolve or modify the injunction, appear limited to the Court issuing it.

§ 1440 Dissolution or modification.

§ 1441 Persons entitled to injunction.

The question as to who is a person aggrieved, within the meaning of this Section, and hence entitled to injunctive relief, will now be considered.

§ 1442 Equitable proprietors.

In an English case, the equitable proprietor of

32—Reed v. Holliday, 19 F. 325.

33—See §§ 1057, 1063.

34—Black v. Henry G. Allen Co., 56 F. 764.

35—Sampson & Murdock Co. v. Seaver Radford Co., 134 F. 890; (rev'd upon another point, 140 F. 539).

36—Da Prato Statuary Co. v. Giuliani, 189 F. 90.

37—See § 1215.

38—Hills & Co. v. Hoover, 142 F. 904.

a copyright was permitted to sue for injunctive relief, in his own name.[39] This was independently of any special statutory language.

It has been held the holder of the equitable title in a copyright may sue in his own name, for infringement, where the holder of the legal title is one of the infringers and hostile to him.[40] In another case,[41] it was held that the holder of the legal title in a copyright could sue, although the beneficial ownership, or equitable title in it, were in another.

§ 1443 Joinder of legal and equitable proprietor.

Both the legal and equitable owners may join as co-plaintiffs.[42]

§ 1444 "Persons aggrieved" by infringement.

There are very few cases in the reports which deal with the question as to who can sue under the statute.

The term "person aggrieved" was used in the 5 & 6 Vict. c. 45 S. 14 and various English cases have construed it.[43]

§ 1445 "Person aggrieved" under English statutes.

It seems a "person aggrieved," within the English statute to which reference was just made, was one who showed that an act of which he complained was inconsistent with some right he set up in himself, or some other person, or that such act really interfered with some intended action on his part[44] and that his complaint was substantial.[45]

§ 1446 Maker of music rolls, not proprietor or assignee of copyright—a person aggrieved.

In an interesting matter,[46] decided in the District Court for the Western District of New York, it was held that the maker of music rolls which served mechanically to reproduce copyrighted music was a "person aggrieved," who could sue under this Section, where the music rolls were copied by a third

39—Mawman v. Tegg, 2 Russ. 385.

40—Wooster v. Crane & Co., 147 F. 515.

41—Hansen v. Jacquard Jewelry Co., 32 F. 202.

42—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618.

43—See Chappell v. Purday, 14 M. & W. 303; Ex parte Hutchins & Romer, 4 Q. B. D. 483; Ex parte Davidson, 18 C. B. at 311.

44—Grave's Case, L. R. 4 Q. B. 715, 724.

45—Same, at p. 721.

46—Æolian Co. v. Royal Music Roll Co., 196 F. 926.

person, although the plaintiff was neither the owner of the copyright nor, as far as appeared, even a licensee. The decision appears erroneous. This Section does not create causes of action, or even remedies, but merely machinery for enabling remedies, elsewhere conferred, to be enforced. While there was clearly infringement in the case under discussion, and while the plaintiff had been injured, it may be questioned whether any legal right, vested in the plaintiff, under the copyright laws, had been invaded, and unless it had, it would seem he had no cause of action under the Act. It may be the plaintiff was a licensee, either contractual, or by operation of law, and hence had a cause of action, but non-exclusive licensees cannot sue in all cases.[47]

§ 1447 Licensees.

§ 1448 Rights of non-exclusive licensee to sue for fixed damages and injunction distinguished.

It would seem quite clear that a non-exclusive licensee could not sue for arbitrary damages, on infringement, unless the copyright proprietor were a co-plaintiff, even though the licensee had an exclusive territorial license.[47a] This is for the reason that such damages would be general and enure, primarily, to the copyright proprietor. It does not follow, however, that a licensee cannot sue for an injunction without joining the licensor.

§ 1449 Limitation on rights conferred on persons merely because aggrieved.

It should be carefully noted that this Section which refers to "aggrieved parties," only deals with injunctions and that this phrase with its broad indefiniteness, does not, accordingly, refer to actions, or remedies, other than for, or by way of, injunction.

§ 1450 Right of licensee to accounting of profits.

Whether profits can be recovered by a licensee, would seem to depend upon the nature and terms of the license. If exclusive and perpetual, it would seem as if all the profits earned would naturally go to such licensee. If non-exclusive, it would seem that this cannot be deemed to be true, as, even if partially exclusive and partially non-exclusive, as, for example, on a limited territorial basis, it is impos-

47—Tully v. Triangle Film Corporation, 229 F. 297.

47a—New Fiction Publishing Co. v. Star Co., 220 F. 994.

sible, accurately, to estimate the damage which infringement in a given territory may cause in other territory. Similarly, if the license is not perpetual, present infringement, theoretically at least, may diminish the value of a copyright, in the future, beyond the period of license. Such considerations indicate the justice of requiring that a licensor be joined as a party to the suit, so that neither the licensee's, licensor's or defendant's rights be neglected but that these be all measured and determined in one suit.

§ 1451 Parties to action by licensee.

The proprietor of a copyright and his territorial lessee may join, as parties plaintiff, in suing an alleged infringer.[48]

§ 1452 Joinder of parties plaintiff in such cases.

In an action involving Charles Lamb's theretofore unpublished letters, it was held where both licensor and licensee were parties plaintiff, if either might sue, this would support a judgment against the defendant.[49]

§ 1453 Effect of joinder of licensor and licensee.

In an English case,[50] it was held that one who has given exclusive territorial rights in a play, on a royalty basis, cannot sue in connection with infringement in that territory, without joining the territorial proprietor as a party. An exclusive territorial licensee of common law rights, in an unpublished opera, was held the proper party to sue for infringement, in his territory.[51]

§ 1454 Exclusive licenses: action by licensor or by licensee.

Where registration was erroneously made in the name of a mere agent, as distinguished from a trustee of the copyright, for the benefit of the owner, it was held, this was a fatal bar to an action, which was not obviated by the real party in interest joining in the action as a party plaintiff.[52]

§ 1455 Erroneous registration incurable by joinder real proprietor, as co-plaintiff.

The proprietor of a copyright in an article, published under license by third persons, need not

§ 1456 Action by proprietor whose licensee had

48—Gaumont Co. v. Hatch, 208 F. 378.
49—McMillan v. Dent, (1907) 1 Ch. 107.
50—Tree v. Bowket, 74 L. T. 77.
51—Aronson v. Fleckenstein, 28 F. 76.
52—Petty v. Taylor, (1896) 1 Ch. 465.

published work.

publish it himself, to obtain standing to enjoin an infringer.[53]

§ 1457 Action by "assignees" of copyright who had covenanted not to multiply copies.

In a decision[54] rendered by the High Court of Justice, Chancery Division, it appeared the owners of copyright in a painting assigned the British copyright to the plaintiffs, on the plaintiffs' agreement that they would not reproduce the pictures without the assignors' consent. The Court held the assignees could not sue an infringer, without joining the assignors as parties, as plaintiffs' rights, —copyright without the right to reproduce,—were too limited, even though called copyright, to be deemed copyright at all.

§ 1458 Form of injunction.

As to the form of an injunction, broad language may be inserted in the writ or order where the copyrightability of a work is established but its precise character is doubtful. Thus in an English case,[55] the Court was doubtful whether a work was a book or picture, it having been copyrighted as both. It was, however, clear that an injunction should issue and it, accordingly, simply described this article as a "work" in its writ.

§ 1458a Cross-injunctions.

Cross-injunctions may issue as where defendant is infringing and plaintiff violating its implied agreement not to diminish the value of a license granted defendant.[55a]

§ 1459 Transmission of certified copy of injunction papers.

Section 37. That the clerk of the Court, or judge granting the injunction, shall, when required so to do by the Court hearing the application to enforce said injunction, transmit without delay to said Court, a certified copy of all the papers in said cause that are on file in his office.

53—Johnson v. George Newnes Ltd., (1894) 3 Ch. 663.
54—Landeker & Brown v. Louis Wolff & Co., 52 Solic. Jour. 45.
55—Hildesheimer v. Dunn, 64 L. T. N. S. 452.
55a—Harper Brothers v. Klaw, 232 F. 609.

CHAPTER XXIII

APPEALS

§ 1460
Appeals in copyright causes.

Section 38. That the orders, judgments, or decrees of any Court mentioned in Section 34 of this Act arising under the copyright laws of the United States may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases determined in said Courts, respectively.

The first of these Sections requires no comment. The second approximates the question of copyright appeals to appeals generally in the Federal Courts. Any extended discussion of this subject would be without the scope of this work, and the practitioner interested, is referred to the standard works on Federal Practice.

CHAPTER XXIV

LIMITATION OF ACTIONS

§ 1461
Criminal statute of limitations.

Section 39. That no criminal proceeding shall be maintained under the provisions of this Act unless the same is commenced within three years after the cause of action arose.

§ 1462
Limitations of time to sue in civil causes.

There is no limitation prescribed as to the time within which civil suits under the statute must be brought, so it would seem the statutes of limitations of the particular state where a cause of action under the Act arose would apply.[56]

§ 1463
Effect of expiration of copyright on pending litigation.

If, prior to final judgment, a copyright expires, it would seem that the only effect of such expiration upon a pending action would be to prevent the award of injunctive relief which would forbid the defendants from making such future use of the work, after it fell into the public domain, as anyone else was free to make. Except to this extent, the expiration of the copyright would, it seems, not affect pending litigation.

§ 1464
Proposed and prior legislation as to limitations.

The original drafts of the bill provided that all actions under the Act were to be brought within three years after accrual and R. S. 4968 provided for a two year limitation in cases of forfeitures and penalties. The latter Section is not applicable to the present Act.

56—McLaine v. Rankin, 197 U. S. 154, 49 L. ed. 702.

CHAPTER XXV

COSTS AND ATTORNEY'S FEES

§ 1465
Costs and counsel fees.

Section 40. That in all actions, suits, or proceedings under this Act, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the Court may award to the prevailing party a reasonable attorney's fee as part of the costs.

§ 1466
Prior law.

The first portion of this Section changes the prior law which made full costs mandatory only in actions at law.[57] Under the present Act, full costs are to be allowed to the successful party, whether the action is at law, or in equity, and whether monetary damages are recovered or not. This view is emphasized by a comparison of early drafts of this Section,[58] which were intended to limit it to actions where there was a monetary recovery, with the Section as enacted.

§ 1467
Full costs to successful party.

This absolute requirement has, however, in some cases, been overlooked, or ignored, by the Courts.[59] The plaintiff in one action [60] had brought suit in connection with two separate and independent musical compositions. He succeeded with respect to one: was defeated with reference to the other. Each party was allowed half costs. This decision, if sound, apparently distinguishes between successful, and partly successful, parties.

§ 1468
Decisions under present Act refusing, or cutting down, costs.

57—See Act July 8, 1870, § 108; R. S. Title 13, Ch. 18, § 972; Record & Guide Co. v. Bromley, 175 F. 156.

58—See Copyright Office Bulletin No. 12, p. 56.

59—Vernon v. Shubert, 220 F. 694.

60—M. Witmark & Sons v. Standard Music Roll Co., 221 F. 376.

§ 1469
Counsel fee discretionary.

Counsel fee, on the other hand, is only to be awarded, if the court deem fit.

In discussing this Section, Hough, J., said:[61]

"The counsel fee provided for in the copyright Act is merely a revival of old practice. I am not informed that it is known what reasons induced Congress to revive old practice in respect to copyrights only. Having therefore nothing but the text of the law to guide me, I do not regard the congressional provision as punitive and assume that the intent of Congress was merely to compensate counsel for professional labors. Consequently, I inquire not only into the extent of professional labor known to the court, but the importance of the litigation both as to the principle involved and the pecuniary magnitude of the case. In my judgment the professional labor in this matter was out of all proportion to the principle or the amount of money involved."

§ 1470
Fee to be compensatory.

§ 1471
Rules for determining amount.

§ 1472
Discussion of probable reasons for permitting award of such fees.

It would seem that the last remark by the Court indicates quite clearly the underlying reason that undoubtedly influenced Congress in the enactment of the provision under discussion. The amount of money frequently involved in copyright litigation, especially on the part of the defendant, is trifling. The expense of any litigation is considerable. Unless, therefore, some provision is made for financial protection to a litigant, if successful, it may not pay a party to defend rights, even if valid, a situation opposed to justice. The Act is designed to furnish summary and drastic relief to those whose rights have been invaded, but not to afford means of oppression, based upon extraneous financial considerations. It is increasingly recognized that the person who forces another to engage counsel either

61—Universal Feature Film Co. v. Copperman, 218 F. 580.

to vindicate, or defend, a right should bear the expense of such engagement and not his successful opponent. To mulct the successful party for asserting his legal rights, by judicial action, is an anomalous condition wherever it exists. It would seem, then, that counsel fees should be granted in all such cases, except where the result would work a palpable injustice.[62]

§ 1473 Counsel fees on appeal.

In the Copperman case, the lower Court allowed counsel $250. An application for an increased fee was made to the Circuit Court of Appeals, after affirmance, but denied, without opinion. Whether the Appellate Court deemed the application should have been made to the lower Court, or that the Circuit Court of Appeals was without power to grant the application, does not appear. That Court had previously expressed its satisfaction[63] with the lower Court's ruling on counsel fee, which was designed by the lower Court to be compensatory of the work actually done. Subsequently counsel in the litigation was compelled to oppose an application, in the Supreme Court, for a writ of certiorari. No further application for counsel fee was made, so that the total counsel fee allowed was $250. As this amount was necessarily intended by the lower Court to compensate counsel only for the work actually done to the date of its award, it would seem that further counsel fees should have been allowed, in conformity with the reasons advanced by the lower Court, in fixing the amount granted by it. It may be suggested that if a provision be inserted in the final judgment, giving the successful party the right to apply for further counsel fee, at the foot of the decree, if successful on appeal, that proceedings taken pursuant to such permission, might be conducive of a more equitable result.

62—Cf. Hene v. Samstag, 198 F. 359, where counsel fee was refused as "unfair" in the light of the record.

63—Universal Feature Film Co. v. Copperman, 218 F. 578.

§ 1474 Counsel fees on dismissal without trial.

Counsel fees have, since the rendition of the opinion cited, been allowed on dismissal of a bill of complaint without trial, in the Second Circuit, in at least two unreported causes.

§ 1475 Instances where plaintiff was allowed counsel fee.

Where the defendant put plaintiff's right to recover in issue in its answer, but conceded the right to some recovery on the trial, a counsel fee of $75 was allowed, although defendant successfully defeated contentions of plaintiff which, if sustained, would have increased the amount of recovery [64] and in a recent case $150 was allowed, because defendant contested the action.[65]

64—Strauss v. Penn Printing & Publishing Co., 220 F. 977.
65—F. A. Mills v. Standard Music Roll Co., 223 F. 849.

CHAPTER XXVI

PROPERTY IN PHYSICAL OBJECT COPYRIGHTED AND LAWFUL COPIES

§ 1476 The title to, and transfer of, material objects copyrighted and such copyrights.

Section 41. That the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

§ 1477 The transfer of lawfully acquired copies.

§ 1478 Declaratory nature of Section.

This Section of the Act is, in great part, declaratory of prior law. As has been shown elsewhere, what we call copyright, exists in the group of intellectual concepts which constitute a given work. It is not limited to physical reproductions of the work, whether these be copies, or the actual, or theoretical, original from which the copies are made. It is an intangible property right. The property in the copies, however, is in their tangible being. The rights in the first are measured by the statute. The rights in the latter are created by force of general rules of law affecting personal property in chattels. The two forms of right are distinct. The two classes of property are individual and not, necessarily, dependent or interconnected. This has been recognized from the period of the early beginnings of copyright.

§ 1479 The distinction between property in the object copyrighted and such copyright.

Thus in a leading case [66] it was held that the sale,

66—Stephens v. Cady, 14 How. 529, 14 L. ed. 528.

§ 1480 Rights acquired by purchase of copper plates on execution.

§ 1481 Rights on purchase of manuscript.

on execution, of a copper plate for printing a copyrighted map, conferred no right upon the purchaser to use it to print such maps, without the copyright proprietor's consent. The Court, incidentally, said that even the transfer of the manuscript of a book would not, at common law, carry with it a right to print and publish the work, without the express consent of the author, as the property in the manuscript, and the right to multiply the copies, were two separate and distinct interests.

§ 1482 Reduction of copyrights to satisfaction of proprietor's debts.

The opinion contains a *dictum* to the effect that while copyrights cannot be seized on execution, they may be reached by a creditor's bill in equity. This is undoubtedly the law,[67] and, by analogy from patent cases,[68] it would seem reasonably clear that under statutes such as those, in New York, regulating proceedings supplementary to execution, a copyright proprietor may be compelled to assign his rights to a receiver of his property, by appropriate proceedings under such statutes.

§ 1483 Title to instrumentality for making copies.

The question decided in Stephens v. Cady,[69] was re-examined, and re-affirmed, in a later decision.[70] In that case, the Court also said it was lawful for anyone to make, own, or sell the copper plate. The doctrine of these decisions has been re-affirmed[71] and has never been questioned.

§ 1484 Separate sales of painting and right to copyright it.

In a more recent decision, the Supreme Court held,[72] that an artist could assign the right to obtain a statutory copyright to one person, while selling the painting so to be copyrighted, to another. A writing stating that, for a given consideration, the author, an Englishman, "hereby transfers the copyright in my picture" (describing it), was there held to be a

67—Cf. Ager v. Murray, 105 U. S. 126, 26 L. ed. 942.
68—Barnes v. Miner, 3 Hun 703.
69—14 How. 529, 14 L. ed. 528.
70—Stephens v. Gladding, 17 How. 447, 15 L. ed. 155.
71—Patterson v. J. S. Ogilvie Publishing Co., 119 F. 451.
72—American Tobacco Co. v. Werckmeister, 207 U. S. 384, 52 L. ed. 257.

complete transfer of the intangible property rights in connection with the picture, although the physical work itself was sold to a third person.

§ 1485
The mere sale of work will not carry right to copyright it, with it.

The effect of this Section of the Act, when interpreted in the light of the decisions cited, is, then, to crystallize the rule, in statutory form, that the copyright in a work subject to copyright and the ownership of the work itself, in any material form, are separate and distinct properties and that, in the absence of express agreement, to the contrary, the mere sale of either property will not, necessarily, carry the other with it. This suggests the need for proper precautions in the purchase of works of art, for example, or future advertising, with more or less faithful reproductions of the work purchased, may harass and confound the amateur.

§ 1486
Effect of such sale, where author has not previously parted with right to copyright.

It is to be noted that the Section provides that the sale of the material object copyrighted shall not of itself constitute a transfer of the copyright nor *vice versa*. It would seem, however, that unless the author had parted with the copyright, sale of the original would, prima facie, at least, if made, voluntarily, by the author, carry the right to copyright it with it.[73] This would appear implied, as in consonance with ordinary custom and usage.

§ 1487
The rights of parties in such case, depend on facts.

The rule appears to be that what the rights of parties are, on a voluntary sale of a physical work, would be determined from the contract of sale and its attendant circumstances.[74]

§ 1488
The foregoing rules apply to copyrighted works.

This would appear equally true where a work had been copyrighted and the property in the physical reproduction of the work and of the copyright were in the same person. In an English case,[75] electro-blocks of copyrighted designs were sold, with a view

73—Dennison v. Ashdown, 13 L. T. 226; Parton v. Prang, 3 Cliff. 537.

74—Stephens v. Gladding, 17 How. 452, 15 L. ed. 157 (semble).

75—Cooper v. Stephens, (1895) 1 Ch. 567. See also to the same effect, W. Marshall & Co. v. A. H. Bull Ltd., 85 L. T. N. S. 77.

§ 1489 Sale of electro-blocks for printing: non-assignable license.

to their use, for the reproduction of such designs, by the purchaser. It was held this sale imported a license for such use but that this was not assignable, and that only the original purchaser could use the blocks for the purpose of printing from them.

§ 1490 Taxation of copyrights.

The distinction, to which reference is made in the opening portion of this Section, is illustrated by the law of taxation. Copyrights are not taxable by the States but the physical objects produced under a copyright are taxable.[76]

§ 1491 Attempted restrictions on resale of lawful copies.

The concluding portion of the Section provides that nothing contained in the Act shall be deemed to forbid, prevent or restrict, the transfer of a copyrighted work, the possession of which has been lawfully obtained. This is substantially declaratory of the law as laid down in such cases as Bobbs-Merrill Co. v. Straus.[77]

§ 1492 Such attempted restrictions, by affixing notices, ineffectual.

These decisions are discussed elsewhere.[78] In a typical case, where publishers of a copyrighted book printed a notice on the title page that the retail price was one dollar, that no dealer was licensed, to sell it for less and that any resale, if made for less, would be an infringement of copyright, such notice was held[79] ineffectual to give the publishers any rights against subsequent purchasers under the copyright laws. They having once sold the copies, as distinguished from parting with their possession and retaining title, had exhausted their statutory rights of sole sale and could not annex conditions to resales.[78]

§ 1493 Effect of Section as rendering such copies simply subject to general rules of law.

It is to be noted, however, that the language used in this portion of the Section, while apparently very broad, is limited, by the use of the words "lawfully obtained," to such an extent, that it may well be

76—People ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 71, 45 L. R. A. 126.

77—210 U. S. 339, 52 L. ed. 1086.

78—See § 165.

79—Bobbs-Merrill Co. v. Snellenburg, 131 F. 530.

deemed that the effect of this portion of the Section is simply to approximate questions of the devolution of title to copies of copyrighted works to the rules governing property generally and to deny any special rights, by virtue of the copyright laws, to the late proprietor of the copies, in connection with, or after, a transfer of the copies.

§ 1494 Limitation of authority of agents authorized to sell copies: the decisions discussed.

This appears to have been the law before the enactment of the Section. Thus in one case,[80] it appeared that a work was to be published by subscription. A canvass for subscribers was made by book agents who purchased copies, binding themselves, by contract, not to resell them to subscribers at less than the retail price. Some of their number, in violation of their contracts, agreed to sell at lower prices to the defendant, who, in turn, had agreed to resell to third persons in the regular course of trade. It was held that to entitle the plaintiff to injunctive relief, he must first show that the defendants had notice of the terms of the contract between himself and his agents, and that, in the absence of any notice of the contract, the defendant had a right to buy, or contract to buy, books from agents who lawfully obtained them by purchase from the plaintiff or his publishers and to sell such books at any price they saw fit.

In a subsequent case,[81] it appeared that books were sold to subscribers through agents only. One of the agents, on terms, which violated his instructions, sold to a dealer from whom the defendant, in turn, purchased. The evidence, although not over satisfactory, was that the defendant did not know that the copies purchased by him had been sold in the manner indicated. It was held that no title was conferred by the sale made by the agent in violation of instructions and that, since the books bore notice

80—Clemens v. Estes, 22 F. 899.
81—Henry Bill Publishing Co. v. Smythe, 27 F. 914.

of copyright, it was the defendant's duty, at his peril, to communicate with the copyright proprietor, before purchasing, to ascertain whether this was a second hand copy, which had been sold by authority, or what the agent's actual authority was. The defendant not having done this, an injunction was ordered and he was compelled to account for his profits. The Court distinguished the preceding case on the ground that there, there had been a sale to the agent and that the copyright proprietor could not limit the title so conferred by restrictions on resale. The Court's opinion is an elaborate one, contains some very sweeping language, partly unsound, and endeavors logically to demonstrate that the copyright proprietor's exclusive right to sell necessarily implies that an act done by an agent in violation of orders contravenes this right and that a sale made in this manner is not, in the absence of estoppel, such a sale as would divest the copyright proprietor's title to the copies, the mere possession of copies for the purpose of sale, not being deemed to raise such an estoppel.

§ 1495
The question discussed as to whether purchasers must ascertain agent's actual authority.

It would seem, however, that this decision takes an unduly sweeping view of a copyright proprietor's rights. The proprietor of any material object has the sole right to its sale; but the rule is universal that where a principal not only entrusts the possession of the property to an agent but also clothes him with the apparent power of sale, he will not be permitted to deny the agent's authority, as against third persons who have dealt with him in good faith and with reasonable prudence, unless the purchaser has notice of the lack of authority.[82]

The physical copies of a copyrighted work stand on the same basis as property generally and the general rules of law applicable to such property apply to such copies.[83] Apparent authority of an

82—See cases collected in 2 C. J. 594–5, 598.

83—See Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086.

agent of a copyright proprietor may be quite effectual to bind his principal.[84] There is no suggestion in any other decision that a prospective purchaser of a material object must ascertain the actual authority of the agent who is endeavoring to sell it, merely because it bears evidence that the work of which it is a copy was copyrighted and the case last cited,[84] as well as other decisions,[85] appear to involve the contrary proposition. The Court, in the case under discussion, evidently failed to distinguish the authority of an agent to bind his principal from his instructions.[86] Actual knowledge by a prospective purchaser that an agent was exceeding his instructions would, of course, give him no rights under the doctrine of apparent authority.[87]

§ 1496 The renting, mortgaging, etc., of lawful copies.

The word "transfer," as used in this Section, when coupled with the use of the word "possession," appears broad enough to include, not only cases where there has been an absolute devolution of title but also to comprehend, and hence permit, those lesser uses to which a proprietor may put his property in connection with third persons, as, for example, renting or mortgaging such lawful copies. The effect of this portion of the Section, then, is to put the owner of a lawful copy of a work upon the same basis as the owner of other chattel property, in so far as concerns its lawful use.

§ 1497 Provisions of Section preventative and confer no rights.

It should be carefully borne in mind, however, that the effect of this Section is not to legalize dealings with property not permitted by general rules of law, nor by valid contracts, but, simply, to prevent the invocation of the copyright law in such connection. Thus it is no defense to a suit for infringement that the plaintiff has violated either federal or state

§ 1498 Anti-trust Acts as affecting copyrights.

84—Authors etc. Association v. O'Gorman Co., 147 F. 616.
85—Harrison v. Maynard & Merrill Co., 61 F. 689.
86—2 C. J. 570.
87—Authors etc. Association v. O'Gorman Co., 147 F. 616 (semble).

anti-trust statutes,[88] but, on the other hand, the copyright Acts are no defense to proceedings under the Anti-Trust Acts.[89]

§ 1499
Possession of lawful copies gives no right to their physical reproduction.

It should also be noted that there is nothing in the Section which confers permission upon persons, other than the copyright proprietor, to invade, or infringe upon, the sole rights secured to him by the statute. In a relatively recent case,[90] it appeared that a copyrighted book was published in the United States from plates made and type set in this country. The plates were then taken by the proprietor to England and an edition was published there which, intentionally, omitted notice of the United States copyright. A copy was brought to the United States and there reproduced. It was held,[90] overruling the contrary opinion of the lower Court,[91] that although the foreign copy was a lawful one, its reproduction, in the United States was infringement.[92]

§ 1500
Lawful physical use of copies and infringement distinguished.

This decision is illustrative of the difference between lawful physical use of a copy of a work and illicit infringement of the work itself, by copying it. That the agency or facilities used, here the lawful copy, were lawful, will not prevent the act which comprehended the copying from being forbidden. The lawful copy is no securer basis for protected infringement that a lawful printing press, or a lawful painting brush would be, if used for copying. The copyright proprietor's property rights in the copy (which includes copyright) have ceased, when

88—Scribner v. Straus, 130 F. 389.

89—Bobbs-Merrill Co. v. Straus, 15 L. R. A. (N. S.) 766, 147 F. 15, aff'd 210 U. S. 339, 52 L. ed. 1086; Scribner v. Straus, 147 F. 29; Mines v. Scribner, 147 F. 927; Straus v. American Publishers Association, 231 U. S. 222, 58 L. ed. 192, L. R. A. 1915 A, 1099; Bauer et Cie. v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041, 50 L. R. A. (N. S.) 1185.

90—G. & C. Morriam Co. v. United Dictionary Co., 143 F. 354, aff'd 208 U. S. 260, 52 L. ed. 478.

91—140 F. 768.

92—This case should be contrasted with Bentley v. Tibbals, 223 F. 247.

it lawfully becomes the property of another, but this is not equivalent to saying that his right to protect his copyright had been in any way diminished, because a copy of the work had been permitted to come into the hands of another.

This decision should not be misunderstood, however. It applies only to cases where the copyright proprietor has affixed the statutory notice to copies sold in the United States, or has made sales abroad and had a pre-existing copyright in the United States. It does not apply to cases where he imports copies, printed abroad and sells them, without the prescribed notice of copyright,[93] not does it apply, necessarily, in the case of copies sold abroad, prior to copyright in the United States.[94]

§ 1501 What are copies "lawfully obtained."

What are copies "lawfully obtained" is a question which in no way depends on the copyright laws. An unlawful copy has been defined to mean a copy made without the consent of the copyright proprietor,[95] so that a lawful copy would appear to mean merely one issued by, or with the authority of, the copyright proprietor. Interesting questions can arise in this connection. If copies of a work are seized on execution, can they be resold against the copyright proprietor's will? It would seem under the decision cited,[96] and the language of this Section, that such a question should be answered in the affirmative, that is, that such copies might be resold, but not copied. If a copyright be renewed by the author, and not by the proprietor of the original copyright, it would seem the latter, even after the expiration of the original copyright, might sell copies previously printed, their possession having been lawfully obtained. This result was

§ 1502 Lawful copy defined.

§ 1503 Resale of copies seized on execution.

§ 1504 Sale of lawfully printed copies by owner of copyright after renewal copyright by author.

93—Bentley v. Tibbals, 223 F. 247.

94—See § 755; and cf. Clementi v. Walker, 2 Barn. & Cr. 861.

95—Lord Esher., M. R., in Tuck v. Continental Printing Co., 3 T. L. R. 826.

96—See §§ 1480-1483.

reached in English cases, in the absence of express contract to the contrary, where a copyright was sold and the seller had lawfully printed copies left in his possession[97] and also where a license had expired, with reference to copies printed during the license period.[98] Mr. Drone's view,[99] that lawfully printed copies might not be sold by an assignee, after the period of assignment passes, is now overruled by the enactment of this Section. It did not represent the English law.[98]

§ 1505 Similar sales of similar copies after expiration of license.

§ 1506 Sale of copies on foreclosure of artisan's lien.

If a printer print on credit and properly refuse to deliver without payment, it would seem that on foreclosure of his artisan's lien, the copies would come under the protection of this Section. It is to be noted that one who does the mechanical work of making copies for a copyright proprietor has no more right than a stranger, to make or sell copies in excess of those ordered, either for his own use, or for that of others than the copyright proprietor, but, as all property is held under, and only, by virtue of the law, a legal sale will divest the owner of his property in this, as effectually as a private sale would, although the uses of such property permitted to a purchaser might be different in the two cases.[1]

97—210 U. S. 339, 52 L. ed. 1086.
98—Howitt v. Hall, 6 L. T. N. S. 348.
99—See Drone, p. 339.
1—Stephens v. Cady, 17 How. 447, 15 L. ed. 155.

CHAPTER XXVII

ASSIGNMENTS, LICENSES AND OTHER TRANSFERS OF COPYRIGHTS

§ 1507
The transfer and mortgage of copyrights.

Section 42. That copyright secured under this or previous Acts of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will.

§ 1508
Verbal assignments of common law and statutory copyrights.

A common law copyright may be assigned verbally[2] and so, it would seem, may a statutory copyright, except where such assignment is executed without the United States.[3] It is impossible, however, to speak with any certainty on this point.

§ 1509
History of legislation with respect to assignments of copyright.

Early drafts of the present Act, not enacted by Congress, contained an unequivocal provision requiring all assignments of copyright to be in writing.[4] Congress, unfortunately, it would seem, instead of adopting the suggested provision, or one to the precise contrary, chose to reenact the pertinent provision of the prior statute,[5] in a manner which appears to have left the questions which existed under it, more doubtful, if possible, than they were before.

§ 1510
The prior Act.

The prior statute[5] provided:

"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 execu-

2—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618; Parton v. Prang, 3 Cliff. 437.

3—Section 43.

4—See Copyright Office Bulletin, No. 12, p. 57.

5—R. S. 4955.

tion; in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice."

§ 1511 Written assignments required by language of early statutes.

Still earlier statutes[6] had been held to provide for written assignments, or licenses, by implication from the provisions contained in them, which required written consents in writing signed by the copyright proprietor before two witnesses, to prevent suits for infringement against anyone exercising any of the rights, other than dramatic ones, which were reserved to a copyright proprietor by the statute. The latter requirements are no longer law.

§ 1512 Changes in statutory language used in present Act.

But, instead of the former peremptory "shall" of the Revised Statutes, the present Act uses the permissive "may," which lends color to the argument that its reference to written assignments is not to render verbal ones invalid, but, on the other hand, omits the language restricting it to law, as distinguished from equity, thus, apparently, closing a loop-hole available, in certain instances, under prior Acts.[7]

§ 1513 The English law.

The English cases[8] holding assignments of copyrights were required to be in writing, were founded on the language of early statutes requiring licenses to be in writing (7). The early *dicta* in the United States were based upon the similar language found in the Acts of 1790 and 1831.[9]

§ 1514 Verbal assignments deemed valid, in general.

Mr. Drone's view[10] that the prior statutes did not render parol assignments invalid in all cases, but only ineffectual as against bona fide purchasers and mortgagees, appears sound. It has the sup-

6—Act of July 8, 1870, § 150.

7—See § 1550.

8—Rundell v. Murray, Jac. 314; Shepherd v. Conquest, 17 C. B. 427; Leyland v. Stowart, 4 Ch. D. 419; Power v. Walker, 3 Maule & S. 7; Davidson v. Bohn, 6 C. B. 456.

9—Stephens v. Cady, 14 How. 532, 14 L. ed. 529; Little v. Hall, 18 How. 171, 15 L. ed. 331. Cf. also Gould v. Banks, 8 Wend. 562.

10—Drone: Copyright, p. 302.

port of at least one adjudicated case.[11] It would probably be followed under the present Act.[12] It is true that unless an assignment is in writing, it cannot be recorded and that, unless recorded, it is ineffective as against a subsequent bona fide purchaser or mortgagee for value.[13] But this, as Mr. Drone points out, is not the equivalent of enacting that unrecorded assignments are void, for all purposes. The question as to whether they are valid, as between the parties, or persons who have actual notice thereof, remains unaffected by the express language of these provisions. The Section will probably, then, be deemed merely permissive, in its reference to instruments in writing, except as concerns subsequent bona fide purchasers for value and mortgagees.

§ 1515 Verbal assignments not valid against bona fide purchasers and mortgages.

§ 1516 Section permissive.

The utmost confusion exists in the decisions and *dicta* with respect to the question as to whether there may be a partial assignment of a copyright. It is obvious that what may take place may be either that an attempt may be made to convey the entire copyright, for a limited time, or for a limited territory, or to convey part of the general copyright, either for its full term, or for a limited time, or to give a third person the exclusive, or non-exclusive, right to utilize any one, or more (not all, however) of the rights comprehended in the general copyright, either for the duration of the copyright, or for a lesser time. The decisions have a way of calling all such grants assignments, and this seems the root of the difficulty as many of them appear mere licenses.

§ 1517 Partial assignments of copyright.

If the test of the decisions,[14] rendered under the patent statutes, be adopted, any assignment of a

§ 1518 Assignments defined and

11—Webb v. Powers, 2 Wood & M. 297.

12—See Parton v. Prang, 3 Cliff. 537.

13—Section 44.

14—Gayler v. Wilder, 10 How. 477, 494, 13 L. ed. 504, 511; Waterman v. Mackenzie, 138 U S. 252, 34 L. ed. 923; Pope Manufacturing Co. v. Gormully & Jeffreys Co., 144 U. S. 248, 36 L. ed. 423.

distinguished from licenses.

copyright which does not convey the entire and unqualified monopoly of the copyright proprietor, or an individual share thereunder, is to be deemed a license rather than an assignment.

§ 1519 License defined and distinguished from assignment.

In a leading English patent decision,[15] the difference between a license, even if exclusive, and an assignment, is brought out with great clearness. It was there held that the former was merely a leave to do a thing and a contract by the assignor not to permit anyone else to do it, but that, unless coupled with a grant, it conferred, no more than did any other license, no interest or property in the subject matter of the contract, and, hence, it was held a licensee could not sue, in his own name, for infringement.[16]

§ 1520 Licensee not permitted to sue for infringement.

§ 1521 Setting forth contract for judicial determination whether license or assignment.

The uncertainties in these matters are illustrated by a decision which held,[17] it was a proper form of equity pleading, to set out an agreement between an author and parties plaintiff and to allege that if this did not embody an assignment, that it conferred an exclusive license. The fact being pleaded, the conclusion to be drawn therefrom might be pleaded in the alternative.

§ 1522 Differences between patent and copyright Acts as to partial assignments.

Early drafts of the Act, not enacted by Congress contained a provision that each of the various rights given a copyright proprietor by the Act was to "be deemed a separate estate subject to assignment, lease, license, gift, bequest or inheritance."[18] This provision was stricken out before enactment. The Copyright Act differs in language from the Patent Act. The latter expressly permits the assignment of a patent, or any interest therein. The pertinent language is:

> "Every patent or any interest therein shall be assignable in law, by an instrument in writ-

15—Heap v. Hartley, 42 Ch. D. 461.
16—See § 1579 *et seq.* as to this under the present Act.
17—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618.
18—See Copyright Office Bulletin No. 12, p. 57.

ing, and the patentee or his assigns or legal representatives may in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States."[10]

There is no need to enlarge upon the differences between this comprehensive language and that of the Section under discussion.

§ 1523 English statutory rules.

In England, assignments may be entire or partial, but they, as well as licenses, must be written.[20]

§ 1524 Indivisibility of copyright.

Various *dicta*, in the books, deem a copyright an entirety, indivisible and hence not capable of partial assignment.[21] This view, if properly limited, possesses great advantages of public and private convenience. Where there are several proprietors of a copyright, they have been held to be tenants in common.[22] Either may make any use he pleases of the work, sell copies or grant licenses, without in any way consulting his co-proprietors and need not account to the others for any profits he may make out of such use of the copyright.[23] Such proprietors may, it would seem, sell their interests in the copyright, and if they may do so, it would seem, logically, the sole copyright proprietor, if sufficiently ill advised, or unfortunate enough to be compelled to put himself at another's mercy, may sell or assign, an undivided part or share in the copyright.[24]

§ 1525 Theory as affected by joint owners.

§ 1526 Rights of such persons.

§ 1527 Undivided interests in copyrights.

The *dicta*[21] that say that copyright cannot be divided were, however, all made in cases where it was not sought to assign an undivided interest in a

19—R. S. § 4898 as amended by the Act of March 3, 1897; Comp. Stat. § 9444.

20—Part I, 5, § 21.

21—Jeffreys v. Boosey, 4 H. L. C. at 992; Shepherd v. Conquest, 17 C. B. at 436.

22—Powell v. Head, 12 Ch. 686; Carter v. Bailey, 64 Me. 458.

23—Carter v. Bailey, 64 Me. 458.

24—Black v. Henry G. Allen Co., 9 L. R. A. 433, 42 F. 618.

copyright but to assign the copyright, *in toto*, for a given country. They arose under statutes where copyright was, substantially, a single right and not an aggregation of rights, as under the present Act.

It is quite obvious that they did not contemplate the situations which frequently arise under the present Act where, as previously pointed out,[25] copyright represents an aggregation of rights rather than a single right.

§ 1528 Transfer of individual rights comprehended in copyright.

Where there is more than one right given by statute, the various rights may, it seems, be split up as the owner pleases.[26] Under the present Act, it has been held that each right given a copyright proprietor may be assigned separately.[27] This is in accordance with the doctrine of an earlier case,[28] where it was further held that each such assignee might sue, without joining his assignor, if the right so assigned to him were invaded. Under the present Act, no such right is "incidental" to any "general" copyright.[29] In the case last cited, a grant of the exclusive dramatic rights in a play and of its exclusive leasing, was held an assignment of the dramatic rights therein.[30]

§ 1529 Rights of action of such transferee.

§ 1530 Grant of exclusive dramatic rights held an assignment.

§ 1531 The question raised whether such "assignments" are not licenses.

It may be questioned, however, whether such so-called assignments are not rather in the nature of licenses[31] than in the nature of assignments, but this point is not discussed in the decisions.

§ 1532 Transfer of exclusive rights comprehended in copyright, for

In a leading case[32] it was held that the exclusive right of printing, publishing, enacting, performing, representing and producing a work within, and

25—See § 137.

26—Press Publishing Co. v. Munroe, 51 L. R. A. 353, 73 F. 196.

27—Photo Drama Motion Picture Co. v. Social Uplift Film Co., 220 F. 448.

28—Roberts v. Myers, 20 F. C. 11906.

29—Photo Drama Motion Picture Co. v. Social Uplift Film Co., 220 F. 448.

30—213 F. 374.

31—See § 1519.

32—Palmer v. DeWitt, 47 N. Y. 532.

throughout, the United States would be deemed a license, rather than an assignment. The correctness of this view may be questioned,[33] just as the Court was clearly mistaken in its apparent view that the citizen assignee of an alien author might obtain copyright in the United States where his assignor could not.[34]

United States, held an assignment.

§ 1533
Such transfers when limited, in time and place, held equitable assignments.

Similarly, in an early American case,[35] an instrument assigning the right to perform a play, for one year, everywhere in the United States, save in five cities, was deemed an equitable assignment and the plaintiff was permitted to sue for an injunction, without joining the assignor as a party to the litigation. The result of this decision is sustainable under Section 36 of the present Act, but its view as to the technical effect of the instrument involved, which apparently conferred only a limited license, appears erroneous.

A similar view of an analogous situation was taken in another early case,[36] where a partial assignment by a foreign author, was deemed inoperative, at law, except as a license, but held a valid assignment, in equity, to the extent permitted by its limitations.

§ 1534
Practical differences between license and assignment under present Act.

The chief distinction, under the present Act, between assignments and licenses is with respect to the right to sue on infringement, or rather as to the extent of the relief obtainable in such actions,[37] and with respect to the right to re-assign.

§ 1535
Licenses not transferrable.

A license is usually deemed personal[38] and, hence, not transferrable, while, since all the assignor's

33—Cf. Pope Mfg. Co. v. Gormully & Jeffreys Co., 144 U. S. 248, 36 L. ed. 423.

34—Bong v. Alfred S. Campbell Art Co., 214 U. S. 236, 53 L. ed. 979.

35—Roberts v. Myers, 13 Monthly L. J. 396 (U. S. C. C. Mass.).

36—Keene v. Wheatley, 4 Phila. 157 (U. S. C. C. E. D. Pa.).

37—See § 1579 *et seq.*

38—Lucas v. Moncrieff, 21 T. L. R. 683; Cooper v. Stephens, (1895) 1 Ch. 567; Stevens v. Benning, 6 De G. M. & G. 223.

§ 1536 Re-assignments. Sub-licenses.

§ 1537 Personal reliance, one test whether license or assignment.

rights are divested on assignment, an assignee may, of course, re-assign. A licensee may not grant sub-licenses unless authorized to do so by the licensor.[39] One of the tests, in doubtful cases, as to whether or not there has been assignment or license, is whether, on examination, the transaction appears to show reliance on the person, or character, of the party with whom the copyright proprietor has dealt, to such an extent that the right may be deemed a personal one. The fact that the licensee be a corporation will not of itself, overturn the presumption that the license was not intended to be assigned.[40]

§ 1538 Agreement by author to copyright negatives assignment.

Where a contract between a foreign author and a theatrical manager granted the stage rights in a work for the United States to the latter, but the author agreed to copyright the play in this country, it was held (1) that such a contract involved the retention by the author of the right to copyright and an attempted copyright by the manager was held invalid. The manager's rights thus were in the nature of a license under a contemplated copy-

§ 1539 Limitation of rights to publication in given form.

right.[41] The grant of the sole and exclusive right of printing and publishing and of issuing musical compositions, in volume form, was held to be a license, not an assignment.[42] Similarly, an assignment of

§ 1540 Serial rights.

"serial rights" in a play is a mere license.[43] On

§ 1541 Limitation to given edition, of rights of user.

the other hand, in a leading case,[44] the Court held that a contract which provided that the defendant was only to use certain notes to a work, with a given edition of the work, and was not to use them in a new edition, without the author's consent, but that the author be given the right to make such use of them as he deemed fit, was the equivalent of a con-

39—Heine v. Liebler, 73 N. Y. A. D. 194.
40—Griffith v. Tower Publishing Co., (1897) 1 Ch. 21.
41—Saake v. Lederer, 174 F. 135.
42—In re Jude's Compositions, (1907) 1 Ch. 651.
43—New Fiction Publishing Co. v. Star Co., 220 F. 994.
44—Lawrence v. Dana, 4 Cliff. 1.

tract, enforceable in equity, to assign the legal title in the copyright in such notes, to the author.

§ 1542 Joint publishing venture, a revocable license.

In an English case, it appeared the parties had entered into an agreement by which the plaintiff-author's "Peg Woffington" was to be published by defendant, at the latter's own expense and risk, and after all expenses, including 10% on the gross sale, for commissions and bad debts, had been deducted, the profits on every edition published were to be divided, half and half.[45] It was held this agreement did not confer an irrevocable license to publish upon the defendant, but contemplated a joint adventure which the author might end at any time after publication of the first edition, as to any edition not then published, or in process of preparation. In another instance,[46] it was held that a sale of a short story to the publisher of a magazine and the acceptance of a check "in full payment for story," without further agreement, was a sale of the story and the right to copyright it, without reservation, carrying with it the right to dramatize it. The legal situation was deemed not to be affected by a claim made by the plaintiff, the author, suing as assignee of his assignor, in his original pleadings and papers, that the right to dramatize the story had been held in trust for him by the assignor, and that he had not sold this right to the assignor. The decisions thus cited appear to indicate that the rule indicated by the patent cases, *supra*, is the rule underlying adjudications in copyright causes also.

§ 1543 Outright sale of short story to magazine: status of rights not affected by unfounded claims of assignor.

§ 1544 The right to grant licenses under copyrights.

It is to be noted that licenses are nowhere mentioned in the Copyright Act, but may, as has been assumed, without discussion, be granted under it. Thus, a license of the dramatic rights in a series of cartoons, "Mutt & Jeff," was deemed valid and

45—Reade v. Bentley, 27 L. J. Ch. 254.

46—Dam v. Kirk La Shelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 902.

§ 1545 Dramatic licenses in cartoons.

§ 1546 Possible reasons for omission of express right to license.

§ 1547 Creation of licenses and assignments.

§ 1548 General law of contracts applies.

§ 1549 Formalities unnecessary.

§ 1550 Assignments and agreements to assign distinguished.

§ 1551 Implied assignments.

the licensee protected against infringement.[47] In certain patent decisions, licenses have been deemed mere relinquishments of the rights of action, which would accrue in favor of the licensor, by reason of the acts of the licensees were it not for the license.[48] They rest primarily in the law of contract, and, for these reasons, it may be, or possibly because of their universal recognition, Congress may have deemed it unnecessary to confer an express power to license, or to regulate licenses.

The method of creation of licenses and assignments will now be considered.

Contracts governing the sale of copyrights, and such sales generally, are controlled by the same rules of law as are similar contracts and sales of other property.[49]

In the absence of statutory provision, no particular words are necessary to constitute an assignment,[50] and since, as has been shown, this may be oral, it need not be by deed, or before witnesses, as some of the earlier statutes required.

A distinction is brought out in the English cases between assignments, and executory agreements to assign.[51] The latter, while enforceable to a certain extent in equity,[52] are inferior to a subsequent actual assignment to a third person.[53]

It is to be noted that in certain of the cases cited the author's manuscript had been delivered to a third person with the intention that such third per-

47—Hill & Whalen v. Martell, Inc., 220 F. 359.

48—See Heaton Peninsular Button Fastener Co. v. Eureka Specialty Co., 35 L. R. A. 728, 77 F. 288.

49—Hubbard v. Thompson, 25 F. 188; aff'd 131 U. S. 123, 33 L. ed. 76.

50—Cf. Lacy v. Toole, 15 L. T. N. S. 512.

51—Leader v. Purday, (1849) 7 C. B. 4; Colburn v. Duncombe, 9 Sim. 151; Levy v. Rutley, (1871) L. R. 6 C. P. 523; London Printing & Publishing Co. v. Cox, (1891) 3 Ch. 291.

52—Sweet v. Cater, 11 Sim. 572; Sweet v. Shaw, 9 L. J. Ch. 216; Sims v. Marryat, (1851) 17 Q. B. 281; Thombleson v. Black, 1 Jur. 198.

53—Leader v. Purday, (1849) 7 C. B. 4.

son should acquire all rights in the work. These cases would probably not be followed at present, in so far as they do not hold this to be a sufficient assignment.

§ 1552 Words of assignment unnecessary.

Actual words of assignment are not necessary to constitute an assignment.[54] Thus in a House of Lords case,[55] Lord Wensleydale deemed that a receipt in full payment for a song constituted an effectual assignment of the copyright therein. In another case, it was held that there might be such a course of dealing and of action on the part of the proprietor of a copyright that the Court would, without proof of an assignment of the copyright, draw the inference that there had been a valid assignment.[56]

§ 1553 Receipt as assignment.

§ 1554 Acts as evidencing assignment.

The author of a work had entered into an agreement with the plaintiffs by which the latter were to publish twenty-five hundred copies of his work. There was no express assignment of the copyright. It was held that to the extent of such copies, plaintiffs were the equitable assignees of the copyright and entitled to restrain defendants from infringing such copyright.[57] Similarly, a license may be implied from the acts of the parties.[58]

§ 1555 Implied equitable assignment.

§ 1556 Implied licenses.

There can, of course, be neither assignment nor license, where there is nothing to license or assign, since the rights of an assignee of a copyright are, of course, strictly limited to those of his assignor.[59]

§ 1557 Assignee or licensee stands in grantor's shoes.

A contract giving the "sole and exclusive right to publish" a work, then being run serially in England, in the United States, "from advance sheets," these to be delivered two months prior to completion of the English publication, was held to confer a mere right

§ 1558 Illustrations: cases where grantor cannot obtain, or has no, copyright.

54—Ward Lock & Co. Ltd. v. Long, (1906) 2 Ch. 550 at p. 557.
55—Kyle v. Jeffreys, 3 Macq. 611.
56—Dennison v. Ashdown, 13 L. T. 226.
57—Sweet v. Cater, 11 Sim. 572.
58—Cooper v. Stephens, (1895) 1 Ch. 567.
59—Davies v. Boes, 209 F. 53.

to use such advance sheets and no proprietory rights whatever. The Court's view was strengthened by the smallness of the consideration set forth in the contract and by the fact that the alien author of the novel could not have obtained its copyright in the United States at this time, in person or through an assignee.[60] Similarly, a license to use a work in a certain form, is, of course, ineffectual to confer an exclusive right where the licensor has no copyright.[61]

The proper construction, and scope, of licenses and assignments may next be discussed.

§ 1559 Licenses limited to expressed purpose.

A license will be limited strictly to its expressed purpose. Thus it has been held[62] that a license to use copyrighted musical compositions in the manufacture of mechanical records, "in any form whatsoever," would not permit the separate printing of the words of songs, on paper, and their subsequent distribution.

§ 1560 Licenses presumptively non-exclusive.

A license will be presumed non-exclusive, unless expressly made exclusive.[63]

§ 1561 Foregoing rule not affected by alleged custom.

Unless a license expressly states it is exclusive, it cannot be shown to be so, by proof of an alleged custom that such licenses be exclusive.[64]

§ 1562 Intention of parties cannot control unequivocal language.

Where an assignment or license is unequivocal in its language, it will be construed in accordance with this, and the actual intention of the parties cannot be shown, as long as the instrument remains in its original form.[65]

§ 1563 Rights of licensee as to manner of publication, in

It is necessary for the licensor to insert such provisions as he deems fit, for his own protection, in the license, or the licensor may publish in any manner

60—Fraser v. Mack, 116 F. 285.
61—Hene v. Samstag, 198 F. 359.
62—F. A. Mills v. Standard Music Roll Co., 223 F. 849.
63—Warne v. Rutledge, L. R. 18 Eq. 496; Hart v. Cort, 165 N. Y. A. D. 583.
64—Hart v. Cort, 165 N. Y. A. D. 583.
65—Ward v. Moss, New York Daily Register March 23, 1881.

he sees fit, so long as he remains within the general scope of the license.[66]

absence of agreement.

§ 1564 Limited licenses.

A license may be limited in any manner not contravening public policy or positive statute, in accordance with general rules of the law of contracts. Thus, in one instance,[67] it was held that a license to publish prints in a periodical, would not permit the subsequent separate publication of the articles and illustrations.

§ 1565 Instances of limited licenses.

A license to publish a photograph in a paper authorized its publication as a supplement, on a separate sheet, provided this was sold as part of the paper, but not otherwise.[68]

In an English case,[69] it was held that assignment of the right to produce an engraving of a painting, in a certain size, left the right of producing copies of the painting in other ways, or by engravings of other sizes, in the proprietor of the copyright in the painting, and that while the licensee had copyright in his engraving, he could not sue for infringement, in the absence of proof that defendant's work was copied from his work and not from the painting, etc.

In another instance, it was held that a license to publish a song in a compilation of songs comprehended the right to publish it in future editions of the work, even though some songs were added and others omitted in these, within fair limits, not inconsistent with the general tenor of the first work.[70]

§ 1566 Reservation of rights, on sale of copyright.

An author in selling the right to vend, or publish, a work may retain the right to translate, or to dramatize it, but there can be no such reservation by implication, or in the absence of express reservation.[71]

§ 1567 Must be express.

66—Brock v. Lloyd Ltd., 26 L. T. R. 549.

67—Strahan v. Graham, 16 L. T. 87.

68—Guggenheim v. Lang, 12 T. L. R. 491.

69—Lucas v. Cooke, L. R. 13 Ch. D. 872.

70—Gabriel v. McCabe, 74 F. 743.

71—Dam v. Kirk La Shelle Co., 41 L. R. A. (N. S.) 1002, 175 F. 907 (semble). The dicta to the contrary in Marsh v. Conquest, 17

§ 1568 Non-exclusive licenses.

It has been said that the owner of a story after giving one the right to perform a particular dramatization, may give someone else the right to perform a different dramatization.[72]

§ 1569 Motion picture rights comprised in assignment of dramatic rights.

The assignment of dramatic rights has been held to carry with it the assignment of the motion picture rights in the work,[73] even though motion pictures were unknown at the time when the assignment was made.[74]

§ 1570 Rights of assignor after assignment.

After assignment, an author has of course, no more right to use the copyright work than a stranger has, unless he has reserved such right on making his assignment.[75]

§ 1571 Breach of contract containing assignment will not, per se, work re-assignment.

Breach of a contract which has provided for the sale and transfer of a copyright, and also regulated the future relations of the parties, will not revest title to the copyright in the assignor,[76] unless the contract so provides. In the absence of appropriate provision to that end, an author who assigns his copyright, cannot control the manner or extent of the use made of it by the assignee, even though he is to be compensated by a share of the future profits for making such assignment.[77]

§ 1572 Rule not varied because assignor entitled to part, of profits.

§ 1573 Rule not varied by breach of independent stipulation, in case of joint copyright.

In an unusual case,[78] the Court had occasion to consider the situation arising from the breach of a contract which provided for a joint copyright, to vest in an author and a publisher, with exclusive territory to each. The publisher bound himself to print for the author at cost. This provision was held an independent stipulation, so that his failure

C. B. N. S. 418, 426, rest in the special language of the statutes there in question.

72—Harper Bros. v. Kalem Co., 169 F. 61.

73—Photo Drama Motion Picture Co. v. Social Uplift Film Co., 220 F. 448.

74—Frohman v. Fitch, 164 N. Y. A. D. 231.

75—Mackaye v. Mallory, 12 F. 328.

76—Thompson v. Hubbard, 131 U. S. 123, 33 L. ed. 76, Mackaye v. Mallory, 12 F. 328 (semble).

77—Mackaye v. Mallory, 12 F. 328.

78—Baldwin v. Baird, 25 F. 293.

to comply therewith was held not to justify an invasion of his exclusive territory.

§ 1574 Contractual rights to reassignment on default.

A contract between author and publisher may be so drawn as to be personal only, even though the latter be a corporation and also so phrased as to give the author a right of reassignment of copyright, in the event of the publisher's default, which may be enforced as against the latter's trustee in bankruptcy.[79]

§ 1575 Assignor's rights under contract for payment of royalties by assignee only: permissive sales.

In an English case,[80] it appeared that the plaintiff had assigned his copyright upon the basis of a royalty to be paid him on each copy sold by the assignee. The latter permitted publication of the work in a newspaper not owned by it. The plaintiff sought to recover royalties on the sales of the newspaper. It was held he could not do so. The assignee, in the absence of express agreement, was not bound to publish the work at all, and was only bound to account for sales actually made by it, not for permissive sales by others.

§ 1576 Effect of licensee's omission of copyright notices.

Publication of a work by a licensee, without proper notice of copyright, will render it part of the public domain,[81] unless such omission violates the contractual conditions licensing publication.[82]

In the case last cited,[83] it was held that the owner of a copyrighted article did not lose any rights in connection with it, as a consequence of the fact that a limited territorial licensee, authorized to publish it on the express condition of affixing the usual copyright notice, had, inadvertently, failed to do so. This decision is discussed elsewhere.[84]

79—In re D. H. McBride & Co., 132 F. 285.

80—Nicholas v. Amalgamated Press, (1907) Reported in 8 Halsbury's Laws of England, 159.

81—West Publishing Co. v. Edward Thompson Co., 169 F. 833.

82—American Press Publishing Co. v. Daily Story Publishing Co., 66 L. R. A. 444, 120 F. 766.

83—66 L. R. A. 444, 120 F. 766.

84—See §§ 883, 1051.

§ 1577 Warranties on sales of copyrights.

The usual covenants implied on the sale of personal property will be deemed implied on a sale of copyright.[85] In an early case, a recovery appears to have been permitted against one who had represented that he had a right to permit a work to be printed, as a result of which the plaintiff incurred large expenditures for printing, and defending an unsuccessful law suit for infringement.[86]

§ 1578 Implied warranty of right to publish.

§ 1579 Right of licensor to sue, for infringement.

The English cases which hold that a copyright proprietor, who has given an exclusive license, cannot sue without the licensee,[87] do not appear to be law under Section 36 of the American Act, as far as injunctions are concerned.[88]

§ 1580 Right of licensee to sue for fixed damages on infringement.

A licensee has not, however, the right to sue solely for fixed, or statutory, damages under the present Act, as the statute, the Court deemed, was only designed to give these once, and, hence, to all the parties damaged by the infringement.[89]

§ 1581 Right of assignee to sue, where assignment qualified by covenant, not to reproduce in copies.

In an interesting English case,[90] it appeared that the owners of copyright in a painting assigned it to plaintiffs, upon the undertaking of the plaintiffs that they would not reproduce the picture, without the consent of the assignors. It was held an assignment, so qualified, was insufficient to allow a suit by the assignees, unless the assignors joined as parties plaintiff, as what was transferred—copyright without the right to copy—was nothing at all.

§ 1582 Proof essential as basis of action by assignee.

In a well considered decision,[91] it was held that where an assignee sues for infringement of copyright, the burden is upon him to prove that his assignor was the author of the copyrighted work

85—Sims v. Marryat, 17 Q. B. 281 (semble).
86—Shebbeare v. Gwynn, 2 Eden. at 330.
87—Taylor v. Neville, 26 W. R. 299; Tree v. Bowkett, 74 L. T. 77; Heape v. Hartley, 42 Ch. D. 461; Neilson v. Horniman, 25 L. T. R. 188; London Printing & Publishing Alliance v. Cox, (1891) 3 Ch. 291.
88—See § 1447 *et seq.*
89—New Fiction Publishing Co. v. Star Co., 220 F. 994.
90—Landeker & Brown v. Louis Wolff & Co., 52 Solicitor's J., 45.
91—Bosselman v. Richardson, 174 F. 622.

and that neither assignee, nor assignor, published the original, before statutory copyright. It was further held that no certificate of the Librarian of Congress was sufficient to prove these facts. Subject to changes in the statute, the general doctrine of this case is undoubtedly the law.

§ 1583 Certificate of Copyright Office insufficient proof in such cases.

Under an assignment giving a proper power to that end, it may be that the cases [92] holding that an assignee cannot sue in his own name, for infringement prior to the assignment, would not be followed, under the section of the Act cited. It would appear a safer practice, however, to join the assignor as co-plaintiff and to reserve the right to do so in instruments of assignment.

§ 1584 Action by assignees for infringement prior to copyright.

A further method of procedure was indicated in another case,[93] where it was held that a right of action at equity, for past infringement, might be assigned with the copyright.

§ 1585 Assignments of claims for prior infringement.

Where the copyright is vested in more than one person, any such person [94] may sue for infringement of the entire copyright.

§ 1586 Suits by joint proprietors.

In an early case,[95] it was held that where the right to English copyright was assigned abroad and, thereafter, before copyright in England, the assignor permitted a first publication of the work abroad, this prevented statutory English copyright, since the publication was said not to have been made by a wrongdoer but by one lawfully entitled to publish.

§ 1587 Effect of general publication by assignor, on rights of non-exclusive assignee.

In another early case,[96] on the other hand, it was held that where an author before composition of a work, sold the exclusive right to perform it in the United States, and, before publication, sent a copy

92—Dupuy v. Dilkes, 48 L. J. Ch. 682; Chappell v. Purday, 14 M. & W. 303.

93—Gilmore v. Anderson, 38 F. 846.

94—Lauri v. Renad, (1892) 3 Ch. 402, 413; Powell v. Head, 12 Ch. 686.

95—Chappell v. Purday, 14 M. & W. 303.

96—Goldmark v. Kreling, 35 F. 661.

of the manuscript to the purchaser, the author could not thereafter sell the same right to another, nor dedicate the work to the public by a general publication, so as to defeat the rights of the first purchaser.

§ 1588 Acts of assignee of foreign rights.

Where an author sells the American serial and book rights in a work to one firm, and the English rights to another, it has been held that the English proprietor's publication did not affect the plaintiff's rights, as there was said to be no privity between the two assignees.[97]

§ 1589 The foregoing decisions discussed.

These decisions all refer to common law copyrights, or to the right to obtain statutory copyright. In such cases the test would appear to be whether there was an assignment, or a license. If an assignment, the assignor has ceased to have any rights under the copyright laws; and any act by him cannot affect the rights of the assignee. If on the other hand, there has merely been a license, the licensee's rights are purely contractual and are subject at all times to termination, as far as respects third persons, by act of the licensor, the copyright proprietor.

§ 1590 Effect of general publication by assignee, on rights reserved to assignor.

Where acting rights were reserved, but the exclusive right to publish the work, as well as the absolute ownership, or unconditional possession, of the work, were transferred, it was held that a publication by such transferee, ended any rights of the author, to prevent anyone who pleased, from acting the work.[98]

§ 1591 Effect of licenses to use digest paragraphs.

A possible effect of the giving of licenses was illustrated in another decision[99] where it was considered that the giving of general licenses to use copyrighted materials contained in a digest, was to be deemed in the light of a sale of the labor represented in making the digest and, hence, to be an abandonment of the exclusive right to publish it, unless the terms of the licenses were such as to

97—Harper & Bros. v. M. A. Donohue & Co., 144 F. 491.
98—Wagner v. Conreid, 125 F. 798.
99—West Publishing Co. v. Edward Thompson Co., 169 F. 833.

ensure the insertion of the appropriate copyright notices wherever required by law, or unless the use contemplated by the licenses was so limited as to constitute quotation rather than republication. This view emphasizes the necessity for care in drawing licenses, to which attention has been directed elsewhere.[1]

§ 1592 Assignments of inchoate or unregistered copyrights.

Copyright may, of course, be transferred in the interval between the time when it vests and when it is registered, as well as after copyright, or when inchoate, before copyright.[2]

§ 1593 Patent cases involving assignments.

Decisions with reference to the assignment of patents, and to licenses thereunder, are much more numerous than similar cases decided under the copyright laws. Many diverse aspects of this general subject will be found to have been discussed, or adjudicated, in such decisions. Such cases may be consulted, with profit, by the profession, in doubtful situations, provided that the difference between the copyright and patent statutes, in each instance, be remarked, and allowance made therefor in reading, and citing, such decisions. A detailed discussion of such cases is, obviously, without the scope of this work, as much as would be a compilation of cases bearing on licenses and assignments, under the general rules of law applicable to such instruments.

§ 1594 Mortgages of copyrights.

No cases appear to have arisen, as yet, involving mortgages of copyright. It is deemed probable, however, that such mortgages must conform to the rules of law applicable to mortgages of personal property in general; and would be governed as to form, validity, recording, etc., by the laws of the particular state where made.

§ 1595 State laws apply.

§ 1596 Recording mortgages and licences in Copyright Office.

Mortgages and licenses are not required to be recorded in the Copyright Office. The sections of the Statute applicable to recording follow.

1—See § 1563.

2—Grave's Case, L. R. 4 Q. B. 715.

§ 1597
Assignments of copyright, executed abroad.

Section 43. That every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts. The certificate of such acknowledgment under the hand and official seal of such consular officer or secretary of legation shall be prima facie evidence of the execution of the instrument.

§ 1598
Effect of failure to comply with Section.

It is to be observed that this Section provides no penalty, in terms, for non-compliance with it. Hence, it would seem that, since its requirements are absolute, any failure to comply with its terms will invalidate the assignment in question, and that all assignments executed abroad, must be in writing and acknowledged as prescribed in this Section.

§ 1599
Foreign assignments must be written.

§ 1600
Recording assigiments of copyright: effect of non-recording.

Section 44. That every assignment of copyright shall be recorded in the Copyright Office within three calendar months after its execution in the United States, or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

§ 1601
Unrecorded assignments valid except as to bona fide purchasers for value or mortgagees.

This Section differs from the preceding Section in prescribing the penalty for non-compliance therewith. The penalty, since prescribed, appears exclusive, and not absolute, but merely relative. Under it, it would appear, unrecorded assignments may be valid, as between the parties thereto, or against anyone who is not a purchaser for value, or a mortgagee, without notice of the assignment. This appears to be the law. So it has been held that an

unrecorded assignment of copyright is good as between the parties to it,[3] and as against infringers.[4]

§ 1602 Licenses not recordable.

There is no requirement in the Act that licenses must be recorded. There appears no authority for the record of such instruments and it is probable that, in accordance with general rules of law, record of a license, if made, would not be constructive notice thereof to anyone.

§ 1603 Effect of unrecorded licenses against assignees of copyright.

The question therefore, arises, as to what effect an unrecorded license would have as against a subsequent assignee of the copyright, without notice of the license.

In England,[5] it has been said that an assignee of the copyright takes it free and clear of licenses to use it, of which he has no notice.

§ 1604 Effect of unrecorded assignment of motion picture rights.

In the United States, it has recently been held,[6] that an unrecorded assignment of motion picture rights is void, as against a subsequent assignee, without notice.

The Court in the case last cited, apparently considered the instrument before it an assignment. If it was one, its decision is unquestionable, under the very language of the Section under discussion. But it may well be questioned whether anything more than an exclusive, perpetual license was conferred in the instrument, involved in the case in question. The Court did not discuss the apparent distinction between licenses and assignments, to which attention has been directed elsewhere.[7] It does not appear whether its attention was directed to this and how it would have decided the matter, if it had deemed the instrument a license. It may well be

3—Banks Law Publishing Co. v. Lawyers Cooperative Co., 169 F. 386 (see opinion of lower court).

4—New Fiction Publishing Co. v. Star Co., 220 F. 994.

5—London Printing & Publishing Alliance v. Cox, (1891) 3 Ch. 291.

6—Photo Drama Motion Picture Co. v. Social Uplift Film Co., 220 F. 448.

7—See § 1519 *et seq.*

that its decision would have been the same way,[8] however, although it might have applied the doctrine of the English case cited.[9]

§ 1605 Certificates of record of assignments and certified copies thereof.

Section 45. That the Register of Copyrights shall upon payment of the prescribed fee, record such assignment, and shall return it to the sender with a certificate of record attached under seal of the Copyright Office, and upon the payment of the fee prescribed by this Act he shall furnish to any person requesting the same a certified copy thereof under the said seal.

§ 1606 Names of assignees in copyright notices.

Section 46. That when an assignment of the copyright in a specified book or other work has been recorded the assignee may substitute his name for that of the assignor in the statutory notice of copyright prescribed by this Act.

§ 1607 Recording fees.

The fees for recording assignments will be found in the Appendix.[10]

§ 1608 Name of assignee in notice after record.

After the assignment has been recorded, but not before, the assignee may substitute his name for that of the assignor, in the statutory notices of copyright required by the Act.[11]

§ 1609 Sections regulating administration of Copyright Office.

Sections 47 to 51 inclusive, 54 and 56-60 inclusive, relate to the administration of the Copyright Office and since they require no special comment, and have no general interest, are not reproduced at length in the text. They may be found set forth at length in the Appendix.[12]

8—Cf. Gates Iron Works v. Fraser, 153 U. S. 332 at 349, 38 L. ed. 734, 740. But see Pratt v. Wilcox Mfg. Co., 64 F. 589.

9—London Printing & Publishing Alliance v. Cox, (1891) 3 Ch. 291.

10—See Appendix.

11—See §§ 730, 853.

12—See Appendix.

CHAPTER XXVIII

COPYRIGHT OFFICE ADMINISTRATION

(a) SEAL

§ 1610 Copyright Office seal.

Section 52. *That the seal provided under the Act of July* 8, 1870, *and at present used in the Copyright Office, shall continue to be the seal thereof, and by it all papers issued from the Copyright Office requiring authentication shall be authenticated.*

§ 1611 Authentication of papers by seal.

(b) RULES

§ 1612 Authority of Copyright Office to make rules for registration.

Section 53. *That, subject to the approval of the Librarian of Congress, the Register of Copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this Act.*

This Section is new, and without parallel in prior copyright legislation.[13] Its enactment represents final legal sanction of the gradual assumption, by the Copyright Office, of the right to make rules in connection with the copyright of works.

§ 1613 Authority limited to rules and regulations for registration of claims of copyright.

The Rules made by the Register of Copyrights are printed in the Appendix. The narrow limits of the power here conferred, viz: to make rules for the registration of claims to copyright, should be borne in mind, in reading the present Rules, some of which as is pointed out elsewhere in this work,[14] appear to exceed the limits of the authority conferred, and to take quite an incorrect view of various sections of the law.

13—See Copyright Office Bulletin No. 12.

14—See § 546 *et seq.*, 1623.

§ 1614
Recent decision holding scope of copyright, under prior Act limited by application as a result of such Rules.

The confusion that such Rules may cause, unless their nature and limitations are correctly appraised, was forcibly illustrated in a very recent decision,[15] other aspects of which are discussed elsewhere.[16] The Court there considered the scope of a copyright as, in some unexplained way, limited by its description in the applicant's registration, because of the "practical interpretation," given by the Copyright Office, to the former statute, in its Rules.

§ 1615
The decision criticized.

"Under these Rules a copyrighted musical composition covered words and music, while, if the applicant intended to copyright only the words of a song, he must have designated his work under the classification of book, which has been construed to be a literary composition. Littleton v. Oliver Ditson Co., 62 F. 597; Hervieu v. J. S. Ogilvie Pub. Co., 169 F. 978," said the Court.[17] These citations increase the feeling of surprise which the other portions of the opinion in the Witmark case are well calculated to inspire. The two decisions cited, construed the so-called manufacturing clause of the prior act, and held that, since this was penal in its nature, it would not be construed in its reference to books, to embrace either bound music or printed dramatic compositions. But it has not heretofore been doubted, since the earliest stages of copyright law, that, save under penal sections of the statutes, both of such classes of works were "books."[18] What decisions construing penal statutes have to do either with the Rules of the Copyright Office, or with non-penal portions of the Act, is not readily apparent. For that matter, it may be questioned very decidedly where the Copyright Office derived authority to make rules prior to the passage of the present Act. There appears to have been nothing

15—M. Witmark & Sons v. Standard Music Roll Co., 221 F. 376.
16—See §§ 472, 1010.
17—Page 380.
18—See citations, § 539.

in the prior statutes conferring any such authority, and its "practical interpretation" of Rules, it apparently had no legal right to make, would scarcely seem to furnish a safe basis for judicial reasoning.

(c) CERTIFICATES OF REGISTRATION

§ 1616 Certificates to be furnished by Copyright Office.

Section 55. *That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the Copyright Office, to contain the name and address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the Copyright Office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book the certificate shall also state the receipt of the affidavit, as provided by Section* 16 *of this Act, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The register of copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after this Act goes into effect, and in the case of all previous registrations so far as the Copyright Office record books shall show such facts, which certificate, sealed with the seal of the Copyright Office shall, upon payment of the prescribed fee, be given to any person making application for the same. Said*

§ 1617
Such certificates prima facie evidence.

§ 1618
Receipts.

certificate shall be admitted in any Court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration.

§ 1619
The prior law as to official certificates.

This Section is largely an innovation in copyright legislation.[19] However, somewhat less comprehensive certificates appear to have been deemed competent prima facie evidence, even in the absence of statute, *as to facts*, stated therein.[20] Thus it was held that a certificate that copies have been deposited, given by the officer with whom they are deposited, is prima facie evidence of the fact of deposit.[21]

§ 1620
The present law.

The present Section, however, provides for certificates which go far beyond those involved in the decisions cited. The law differs from the patent statutes in making no provision for any preliminary or tentative examination by any governmental official or agency as to whether, or not, one claiming copyright is, or is not, prima facie entitled to it.[22]

§ 1621
Burden of proof to show that work copyrightable and was copyrighted.

Hence, all well considered cases have held that one claiming copyright must prove both that such work was copyrightable,[23] and that there has been substantial compliance with the formalities incident to obtaining statutory copyright.[24]

§ 1622
Effect of Section on proof in copyright suits.

This is still, theoretically, law. Applications for registration of copyrights are not required to be made under oath. The Copyright Office is not given the right to examine into the correctness of the statements contained in the application. By this Section,

19—Copyright Office Bulletin No. 12, p. 63.
20—Blume v. Spear, 30 F. 629.
21—Callaghan v. Myers, 128 U. S. 617, 32 L. ed. 547.
22—Burrow Giles Lithographing Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349.
23—See § 1330. Cf. Bosselman v. Richardson, 174 F. 622.
24—See § 147. Cf. Saako v. Lederer, 174 F. 135.

however, its restatement of the unverified statements contained in the application, is made prima facie evidence of the truth of such statements. It is also made evidence, but prima facie evidence only, of the facts connected with registration. The certificates issued by the Copyright Office go even beyond these drastic provisions.

§ 1623 Unauthorized statements in such certificates.

The Copyright Office certifies in the form of certificate used by it, to the fact that the copies deposited are copies, as to which it can have no possible knowledge, that a work is, or is not, reproduced in copies for sale—as to which the same comment may be made—and that there has been compliance with the provisions of the law with respect to registration,[25] which appears an encroachment on the functions of the Courts. There seems no warrant in the law for any such insertions. In the one case[26] which has actually passed upon the Section, it was expressly held that statements in such certificates not authorized by the statute, were entirely ineffectual. Lacombe, J., said:

§ 1624 Such statements ineffectual for any purpose.

> "The statement in the certificate that they were received 'as copyright deposits' indicates nothing more than that they were turned over to the office in attempted compliance with the copyright statute. The receipt of them by the Librarian does not involve any determination by him as to whether or not the deposit is made in time; he is not required to make any investigation when a copy is delivered to him or comes to him by mail as to what was the date of publication."

Similarly, the certificate is insufficient to show that the work was unpublished before proceedings were begun for its copyright.[27]

25—See certificate reproduced in Universal Feature Film Co. v. Copperman, 218 F. 588.

26—Davies v. Boes, 219 F. 178.

27—Bosselman v. Richardson, 174 F. 622.

§ 1625 Certificates prima facie evidence only.

The certificate is simply prima facie evidence as far as authorized. It does not relieve the plaintiff of the burden of proving his case,[28] but it may shift the burden of going forward upon defendant.

The importance of an early examination of the certificate issued in a given matter, is great, if an attack on the validity of the copyright be contemplated, for its sweeping language may otherwise frequently, and quite unexpectedly, shift the burden of going forward with the evidence upon defendant, by being used as plaintiff's main prima facie case.

§ 1626 Contradiction of certificate by copyright proprietor.

The certificate is not conclusive even as against the copyright proprietor, who may show by common law evidence that the books were filed before the certificate says they were.[29]

§ 1627 Signature of certificates. Receipts for affidavits of manufacture.

For such a certificate to be evidence, it must be signed at the end thereof; and matter inserted after the signature is admissible only as against the party who has written it, whoever that may be.[30]

A receipt card to the effect that the affidavit required by Section 16 of the Act has been received by the Register of Copyrights is competent evidence.[31]

§ 1628 "Title," as used in Section, defined.

The title to which reference is made in the Section would appear to mean substantially the title[32] by which a work is bought, sold or is inquired for in the speech of the people.

§ 1629 Certificates in connection with copyrights under Section 11.

There appears to be an important limitation upon the issuance of certificates under this Section, which apparently has not been previously remarked. The Section provides for such certificates of the Copyright Office only "in the case of each entry" of a work. Section 54 of the Act provides for such entry

28—Saake v. Lederer, 174 F. 135.

29—Black v. Henry G. Allen Co., 56 F. 764.

30—Merrill v. Tice, 104 U. S. 557, 26 L. ed. 854.

31—Chautauqua School of Nursing v. National School of Nursing, 211 F. 1014.

32—Daly v. Webster, 56 F. 483; Black v. Henry G. Allen Co., 56 F. 764.

only where a copy of a work is deposited in the Copyright Office. The certificate is to contain the date of such deposit of copies. But copies are not required to be deposited where proceedings are had under Section 11 of the Act.[33] It may, accordingly, be deemed a doubtful question, whether such certificates may legally be issued in connection with copyrights secured under Section 11 of the Act.

(d) FEES

§ 1630 Fees of Copyright Office.

Section 61. *That the register of copyrights shall receive and the persons to whom the services designated are rendered shall pay, the following fees: For the registration of any work subject to copyright, deposited under the provisions of this Act, one dollar, which sum is to include a certificate of registration under seal: Provided, That in the case of photographs the fee shall be fifty cents where a certificate is not demanded. For every additional certificate of registration made, fifty cents. For recording and certifying any instrument of writing for the assignment of copyright, or any such license specified in Section* 1, *subsection (e), or for any copy of such assignment or license, duly certified, if not over three hundred words in length, one dollar; if more than three hundred and less than one thousand words in length two dollars; if more than one thousand words in length, one dollar additional for each one thousand words or fraction thereof over three hundred words. For recording the notice of user or acquiescence specified in Section* 1, *subsection (e), twenty-five cents for each notice if not over fifty words, and an additional twenty-five cents for each additional one hundred words. For comparing any copy of an assignment with the record of such document in the Copyright*

33—See §§ 765–766.

Office and certifying the same under seal, one dollar. For recording the extension or renewal of copyright provided for in Sections 23 and 24 of this Act, fifty cents. For recording the transfer of the proprietorship of copyrighted articles, ten cents for each title of a book or other article, in addition to the fee prescribed for recording the instrument of assignment. For any requested search of Copyright Office records, indexes or deposits, fifty cents for each full hour of time consumed in making such search: Provided, That only one registration at one fee shall be required in the case of several volumes of the same book deposited at the same time.

§ 1631 Method of payment of fees.

The Copyright Office Rules provide that remittances should be sent by money order or bank draft, *certified* checks, coin or currency (the latter two being sent at remitter's risk). Stamps and uncertified checks are not accepted. Provision is made for advance deposits by publishers against which registrations are charged.

§ 1632 Fees for registration of commercial labels.

If prints or labels designed to be used for articles of manufacture are governed by the Act of June 18, 1874, the registration fee is six dollars "which shall cover the expense of furnishing a copy of the record" "to the party entering the same."[34]

34—See § 594 *et seq.*

CHAPTER XXIX

DEFINITIONS

§ 1633 Definition of date of publication of works reproduced in copies.

Section 62. That in the interpretation and construction of this Act "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word "author" shall include an employer in the case of works made for hire.

§ 1634 Authors defined to include employers.

The first portion of this Section has been fully discussed elsewhere.[35] The concluding provision is largely declaratory of prior law.[36]

§ 1635 Employers as authors of works made for them, for hire.

An employer, in a proper case, is deemed the author of the work of his employee. Employers, accordingly, should copyright the works made for them, in their own name as author, and not as obtained in a derivative capacity.[37]

§ 1636 Copyrights by employer.

§ 1637 Employment must relate to work in question.

It is to be noted in connection with this Section, however, that the mere fact that the relation of employer and employee exists, is not sufficient to vest title to copyrightable works in the employer, in

35—See § 311.

36—Little v. Gould, 2 Blatch. 165; Heine v. Appleton, 4 Blatch. 125; Lawrence v. Dana, 4 Cliff. 1 (semble). The decision in Binns v. Woodruff, 4 Wash. C. C. 48, contra, rested in the special language of an early statute.

37—The decisions under prior statutes which were concerned with the technical theoretical question of how title to the employee's works vested in the employer have ceased to have any present importance. See Jones v. Thorne, 1 N. Y. Legal Obs. 408; Grace v. Newman, L. R. 19 Eq. 623; Keene v. Wheatley, 4 Phila. 157.

the absence of an express agreement to that end, or unless the employee is employed for the express purpose of producing such, or similar, works.[38] This subject is partly discussed elsewhere.[39]

§ 1638 Question as to whether work belongs to employer one of fact.

The question whether the copyright in articles written by an employee belongs to the employer is one of fact, to be determined from the nature of the employment, and all the surrounding circumstances.[40]

§ 1639 Presumption as to such works.

Prima facie, where employment and payment for a work are shown, the inference is that it is to belong to the employer.[41]

§ 1640 No presumption from bare fact of employment.

It cannot, however, be inferred from the mere fact of employment. Thus in one case,[42] an actor and stage manager of defendant's theater wrote a play, on the understanding that it should be performed as long as it could run at the theater at which he was employed. It was held under such an agreement, the property on the play remained in the employee, for despite his general employment, he was not employed to write the play and no circumstances existed to show, by implication, that it was to become defendant's property.

§ 1641 The employee's claim of copyright insufficient to overturn the presumption.

In another case,[43] it was held that where an artist was commissioned to execute a work of art, not in existence at the time when the commission is given him, the burden of proving that he retains a copyright therein rested "heavily" upon him, there being a "very strong implication," that the work of art was to belong unreservedly, and without limitation, to the patron. In that case, the plaintiff had been commissioned to design, furnish and put in place, mosaics in the Congressional Library.

38—Roberts v. Myers, 13 Monthly L. J. 396.
39—See §§ 411, 429, 702, 716.
40—Lawrence & Bullen v. Alfalo, L. R., (1903) A. C. 17.
41—Lamb v. Evans, (1893) 1 Ch. 218; Sweet v. Benning, 16 C. B. 484; Lawrence & Bullen v. Alfalo, L. R., (1903) A. C. 17.
42—Bouccicault v. Fox, 5 Blatch. 87.
43—Dielman v. White, 102 F. 892.

After making cartoons for the mosaics, he affixed notice of copyright to these and had them approved by the government architect, and the mosaics when completed, were put in place bearing a similar notice. The defendant took photographs of the mosaics, with the consent of the Federal authorities. The Court held that in the absence of express reservation of the right to copyright in the work, in the plaintiff's contract with the government, and "considering the nature of governments, and the habits of government officers, which are matters of common knowledge," there was insufficient proof of acquiescence to overthrow the presumption (which arose out of the nature of the transaction) that copyright in the work was to be in the government.

§ 1642 Employment to publish a work, not to compose it.

Where what is paid for is not for the work but for its publication, a different result follows. Thus where an advertiser paid for the publication of an advertisement and a translation was made for this purpose, copyright in the translation was held to be in the translator, not in the advertiser.[44]

§ 1643 Employment involved in taking photographic portraits.

In an English case,[45] it was held there could be no copyright by a photographer of photographs taken by him, for hire, and paid for by the sitters, although the rule is, of course, otherwise, where the sitting is gratuitous.[46]

§ 1644 Effect of assertion that work written in representative capacity was individual.

In a somewhat curious case, it was held that where the solicitor for a corporation wrote a letter apparently on its behalf, he had no such property in it, as would enable him to prevent its publication, although he swore it was written in a private, individual capacity.[47]

§ 1645 Painting made as basis for supplying

In an English case[48] it appeared an original picture had been prepared for one firm only, for the

44—Byrne v. Statist Co., (1914) 1 K. B. 622.
45—Ellis v. Ogden, 11 T. L. R. 50.
46—Ellis v. Marshall, 11 T. L. R. 522.
47—Howard v. Gunn, 32 Beav. 462.
48—Levi v. Champion, 3 L. T. R. 286.

advertising labels.

purpose of being reproduced on advertising labels. Large orders were given for these to the proprietor. It was held, that having been made for this express purpose, the picture became the property of the customer and the original owner could not print similar labels for anyone else, in the absence of a reservation of the right to do so.

§ 1646 Composition of incidental stage music, for employer.

In another case,[49] the defendant, a theatrical manager was reviving one of Shakespeare's plays. He employed plaintiff to compose the incidental music for it, on the distinct understanding, as found by the Court, that the music should become part of the entertainment and thereafter belong to defendant. It was held that it thereby became defendant's property.

This decision, not defensible on other points, is supportable only on the theory that the plaintiff, as an employee of the defendants obtained no independent right to his work, but that this, under the contract of employment, vested, on composition, in his employer. The subsequent and much criticised case of Wallenstein v. Herbert [50] where the manager of an orchestra whose duty it was to provide incidental music for plays in the theatre in which he was employed, which music he might either select or compose, and which was played by musicians employed and paid by him, was held to have no property in music so composed by him, differed from the former [49] in that Wallenstein was shown to have been an independent contractor rather than a mere employee and that no such contract as existed between Hatton and Kean, subsisted between himself and Herbert, or could reasonably be implied. The authority of these cases has been much shaken.[51]

§ 1647 Composition of similar music by independent contractor.

"Employer" under this Section includes a cor-

49—Hatton v. Kean, 7 C. B. N. S. 268.
50—15 L. T. N. S. 364; aff'd 16 L. T. N. S. 453.
51—See Eaton v. Lake, 20 Q. B. D. 378.

porate employer.[52] Various English cases decided under the language of the 5 and 6 Vict., c. 45 held that for an employer to be deemed the proprietor of a copyright, he must not only have agreed to pay for the work, but actually have paid therefor.[53] Whether the doctrine of these decisions applies to the present Act is an open question. It is difficult to reconcile the result of these decisions, save as a matter of statutory language, however, with another decision where it was held that if a work be executed at the request of another, the law may imply a promise to pay for it, if the circumstances warrant, sufficient to vest copyright in the work in the employer.[54]

§ 1648 Corporate employers.

§ 1649 Necessity for payment by employer.

§ 1650 Implied promise to pay, as result of employment.

§ 1651 Rights of employee.

Where the title to a work has vested in the employer, the author-employee's rights in connection with it are purely contractual.[55]

Thus, in a case involving this point,[56] it was held that where it was the contractual duty of a salaried employee to compile, prepare and revise certain matter, he had no more right than any other stranger to copy or reproduce such matter, which became his employer's property as produced, but he was not debarred from making a new compilation, from the same sources, after termination of his employment nor from, in doing so, using such experience or information as he might have acquired while in his employer's service.

§ 1652 Copyright by domestic employers in works of alien employees.

The question whether a domestic employer can obtain copyright, in the work of an employee, who, if unemployed, would not be entitled to copyright because of alienage, must be deemed an open one. Since such employer would, under the present

52—National Cloak & Suit Co. v. Kaufman, 189 F. 215.

53—Brown v. Cooke, 16 L. J. R. N. S. Ch. 140; Richardson v. Gilbert, 1 Sim. N. S. 336; Bishop of Hereford v. Griffin, 16 Sim. 190.

54—Boucas v. Cooke, (1903) 2 K. B. 227.

55—Mallory v. Mackaye, 86 F. 123.

56—Colliery Engineer Co. v. United Correspondence Schools Co., 94 F. 152.

statute be the "author" of the work, it is deemed the alienage of the employee could not affect his right, the employee in such case not being an "author" in the sense contemplated by the present statute.

CHAPTER XXX

REPEALING CLAUSE OF PRESENT ACT

§ 1653
Laws repealed by Act.

Section 63. That all laws or parts of laws in conflict with the provisions of this Act are hereby repealed, but nothing in this Act shall affect causes of action for infringement of copyright heretofore committed now pending in courts of the United States, or which may hereafter be instituted; but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

§ 1654
No schedule of laws repealed annexed.

No schedule of laws repealed by the Act was appended to it. Conflict with its provisions is made the test of repeal. It is not perhaps surprising therefore that various open questions exist as to the effect of this repealing clause.

The effect of this Section has been recently considered in a case[57] where it appeared that a copyright had been obtained prior to the passage of the present Act, in a song, consisting of words and music. The defendant reproduced the music mechanically, as he lawfully might, under the copyright involved in the case, but also had the words of the song printed separately and distributed copies of such words with his mechanical music records. This was held to be no infringement, for reasons partially considered elsewhere.[58] One of the plaintiff's contentions was that he was protected under Section 3 of the present Act,[59] in that the prior Acts governing the measure of his rights had been con-

§ 1655
The prior Acts held unrepealed with respect to copyrights created under them.

57—M. Witmark & Sons v. Standard Music Roll Co., 221 F. 376.
58—See §§ 472, 1010, 1614.
59—See § 472.

solidated into, and superseded by, the present Act. The Court, however, construed Section 63 to exclude the repeal of such prior statutes, and the application of the present Act to cases where there had been a violation, after 1909, of the copyright secured under the statutes which existed prior to July 1, 1909. That is to say, it was apparently the view of the Court that the prior statutes still remain unrepealed in so far as they may bear upon the scope of copyrights issued under them and upon the question as to actions brought for their infringement.

§ 1656
The decision criticized.

It is deemed that this view is demonstrably erroneous. The Act of 1909 is entitled "an act to amend and consolidate the Acts respecting copyright." In the first Section of the statute, which greatly enlarged the scope of a copyright proprietor's rights,[60] Congress specifically enacted with respect to the enlarged right as to mechanical reproduction, "provided, That the provisions of this Act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after this Act goes into effect." No such saving clause will be found anywhere else in the Act, with respect to any right or provision contained in it. It would appear to follow necessarily, that the prior copyright Acts have been amended and consolidated into the present Act, with possible exceptions considered elsewhere in this work,[61] which do not bear on the point under discussion. It would further appear to follow that the rights of proprietors of copyrights obtained prior to the passage of the present Act have been enlarged, with the single express exception noted, to correspond to the rights of proprietors of copyrights obtained under the present Act, that is, that after the

§ 1657
Effect of present Act as one of consolidation.

60—See § 134 (e).
61—See § 1660.

passage of the present Act, there was only one statutory copyright as far as scope was concerned, independently of the time when such copyright was granted. Unless there is something in Section 63 of the Act to lead to a contrary result, it is difficult to see how the prior Acts relating to copyright, after being amended and consolidated into the present Act, can continue in being in their original form, for the purpose of measuring and defining the extent of the rights which inhere in copyrights obtained under them. The Court, in the decision under discussion, took the view, however, that there was language in Section 63 which led to this result.

§ 1658
The exception to the general repeal effected by Section.

On examining Section 63 it will be noted that it provides that "nothing in this Act shall affect causes of action for infringement of copyright heretofore committed, now pending in Courts of the United States, or which may hereafter be instituted; but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." It would seem plain that this portion of the Section was intended to be a saving clause for the protection of copyrights, granted prior to the passage of the Act. Its language perhaps lacks clarity, but, if so, to a limited extent only. But its purpose is manifest. It refers solely to infringements heretofore committed, that is, prior to the passage of the Act. This is the only possible meaning of the language used as "causes of action" cannot well be "committed," and infringement cannot well be "instituted." The language, then, refers to pending, or future, suits, for infringement, antecedent to the passage of the present Act and to nothing more.

§ 1659
The view advanced that exception refers only to prior infringement.

Its language does not refer to the scope of copyrights but only to their violation. Unless it were limited to infringements preceding the present statute, one mode of procedure would be outlined for future violation of rights embraced in prior statutes and another mode for violations of the supplemen-

tary rights conferred by the present statute upon the same copyright proprietor. This undesirable and illogical result appears neither intended, nor enacted by the language used. The draughtsmen of the Section apparently said to themselves, "We must save pending litigation," and enacted appropriate provisions for this. They then apparently said to themselves, "But if we repeal the earlier statutes conferring copyright and such copyright has been infringed, unless we make suitable provision, causes of action for such infringement, unless pending, will be lost unless saved by our provision." They therefore added a provision to cover these and since it would appear just that all cases of infringement under a given statute should stand on the same basis, wherever provided for, this resulted in the saving clause finally enacted. The Section does not purport to deal with substantive rights. Section 1 does that. It purports to deal with present and future remedies for the violation of past rights, only. Its language and purpose both appear to lend themselves to this construction and to no other. If these views are correct, the views of the Court in the Witmark Case,[62] are clearly incorrect.

The Court, in that case said:[63]

> "We may concede that the great purpose in the enactment of the Copyright Law of 1909 was to bring together all the statutes applicable to the subject of copyright, and in many instances to enlarge the protection, secured by copyright, particularly by protecting the works of authors and composers which had theretofore been regarded as insufficiently protected. Yet notwithstanding this purpose, we must construe Section 63 as limiting the remedy in instances where the cause of action for infringement arose

62—M. Witmark & Sons v. Standard Music Roll Co., 221 F. 376.
63—Page 379.

prior to July 1, 1909, or where causes were then pending, *or to instances where there has been a violation of the statutes which existed prior to July* 1, 1909, *but which might not be prosecuted* until after that date."

"Appellant urges, however, that Section 3 of the Copyright Law of 1909 will give it protection. . . . The difficulty with this contention is that the statute reached only copyright provided by the Act of 1909; whereas in the present instance, the musical composition was copyrighted under an earlier Act, which gave a cause of action, *the remedy for which was preserved, as already said,* by the provisions of Section 63 of the Act of 1909."

The italics in these quotations are inserted by the author of this work to direct attention to the words italicized. No reasons are advanced for the views thus expressed by the Court. It appears from the opinion[64] that the infringement in question took place at some time in, or after, 1912. It appears clear then, that the Court deemed that the effect of Section 63 was to keep the prior statutes in force, as far as concerned future infringement of the rights, which comprised copyright under such statutes. The bearing of Section 3 of the Act upon these questions is discussed under that Section[65] and need not be repeated here.

The Court's view, as expressed, was, apparently, that the past Acts were amended and consolidated into the present Act. If so, they ceased to exist. The statutes did not give a cause of action. They could not do so, if non-existent. They did not do so if existent. The cause of action arose out of the defendant's violation of the statute, not out of the statute itself. The right invaded arose out of the

64—Page 378.
65—See § 474.

statute. It is true, of course, that if it were not for statute, such Act would not be actionable but the remedy and the right must not be confused. The Court appears to have done this, for while it recognizes Section 63 deals with remedies only, the effect of its decision is to make it deal with substantive rights. It may be doubted whether the apparent injustice of the decision will be perpetuated elsewhere than in the Circuit where adopted, or whether the opinion with its statements of conclusions, without reasons in support thereof, and misapprehension of authorities, will commend itself to other judicial tribunals.

§ 1660 Possible unrepealed Sections.

Possible important open questions under the Act are (a) whether the Act has repealed the provisions of prior law requiring labels and prints relating to articles of manufacture to be filed in the Patent Office,[66] and (b) the provisions with respect to ad interim copyrights of books printed in foreign languages[67] discussed elsewhere.

Other Sections, which may, or may not, be held repealed, follow. Only those which do not appear on their face to conflict with the Act are printed.

§ 1661 Manuscripts.

> "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 the injury."[68]

This Act may be traced back to Section 6 of the Copyright Act of 1790. Declaratory as it is of the common law, it is of interest chiefly from the point of view of a jurisdictional aspect, where Federal Courts may be asked for relief in cases covered by its provisions, if unrepealed.

66—Act of June 18, 1874. See § 594 *et seq.*
67—Act of March 5, 1905. See § 810, 929 *et seq.*
68—Act of March 3, 1891.

"In all actions arising under the laws respecting copyrights the defendant may plead the general issue and give the special matter in evidence."[69]

§ 1662 Pleading.

Whether this Section of the former Act is still in force, is an open question. Various possible defenses to a bill of complaint in copyright suits such as abandonment, prior publication, improper registration or non-registration, etc., require affirmative allegation in the absence of a rule as laid down in the statute under discussion. In the absence of a decision on the point, the careful practitioner will, doubtless, set out affirmative defenses at length, in addition to pleading the general issue.

§ 1663 Deposit of copies of subsequent editions.

So much of R. S. 4959 as provides for the deposit of a "copy of every subsequent edition wherein any substantial changes shall be made" within ten days after publication,[70] covers a situation not expressly mentioned in the Act. It is, however, probably repealed.

§ 1664 Date on which Act of 1909 became effective.

Section 64. That this Act shall go into effect on the first day of July, Nineteen Hundred and Nine.

69—R. S. 4969 Revision of Dec. 1, 1873.
70—Revision of 1873.

APPENDIX

APPENDIX A.

THE COPYRIGHT LAW OF THE UNITED STATES OF AMERICA

Being the Act of March 4, 1909
(In Force July 1, 1909)
As Amended by the Acts of August 24, 1912,
March 2, 1913, and March 28, 1914
Together with Rules for Practice and Procedure
under Section 25 by the Supreme Court
of the United States

AN ACT TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work; — Exclusive right to print, publish, and vend.

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art; — Exclusive right to translate, dramatize, arrange, and adapt, etc.

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production; — Exclusive right to deliver lectures, sermons, etc.

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or — To represent dramatic works, or make record, or exhibit or perform, etc.

any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;

To perform music and make arrangement, setting, or record.

(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced:

Act not retroactive.

Provided, That the provisions of this Act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall

Music by foreign author.

include only compositions published and copyrighted after this Act goes into effect, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights: *And provided further, and as a condition of extending the copyright control to such mechanical reproductions,* That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: *And provided further,* That it

Control of mechanical musical reproduction.

Royalty for use of music on records, etc.

shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

Notice of use of music on records.

License to use music on records.

In case of the failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount.

Failure to pay royalties.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

Reproduction of music on coin-operated machines.

SEC. 2. That nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

Right at common law or in equity.

SEC. 3. That the copyright provided by this Act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act.

Component parts of copyrightable work.

Composite works or periodicals.

SEC. 4. That the works for which copyright may be secured under this Act shall include all the writings of an author.

Works protected.

SEC. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

Classification of copyright works.

Books, composite, cyclopædic works, directories, gazeteers, etc.

(a) Books, including composite and cyclopædic works, directories, gazetteers, and other compilations;

(b) Periodicals, including newspapers;

(c) Lectures, sermons, addresses (prepared for oral delivery);

(d) Dramatic or dramatico-musical compositions;

(e) Musical compositions;

(f) Maps;

(g) Works of art; models or designs for works of art;

(h) Reproductions of a work of art;

(i) Drawings or plastic works of a scientific or technical character;

(j) Photographs;

(k) Prints and pictorial illustrations;

(*l*) *Motion-picture photoplays;*[1]

(*m*) *Motion pictures other than photoplays:*

Classification does not limit copyright.

not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act.

Compilations, abridgements, dramatizations, translations, new editions.

SEC. 6. That compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works.

Subsisting copyright not affected.

Not subject-matter of copyright; works in public domain; Government publications.

SEC. 7. That no copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to the going into effect of this Act and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof: *Provided, however,*

1—The changes marked, and the additions of the words printed in italics are authorized by the amendatory Act of August 24, 1912.

That the publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.

Copyright to author or proprietor for terms specified in Act.

SEC. 8. That the author or proprietor of any work made the subject of copyright by this Act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this Act: *Provided, however*, That the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:

Foreign authors who may secure copyright protection.

Alien authors domiciled in U. S.

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

Authors, when citizens of countries granting reciprocal rights.

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

International agreement.

Presidential proclamations.

The existence of the reciprocal 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.

Publication with notice initiates copyright.

SEC. 9. That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section twenty-one of this Act.

Registration of copyright.

SEC. 10. That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such

Copyright certificate.

compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act.

Copyright protection of unpublished works: lectures, dramas, music, etc.

SEC. 11. That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or *dramatico-musical* composition; *of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay;* of a photographic print if the work be a photograph; *of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay;*[2] or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this Act, where the work is later reproduced in copies for sale.

Deposit of copies after publication.

Two complete copies of best edition.

Label and print.

Work by foreigner, published abroad, only one copy required.

Periodical contributions.

Work not reproduced in copies for sale.

SEC. 12. That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, *or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country,* which copies *or copy,*[3] if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale, there shall be deposited

2—The words printed in italics indicate the amendments authorized by the amendatory Act of August 24, 1912.

3—The words printed in italics in sec. 12 are inserted by the amendatory Act of Mar. 28, 1914, which also provides "That all Acts or parts of Acts in conflict with the provisions of this Act are hereby repealed."

the copy, print, photograph, or other identifying reproduction provided by section eleven of this Act, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.

No action for infringement until deposit of copies.

SEC. 13. That should the copies called for by section twelve of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.

Failure to deposit copies.

Register of copyrights may demand copies.

Failure to deposit on demand.

Fine $100 and retail price of 2 copies, best edition.

Forfeiture of copyright.

SEC. 14. That the postmaster to whom are delivered the articles deposited as provided in sections eleven and twelve of this act shall, if requested, give a receipt therefor and shall mail them to their destination without cost to the copyright claimant.

Postmaster's receipt.

SEC. 15. That of the printed book or periodical specified in section five, subsections (a) and (b) of this act, except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this act, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo-engraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which re-

Printed from type set within the United States.

Book in foreign language excepted.

Lithographic or photo-engraving process.

Printing and binding of the book.

Illustrations in a book.

quirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photo-engraving process, and also to separate lithographs or photo-engravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art; but they shall not apply to works in raised characters for the use of the blind, or to books of foreign origin in a language or languages other than English, or to books published abroad in the English language seeking ad interim protection under this act.

Separate lithographs and photo-engravings.

Books for blind excepted.

Books in foreign languages excepted.

Affidavit of American manufacture.

SEC. 16. That in the case of the book the copies so deposited shall be accompanied by an affidavit, under the official seal of any officer authorized to administer oaths within the United States, duly made by the person claiming copyright or by his duly authorized agent or representative residing in the United States, or by the printer who has printed the book, setting forth that the copies deposited have been printed from type set within the limits of the United States or from plates made within the limits of the United States from type set therein; or, if the text be produced by lithographic process, or photo-engraving process, that such process was wholly performed within the limits of the United States, and that the printing of the text and binding of the said book have also been performed within the limits of the United States. Such affidavit shall state also the place where and the establishment or establishments in which such type was set or plates were made or lithographic process, or photo-engraving process or printing and binding were performed and the date of the completion of the printing of the book or the date of publication.

Printing and binding of the book.

Establishment where printing was done.

Date of publication.

False affidavit, a misdemeanor; fine, $1,000 and forfeiture of copyright.

SEC. 17. That any person who, for the purpose of obtaining registration of a claim to copyright, shall knowingly make a false affidavit as to his having complied with the above conditions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, and all of his rights and privileges under said copyright shall thereafter be forfeited.

Notice of copyright.

SEC. 18. That the notice of copyright required by section nine of this act shall consist either of the word

"Copyright" or the abbreviation "Copr.," accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section five of this act, the notice may consist of the letter C inclosed within a circle, thus: ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided,* That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright is subsisting when this act shall go into effect, the notice of copyright may be either in one of the forms prescribed herein or in one of those prescribed by the Act of June eighteenth, eighteen hundred and seventy-four.

Notice on maps, copies of works of art, photographs, and prints.

Notice on accessible portion.

Notice on existing copyright works.

SEC. 19. That the notice of copyright shall be applied, in the case of a book or other printed publication, upon its title-page or the page immediately following, or if a periodical either upon the title-page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title-page or the first page of music: *Provided,* That one notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.

Notice of copyright on book.

On periodical.

One notice in each volume or periodical.

SEC. 20. That where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.

Omission of notice by accident or mistake.

Innocent infringement.

SEC. 21. That in the case of a book published abroad in the English language before publication in this country, the deposit in the copyright office, not later than thirty

Book published abroad in the English language.

days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book, shall secure to the author or proprietor an ad interim copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of thirty days after such deposit in the copyright office.

Ad interim copyright for 30 days.

Extension to full term.

SEC. 22. That whenever within the period of such ad interim protection an authorized edition of such book shall be published within the United States, in accordance with the manufacturing provisions specified in section fifteen of this Act, and whenever the provisions of this Act as to deposit of copies, registration, filing of affidavit, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book for the full term elsewhere provided in this Act.

Deposit of copies, filing of affidavit.

Duration of copyright: First term, 28 years.

SEC. 23. That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopædic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopædic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or chil-

Posthumous works, periodicals, cyclopædic or composite works.

Renewal term, 28 years.

Other copyrighted works, first term 28 years.

Renewal term, 28 years; to author, widow, children, heirs, or next of kin.

dren be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

Notice that renewal term is desired.

Copyright ends in 28 years unless renewed.

SEC. 24. That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: *Provided however,* That if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: *Provided,* That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term.

Extension of subsisting copyrights.

Proprietor entitled to renewal for composite work.

Renewal application.

SEC. 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

Infringement of copyright.

(a) To an injunction restraining such infringement;

Injunction.

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in

Damages.

Proving sales.

Newspaper reproduction of photograph: recovery, $50 to $200.

its discretion, allow the amounts as hereinafter stated, but in [4] case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, *and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of one hundred dollars; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars,* and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. *But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.*[5]

Infringement by motion pictures.

Undramatized or non-dramatic work, maximum damages, $100.

Dramatic work, maximum damages, $5,000.

Maximum recovery, $5,000.

Minimum recovery, $250.

Painting, statue, or sculpture, $10 for every infringing copy.

Other works, $1 for every infringing copy.

First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section five of this Act, except a painting, statue, or sculpture, one dollar for every infringing copy made

4—The word "the" before the words "case of a newspaper reproduction," etc., was struck out by the amendatory Act of August 24, 1912.

5—The words printed in italics indicate the amendments authorized by the amendatory Act of August 24, 1912.

or sold by or found in the possession of the infringer or his agents or employees;

Lectures, $50 for every infringing delivery.

Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

Dramatic or musical works. $100 for first and $50 for subsequent infringing performance.

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance;

Other musical compositions. $10 for every infringing performance.

Delivering up infringing articles.

(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

Destruction of infringing copies, etc.

(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order;

Infringement by mechanical musical instruments.

(e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one, subsection (e), of this Act: *Provided also*, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this Act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums herein-

Injunction may be granted.

Recovery of royalty.

Notice to proprietor of intention to use.

Damages, three times amount provided.

above mentioned, award the complainant a further sum, not to exceed three times the amount provided by section one, subsection (e), by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

Temporary injunction.

Rules for practice and procedure.

Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States.

Judgment enforcing remedies.

SEC. 26. That any court given jurisdiction under section thirty-four of this Act may proceed in any action, suit, or proceeding instituted for violation of any provision hereof to enter a judgment or decree enforcing the remedies herein provided.

Proceedings, injunction, etc., may be united in one action.

SEC. 27. That the proceedings for an injunction, damages, and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action.

Penalty for willful infringement.

SEC. 28. That any person who willfully and for profit shall infringe any copyright secured by this Act, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than one hundred dollars nor more than one thousand dollars, or both, in the discretion of the court: *Provided, however,* That nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

Oratorios, cantatas, etc., may be performed.

False notice of copyright (penalty for).

Fraudulent removal of notice, fine $100-$1,000.

Issuing, selling, or importing article bearing false notice; fine $100.

SEC. 29. That any person who, with fraudulent intent, shall insert or impress any notice of coypright required by this Act, or words of the same purport, in or upon any uncopyrighted article, or with fraudulent intent shall remove or alter the copyright notice upon any article duly copyrighted shall be guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars and not more than one thousand dollars. Any person who shall knowingly issue or sell any article bearing a notice of

United States copyright which has not been copyrighted in this country, or who shall knowingly import any article bearing such notice or words of the same purport, which has not been copyrighted in this country, shall be liable to a fine of one hundred dollars.

Importation prohibited of articles bearing false notice and *piratical* copies.

SEC. 30. That the importation into the United States of any article bearing a false notice of copyright when there is no existing copyright thereon in the United States, or of any piratical copies of any work copyrighted in the United States, is prohibited.

Prohibition of importation of books.

SEC. 31. That during the existence of the American copyright in any book the importation into the United States of any piratical copies thereof or of any copies thereof (although authorized by the author or proprietor) which have not been produced in accordance with the manufacturing provisions specified in section fifteen of this Act, or any plates of the same not made from type set within the limits of the United States, or any copies thereof produced by lithographic or photo-engraving process not performed within the limits of the United States, in accordance with the provisions of section fifteen of this Act, shall be, and is hereby, prohibited: *Provided, however,* That, except as regards piratical copies, such prohibition shall not apply:

Exceptions to prohibition of importation:

Works for the blind.

(a) To works in raised characters for the use of the blind;

Foreign newspapers or magazines.

(b) To a foreign newspaper or magazine, although containing matter copyrighted in the United States printed or reprinted by authority of the copyright proprietor, unless such newspaper or magazine contains also copyright matter printed or reprinted without such authorization:

Books in foreign languages of which only translations are copyrighted.

(c) To the authorized edition of a book in a foreign language or languages of which only a translation into English has been copyrighted in this country;

Importation of authorized foreign books permitted.

(d) To any book published abroad with the authorization of the author or copyright proprietor when imported under the circumstances stated in one of the four subdivisions following, that is to say:

For individual use and not for sale.

First. When imported, not more than one copy at one time, for individual use and not for sale; but

such privilege of importation shall not extend to a foreign reprint of a book by an American author copyrighted in the United States;

For the use of the United States.

Second. When imported by the authority or for the use of the United States;

For the use of societies, libraries, etc.

Third. When imported, for use and not for sale, not more than one copy of any such book in any one invoice, in good faith, by or for any society or institution incorporated for educational, literary, philosophical, scientific, or religious purposes, or for the encouragement of the fine arts, or for any college, academy, school, or seminary of learning, or for any State, school, college, university, or free public library in the United States;

Libraries purchased en bloc.

Fourth. When such books from parts of libraries or collections purchased en bloc for the use of societies, institutions, or libraries designated in the foregoing paragraph, or form parts of the libraries or personal baggage belonging to persons or families arriving from foreign countries and are not intended for sale:

Books brought personally into the United States.

Imported copies not to be used to violate copyright.

Provided, That copies imported as above may not lawfully be used in any way to violate the rights of the proprietor of the American copyright or annul or limit the copyright protection secured by this Act, and such unlawful use shall be deemed an infringement of copyright.

Seizure of unlawfully imported copies.

SEC. 32. That any and all articles prohibited importation by this Act which are brought into the United States from any foreign country (except in the mails) shall be seized and forfeited by like proceedings as those provided by law for the seizure and condemnation of property imported into the United States in violation of the customs revenue laws. Such articles when forfeited shall be destroyed in such manner as the Secretary of the Treasury or the court, as the case may be, shall direct: *Provided, however,* That all copies of authorized editions of copyright books imported in the mails or otherwise in violation of the provisions of this Act may be exported and returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury, in a written application, that such importation does not involve willful negligence or fraud.

Copies of authorized books imported may be returned.

Secretary of Treasury and Postmaster-General to make rules to prevent unlawful importation.

SEC. 33. That the Secretary of the Treasury and the Postmaster-General are hereby empowered and required to make and enforce such joint rules and regulations as shall prevent the importation into the United States in the mails of articles prohibited importation by this Act, and may require notice to be given to the Treasury Department or Post-Office Department, as the case may be, by copyright proprietors or injured parties, of the actual or contemplated importation of articles prohibited importation by this Act, and which infringe the rights of such copyright proprietors or injured parties.

Jurisdiction of courts in copyright cases.

SEC. 34. That all actions, suits, or proceedings arising under the copyright laws of the United States shall be originally cognizable by the circuit courts of the United States, the district court of any Territory, the supreme court of the District of Columbia, the district courts of Alaska, Hawaii, and Porto Rico, and the courts of first instance of the Philippine Islands.

District in which suit may be brought.

SEC. 35. That civil actions, suits, or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found.

Injunctions may be granted.

SEC. 36. That any such court or judge thereof shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this Act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants.

Certified copy of papers filed.

SEC. 37. That the clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to enforce said injunction, transmit without delay to said court a certified copy of all the papers in said cause that are on file in his office.

Judgments, etc., may be reviewed on

SEC. 38. That the orders, judgments, or decrees of any court mentioned in section thirty-four of this Act arising

Appeal or writ of error.

under the copyright laws of the United States may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases determined in said courts, respectively.

No criminal proceedings shall be maintained after *three* years.

SEC. 39. That no criminal proceeding shall be maintained under the provisions of this Act unless the same is commenced within three years after the cause of action arose.

Full costs shall be allowed.

SEC. 40. That in all actions, suits, or proceedings under this Act, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.

Copyright distinct from property in material object.

SEC. 41. That the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

Transfer of any copy of copyrighted work permitted.

Copyright may be assigned, mortgaged, or bequeathed by will.

SEC. 42. That copyright secured under this or previous Acts of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will.

Assignment executed in foreign country to be acknowledged.

SEC. 43. That every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts. The certificate of such acknowledgment under the hand and official seal of such consular officer or secretary of legation shall be prima facie evidence of the execution of the instrument.

Assignments to be recorded.

SEC. 44. That every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

Register of copyrights to record assignments.

SEC. 45. That the register of copyrights shall, upon payment of the prescribed fee, record such assignment, and shall return it to the sender with a certificate of record attached under seal of the copyright office, and upon the payment of the fee prescribed by this Act he shall furnish to any person requesting the same a certified copy thereof under the said seal.

Assignee's name may be substituted in copyright notice.

SEC. 46. That when an assignment of the copyright in a specified book or other work has been recorded the assignee may substitute his name for that of the assignor in the statutory notice of copyright prescribed by this Act.

Copyright records.

SEC. 47. That all records and other things relating to copyrights required by law to be preserved shall be kept and preserved in the copyright office, Library of Congress, District of Columbia, and shall be under the control of the register of copyrights, who shall, under the direction and supervision of the Librarian of Congress, perform all the duties relating to the registration of copyrights.

Register of copyrights and assistant register of copyrights.

SEC. 48. That there shall be appointed by the Librarian of Congress a register of copyrights, at a salary of four thousand dollars per annum, and one assistant register of copyrights, at a salary of three thousand dollars per annum, who shall have authority during the absence of the register of copyrights to attach the copyright office seal to all papers issued from the said office and to sign such certificates and other papers as may be necessary. There shall also be appointed by the Librarian such subordinate assistants to the register as may from time to time be authorized by law.

Register of copyrights to deposit and account for fees.

SEC. 49. That the register of copyrights shall make daily deposits in some bank in the District of Columbia, designated for this purpose by the Secretary of the Treasury as a national depository, of all moneys received to be applied as copyright fees, and shall make weekly deposits with the Secretary of the Treasury in such manner as the latter shall direct, of all copyright fees actually applied under the provisions of this Act, and annual deposits of sums received which it has not been possible to apply as copyright fees or to return to the remitters, and shall also make monthly reports to the Secretary of the Treasury and to the Librarian of Congress of the

Shall make monthly report of fees.

applied copyright fees for each calendar month, together with a statement of all remittances received, trust funds on hand, moneys refunded, and unpaid balances.

Bond of register of copyrights.

SEC. 50. That the register of copyrights shall give bond to the United States in the sum of twenty thousand dollars, in form to be approved by the Solicitor of the Treasury and with sureties satisfactory to the Secretary of the Treasury, for the faithful discharge of his duties.

Annual report of register of copyrights.

SEC. 51. That the register of copyrights shall make an annual report to the Librarian of Congress, to be printed in the annual report on the Library of Congress, of all copyright business for the previous fiscal year, including the number and kind of works which have been deposited in the copyright office during the fiscal year, under the provisions of this Act.

Seal of copyright office.

SEC. 52. That the seal provided under the Act of July eighth, eighteen hundred and seventy, and at present used in the copyright office, shall continue to be the seal thereof, and by it all papers issued from the copyright office requiring authentication shall be authenticated.

Rules for the registration of copyrights.

SEC. 53. That, subject to the approval of the Librarian of Congress, the register of copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this Act.

Record books.

SEC. 54. That the register of copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this Act, and

Entry of copyright.

whenever deposit has been made in the copyright office of a copy of any work under the provisions of this Act he shall make entry thereof.

Certificate of registration.

SEC. 55. That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant,

Nationality of author.

the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work *which is registered* for which copyright is claimed, the date of the deposit of the copies of such work, *the date of publication if the*

work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book the certificate shall also state the receipt of the affidavit, as provided by section sixteen of this Act, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The register of copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for *in the case of all registrations made after this Act goes into effect, and in the case of all previous registrations so far as the copyright office record books shall show such facts,*[6] which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration.

Certificate for book to state receipt of affidavit.

Certificate may be given to any person.

Receipt for copies deposited.

SEC. 56. That the register of copyrights shall fully index all copyright registrations and assignments and shall print at periodic intervals a catalogue of the titles of articles deposited and registered for copyright, together with suitable indexes, and at stated intervals shall print complete and indexed catalogues for each class of copyright entries, and may thereupon, if expedient, destroy the original manuscript catalogue cards containing the titles included in such printed volumes and representing the entries made during such intervals. The current catalogues of copyright entries and the index volumes herein provided for shall be admitted in any court as prima facie evidence of the facts stated therein as regards any copyright registration.

Index to copyright registrations.

Catalogue of copyright entries.

Catalogue cards.

Catalogues and indexes prima facie evidence.

SEC. 57. That the said printed current catalogues as they are issued shall be promptly distributed by the copyright office to the collectors of customs of the United States and to the postmasters of all exchange offices of receipt of foreign mails, in accordance with revised lists of such

Distribution of catalogue of copyright entries.

6—The words printed in italics indicate the amendments authorized by the amendatory Act of March 2, 1913.

collectors of customs and postmasters prepared by the Secretary of the Treasury and the Postmaster-General, and they shall also be furnished to all parties desiring them at a price to be determined by the register of copyrights, not exceeding five dollars per annum for the complete catalogue of copyright entries and not exceeding one dollar per annum for the catalogues issued during the year for any one class of subjects. The consolidated catalogues and indexes shall also be supplied to all persons ordering them at such prices as may be determined to be reasonable, and all subscriptions for catalogues shall be received by the Superintendent of Public Documents, who shall forward the said publications; and the moneys thus received shall be paid into the Treasury of the United States and accounted for under such laws and Treasury regulations as shall be in force at the time.

Subscription price.

Superintendent of documents to receive subscriptions.

Record books, etc., open to inspection.

Copies may be taken of entries in record books.

SEC. 58. That the record books of the copyright office, together with the indexes to such record books, and all works deposited and retained in the copyright office, shall be open to public inspection; and copies may be taken of the copyright entries actually made in such record books, subject to such safeguards and regulations as shall be prescribed by the register of copyrights and approved by the Librarian of Congress.

Disposition of copyright deposits.

SEC. 59. That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein.

Preservation of copyright deposits.

Disposal of copyright deposits.

SEC. 60. That of any articles undisposed of as above provided, together with all titles and correspondence relating thereto, the Librarian of Congress and the register of copyrights jointly shall, at suitable intervals, determine what of these received during any period of years it is desirable or useful to preserve in the permanent files of the copyright office, and, after due notice as hereinafter provided, may within their discretion cause the remain-

ing articles and other things to be destroyed: *Provided,* That there shall be printed in the Catalogue of Copyright Entries from February to November, inclusive, a statement of the years of receipt of such articles and a notice to permit any author, copyright proprietor, or other lawful claimant to claim and remove before the expiration of the month of December of that year anything found which relates to any of his productions deposited or registered for copyright within the period of years stated, not reserved or disposed of as provided for in this Act: *And provided further,* That no manuscript of an unpublished work shall be destroyed during its term of copyright without specific notice to the copyright proprietor of record, permitting him to claim and remove it.

Manuscript copies to be preserved.

Fees.

SEC. 61. That the register of copyrights shall receive, and the persons to whom the services designated are rendered shall pay, the following fees: For the registration of any work subject to copyright, deposited under the provisions of this Act, one dollar, which sum is to include a certificate of registration under seal: *Provided,* That in the case of photographs the fee shall be fifty cents where a certificate is not demanded. For every additional certificate of registration made, fifty cents. For recording and certifying any instrument of writing for the assignment of copyright, or any such license specified in section one, subsection (e), or for any copy of such assignment or license, duly certified, if not over three hundred words in length, one dollar; if more than three hundred and less than one thousand words in length, two dollars; if more than one thousand words in length, one dollar additional for each one thousand words or fraction thereof over three hundred words. For recording the notice of user or acquiescence specified in section one, subsection (e), twenty-five cents for each notice if not over fifty words, and an additional twenty-five cents for each additional one hundred words. For comparing any copy of an assignment with the record of such document in the copyright office and certifying the same under seal, one dollar. For recording the extension or renewal of copyright provided for in sections twenty-three and twenty-four of this Act, fifty cents. For recording the transfer of the proprietorship of

Fee for registration.

Fee for certificate.

Fee for recording assignment.

Fee for copy of assignment.

Fee for recording notice of user upon mechanical musical instruments.

Fee for comparing copy of assignment.

Fee for recording renewal of copyright.

Fee for re-

cording transfer of proprietorship. copyrighted articles, ten cents for each title of a book or other article, in addition to the fee prescribed for record-

Fee for search. ing the instrument of assignment. For any requested search of copyright office records, indexes, or deposits, fifty cents of each full hour of time consumed in making

Only one registration required for work in several volumes. such search: *Provided,* That only one registration at one fee shall be required in the case of several volumes of the same book deposited at the same time.

Definitions: "Date of publication." SEC. 62. That in the interpretation and construction of this Act "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under

"Author." his authority, and the word "author" shall include an employer in the case of works made for hire.

Repealing clause. SEC. 63. That all laws or parts of laws in conflict with the provisions of this Act are hereby repealed, but nothing in this Act shall affect causes of action for infringement of copyright heretofore committed now pending in courts of the United States, or which may hereafter be instituted; but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

Date of enforcement. SEC. 64. That this Act shall go into effect on the first day of July, nineteen hundred and nine.

Approved, March 4, 1909.

NOTE TO SECTION 18 PROVISO.

The Act of June 18, 1874, provides that the notice of copyright to be inscribed on each copy of a copyrighted work shall consist of the following words:

"Entered according to Act of Congress, in the year ——, by A. B., in the office of the Librarian of Congress, at Washington"; or, . . . 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."

RULES FOR PRACTICE AND PROCEDURE

Under Section 25 of An Act to Amend and Consolidate the Acts Respecting

COPYRIGHT

Approved March 4, 1909, to Take Effect July 1, 1909

Adopted and Promulgated by the Supreme Court of the United States June 1, 1909

RULES ADOPTED BY THE SUPREME COURT OF THE UNITED STATES FOR PRACTICE AND PROCEDURE UNDER SECTION 25 OF AN ACT TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT, APPROVED MARCH 4, 1909. TO GO INTO EFFECT JULY 1, 1909.

1.

The existing rules of equity practice, so far as they may be applicable, shall be enforced in proceedings instituted under section twenty-five (25) of the act of March fourth, nineteen hundred and nine, entitled "An act to amend and consolidate the acts respecting copyright."

2.

A copy of the alleged infringement of copyright, if actually made, and a copy of the work alleged to be infringed, should accompany the petition, or its absence be explained; except in cases of alleged infringement by the public performance of dramatic and dramatico- musical compositions, the delivery of lectures, sermons, addresses, and so forth, the infringement of copyright upon sculptures and other similar works and in any case where it is not feasible.

3.

Upon the institution of any action, suit, or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the clerk of any court given jurisdiction under section 34 of the act of March 4, 1909, an affidavit stating, upon the best of his knowledge, information, and belief, the number and location, as near

as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the clerk a bond executed by at least two sureties and approved by the court or a commissioner thereof.

4.

Such bond shall bind the sureties in a specified sum, to be fixed by the court, but not less than twice the reasonable value of such infringing copies, plates, records, molds, matrices, or other means for making such infringing copies, and be conditioned for the prompt prosecution of the action, suit or proceeding; for the return of said articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant; and for the payment to the defendant of any damages which the court may award to him against the plaintiff or complainant. Upon the filing of said affidavit and bond, and the approval of said bond, the clerk shall issue a writ directed to the marshal of the district where the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be stated in said affidavit to be located, and generally to any marshal of the United States, directing the said marshal to forthwith seize and hold the same subject to the order of the court issuing said writ, or of the court of the district in which the seizure shall be made.

5.

The marshal shall thereupon seize said articles or any smaller or larger part thereof he may then or thereafter find, using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ, and bond by delivering the same to him personally, if he can be found within the district or if he can not be found, to his agent, if any, or to the person from whose possession the articles are taken, or if the owner, agent, or such person can not be found within the district by leaving said copy at the usual place of abode of such owner or agent, with a person of suitable age and discretion, or at the place where said articles are found, and shall make immediate return of such seizure, or attempted seizure, to the court. He shall also attach to said articles a tag or label stating the fact of such seizure and warning all persons from in any manner interfering therewith.

6.

A marshal who has seized alleged infringing articles, shall retain them in his possession, keeping them in a secure place, subject to the order of the court.

7.

Within three days after the articles are seized, and a copy of the affidavit, writ and bond are served as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the court sustain the exceptions it may order a new bond to be executed by the plaintiff or complainant or in default thereof within a time to be named by the court, the property to be returned to the defendant.

8.

Within ten days after service of such notice, the attorney of the plaintiff or complainant shall serve upon the defendant or his attorney a notice of the justification of the sureties, and said sureties shall justify before the court or a judge thereof at the time therein stated.

9.

The defendant, if he does not except to the amount of the penalty of the bond or the sufficieney of the sureties of the plaintiff or complainant, may make application to the court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright.

10.

Thereupon the court in its discretion, and after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum to be fixed in the discretion of the court, and conditioned for the delivery of said specified articles to abide the order of the court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond.

11.

Upon the granting of such application and the justification of the sureties on the bond, the marshal shall immediately deliver the articles seized to the defendant.

12.

Any service required to be performed by any marshal may be performed by any deputy of such marshal.

13.

For services in cases arising under this section, the marshal shall be entitled to the same fees as are allowed for similar services in other cases.

PRESIDENTIAL PROCLAMATIONS.

The following proclamations have been issued by the President, by which copyright protection is granted in the United States to works of authors who are citizens or subjects of the countries named. It is to be noted that this protection does not include "copyright controlling the parts of instruments serving to reproduce mechanically the musical work" provided in Sec. 1 (e) of the Act of March 4, 1909, except in the case of the countries named below, viz: Belgium, Cuba, Germany, Hungary, Luxemburg, and Norway.

July 1, 1891—Belgium, France, Great Britain and the British possessions, and Switzerland. (Stat. L., vol. 27, pp. 981-982.)

April 15, 1892—Germany. (Stat. L., vol. 27, pp. 1021-1022.)

October 31, 1892—Italy. (Stat. L., vol. 27, p. 1043.)

May 8, 1893—Denmark. (Stat. L., vol. 28, p. 1219.)

July 20, 1893—Portugal. (Stat. L., vol. 28, p. 1222.)

July 10, 1895—Spain. (Stat. L., vol. 29, p. 871.)

February 27, 1896—Mexico. (Stat. L., vol. 29, p. 877.)

May 25, 1896—Chile. (Stat. L., vol. 29, p. 880.)

October 19, 1899—Costa Rica. (Stat. L., vol. 31, pp. 1955-1956.)

November 20, 1899—Netherlands and possessions. (Stat. L., vol. 31, p. 1961.)

November 17, 1903—Cuba. (Stat. L., vol. 33, pt. 2, p. 2324.)

January 13, 1904—China. (Treaty of October 8, 1903, Article XI.) (Stat. L., vol. 33, pt. 2, pp. 2208, 2213, 2214.)

July 1, 1905—Norway. (Stat. L., vol. 34, pt. 3, pp. 3111-3112.)

May 17, 1906—Japan. (Treaty of November 10, 1905.) Stat. L., vol. 34, pt. 3, pp. 2890-2891.)

September 20, 1907—Austria. (Stat. L., vol. 35, pt. 2, p. 2155.)

April 9, 1908—Convention between the United State and other powers on literary and artistic copyrights, signed at the City of Mexico, January 27, 1902. (This treaty is effective from July 1, 1908, as between the United States and the following countries: Guatemala, Salvador, Costa Rica, Honduras, and Nicaragua.) Stat. L., vol. 35, pt. 2, pp. 1934-1946. English, French, and Spanish texts.)

August 11, 1908—Japan. (Treaty of May 19, 1908, for protection in China.) (Stat. L., vol. 35, pt. 2, pp. 2044-2046.)

August 11, 1908—Japan. (Treaty of May 19, 1908, for protection in Korea.) Stat. L., vol. 35, pt. 2, pp. 2041-2043.)

April 9, 1910—Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and her possessions, Italy, Mexico, the Netherlands and possessions, Norway, Portugal, Spain, and Switzerland. (Stat. L., vol. 36, pt. 2, pp. 2685-2686.)

June 29, 1910—Luxemburg. (Stat. L., vol. 36, pt. 2, p. 2716.)

May 26, 1911—Sweden. (Effective June 1, 1911.) (Stat. L., vol. 37, pt. 2, pp. 1682-1683.)

October 4, 1912—Tunis. (Stat. L., vol. 37, pt. 2, p. 1765.)

October 15, 1912—Hungary. (Copyright convention between the United States and Hungary, effective October 16, 1912, including protection under Sec. 1 (e).) (Stat. L., vol. 37, pt. 2, pp. 1631-1633.)

PRESIDENTIAL PROCLAMATIONS UNDER SECTION 1 (e).

December 8, 1910—Germany. (Stat. L., vol. 36, pt. 2, pp. 2761-2762.)

June 14, 1911—Belgium, Luxemburg, and Norway. (Stat. L., vol. 37, pt. 2, pp. 1687-1690.)

November 27, 1911—Cuba. (Stat. L., vol. 37, pt. 2, pp. 1721-1722.)

October 15, 1912—Hungary. (See above.)

COPYRIGHT.

By the President of the United States of America.

A PROCLAMATION.

Whereas it is provided by the act of Congress of March 4, 1909, entitled "An act to amend and consolidate the acts respecting copyright," that the benefits of said act, excepting the benefits under section 1 (*e*) thereof, as to which special conditions are imposed, shall extend to the work of an author or proprietor who is a citizen or subject of a foreign State or nation, only upon certain conditions set forth in section 8 of said act, to wit:

(*a*) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

(*b*) When the foreign State or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this act or by treaty; or when such foreign State or nation

is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto:

And whereas it is also provided by said section that "The existence of the reciprocal 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":

And whereas satisfactory evidence has been received that in Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and her possessions, Italy, Mexico, the Netherlands and possessions, Norway, Portugal, Spain, and Switzerland the law permits and since July 1, 1909, has permitted to citizens of the United States the benefit of copyright on substantially the same basis as to citizens of those countries:

Now, therefore, I, WILLIAM HOWARD TAFT, President of the United States of America, do declare and proclaim that one of the alternative conditions specified in section 8, of the act of March 4, 1909, is now fulfilled, and since July 1, 1909, has continuously been fulfilled, in respect to the citizens or subjects of Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and her possessions, Italy, Mexico, the Netherlands and possessions, Norway, Portugal, Spain, and Switzerland, and that the citizens or subjects of the aforementioned countries are and since July 1, 1909, have been entitled to all of the benefits of the said act other than the benefits under section 1 (*e*) thereof, as to which the inquiry is still pending.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this ninth day of April,
[SEAL.] in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America the one hundred and thirty-fourth.

WM. H. TAFT.

By the President:
P. C. KNOX,
Secretary of State.

In "The Statutes at Large of the United States of America, from March, 1909, to March, 1911." Vol. 36, part 2. 8 vo. Washington, 1911, pp. 2685-2686.

COPYRIGHT CONVENTION.

United States and Hungary.

IN FORCE OCTOBER 16, 1912.

The President of the United States of America and His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary, desiring to provide, between the United States of America and Hungary, for a reciprocal legal protection in regard to copyright of the citizens and subjects of the two countries, have, to this end, decided to conclude a convention, and have appointed as their plenipotentiaries:

The President of the United States of America—

Richard C. Kerens, Ambassador Extraordinary and Plenipotentiary of the United States of America to His Imperial and Royal Apostolic Majesty; and

His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary—

Count Paul Esterházy, Baron of Galántha, Viscount of Fraknó, Privy Councillor and Chamberlain, Chief of Section in the Ministry of the Imperial and Royal House and of Foreign Affairs, and

Dr. Gustavus de Töry, Secretary of State in the Royal Hungarian Ministry of Justice;

Who, having communicated to each other their full powers, found to be in good and due form, have agreed as follows:

ARTICLE 1.

Authors who are citizens or subjects of one of the two countries or their assigns shall enjoy in the other country, for their literary, artistic, dramatic, musical, and photographic works (whether unpublished or published in one of the two countries) the same rights which the respective laws do now or may hereafter grant to natives.

The above provision includes the copyright control of mechanical musical reproductions.

ARTICLE 2.

The enjoyment and the exercise of the rights secured by the present Convention are subject to the performance of the conditions and formalities prescribed by the laws and regulations of the country where protection is claimed under the present Convention; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work.

ARTICLE 3.

The term of copyright protection granted by the present Convention shall be regulated by the law of the country where protection is claimed.

ARTICLE 4.

The present Convention shall be ratified and the ratification shall be exchanged at Washington as soon as possible.

ARTICLE 5.

The present Convention shall be put in force one month after the exchange of ratifications, and shall remain in force until the termination of a year from the day on which it may have been denounced.

In faith whereof the Plenipotentiaries have signed the present Convention in two copies, each in English and Hungarian languages, and have affixed thereto their seals.

Done at Budapest, the 30th day of January, 1912.

(SEAL) RICHARD C. KERENS.
(SEAL) ESTERHÁZY PÁL.
(SEAL) TÖRY GUSTÁV.

NOTE.—Ratification was advised by the Senate, July 23, 1912; ratifications were exchanged, September 16, 1912; proclaimed by the President, October 15, 1912. The Convention went into force October 16, 1912.

In "The Statutes at Large of the United States of America, from March, 1911, to March, 1913." Vol. 37, part 2. 8 vo. Washington, 1913, pp. 1631-1633.

RULES AND REGULATIONS FOR THE REGISTRATION OF CLAIMS TO COPYRIGHT

Copyright under act.

1. Copyright under the act of Congress entitled: "An act to amend and consolidate the acts respecting copyright," approved March 4, 1909,[7] is ordinarily secured by printing and publishing a copyrightable work with a notice of claim in the form prescribed by the statute. Registration can be made *after* such publication, but the statute expressly provides, in certain cases, for registration of manuscript works.

WHO MAY SECURE COPYRIGHT.

Persons entitled to copyright.

2. The persons entitled by the act to copyright protection for their works are:

(1) The *author* of the work, if he is:

(*a*) A citizen of the United States, or

(*b*) An alien author domiciled in the United States at the time of the first publication of his work, or

(*c*) A citizen or subject of any country which grants either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens. The existence of reciprocal copyright conditions is determined by presidential proclamation.[8]

7—Amendatory acts were approved August 24, 1912 (providing for the registration of motion pictures), and March 2, 1913 (amending sec. 55, with regard to the certificate of registration).

8—Presidential copyright proclamations have been issued securing copyright privileges in the United States to the citizens or subjects of the following countries: Austria, Belgium, Chile, China, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and her possessions, Guatemala, Honduras, Hungary, Italy, Japan, Luxemburg, Mexico, Netherlands (Holland) and possessions, Nicaragua, Norway, Portugal, Salvador, Spain, Sweden, Switzerland, and Tunis.

(2) The *proprietor* of a work. The word "proprietor" is here used to indicate a person who derives his title to the work from the author. If the author of the work should be a person who could not himself claim the benefit of the copyright act, the proprietor can not claim it.

(3) The *executors, administrators,* or *assigns* of the above-mentioned author or proprietor.

REGISTRATION.

Copyright registration.

3. After the publication of any work entitled to copyright, the claimant of copyright should register his claim in the Copyright Office. An action for infringement of copyright can not be maintained in court until the provisions with respect to the deposit of copies and registration of such work shall have been complied with.

A certificate of registration is issued to the applicant and duplicates thereof may be obtained on payment of the statutory fee of 50 cents.

SUBJECT MATTER OF COPYRIGHT.

Works subject to copyright.

4. The act provides that no copyright shall subsist in the original text of any work published prior to July 1, 1909, which has not been already copyrighted in the United States (sec. 7).

Section 5 of the act divides the works for which copyright may be secured into eleven classes, as follows:

(*a*) *Books.*—This term includes all printed literary works (except dramatic compositions) whether published in the ordinary shape of a book or pamphlet, or printed as a leaflet, card, or single page. The term "book" as used in the law includes tabulated forms of information, frequently called charts; tables of figures showing the results of mathematical computations, such as logarithmic tables; interest, cost, and wage tables, etc., single poems, and the words of a song when printed and published without music; librettos; descriptions of motion pictures or spectacles; encyclopædias; catalogues; directories; gazeteers and similar compilations; circulars or folders containing information in the form of reading matter other than mere lists of articles, names and addresses, and literary contributions to periodicals or newspapers.

Blank books, etc., not copyrightable.

5. The term "book" can not be applied to—

Blank books for use in business or in carrying out any system of transacting affairs, such as record books, account books, memorandum books, diaries or journals, bank deposit and check books; forms of contracts or leases which do not contain original copyrightable matter; coupons; forms for use in commercial, legal, or financial transactions, which are wholly or partly blank and whose value lies in their usefulness and not in their merit as literary compositions.

Periodicals.

6. (*b*) *Periodicals.*—This term includes newspapers, magazines, reviews, and serial publications appearing oftener than once a year; bulletins or proceedings of societies, etc., which appear regularly at intervals of less than a year; and, generally, periodical publications which would be registered as second-class matter at the post office.

Lectures, etc.

7. (*c*) *Lectures, sermons, addresses,* or similar productions, prepared for oral delivery.

Dramatic compositions, etc.

8. (*d*) *Dramatic and dramatico-musical compositions,* such as dramas, comedies, operas, operettas, and similar works.

The designation "dramatic composition" does not include the following: Dances, ballets, or other choregraphic works; tableaux and motion-picture shows; stage settings or mechanical devices by which dramatic effects are produced, or "stage business"; animal shows, sleight-of-hand performances, acrobatic or circus tricks of any kind; descriptions of motion pictures or of settings for the production of motion pictures. (These, however, when printed and published, are registrable as "books.")

Dramatico-musical compositions, etc.

9. *Dramatico-musical compositions* include principally operas, operettas, and musical comedies, or similar productions which are to be acted as well as sung.

Songs separately published.

Ordinary songs, even when intended to be sung from the stage in a dramatic manner, or separately published songs from operas and operettas, should be registered as musical compositions, not dramatico-musical compositions.

Musical compositions.

10. (*e*) *Musical compositions,* including other vocal and all instrumental compositions, with or without words.

But when the text is printed alone it should be registered as a "book," not as a "musical composition."

"Adaptations" and "arrangements" may be registered

as "new works" under the provisions of section 6. Mere transpositions into different keys are not expressly provided for in the copyright act; but if published with copyright notice and copies are deposited with application, registration will be made.

Maps.

11. (*f*) *Maps.*—This term includes all cartographical works, such as terrestrial maps, plats, marine charts, star maps, but not diagrams, astrological charts, landscapes, or drawings of imaginary regions which do not have a real existence.

Works of art.

12 (*g*) *Works of art.*—This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

Productions of the industrial arts utilitarian in purpose and character are not subject to copyright registration, even if artistically made or ornamented.

Toys, games, etc.

No copyright exists in toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or any similar articles.

Reproductions of works of art.

13. (*h*) *Reproductions of works of art.*—This term refers to such reproductions (engravings, woodcuts, etchings, casts, etc.) as contain in themselves an artistic element distinct from that of the original work of art which has been reproduced.

Drawings or plastic works.

14. (*i*) *Drawings or plastic works of a scientific or technical character.*—This term includes diagrams or models illustrating scientific or technical works, architects' plans, designs for engineering work, etc.

Photographs.

15. (*j*) *Photographs.*—This term covers all positive prints from photographic negatives, but not half tones or other photo-engravings.

Prints and pictorial illustrations.

16. (*k*) *Prints and pictorial illustrations.*—This term comprises all printed pictures not included in the various other classes enumerated above.

17. (*l*) *Motion-picture photoplays.*

18. (*m*) *Motion pictures other than photoplays.*

Postal cards can not be copyrighted as such. The pictures thereon may be registered as "prints or pictorial illustrations" or as "photographs." Text matter on a postal card may be of such a character that it may be registered as a "book."

Trade-marks can not be copyrighted nor registered in the Copyright Office.

HOW TO SECURE REGISTRATION.

Registrable works.

19. Copyright registration may be secured for:
(1) Unpublished works.
(2) Published works.

UNPUBLISHED WORKS.

Unpublished works are such as have not at the time of registration been printed or reproduced in copies for sale or been publicly distributed. They include: (*a*) Lectures, sermons, addresses, or similar productions for oral delivery; (*b*) dramatic and musical compositions; (*c*) photographic prints; (*d*) works of art (paintings, drawings, and sculpture); (*e*) plastic works; (*f*) motion-picture photoplays; and (*g*) motion pictures other than photoplays.

In order to secure copyright in such unpublished works, the following steps are necessary:

Registration of unpublished works.

20. (1) In the case of lectures, sermons, addresses, and dramatic and musical compositions, deposit one typewritten or manuscript copy of the work.

This copy should be in convenient form, clean and legible, the leaves securely fastened together, and should bear the title of the work corresponding to that given in the application.

The entire work in each case should be deposited. It is not sufficient to deposit a mere outline or epitome, or, in the case of a play, a mere scenario, or a scenario with the synopsis of the dialogue.

Unpublished photograph.

21. (2) In the case of photographs, deposit one copy of a positive print of the work. (Photo-engravings or photogravures are not photographs within the meaning of this provision.)

Photograph of work of art.

22. (3) In the case of works of art, models or designs for works of art, or drawings or plastic works of a scientific or technical character, deposit a photograph or other identifying reproduction.

(4) In the case of motion-picture photoplays, deposit a title and description, with one print taken from each scene or act.

(5) In the case of motion pictures other than photo-

plays, deposit a title and description, with not less than two prints taken from different sections of the complete motion picture.

In each case the deposited article should be accompanied by an application for registration and a money order for the amount of the statutory fee.

Reproduction of unpublished work.

23. Any work which has been registered under section 11, if reproduced in copies for sale or distribution, must be deposited a second time (two copies, accompanied by an application for registration and the statutory fee) in the same manner as is required in the case of works published in the first place.

PUBLISHED WORKS. DEPOSIT OF COPIES.

Deposit of copies.

24. After publication of the work with the copyright notice inscribed, two *complete* copies of the best edition of the work must be sent to the Copyright Office, with a proper application for registration correctly filled out and a money order for the amount of the legal fee.

The statute requires that the deposit of the copyright works shall be made "promptly," which has been defined as "without unnecessary delay." It is not essential, however, that the deposit be made on the very day of publication.

Definition of "published work."

25. Published works are such as are printed or otherwise produced and "placed on sale, sold, or publicly distributed." Works intended for sale or general distribution must first be printed with the statutory form of copyright notice inscribed on every copy intended to be circulated.

NOTICE OF COPYRIGHT.

Form of notice.

26. The ordinary form of copyright notice for books, periodicals, dramatic and musical compositions is "Copyright, 19— (the year of publication), by A. B. (the name of the claimant)." The name of the claimant printed in the notice should be the real name of a living person, or his trade name if he always uses one (but not a pseudonym or pen name), or the name of the firm or corporation claiming to own the copyright. The copyright notice should not be printed in the name of one person *for the benefit of another*. The beneficiary's name should be printed in such cases.

Short form of notice.

27. In the case of maps, photographs, reproductions of works of art, prints or pictorial illustrations, works of art, models or designs for works of art, and plastic works of a scientific or technical character, the notice may consist of the letter C, inclosed within a circle, thus ©, accompanied with the initials, monogram, mark, or symbol of the copyright proprietor. But in such cases the name itself of the copyright proprietor must appear on some accessible portion of the work, or on the mount of the picture or map, or on the margin, back, or permanent base or pedestal of the work.

Notice upon each copy.

28. The prescribed notice must be affixed to each copy of the work published or offered for sale in the United States. But no notice is required in the case of foreign books printed abroad seeking *ad interim* protection in the United States, as provided in section 21 of the copyright act.

AMERICAN MANUFACTURE OF COPYRIGHT BOOKS.

Works produced in United States.

29. The following works must be manufactured in the United States in order to secure copyright:

(*a*) All "books" in the English language and books in any language by a citizen or domiciled resident of the United States must be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text of such books be produced by lithographic process or photo-engraving process, then by a process wholly performed within the limits of the United States; and the printing of the text and binding of the book must be performed within the limits of the United States.

(*b*) All *illustrations* within a book produced by lithographic process or photo-engraving process and all *separate lithographs* or *photo-engravings* must be produced by lithographic or photo-engraving process wholly performed within the limits of the United States, except when the subjects represented in such illustrations in a book or such separate lithographs or photo-engravings "are located in a foreign country and illustrate a scientific work or reproduce a work of art."

Books by foreign authors.

30. Books by foreign authors in any language other

than English are not required to be printed in the United States.

Books printed abroad.

In the case of books printed abroad in the English language an *ad interim* term of copyright of thirty days from registration made in the Copyright Office within thirty days after publication abroad may be secured; but in order to extend the copyright to the full term of protection, an edition of the work must be published in the United States within the thirty days *ad interim* term, printed or produced within the limits of the United States as required in section 15 of the copyright act.

APPLICATION FOR REGISTRATION.

Application for registration.

31. The application for copyright registration required to be sent with each work must state the following facts, without which no registration can be made:

(1) The *name* and address of the claimant of copyright.

(2) The name of the country of which the author of the work is a citizen or subject.

(3) The *title* of the work.

(4) The name and address of person to whom certificate is to be sent.

(5) In the case of works reproduced in copies for sale or publicly distributed, the actual date (year, month, and day) when the work was published.

Name of author.

32. In addition, it is desirable that the application should state for record the name of the author. If, however, the work is published anonymously or under a pseudonym and it is not desired to place on record the real name of the author, this may be omitted. In the case of works made for hire, the employer may be given as the author. By the nationality of the author is meant citizenship, not race; a person naturalized in the United States should be described as an American. An author, a citizen of a foreign country having no copyright relations with the United States, may secure copyright in this country, if at the time of publication of his work he is domiciled in the United States. The fact of such domicile in the United States should be expressly stated in the application, including a statement of this place of domicile. Care should be taken that the title of the work, the name of the author, and the name of the copyright claimant should be correctly stated

Nationality of author.

in the application, and that they should agree exactly with the same statements made in the work itself.

APPLICATION FORMS.

Application forms.

33. The Copyright Office has issued the following application forms, which will be furnished on request, and should be used when applying for copyright registration:

A1. New book printed and published for the first time in the United States; also United States edition of English book.

A2. Book reprinted in the United States with new copyright matter.

A3. Book by foreign author in foreign language.

A4. Ad interim for 30 days. Book published abroad in the English language.

A5. Contribution to a newspaper or periodical.

B1. Periodical. For registration of single issue.

B2. Periodical. General application and deposit.

C. Lecture, sermon or address.

D1. Published dramatic composition.

D2. Dramatic composition not reproduced for sale.

D3. Published dramatico-musical composition.

E. New musical composition published for the first time.

E1. Musical composition republished for new copyright matter.

E2. Musical composition not reproduced for sale.

F. Published map.

G. Work of art (painting, drawing, or sculpture); or model or design for a work of art.

I1. Published drawing or plastic work of a scientific or technical character.

I2. Unpublished drawing or plastic work of a scientific or technical character.

J1. Photograph published for sale.

J2. Photograph not reproduced for sale.

K. Print or pictorial illustration.

L1. Motion-picture photoplay reproduced for sale.

L2. Motion-picture photoplay not reproduced for sale.

M1. Motion picture, not a photoplay, reproduced for sale.

M2. Motion picture, not a photoplay, not reproduced for sale.

R1. Renewal of a copyright for 28 years.
R2. Extension of a renewal copyright for 14 years.

AFFIDAVIT OF MANUFACTURE.

34. In the case of books by American authors and all books in the English language the application must be accompanied by an affidavit, showing the following facts: Affidavit for book.

(1) That the copies deposited have been printed from type set within the limits of the United States; or from plates made within the limits of the United States from type set therein; or if the text be produced by lithographic process or photo-engraving process, that such process was wholly performed within the limits of the United States, stating, in either case, the place and the establishment where such work was done.

(2) That the printing of the text has been performed within the limits of the United States, showing the place and the name of the establishment doing the work.

(3) That the binding of such book has been performed within the limits of the United States, showing the place and the name of the establishment where the work was done. This can be omitted if the work is unbound.

(4) That the completion of the printing of said book was on a stated day, or that the book was published on a given date.

Section 62 of the copyright act defines the date of publication as "the earliest date when copies of the first authorized edition *were placed on sale, sold, or publicly distributed* by the proprietor of the copyright or under his authority." Date of publication.

35. The affidavit may be made before any officer authorized to administer oaths within the United States who can affix his official seal to the instrument. Affidavit must be under seal.

The applicant and the officer administering the oath for such affidavit are specially requested to make sure that the instrument is properly executed, so as to avoid the delay of having it returned for amendment. Experience shows that among the common errors made by applicants are the following: Errors by applicants.

Failure to write in the "venue"—that is, the name of the county and State—and to make sure that the notary's statement agrees.

Reciting a corporation or partnership as affiant. Oaths can be taken only by individuals.

Failure to state in what capacity the affiant takes the oath, whether as claimant, agent of the claimant, or printer. Where a corporation or firm is the claimant, the affiant should swear as agent.

Failure to state the *exact date* of publication or completion of printing. The month alone is insufficient.

Failure to sign the affidavit. The signature should correspond exactly with the name of the affiant stated at the beginning. Corporation or firm names must not appear in this place.

Failure to obtain signature of the notary after swearing to the contents.

Failure to obtain the seal of the notary.

Swearing before an officer not authorized to act in the place stated in the venue.

Variance between names and dates as stated in the affidavit and the application.

The affidavit must never be made *before* publication has taken place.

By whom affidavit may be made.

36. The affidavit may be made by: (1) The person claiming the copyright; or (2) his duly authorized agent or representative residing in the United States; or (3) the printer who has printed the book.

The person making the affidavit should state in which of the above-mentioned capacities he does so.

Book in foreign language.

37. In the case of a foreign author applying for a book in a language other than English, no affidavit is required, as such books are not subject to the manufacturing clause.

In the case of a foreign author applying for a book in the English language, the same affidavit must be made as in that of an American author, except where a book is deposited for *ad interim* protection under section 21. In such cases the affidavit must be filed when the *ad interim* copyright is sought to be extended to the full term.

The affidavit is only required for *books*.

PERIODICALS (FORM B).

Periodicals.

38. Application should be made in the same manner as for books, depositing two copies, but no affidavit is required.

Separate registration is necessary for each number of

the periodical published with a notice of copyright, and can only be made after publication. It is not possible to register the title of the periodical in advance of publication.

CONTRIBUTIONS TO PERIODICALS (FORM A5).

Contributions to periodicals.

39. If special registration is requested for any contribution to a periodical, *one* copy of the number of the periodical in which the contribution appears should be deposited promptly after publication.

The entire copy should be sent; sending a mere clipping or a page containing the contribution does not comply with the statute.

The date of publication of a periodical is not neeessarily the date stated on the title-page. The application should state the day on which the issue is "first placed on sale, sold, or publicly distributed," which may be earlier or later than the date printed on the title-page.

AD INTERIM APPLICATIONS (FORM A4).

Ad interim copyright.

40. Where a book in the English language has been printed abroad, an *ad interim* copyright may be secured by depositing in the Copyright Office one complete copy of the foreign edition, with an application containing a request for the reservation and a money order for $1. Such applications should state: (1) Name and nationality of the author; (2) Name, nationality, and address of the copyright claimant; (3) Exact date of original publication abroad.

The deposit must be made within thirty days from publication abroad. Whenever, within the thirty days' period of *ad interim* protection, an edition manufactured in the United States is published and two copies have thereafter been promptly deposited, the copyright claim therein may be registered the same as any other book (Form A1).

MAILING APPLICATIONS AND COPIES.

Address of mail matter.

41. All mail matter intended for the Copyright Office should be addressed to the "Register of Copyrights, Library of Congress, Washington, D. C." No letters dealing with copyright matters should be addressed to individuals in the office.

Copyright matter designed for deposit in the Copyright

Office will be transmitted by the postmaster free of charge when requested. The postmaster will also, when requested, give a receipt for matter so delivered to him for transmission.

No franking label is issued by the Copyright Office for this purpose.

FEES.

Copyright fees.

42. The fee required to be paid for copyright registration is $1, except that in case of photographs it is only 50 cents when no certificate of registration is desired.

Remittances.

All remittances to the Copyright Office should be sent by money order or bank draft. Postage stamps should not be sent for fees or postage. Checks can not be accepted unless certified. Coin or currency inclosed in letter or packages if sent will be at the remitter's risk.

Publishers may for their own convenience deposit in the Copyright Office a sum of money in advance against which each registration will be charged.

ASSIGNMENTS OF COPYRIGHT.

Assignments of copyright.

43. When a copyright has been assigned the instrument in writing signed by the proprietor of the copyright may be filed in this office for record within six calendar months after its execution without the limits of the United States or three calendar months within the United States.

After having been recorded the original assignment will be returned to the sender with a sealed certificate of record attached. The assignment will be returned by registered mail, if the post-office registration fee (10 cents) is sent for that purpose.

Fee for recording assignment.

44. The fee for recording and certifying an assignment is $1 up to 300 words; $2 from 300 to 1,000 words; and another dollar for each additional thousand words or fraction thereof over 300 words.

Name of assignee in claim.

45. After the assignment has been duly recorded, the assignee may substitute his name for that of the assignor in the copyright notice on the work assigned. Such substitution or transfer of ownership will be indexed in this office upon request, at a cost of 10 cents for each work assigned.

NOTICE OF USER OF MUSICAL COMPOSITIONS.

Notice of user of music.

46. Whenever the owner of the copyright in a musical composition uses such music in phonographs himself or permits anyone else to do so, he must send a notice of such use by him or by any other person to the Copyright Office to be recorded.[9]

Notice in absence of license.

47. Whenever any person in the absence of a license intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce the same mechanically, the act requires that he shall serve notice of such intention upon the copyright proprietor and must also send a duplicate of such notice to the Copyright Office.

APPLICATION FOR THE RENEWAL OR EXTENSION OF SUBSISTING COPYRIGHTS.

Renewals and extensions.

48. Application for the renewal or extension of a subsisting copyright (except copyright of a composite work) may be filed within one year prior to the expiration of the existing term by:

(1) The author of the work if still living;

(2) The widow, widower, or children of the author if the author is not living;

(3) The author's executor, if such author, widow, widower, or children be not living;

(4) If the author, widow, widower, and children are all dead, and the author left no will, then the next of kin.

Renewal for composite work.

49. If the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor is entitled to the privilege of renewal and extension.

Renewal fee.

50. The fee for the recording of the renewal claim is 50 cents. Application for the renewal or extension of copyright can not be recorded in the name of an assignee nor in that of any person not expressly mentioned in section 24 of the act.

SEARCHES.

Searches.

51. Upon application to the Register of Copyrights search of the records, indexes, or deposits will be made for such

9—Presidential proclamations have been issued under section 1 (*e*), securing "copyright controlling the parts of instruments serving to reproduce mechanically the musical work" in behalf of Belgium, Cuba, Germany, Hungary, Luxemburg, and Norway.

information as they may contain relative to copyright claims. Persons desiring searches to be made should state clearly the nature of the work, its title, the name of the claimant of copyright and probable date of entry; in the case of an assignment, the name of the assignor or assignee or both, and the name of the copyright claimant and the title of the music referred to in case of notice of user.[10]

Search fee.

The statutory fee for searches is 50 cents for each full hour of time consumed in making such search.

10—NOTE.—The law provides as follows: "That the record books of the copyright office, together with the indexes to such record books, and all works deposited and retained in the copyright office, shall be open to public inspection; and copies may be taken of the copyright entries actually made in such record books, subject to such safeguards and regulations as shall be prescribed by the register of copyrights and approved by the Librarian of Congress." (Sec. 58, act of Mar. 4, 1909.)

APPLICATION FORMS ISSUED BY COPYRIGHT OFFICE, WASHINGTON, D. C.

APPLICATION FORMS.

BOOKS.

For any new book printed and published for the first time in the United States, ask for *Application Form "A1,"* and *Affidavit Form,* specifying in the request whether the book is to be *printed from type* or plates made from type, or is to be *produced by lithographic or photo-engraving process.*

For a reissued book manufactured in the United States, with new copyright matter, ask for *Application Form "A2."*

For a book of foreign origin in a language or languages other than English, ask for *Application Form "A3."*

For *ad interim* copyright in a book published abroad in the English language, ask for *Application Form "A4."*

For the American edition of a book in the English language on which *ad interim* copyright has been previously secured, ask for *Application Form "A1,"* and *Affidavit Form,* specifying in the request whether the book is to be printed from type or plates made from type or is to be produced by lithographic or photo-engraving process.

For a contribution to a newspaper or periodical, ask for *Application Form "A5."*

PERIODICALS.

For a periodical, if it is desired to make a separate application and remittance as each issue appears, ask for *Application Form "B1."* If the fee is to be charged against a trust fund previously deposited to cover several issues, ask for *Application Form "B2."*

ORAL WORKS.

For a Lecture, Sermon, or Address for oral delivery, ask for *Application Form "C."*

DRAMAS.

For a *published* Dramatic Composition, ask for *Application Form "D1."*

For a Dramatic Composition *of which copies are not reproduced for sale,* ask for *Application Form "D2."*

For a *published* Dramatico-Musical Composition, ask for *Application Form "D3."*

For a Dramatico-Musical Composition *of which copies are not reproduced for sale,* ask for *Application Form "D4."*

MUSIC.

For a Musical Composition *published for the first time,* ask for *Application Form "E."*

For a Musical Composition *republished with new copyright matter,* ask for *Application Form "E1."*

For a Musical Composition *of which copies are not reproduced for sale,* ask for *Application Form "E2."*

MAPS.

For a *published* map, ask for *Application Form "F."*

WORKS OF ART.

For a Work of Art (Painting, Drawing, or Sculpture); or for Model or Design for a Work of Art, ask for *Application Form "G."*

DRAWING OR PLASTIC WORK.

For a *published* drawing or plastic work of a scientific or technical character, ask for *Application Form "I1."*

For an *unpublished* drawing or plastic work of a scientific or technical character, ask for *Application Form "I2."*

PHOTOGRAPHS.

For a photograph *published* for sale, ask for *Application Form "J1."*

For a photograph *of which copies are not reproduced for sale,* ask for *Application Form "J2."*

PRINTS OR PICTORIAL ILLUSTRATIONS.

For the registration of any "print" or "pictorial illustration," which is a printed picture, complete in itself and having artistic quality, ask for *Application Form "K."*

MOTION PICTURES.

For the registration of a motion-picture photoplay *reproduced in copies for sale,* ask for *Application Form "L1."*

For a motion-picture photoplay *of which copies are not reproduced for sale,* ask for *Application Form "L2."*

For a motion picture, not a photoplay, *reproduced in copies for sale,* ask for *Application Form "M1."*

For a motion picture, not a photoplay, *not reproduced in copies for sale,* ask for *Application Form "M2."*

RENEWAL OR EXTENSION.

For the renewal of copyright subsisting in any work for the new renewal term of 28 years as provided by section 24 of the new law, ask for *Renewal Form "R1."*

For the extension of an existing renewal term from 14 years as provided under the old law, to 28 years granted by the new law, ask for *Extension Form "R2."*

[These renewal forms can only be used within a period of one year prior to the expiration of the existing term.]

No forms are issued by the Copyright Office for assignments, or licenses, nor for Postmaster's receipts for articles deposited.

JOINT REGULATIONS OF THE TREASURY AND POST OFFICE DEPARTMENTS GOVERNING THE ENTRY AS IMPORTED MERCHANDISE OF COPYRIGHTED BOOKS AND OTHER ARTICLES.

ART. 613. Copyrighted books and articles, the importation of which is prohibited by section 4956, Revised Statutes, as amended by section 3 of the act of March 3, 1891, shall not be admitted to entry. Such books and articles, if imported *with* the previous consent of the proprietor of the copyright, shall be seized by the collector of customs, who will take the proper steps for the forfeiture of the goods to the United States under section 3082, Revised Statutes.

Treasury Decisions 10269, Oct. 8, 1890; 11098, May 2, 1891; 11436, July 3, 1891; 11449, July 9, 1891; 11617, Aug. 11, 1891; 14898, Apr. 20, 1894; 15664, Feb. 28, 1895; 16046, May 14, 1895; 16739, Feb. 3, 1896; 17454, Oct. 13, 1896; 17885, Mar. 11, 1897; 20430, Dec. 16, 1898; 21003, Apr. 13, 1899; 21012, Apr. 17, 1899.

ART. 614. Copyrighted books and articles imported contrary to said prohibition and *without* the previous consent of the proprietor of the copyright, being primarily subject to forfeiture to the proprietor of the copyright, shall be detained by the collector, who shall forthwith notify such proprietor in order to ascertain whether or not he shall institute proceedings for the enforcement of his right to the forfeiture.

ART. 615. If the proprietor institute such proceedings and obtain a decree of forfeiture, the goods shall be delivered to him upon payment of the expenses incurred in the detention and storage, and the duties accrued thereon. If such proprietor shall fail to institute such proceedings within 60 days from date of notice, or shall declare in writing that he abandons his right to the forfeiture, then the collector shall proceed as in the case of articles imported with the previous consent of such proprietor.

ART. 616. Copyrighted articles, the importation of which is not prohibited, but which, by virtue of section 4965, Revised Statutes, as amended by section 8 of said act, are forfeited to the proprietor of the copyright when imported without his previous consent, and are moreover subject to the forfeiture of $1 or $10 per copy, as the case may be, one-half thereof to the said proprietor and the other half to the use of

the United States, shall be taken possession of by the collector, who shall take the necessary steps for securing to the United States half of the sum so forfeited, and shall keep the goods in his possession until a decree of forfeiture is obtained, and the half of the sum so forfeited, as well as the duties and charges accrued, are paid; whereupon he shall deliver the goods to the proprietor of the copyright. Duties collected on prohibited copyrighted articles can not be refunded.

Treasury Decision 19722, July 22, 1898.

In case of failure to obtain a decree of forfeiture, the goods shall be admitted to entry.

ART. 617. For the purpose of carrying into effect the provisions in section 4965, Revised Statutes, as amended by the copyright acts of March 3, 1891, and March 2, 1895, which prohibits the importation of musical compositions duly copyrighted thereunder, and under the authority conferred by section 4958, Revised Statutes, as amended, which provides that "the Secretary [of the Treasury] and 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," the following regulations are promulgated for the government of the officers of the customs and of the postal service, viz:

Treasury Decision 19514, June 21, 1898.

ART. 618. Inasmuch as under paragraph 403, act of July 24, 1897, music in books or sheets, except in certain specified cases, is liable to customs duty, postmasters are instructed to carefully examine the mails from foreign countries and to forward all musical publications found therein to the nearest customs officer. Customs officers are instructed to keep a close watch for matter imported through the usual channels in violation of the copyright act.

Treasury Decision 20490, Jan. 4, 1899.

ART. 619. Upon the receipt of such matter from postmasters or in the usual channels, customs officers will proceed to collect, in the regular manner, the duty on all such matter as is properly admissible, and shall hold all music in books or sheets imported in violation of any copyright of the United States, and notify by mail the owner of the copyright and the owner, importer, or consignee of the prohibited articles, or the person to whom addressed.

ART. 620. If within three months from the mailing of the notice the owner of the copyright shall not institute proceedings for forfeiture of such articles under the provisions of section 4965, Revised Statutes, as amended by the act of March 22, 1895 (28 Stat., 965), or the owner or

importer of the prohibited articles, or the person to whom addressed, shall not appear and show cause to the contrary, the customs officer is directed to burn or otherwise destroy the prohibited articles.

[Reprinted from "Customs Regulations of the United States Prescribed for the Instruction and Guidance of Officers of Customs. United States Treasury Department." 8°. Washington: Government Printing Office, 1900, pages 210, 211, 212.]

REGULATIONS GOVERNING THE IMPORTATION OF MOVING-PICTURE FILMS UNDER THE COPYRIGHT ACT OF MARCH 4, 1909.

(T. D. 31754 of July 17, 1911, modified.)

TREASURY DEPARTMENT, March 10, 1913.

To Collectors and Other Officers of the Customs:

Attention is invited to section 30 of the copyright act of March 4, 1909, as follows:

That the importation into the United States of any article bearing a false notice of copyright when there is no existing copyright thereon in the United Sates, or of any piratical copies of any work copyrighted in the United States, is prohibited.

The following regulations governing the importation of moving-picture films are hereby promulgated for the guidance of officers of the customs:

1. A "piratical copy" of a film is defined as a film which constitutes either an actual copy or a substantial reproduction of a legally copyrighted film produced and imported in contravention of the rights of the copyright proprietor.

2. Collectors will admit to entry imported films concerning which either (a) adverse copyrights are claimed by parties in interest, or (b) an infringement only is claimed by a copyright proprietor other than the importer. In such cases the copyright claimants will be remitted to their rights at law or in equity.

3. Collectors will not permit entry of imported films concerning which either (a) representations are made that they are piratical copies and such representations are not denied by the importers, or (b) if the collector is satisfied they do, in fact, constitute piratical copies as above defined.

4. Collectors will detain films covered by the preceding regulation and report the facts to the department for instructions.

5. If the collector is not satisfied that an imported film is a piratical copy, and the importer files an affidavit denying that it is in fact such a piratical copy, and alleging that the detention of the film will result in a material depreciation of its value or loss or damage to him, the film

will be admitted to entry, unless a written demand for its exclusion is filed by the copyright proprietor or other party in interest, setting forth that the imported film is a piratical copy of a film legally copyrighted in the United States, and unless there is also filed with the collector a good and sufficient bond conditioned to hold the importer or owner of such film harmless from any loss or damage resulting from its detention in the event that the same is held by the department not to be prohibited from importation under section 30.

6. Upon the filing of such demand and bond the collector will cause the film to be detained, and will fix a time at which the parties in interest may submit evidence to substantiate their respective claims, which evidence shall be reduced to writing at the expense of the parties in interest and transmitted by the collector to the department, with such report and recommendation as he may deem proper.

7. No film will be presumed to be prohibited from entry as a piratical copy under said act, and the burden of proof that any film is in fact a piratical copy will be upon the party making such claim.

8. If the film is held by the department to be a piratical copy, its seizure and forfeiture will be directed in accordance with section 32 of the copyright act, and the bond will be returned to the copyright proprietor, but if not so held, the collector will be directed to release the film and transmit the bond to the importer.

9. Regulations contained in T. D. 31754 of July 17, 1911, so far as they relate to moving-picture films, are hereby modified accordingly.

(88725—4.)

JAMES F. CURTIS,
Assistant Secretary.

ACT 1 AND 2 GEO. 5. CH. 46.

An Act to Amend and Consolidate the Law Relating to Copyright, Passed December 16, 1911

1 & 2 GEO. 5. CH. 46.

COPYRIGHT ACT, 1911.

CHAPTER 46.

AN ACT to amend and consolidate the Law relating to Copyright. [16th December 1911.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

IMPERIAL COPYRIGHT.

RIGHTS.

Copyright secured.

1. (1) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if—

(*a*) In the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and

(*b*) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid;

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries.

Copyright defined.

(2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right,—

(*a*) to produce, reproduce, perform, or publish any translation of the work;

(*b*) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;

(*c*) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;

(*d*) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered,

and to authorise any such acts as aforesaid.

Publication defined.

(3) For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but, for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works.

Infringement of copyright.

2. (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright:

Acts which do not infringe copyright.

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary:

(ii) Where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work:

(iii) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situated in a public place or building, or the making or publishing of paintings, drawings, engravings, or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art:

(iv) The publication in a collection, mainly composed of non-copyright matter, bonâ fide intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists: Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged:

(v) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph shall affect the provisons in paragraph (i) as to newspaper summaries:

(vi) The reading or recitation in public by one person of any reasonable extract from any published work.

Acts which infringe copyright.

(2) Copyright in a work shall also be deemed to be infringed by any person who—

(*a*) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or

(*b*) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(*c*) by way of trade exhibits in public; or

(*d*) imports for sale or hire into any part of His Majesty's dominions to which this Act extends,

any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place.

(3) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

Term of copyright.

3. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after his death:

Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of this Act thirty years, from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work, and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent. on the price at which he publishes the work; and, for the purposes of this proviso, the Board

of Trade may make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties.

Compulsory licenses.

4. If at any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Judicial Committee may think fit.

Ownership of copyright, etc.

5. (1) Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:

Provided that—

Engraving, photograph, or portrait.

(*a*) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright; and

Person who employs author, etc.

(*b*) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work,

otherwise than as part of a newspaper, magazine, or similar periodical.

Assignment of copyright.

(2) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent:

Copyright not assignable beyond 25 years after author's death.

Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work.

Divided ownership.

(3) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly.

CIVIL REMEDIES.

Civil remedies for infringement of copyright.

6. (1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies

by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.

(2) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the Court.

Prima facie ownership, etc.

(3) In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue, then—

Author as stated on work.

(*a*) If a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated, shall, unless the contrary is proved, be presumed to be the author of the work;

Publisher, when author's name is not printed.

(*b*) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein.

Rights of owner against persons possessing or dealing with infringing copies, etc.

7. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

Exemption of innocent infringer from liability to pay damages etc.

8. Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant

proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.

Restriction on remedies in the case of architecture.

9. (1) Where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition.

(2) Such of the other provisions of this Act as provide that an infringing copy of a work shall be deemed to be the property of the owner of the copyright, or as impose summary penalties, shall not apply in any case to which this section applies.

Limitation of actions.

10. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

SUMMARY REMEDIES.

Penalties for dealing with infringing copies, etc.

11. (1) If any person knowingly—

(*a*) makes for sale or hire any infringing copy of a work in which copyright subsists; or

(*b*) sell or lets for hire, or by way of trade exposes or offers for sale or hire any infringing copy of any such work; or

(*c*) distributes infringing copies of any such work either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(*d*) by way of trade exhibits in public any infringing copy of any such work; or

(*e*) imports for sale or hire into the United Kingdom any infringing copy of any such work:

he shall be guilty of an offence under this Act and be liable on summary conviction to a fine not exceeding forty shillings for every copy dealt with in contravention of this section, but not exceeding fifty pounds in respect of the same transaction; or, in the case of a second or subsequent offense, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

(2) If any person knowingly makes or has in his possession any plate for the purpose of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he shall be guilty of an offence under this Act, and be liable on summary conviction to a fine not exceeding fifty pounds, or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

(3) The court before which any such proceedings are taken may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies or plates for the purpose of making infringing copies, be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the court may think fit.

2 Edw. 7 c. 15. 6 Edw. 7. c. 36.

(4) Nothing in this section shall, as respects musical works, affect the provisions of the Musical (Summary Proceedings) Copyright Act, 1902, or the Musical Copyright Act, 1906.

Appeals to quarter sessions.

12. Any person aggrieved by a summary conviction of an offence under the foregoing provisions of this Act may in England and Ireland appeal to a court of quarter sessions and in Scotland under and in terms of the Summary Jurisdiction (Scotland) Acts.

Extent of provisions as to summary remedies.

13. The provisions of this Act with respect to summary remedies shall extend only to the United Kingdom.

IMPORTATION OF COPIES.

Importation of copies.

14. (1) Copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Commissioners of Customs and Excise, that he is desirous that such copies should not be imported into the United Kingdom, shall not be so imported, and shall, subject to the provisions of this section, be deemed to be included in the table of prohibitions and restrictions contained in section forty-two of

the Customs Consolidation Act, 1876, and that section shall apply accordingly. 39 & 40 Vict. c. 30.

(2) Before detaining any such copies or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs and Excise may require the regulations under this section, whether as to information, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the copies are such as are prohibited by this section to be imported. Regulations by Commissioners of Customs.

(3) The Commissioners of Customs and Excise may make regulations, either general or special, respecting the detention and forfeiture of copies the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) The regulations may apply to copies of all works the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the Commissioners of Customs and Excise all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide for notices under any enactment repealed by this Act being treated as notices given under this section.

(6) The foregoing provisions of this section shall have effect as if they were part of the Customs Consolidation Act, 1876: Provided that, notwithstanding anything in that Act, the Isle of Man shall not be treated as part of the United Kingdom for the purposes of this section.

(7) This section shall, with the necessary modifications, apply to the importation into a British possession to which this Act extends of copies of works made out of that possession.

DELIVERY OF BOOKS TO LIBRARIES.

15. (1) The publisher of every book published in the United Kingdom shall, within one month after the publi- Delivery of copies to British Muse-

um and other libraries.

cation, deliver, at his own expense, a copy of the book to the trustees of the British Museum, who shall give a written receipt for it.[1]

(2) He shall also, if written demand is made before the expiration of twelve months after publication, deliver within one month after receipt of that written demand or, if the demand was made before publication, within one month after publication, to some depôt in London named in the demand a copy of the book for, or in accordance with the directions of, the authority having the control of each of the following libraries, namely: the Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh, and the Library of Trinity College, Dublin, and subject to the provisions of this section the National Library of Wales. In the case of an encyclopædia, newspaper, review, magazine, or work published in a series of numbers or parts, the written demand may include all numbers or parts of the work which may be subsequently published.

British Museum copies.

(3) The copy delivered to the trustees of the British Museum shall be a copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and shall be bound, sewed, or stitched together, and on the best paper on which the book is printed.

(4) The copy delivered for the other authorities mentioned in this section shall be on the paper on which the largest number of copies of the book is printed for sale, and shall be in the like condition as the books prepared for sale.

National Library of Wales.

(5) The books of which copies are to be delivered to the National Library of Wales shall not include books of such classes as may be specified in regulations to be made by the Board of Trade.

(6) If a publisher fails to comply with this section, he shall be liable on summary conviction to a fine not exceed-

1—Pursuant to 5 and 6 Geo. V. c. 38, and the Board of Trade regulations passed pursuant thereto, deposit is not required in the British Museum, except on special demand, of commercial printed matter such as advertisements, cards, catalogues, circulars, drawings, formulae, tickets, plans, posters, price lists, prospectuses, sample cards and envelopes.

ing five pounds and the value of the book, and the fine shall be paid to the trustees or authority to whom the book ought to have been delivered.

Book defined.

(7) For the purposes of this section, the expression "book" includes every part or division of a book, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alterations either in the letterpress or in the maps, prints, or other engravings belonging thereto.

SPECIAL PROVISIONS AS TO CERTAIN WORKS.

Works of joint authors.

Term of copyright.

16. (1) In the case of a work of joint authorship, copyright shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licenses a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

(2) Where, in the case of a work of joint authorship, some one or more of the joint authors do not satisfy the conditions conferring copyright laid down by this Act, the work shall be treated for the purposes of this Act as if the other author or authors had been the sole author or authors thereof:

Provided that the term of the copyright shall be the same as it would have been if all the authors had satisfied such conditions as aforesaid.

Work of joint authorship defined.

(3) For the purposes of this Act, "a work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

Married woman as joint author.

(4) Where a married woman and her husband are joint authors of a work the interest of such married woman therein shall be her separate property.

Posthumous works.

17. (1) In the case of a literary dramatic or musical work, or an engraving, in which copyright subsists at the date of the death of the author or, in the case of a work of joint authorship, at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter, and the proviso to section three of this Act shall, in the case of such a work, apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid.

(2) The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be prima facie proof of the copyright being with the owner of the manuscript.

Provisions as to Government publications.

18. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

Provisions as to mechanical instruments.

19. (1) Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where

such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

When *not* an infringement.

(2) It shall not be deemed to be an infringement of copyright in any musical work for any person to make within the parts of His Majesty's dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves—

(*a*) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

(*b*) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate herein-after mentioned:

Provided that—

Alterations in or omissions from work.

(i) nothing in this provision shall authorize any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiesence of, the owner of the copyright or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and

(ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.

Rate of royalties.

(3) The rate at which such royalties as aforesaid are to be calculated shall—

(*a*) in the case of contrivances sold within two years after the commencement of this Act by the person making the same, be two and one-half per cent.; and

(*b*) in the case of contrivances sold as aforesaid after the expiration of that period, five per cent.

on the ordinary retail selling price of the contrivance calculated in the prescribed manner, so however that the royalty payable in respect of a contrivance shall, in no case, be less than a half-penny for each separate musical work in which copyright subsists reproduced thereon, and, where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing:

Change in rate of royalties.

Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by Parliament; but, where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration.

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then, for the purposes of this section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time.

Board of Trade regulations.

(6) For the purposes of this section, the Board of Trade may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency

of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties.

Modifications in case of works published before Act.

(7) In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions:

(*a*) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work, shall not apply:

(*b*) The rate of two and one-half per cent. shall be substituted for the rate of five per cent. as the rate at which royalties are to be calculated, but no royalties shall be payable in respect of contrivances sold before the first day of July, nineteen hundred and thirteen, if contrivances reproducing the same work had been lawfully made, or placed on sale, within the parts of His Majesty's dominions to which this Act extends before the first day of July, nineteen hundred and ten:

Right of mechanical reproduction of assigned work belongs to author.

(*c*) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignee, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives:

(*d*) The saving contained in this Act of the rights and interests arising from, or in connexion with, action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether

made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section:

(e) Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country, the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the making of records, perforated rolls, or other contrivances by means of which the work may be mechanically performed.

Copyright in contrivances previously made.

(8) Notwithstanding anything in this Act, where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived:

Provided that—

(i) the person who, at the commencement of this Act, is the owner of such original plate shall be the first owner of such copyright; and

(ii) nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance.

Provision as to political speeches.

20. Notwithstanding anything in this Act, it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

Provisions as to photographs.

21. The term for which copyright shall subsist in photographs shall be fifty years from the making of the original negative from which the photograph was directly or indirectly derived, and the person who was owner of such negative at the time when such negative was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within

the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

Provisions as to designs registrable under 7 Edw. 7. c. 29.

22. (1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered are not used or intended to be used as models or patterns to be multiplied by any industrial process.

(2) General rules under section eighty-six of the Patents and Designs Act, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

Works of foreign authors first published in parts of His Majesty's dominions to which Act extends.

23. If it appears to His Majesty that a foreign country does not give, or has not undertaken to give, adequate protection to the works of British authors, it shall be lawful for His Majesty by Order in Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty's dominions to which this Act extends, shall not apply to works published after the date specified in the Order, the authors whereof are subjects or citizens of such foreign country, and are not resident in His Majesty's dominions, and thereupon those provisions shall not apply to such works.

Existing works.

24. (1) Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder:

Provided that—

Existing assignments.

(*a*) if the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the

whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine; but the person who immediately before the date at which the right would so have expired was the owner of the right or interest shall be entitled at his option either—

(i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration; or

(ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration, or, where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment;

The notice above referred to must be given not more than one year nor less than six months before the date at which the right would have so expired, and must be sent by registered post to the author, or, if he cannot with reasonable diligence be found, advertised in the London Gazette and in two London newspapers:

(*b*) where any person has, before the twenty-sixth day of July nineteen hundred and ten, taken any action whereby he has incurred any expenditure or liability in connexion with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or

with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interest arising from or in connexion with such action which are subsisting and valuable at the said date, unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

(2) For the purposes of this section, the expression "author" includes the legal personal representatives of a deceased author.

No copyright in work made before Act.

(3) Subject to the provisions of section nineteen subsections (7) and (8) and of section thirty-three of this Act, copyright shall not subsist in any work made before the commencement of this Act, otherwise than under, and in accordance with, the provisions of this section.

APPLICATION TO BRITISH POSSESSIONS.

Application of Act to British dominions.

25.(1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

Notice in London Gazette.

(2) If the Secretary of State certifies by notice published in the London Gazette that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this Act extends, enjoy within the dominion rights substantially identical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall,

for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

Legislative powers of self-governing dominions.

26. (1) The Legislature of any self-governing dominion may, at any time, repeal all or any of the enactments relating to copyright passed by Parliament (including this Act) so far as they are operative within that dominion: Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that, on this Act or any part thereof being so repealed by the Legislature of a self-governing dominion, that dominion shall cease to be a dominion to which this act extends.

Self-governing dominions.

(2) In any self-governing dominion to which this Act does not extend, the enactments repealed by this Act shall, so far as they are operative in that dominion, continue in force until repealed by the Legislature of that dominion.

(3) Where his Majesty in Council is satisfied that the law of a self-governing dominion to which this Act does not extend provides adequate protection within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere than in that dominion, His Majesty in Council may, for the purpose of giving reciprocal protection, direct that this Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein, shall, within the parts of His Majesty's dominions to which this Act extends, apply to works the authors whereof were, at the time of the making of the work, resident within the first-mentioned dominion, and to works first published in that dominion; but, save as provided by such an Order, works the authors whereof were resident in a dominion to which this Act does not extend shall not, whether they are British subjects or not, be entitled to any protection under this Act except such protection as is by this Act conferred on works first published within

the parts of His Majesty's dominions to which this Act extends:

Provided that no such Order shall confer any rights within a self-governing dominion, but the Governor in Council of any self-governing dominion to which this Act extends, may, by Order, confer within that dominion the like rights as His Majesty in Council is, under the foregoing provisions of this subsection, authorised to confer within other parts of His Majesty's dominions.

For the purpose of this subsection, the expression "a dominion to which this Act extends" includes a dominion which is for the purposes of this Act to be treated as if it were a dominion to which this Act extends.

Power of Legislatures of British possessions to pass supplemental legislation.

27. The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but, except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

Application to protectorates.

28. His Majesty may, by Order in Council, extend this Act to any territories under his protection and to Cyprus, and, on the making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty's dominions to which this Act extends.

Part II.

INTERNATIONAL COPYRIGHT.

Power to extend act to foreign works.

29. (1) His Majesty may, by Order in Council, direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply—

(*a*) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which this Act extends;

(*b*) to literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were at the time of the making of the work subjects or

citizens of a foreign country to which the order relates, in like manner as if the authors were British subjects:

(c) in respect of residence in a foreign country to which the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which this Act extends;

and thereupon, subject to the provisions of this Part of this Act and of the Order, this Act shall apply accordingly:

Provided that—

Reciprocal protection.

(i) before making an Order in Council under this section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to His Majesty expedient to require for the protection of works entitled to copyright under the provisions of Part I. of this Act;

(ii) the Order in Council may provide that the term of copyright within such parts of His Majesty's dominions as aforesaid shall not exceed that conferred by the law of the country to which the Order relates;

Delivery of foreign books not required.

(iii) the provisions of this Act as to the delivery of copies of books shall not apply to works first published in such country, except so far as is provided by the Order;

Conditions and formalities.

(iv) the Order in Council may provide that the enjoyment of the rights conferred by this Act shall be subject to the accomplishment of such conditions and formalities (if any) as may be prescribed by the Order;

(v) in applying the provision of this Act as to ownership of copyright, the Order in Council may make such modifications as appear necessary having regard to the law of the foreign country;

(vi) in applying the provisions of this Act as to existing works, the Order in Council may make such modifications as appear necessary, and may pro-

vide that nothing in those provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased by virtue of section five of the International Copyright Act, 1886. 49 & 50 Vict. c. 33.

(2) An Order in Council under this section may extend to all the several countries named or described therein.

Application of Part II. to British possessions.

30. (1) An Order in Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends except self-governing dominions and any other possession specified in the order with respect to which it appears to His Majesty expedient that the Order should not apply.

(2) The Governor in Council of any self-governing dominion to which this Act extends may, as respects that dominion, make the like orders as under this Part of this Act His Majesty in Council is authorised to make with respect to His Majesty's dominions other than self-governing dominions, and the provisions of this Part of this Act shall, with the necessary modifications, apply accordingly.

(3) Where it appears to His Majesty expedient to except from the provisions of any order any part of his dominions not being a self-governing dominion, it shall be lawful for His Majesty by the same or any other Order in Council to declare that such order and this Part of this Act shall not, and the same shall not, apply to such part, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order.

PART III.

SUPPLEMENTAL PROVISIONS.

Abrogation of common law rights.

31. No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

Provisions as to Orders in Council.

32. (1) His Majesty in Council may make Orders for altering, revoking, or varying any Order in Council made under this Act, or under any enactments repealed by this Act, but any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests.

(2) Every Order in Council made under this Act shall be published in the London Gazette and shall be laid before both Houses of Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act.

Saving of university copyright. 15 Geo. 3, c. 53.

33. Nothing in this act shall deprive any of the universities and colleges mentioned in the Copyright Act, 1775, of any copyright they already possess under that Act, but the remedies and penalties for infringement of any such copyright shall be under this Act and not under that Act.

Saving of compensation to certain libraries.

34. There shall continue to be charged on, and paid out of, the Consolidated Fund of the United Kingdom such annual compensation as was immediately before the commencement of this Act payable in pursuance of any Act as compensation to a library for the loss of the right to receive gratuitous copies of books:

Provided that this compensation shall not be paid to a library in any year, unless the Treasury are satisfied that the compensation for the previous year has been applied in the purchase of books for the use of and to be preserved in the library.

Interpretation.

35. (1) In this Act, unless the context otherwise requires—

"Literary work" includes maps, charts, plans, tables, and compilations;

"Dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character;

"Artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and archi-

tectural works of art and engravings and photographs;

"Works of sculpture" includes casts and models;

"Architectural work of art" means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction;

"Engravings" include etchings, lithographs, wood-cuts, prints, and other similar works, not being photographs;

"Photograph" includes photo-lithograph and any work produced by any process analogous to photography;

"Cinematograph" includes any work produced by any process analogous to cinematography;

"Collective work" means—

(*a*) an encyclopædia, dictionary, year book, or similar work;

(*b*) a newspaper, review, magazine, or similar periodical; and

(*c*) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;

"Infringing," when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act;

"Performance" means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument;

"Delivery," in relation to a lecture, includes delivery by means of any mechanical instrument;

"Plate" includes any stereotype or other plate, stone, block, mould, matrix, transfer, or negative used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records, perforated rolls or other contrivances for the acoustic representation of the work are or are intended to be made;

"Lecture" includes address, speech, and sermon;

"Self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

(2) For the purposes of this Act (other than those relating to infringements of copyright), a work shall not be deemed to be published or performed in public, and a lecture shall not be deemed to be delivered in public, if published, performed in public, or delivered in public, without the consent or acquiescence of the author, his executors, administrators or assigns.

Simultaneous publication.

(3) For the purposes of this Act, a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of His Majesty's dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days, or such longer period as may, for the time begin, be fixed by Order in Council.

Unpublished work: residence in His Majesty's dominions.

(4) Where, in the case of an unpublished work, the making of a work has extended over a considerable period, the conditions of this Act conferring copyright shall be deemed to have been complied with, if the author was during any substantial part of that period, a British subject or a resident within the parts of His Majesty's dominions to which this Act extends.

(5) For the purposes of the provisions of this Act as to residence, an author of a work shall be deemed to be a resident in the parts of His Majesty's dominions to which this Act extends if he is domiciled within any such part.

Repeal.

36. Subject to the provisions of this Act, the enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule:

Provided that this repeal shall not take effect in any part of His Majesty's dominions until this Act comes into operation in that part.

37. (1) This Act may be cited as the Copyright Act, 1911. Short title and commencement.

(2) This Act shall come into operation—

(*a*) in the United Kingdom, on the first day of July nineteen hundred and twelve or such earlier date as may be fixed by Order in Council;

(*b*) in a self-governing dominion to which this Act extends, at such date as may be fixed by the Legislature of that dominion;

(*c*) in the Channel Islands, at such date as may be fixed by the States of those islands respectively;

(*d*) in any other British possession to which this Act extends, on the proclamation thereof within the possession by the Governor.

SCHEDULES.

FIRST SCHEDULE.

Section 24.

EXISTING RIGHTS.

Existing Right.	Substituted Right.
(a) *In the case of Works other than Dramatic and Musical Works.*	
Copyright.	Copyright as defined by this Act.[1]
(b) *In the case of Musical and Dramatic Works.*	
Both copyright and performing right.	Copyright as defined by this Act.[1]
Copyright, but not performing right.	Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public.
Performing right but not copyright.	The sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act.

For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings:

"Copyright," in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on Copyright defined.

1—In the case of an essay, article, or portion forming part of and first published in a review, magazine, or other periodical or work of a like nature, the right shall be subject to any right of publishing the essay, article, or portion in a separate form to which the author is entitled at the commencement of this Act, or would, if this Act had not been passed, have become entitled under section eighteen of the Copyright Act, 1842.

publication, includes the right at common law (if any) to restrain publication or other dealing with the work;

Performing right defined.

"Performing right," in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

SECOND SCHEDULE.

ENACTMENTS REPEALED.

Section 36.

Session and Chapter	Short Title	Extent of Repeal
8 Geo. 2. c. 13....	The Engraving Copyright Act, 1734...	The whole Act.
7 Geo. 3. c. 38....	The Engraving Copyright Act, 1767....	The whole Act.
15 Geo. 3. c. 53...	The Copyright Act, 1775.....	The whole Act.
17 Geo. 3. c. 57...	The Prints Copyright Act, 1777.....	The whole Act.
54 Geo. 3. c. 56...	The Sculpture Copyright Act, 1814....	The whole Act.
3 & 4 Will. 4. c. 15.	The Dramatic Copyright Act, 1833....	The whole Act.
5 & 6 Will. 4. c. 65.	The Lectures Copyright Act, 1835.....	The whole Act.
6 & 7 Will. 4. c. 59.	The Prints and Engravings Copyright (Ireland) Act, 1836.	The whole Act.
6 & 7 Will. 4. c. 110	The Copyright Act, 1836.....	The whole Act.
5 & 6 Vict. c. 45...	The Copyright Act, 1842.....	The whole Act.
7 & 8 Vict. c. 12...	The International Copyright Act, 1844.	The whole Act.
10 & 11 Vict. c. 95.	The Colonial Copyright Act, 1847.....	The whole Act.
15 & 16 Vict. c. 12.	The International Copyright Act, 1852.	The whole Act.
25 & 26 Vict. c. 68.	The Fine Arts Copyright Act, 1862....	Sections one to six. In section eight the words "and pursuant to any Act for the protection of copyright engravings," and "and in any such Act as aforesaid." Sections nine to twelve.
38 & 39 Vict. c. 12.	The International Copyright Act, 1875.	The whole Act.
39 & 40 Vict. c. 36.	The Customs Consolidation Act, 1876..	Section forty-two, from "Books wherein" to "such copyright will expire." Sections forty-four, forty-five and one hundred and fifty-two.
45 & 46 Vict. c. 40.	The Copyright (Musical Compositions) Act, 1882.	The whole Act.
49 & 50 Vict. c. 33.	The International Copyright Act, 1886.	The whole Act.
51 & 52 Vict. c. 17.	The Copyright (Musical Compositions) Act, 1888.	The whole Act.
52 & 53 Vict. c. 42.	The Revenue Act, 1889.....	Section one from "Books first published" to "as provided in that section."
6 Edw. 7. c. 36...	The Musical Copyright Act, 1906.....	In section three the words "and which has been registered in accordance with the provisions of the Copyright Act, 1842, or of the International Copyright Act, 1844, which registration may be effected notwithstanding anything in the International Copyright Act, 1886."

[From the official edition of the Act printed by Eyre and Spottiswoode for Rowland Bailey, the King's Printer, London. ii, 20 pp. sm. 4°.]

PREVIOUS COPYRIGHT ACTS NOT REPEALED.

[Repealed matter indicated by italics and brackets.]

THE FINE ARTS COPYRIGHT ACT, 1862.

25 AND 26 VICTORIA, CHAPTER 68.

Act 25 and 26 Vict., c. 68, 1862.

AN ACT for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works. [29th July 1862.]

Whereas by Law, as now established, the Authors of Paintings, Drawings, and Photographs have no Copyright in their such Works, and it is expedient that the Law should in that respect be amended; Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

[*Sections 1-6 are repealed by the Copyright Act, 1911.*]

7. No Person shall do or cause to be done any or either of the following Acts; that is to say,

Penalties on fraudulent productions and sales.

First, no Person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any Painting, Drawing, or Photograph, or the Negative thereof, any Name, Initials, or Monogram:

Secondly, no Person shall fraudulently sell, publish, exhibit, or dispose of, or offer for Sale, Exhibition, or Distribution, any Painting, Drawing, or Photograph, or Negative of a Photograph, having thereon the Name, Initials, or Monogram of a Person who did not execute or make such Work:

Thirdly, no Person shall fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of, any Copy or colourable Imitation of any Painting, Drawing, or Photograph, or Negative of a Photograph, whether there shall be subsisting Copyright therein or not, as having been made or executed by the Author or Maker of the original Work from which such Copy or Imitation shall have been taken:

Fourthly, where the Author or Maker of any Painting, Drawing, or Photograph, or Negative of a Photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the Possession of such Work, if any Alteration shall afterwards be made therein by any other Person, by Addition or otherwise, no Person shall be at liberty during the life of the Author or Maker of such Work, without his Consent, to make or knowingly to sell or publish, or offer for Sale, such Work or any Copies of such Work so altered as aforesaid, or of any Part thereof, as or for the unaltered Work of such Author or Maker:

Penalties. Every Offender under this Section shall, upon Conviction, forfeit to the Person aggrieved a Sum not exceeding Ten Pounds, or not exceeding double the full Price, if any, at which all such Copies, Engravings, Imitations, or altered Works shall have been sold or offered for Sale; and all such Copies, Engravings, Imitations, or altered Works shall be forfeited to the Person, or the Assigns or legal Representatives of the Person, whose Name, Initials, or Monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered Work shall be so fraudulently or falsely ascribed as aforesaid: Provided always, that the Penalties imposed by this Section shall not be incurred unless the Person whose Name, Initials, or Monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered Work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within Twenty Years next before the Time when the Offense may have been committed.

Recovery of pecuniary penalties. 8. All pecuniary Penalties which shall be incurred, and all such unlawful Copies, Imitations, and all other Effects and Things as shall have been forfeited by Offenders, pursuant to this Act, [*and pursuant to any Act for the Protection of Copyright Engravings,*] may be recovered by the Person herein-before [*and in any such Act as aforesaid*] empowered to recover the same respectively, and hereinafter called the Complainant or the Complainer, as follows:

Words in brackets and italics repealed by Copyright Act, 1911.

In England and Ireland, either by Action against the Party offending, or by summary Proceeding before any two Justices having jurisdiction where the Party offending resides:

In Scotland by Action before the Court of Session in ordinary Form, or by summary Action before the Sheriff of the County where the Offense may be committed or the Offender resides, * * * and any Judgment so to be pronounced by the Sheriff in such summary Application shall be final and conclusive, and not subject to Review by [*Advocation,*] Suspension, Reduction, or otherwise.

[*Secs. 9-12 repealed by the Copyright Act, 1911.*]

[From "The Statutes of the United Kingdom of Great Britain and Ireland." Vol. 25, 4°. By G: Kettilby Rickards. London, G: E: Eyre and W: Spottiswoode, 1862, pp. 750-752.]

THE CUSTOMS CONSOLIDATION ACT, 1876.

39 AND 40 VICTORIA, CHAPTER 36.

Act 39 and 40 Vict.,c.36,1876.

AN ACT to consolidate the Customs Laws. [24th July 1876.]

* * * * *

Prohibitions and restrictions.

AS TO THE IMPORTATION, PROHIBITION, ENTRY, EXAMINATION, LANDING, AND WAREHOUSING OF GOODS.

* * * * *

42. The goods enumerated and described in the following table of prohibitions and restrictions inwards are hereby prohibited to be imported or brought into the United Kingdom, save as thereby excepted, and if any goods so enumerated and described shall be imported or brought into the United Kingdom contrary to the prohibitions or restrictions contained therein, such goods shall be forfeited, and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct.

A TABLE OF PROHIBITIONS AND RESTRICTIONS INWARDS.

Goods prohibited to be imported.

[*Books wherein the copyright shall be first subsisting, first composed, or written or printed, in the United Kingdom, and printed or reprinted in any other country, as to which the proprietor of such copyright or his agent shall have given to the Commissioners of Customs a notice in writing, duly declared, that such copyright subsists, such notice also stating when such copyright will expire.*]

* * * * *

Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles.

[*Secs. 44 and 45 are repealed by the Copyright Act, 1911.*]

* * * * *

Customs acts to extend to British possessions abroad, except where otherwise provided for.

151. The Customs Acts shall extend to and be of full force and effect in the several British possessions abroad, except where otherwise expressly provided for by the said Acts, or limited by express reference to the United Kingdom or the Channel Islands, and except also as to any such possession as shall by local Act or ordinance have provided, or may hereafter, with the sanction and approbation of Her Majesty and her successors, make entire provision for the management and regulation of the Customs of any such possession, or make in like manner express provisions in lieu or variation of any of the clauses of the said Act for the purposes of such possession.

[*Sec. 152 repealed by the Copyright Act, 1911.*]

[From "The Law Reports. The Public General Statutes, 1876." Vol. 11, 8°. London, William Clowes and Sons, 1876, pp. 171, 181-182, 210.]

The Musical (Summary Proceedings) Copyright Act, 1902.

2 Edward VII., Chapter 15.

Act 2 Edw. 7, c. 15, 1902.

AN ACT to amend the Law relating to Musical Copyright. [22nd July, 1902.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lord's Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Seizure, &c., of pirated copies.

1. A court of summary jurisdiction, upon the application of the owner of the copyright in any musical work, may act as follows: If satisfied by evidence that there is reasonable ground for believing that pirated copies of such musical work are being hawked, carried about, sold or offered for sale, may, by order, authorise a constable to seize such copies without warrant and to bring them before the court, and the court, on proof that the copies are pirated, may order them to be destroyed, or to be delivered up to the owner of the copyright if he makes application for that delivery.

Power to seize copies on hawkers.

2. If any person shall hawk, carry about, sell or offer for sale any pirated copy of any musical work, every such pirated copy may be seized by any constable without warrant, on the request in writing of the apparent owner of the copyright in such work, or of his agent thereto authorised in writing, and at the risk of such owner.

On seizure of any such copies, they shall be conveyed by such constable before a court of summary jurisdiction, and, on proof that they are infringements of copyright, shall be forfeited or destroyed, or otherwise dealt with, as the court may think fit.

Definitions.

3. "Musical copyright" means the exclusive right of the owner of such copyright, under the Copyright Acts in force for the time being, to do, or to authorise another person to do, all or any of the following things in respect of a musical work:—

(1) To make copies by writing or otherwise of such musical work.
(2) To abridge such musical work.
(3) To make any new adaptation, arrangement or setting of such musical work, or of the melody thereof, in any notation or system.

"Musical work" means any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced.

"Pirated musical work" means any musical work written, printed or otherwise reproduced, without the consent lawfully given by the owner of the copyright in such musical work.

Short title and commencement.

4. This Act may be cited as The Musical (Summary Proceedings) Copyright Act, 1902, and shall come into operation on the first day of October, one thousand nine hundred and two, and shall apply only to the United Kingdom.

[From "The Law Reports. The Public General Statutes, 1902." Vol. 40, 8°. London, William Clowes & Sons, Ltd., 1903, p. 18.]

THE MUSICAL COPYRIGHT ACT, 1906.

6 EDWARD VII., CHAPTER 36.

AN ACT to amend the law relating to Musical Copyright. [4th August, 1906.]

Act 6 Edw. 7. c. 36. 1906.

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Penalty for being in possession of pirated music.

1. (1) Every person who prints, reproduces, or sells, or exposes, offers, or has in his possession for sale, any pirated copies of any musical work, or has in his possession any plates for the purpose of printing or reproducing pirated copies of any musical work, shall (unless he proves that he acted innocently) be guilty of an offence punishable on summary conviction, and shall be liable to a fine not exceeding five pounds, and on a second or subsequent conviction to imprisonment with or without hard labour for a term not exceeding two months or to a fine not exceeding ten pounds: Provided that a person convicted of an offence under this Act who has not previously been convicted of such an offence, and who proves that the copies of the musical work in respect of which the offence was committed had printed on the title page thereof a name and address purporting to be that of the printer or publisher, shall not be liable to any penalty under this Act unless it is proved that the copies were to his knowledge pirated copies.

Constable may take into custody without warrant.

(2) Any constable may take into custody without warrant any person who in any street or public place sells or exposes, offers, or has in his possession for sale any pirated copies of any such musical work as may be specified in any general written authority addressed to the chief officer of police, and signed by the apparent owner of the copyright in such work or his agent thereto authorised in writing, requesting the arrest, at the risk of such owner, of all persons found committing offences under this section in respect to such work, or who offers for sale any pirated copies of any such specified musical work by personal canvass or by personally delivering advertisements or circulars.

(3) A copy of every written authority addressed to a chief officer of police under this section shall be open to

inspection at all reasonable hours by any person without payment of any fee, and any person may take copies of or make extracts from any such authority.

(4) Any person aggrieved by a summary conviction under this section may in England or Ireland appeal to a court of quarter sessions, and in Scotland under and in terms of the Summary Prosecutions Appeals (Scotland) Act, 1875.

38 and 39 Vict., c. 62.

Right of entry by police for execution of act.

2.—(1) If a court of summary jurisdiction is satisfied by information on oath that there is reasonable ground for suspecting that an offence against this Act is being committed on any premises, the court may grant a search warrant authorising the constable named therein to enter the premises between the hours of six of the clock in the morning and nine of the clock in the evening, and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and to seize any copies of any musical work or any plates in respect of which he has reasonable ground for suspecting that an offence against this Act is being committed.

(2) All copies of any musical work and plates seized under this section shall be brought before a court of summary jurisdiction, and if proved to be pirated copies or plates intended to be used for the printing or reproduction of pirated copies shall be forfeited and destroyed or otherwise dealt with as the court think fit.

3. In this Act—

Definitions: "Pirated copies."

The expression "pirated copies" means any copies of any musical work written, printed, or otherwise reproduced without the consent lawfully given by the owner of the copyright in such musical work:

"Musical work."

The expression "musical work" means a musical work in which there is a subsisting copyright, [*and which has been registered in accordance with the provisions of the Copyright Act, 1842, or of the International Copyright Act, 1844, which registration may be effected notwithstanding anything in the International Copyright Act, 1886*]:

Words in brackets and italics repealed by copyright act, 1911.

"Plates."

The expression "plates" includes any stereotype or other plates, stones, matrices, transfers, or negatives used or intended to be used for printing or reproducing copies of any musical work: Provided that the expressions "pirated copies" and "plates" shall not, for the

purposes of this Act, be deemed to include perforated music rolls used for playing mechanical instruments, or records used for the reproduction of sound waves, or the matrices or other appliances by which such rolls or records respectively are made:

"Chief officer of police."

The expression "chief officer of police"—

(*a*) with respect to the City of London, means the Commissioner of City Police;

53 and 54 Vict., c. 45.

(*b*) elsewhere in England has the same meaning as in the Police Act, 1890;

53 and 54 Vict.,c. 67.

(*c*) in Scotland has the same meaning as in the Police (Scotland) Act, 1890;

(*d*) in the police district of Dublin metropolis means either of the Commissioners of Police for the said district;

(*e*) elsewhere in Ireland means the District Inspector of the Royal Irish Constabulary:

"Court of summary jurisdiction."

The expression "court of summary jurisdiction" in Scotland means the sheriff or any magistrate of any royal, parliamentary, or police burgh officiating under the provisions of any local or general police Act.

Short title.

4. This Act may be cited as the Musical Copyright Act, 1906.

[From "The Law Reports. The Public General Statutes, 1906." Vol. 44, 8°. London, Rowland Bailey, 1906, pp. 98-100.]

EXCERPT FROM ENGLISH STAGE LICENSING LAW

ACT OF REGULATING THEATRES.

(6 & 7 Vict. Chap. LXVIII) (22d August, 1843)

XII. And be it enacted, That One Copy of every new Stage Play, and of every new Act, Scene or any other Part added to any old Stage Play and of every new Prologue or Epilogue and of every new Part added to an old Prologue or Epilogue intended to be produced and acted for Hire at any Theatre in Great Britain, shall be sent to the Lord Chamberlain of Her Majesty's Household, for the Time being, Seven Days at least before the first acting or presenting thereof, with an Account of the Theatre where and the Time when the same is intended to be first acted or presented, signed by the Master or Manager or One of the Masters or Managers, of such Theatre; and during the said Seven Days no Person shall for Hire act or present the same, or cause the same to be acted or presented; and in case the Lord Chamberlain either before or after the Expiration of the said Period of Seven Days, shall disallow any Play or any Act, Scene or Part thereof, or any Prologue or Epilogue, or any Part thereof it shall not be lawful for any person to act or present the same or cause the same to be acted or presented, contrary to such Disallowance.

XIII. And be it enacted, That it shall be lawful for the Lord Chamberlain to charge such Fees for the Examination of the Plays, Prologues, and Epilogues or Parts thereof which shall be sent to him for Examination, as to him from Time to Time shall seem fit, according to a Scale which shall be fixed by him, such Fee not being in any Case more than Two Guineas and such fees shall be paid at the Time when such Play, Prologues and Epilogues or Parts thereof, shall be sent to the Lord Chamberlain; and the said Period of Seven Days shall not begin to run in any Case until the said Fee shall have been paid to the Lord Chamberlain, or to some officer, deputed by him to receive the same.

ORDER IN COUNCIL RESPECTING BRITISH COPYRIGHT IN WORKS BELONGING TO CITIZENS OF THE UNITED STATES

GREAT BRITAIN.

COPYRIGHT ORDER IN COUNCIL.

At the Court at Buckingham Palace, the 3rd day of February, 1915.

PRESENT,

The King's Most Excellent Majesty

Lord President
Viscount Knollys
Lord Chamberlain
Mr. Secretary Harcourt
Mr. Arthur Henderson
Sir William Macgregor
Lord Justice Bankes.

Whereas by a Proclamation of the President of the United States of America, dated the 9th April, 1910, the benefits of the United States Act of 1909, entitled "An Act to Amend and Consolidate the Acts respecting Copyright," were extended to the subjects of Great Britain and her possessions, but no provision was made therein for the protection of the musical works of British subjects against reproduction by means of mechanical contrivances:

And whereas His Majesty is advised that the Government of the United States of America has undertaken, upon the issue of this Order, to grant such protection to the musical works of British subjects:

And whereas by reason of these premises His Majesty is satisfied that the Government of the United States of America has made, or has undertaken to make, such provisions as it is expedient to require for the protection of works entitled to copyright under the provisions of Part I of the Copyright Act, 1911:

And whereas by the Copyright Act, 1911, authority is conferred upon His Majesty to extend, by Order in Council, the protection of the said Act to certain classes of foreign works within any part of His Majesty's Dominions, other than self-governing dominions, to which the said Act extends:

And whereas it is desirable to provide protection within the said dominions for the unpublished works of citizens of the United States of America:

Now, therefore, His Majesty, by and with the advice of His Privy Council, and by virtue of the authority conferred upon him by the Copyright Act, 1911, is pleased to order, and it is hereby ordered, as follows:—

1. The Copyright Act, 1911, including the provisions as to existing works, shall, subject to the provisions of the said Act and of this Order, apply—

(*a*) to literary, dramatic, musical and artistic works the authors whereof were at the time of the making of the works Citizens of the United States of America, in like manner as if the authors had been British Subjects:

(*b*) in respect of residence in the United States of America, in like manner as if such residence had been residence in the parts of His Majesty's dominions to which the said Act extends.

Provided that—

(i) The term of copyright within the parts of His Majesty's dominions to which this order applies shall not exceed that conferred by the law of the United States of America:

(ii) the enjoyment of the rights conferred by this Order shall be subject to the accomplishment of the conditions and formalities prescribed by the law of the United States of America:

(iii) in the application to existing works of the provisions of Section 24 of the Copyright Act, 1911, the commencement of this Order shall be substituted for the 26th July, 1910, in subsection 1 (b).

2. This Order shall apply to all His Majesty's Dominions, Colonies and Possessions, with the exception of those hereinafter named, that is to say:—

The Dominion of Canada.
The Commonwealth of Australia.
The Dominion of New Zealand.
The Union of South Africa.
Newfoundland.

3. This Order shall come into operation on the 1st day of January, 1915, which day is in this Order referred to as the commencement of this Order.

And the Lords Commissioners of His Majesty's Treasury are to give the necessary Orders accordingly.

ALMERIC FITZROY.

RULES AND ORDERS, ETC., MADE UNDER THE BRITISH COPYRIGHT ACT

The Copyright Royalty System (General) Regulations, 1912.
Dated June 7, 1912.

The Board of Trade, in pursuance of the powers conferred by section 3 of the Copyright Act, 1911, hereby makes the following regulations:—

PRELIMINARY.

(1) These Regulations may be cited as the Copyright Royalty System (General) Regulations, 1912, and shall come into operation on the 1st day of July, 1912.

NOTICE.

(2) The notice required by section 3 of the Copyright Act, 1911, shall contain the following particulars:—

(*a*) The name and address of the person intending to reproduce the work;

(*b*) The name of the work which it is intended to reproduce and (if necessary) a description sufficient to identify it;

(*c*) The manner in which it is intended to reproduce the work (*e. g.*, whether by printing, lithography, photography, &c.);

(*d*) The price or prices at which it is intended to publish the work;

(*e*) The earliest date at which any of the copies will be delivered to a purchaser.

(3) The notice shall, not less than one month before any copies of the work are delivered to a purchaser, be sent by registered post or published by advertisement as follows:—

(*a*) If the name and an address within the United Kingdom of the owner of the copyright, or his agent for the receipt of notice, are known or can with reasonable diligence be ascertained, the notice shall be sent to such owner or agent at such address;

(*b*) If such name and address are not known and cannot with reasonable diligence be ascertained, the notice shall be advertised in the *London Gazette;* the advertisement in the *London Gazette* shall give the particulars required by paragraphs (*a*) and (*b*) of Regulation (2), and shall also state an address from which a copy of the notice described in Regulation (2) may be obtained.

PAYMENT OF ROYALTIES.

(4)—(*a*) Unless otherwise agreed, royalties shall be payable by means of adhesive labels purchased from the owner of the copyright and affixed to the copies of the work.

After the person reproducing the work has given the prescribed notice of his intention to reproduce the work the owner of the copyright shall by writing sent by registered post intimate to him some reasonably convenient place within the United Kingdom from which adhesive labels can be obtained and on demand in writing and tender of the price shall supply from such place adhesive labels of the required denominations at a price equal to the amount of royalty represented thereby.

Subject to these Regulations, no copy of the work shall be delivered to a purchaser until such label or labels denoting the amount of royalty have been affixed thereto.

(*b*) In cases when royalties are payable by means of adhesive labels if at any time labels of the required denomination are not available either because—

(i) after the expiration of 14 days from the date of the prescribed notice the owner of the copyright has not duly sent to the person reproducing the work an intimation of some reasonably convenient place within the United Kingdom from which such labels can be obtained; or

(ii) the owner of the copyright refuses or neglects to supply such labels within 14 days after demand duly made, copies of the work may be delivered to purchasers without having labels affixed thereto; and the amount of royalties shall be a debt due from the person reproducing the work to the owner of the copyright, and the person reproducing the work shall keep an account of all such copies sold by him.

(*c*) For the purposes of this Regulation, "the date of the prescribed notice" means—

(i) in cases when the notice is required to be sent by registered post, the date when the notice would in ordinary course of post be delivered;

(ii) in cases when the notice is required to be advertised in the *London Gazette*, the date of such advertisement.

(*d*) Where royalties are by agreement payable in any other mode than by means of adhesive labels the time and frequency of the payment shall be such as are specified in the agreement.

(*e*) The adhesive label supplied as aforesaid shall be an adhesive paper label, square in shape, the design to be entirely enclosed within

a circle and the side of the label not to be greater than ¾ inch in length. The label shall not bear the effigy of the Sovereign or any other person, nor any word, mark or design such as to suggest that the label is issued by or under the authority of the Government for the purpose of denoting any duty payable to the Government.

INTERPRETATION.

(6) In these Regulations the expression "owner of the copyright" has the same meaning as in section 3 of the Copyright Act, 1911.

Dated this 7th day of June, 1912.

H. LLEWELLYN SMITH,
Secretary to the Board of Trade.

THE COPYRIGHT ROYALTY SYSTEM (MECHANICAL MUSICAL INSTRUMENTS) REGULATIONS, 1912.

Dated June 7, 1912.

The Board of Trade, in pursuance of the powers conferred by section 19 (6) of the Copyright Act, 1911, hereby make the following regulations:—

PRELIMINARY.

(1) These Regulations may be cited as the Copyright Royalty System (Mechanical Musical Instruments) Regulations, 1912, and shall come into operation on the 1st day of July, 1912.

NOTICE.

(2) The notice required by section 19 (2) of the Copyright Act, 1911, shall contain the following particulars:—

(*a*) The name and address of the person intending to make the contrivances;

(*b*) The name of the musical work which it is intended to reproduce and of the author (if known); and (if necessary) a description sufficient to identify the musical work;

(*c*) The class of contrivance on which it is intended to reproduce the musical work (*e. g.*, whether discs, cylinders or music rolls);

(*d*) The ordinary retail selling prices of the contrivances, and the amount of the royalty payable on such contrivance in respect of the musical work;

(*e*) The earliest date at which any of the contrivances will be delivered to a purchaser;

(*f*) Whether any other work is to be reproduced on the same contrivance with the musical work specified in accordance with paragraph (*b*).

(3) The notice shall, not less than 10 days before any contrivances on which the musical work is reproduced are delivered to a purchaser, be sent by registered post or published by advertisement as follows:—

(*a*) If the name and an address within the United Kingdom of the owner of the copyright, or his agent for the receipt of notice, are known, or can with reasonable diligence be ascertained, the notice shall be sent to such owner or agent at such address;

(*b*) If such name and address are not known and cannot with reasonable diligence be ascertained, the notice shall be advertised in the *London Gazette;* the advertisement in the *London Gazette* shall give the particulars required by paragraphs (*a*) and (*b*) of Regulation (2), and shall also state an address from which a copy of the notice described in Regulation (2) may be obtained. Any number of musical works may be included in the same advertisement.

The notice may be given either before or after the 1st day of July, 1912.

PAYMENT OF ROYALTIES.

(4)—(*a*) Unless otherwise agreed, royalties shall be payable by means of adhesive labels purchased from the owner of the copyright and affixed in the manner provided by these Regulations.

After the person making the contrivances has given the prescribed notice of his intention to make or sell the contrivances, the owner of the copyright shall by writing sent by registered post intimate to him some reasonably convenient place within the United Kingdom from which adhesive labels can be obtained and on demand in writing and tender of the price shall supply from such place adhesive labels of the required denominations at a price equal to the amount of royalty represented thereby.

Subject to these Regulations no contrivance shall be delivered to a purchaser until such label or labels denoting the amount of royalty have been affixed thereto, or in the case of cylinders, to which it is not reasonably practicable to affix the labels, until such label or labels have been affixed to a carton or box enclosing the cylinder.

(*b*) In cases where royalties are payable by means of adhesive labels if at any time labels of the required denominations are not available either because—

(i) After the expiration of five days from the date of the prescribed notice of the intention of the person making the contrivance

to make or sell such contrivances the owner of the copyright has not duly sent to the person making the contrivances an intimation of some reasonably convenient place within the United Kingdom from which such labels can be obtained; or

(ii) the owner of the copyright refuses or neglects to supply such labels within three days after demand duly made,

contrivances may be delivered to purchasers without having labels affixed thereto or to the carton or box enclosing the same; and the amount of royalties shall be a debt due from the person making the contrivances to the owner of the copyright and the person making the contrivances shall keep an account of all such contrivances sold by him.

(*c*) For the purposes of this Regulation "the date of the prescribed notice" means—

(i) in cases where the notice is required to be sent by registered post, the date when the notice would in ordinary course of post be delivered;

(ii) in cases where the notice is required to be advertised in the *London Gazette*, the date of such advertisement.

(*d*) In cases where royalties are payable on contrivances made before the commencement of the Copyright Act, 1911, the person making such contrivances may give notice of his intention to sell them, containing *mutatis mutandis* the same particulars and given in the same manner as is prescribed by these Regulations in the case of the notice required by section 19 (2) of the Copyright Act, 1911.

(*e*) Where royalties are by agreement payable in any other mode than by means of adhesive labels, the time and frequency of the payment shall be such as are specified in the agreement.

(*f*) The adhesive label supplied as aforesaid shall be an adhesive paper label, square in shape, the design to be entirely enclosed within a circle and the size of the label not to be greater than ¾ inch in length. This label shall not bear the effigy of the Sovereign or any other person, nor any word, mark, or design such as to suggest that the label is issued by or under the authority of the Government for the purpose of denoting any duty payable to the Government.

ORDINARY RETAIL SELLING PRICE.

(5) The ordinary retail selling price of any contrivance shall be calculated at the marked or catalogued selling price of single copies to the public, or, if there is no such marked or catalogued selling price, at the highest price at which single copies are ordinarily sold to the public.

INQUIRIES.

(6) The inquiries referred to in section 19 (5) of the Copyright Act, 1911, shall be directed to the owner of the copyright by name or (if his name is not known and cannot with reasonable diligence be ascertained) in general terms to "the owner of the copyright" of the musical work in respect of which the inquiries are made, and shall contain—

(*a*) a statement of the name of the musical work in respect of which the inquiries are made and of the author (if known), and (if necessary) a description sufficient to identify it;

(*b*) a statement of the name, address and occupation of the person making the inquiries;

(*c*) an allegation that a contrivance has previously been made by means of which the musical work may be mechanically performed, with the trade name (if known) and a description of such contrivance;

(*d*) an inquiry whether the contrivance so described was made with the consent or acquiescence of the owner of the copyright.

(7) The inquiries shall be sent by registered post or published by advertisement as follows:—

(*a*) if an address within the United Kingdom of the owner of the copyright is known or can with reasonable diligence be ascertained, the inquiries shall be sent to such address; or

(*b*) if such address is not known and cannot with reasonable diligence be ascertained, the inquiries shall be advertised in the *London Gazette.*

(8) The prescribed time for reply to such inquiries shall be:—

(*a*) In cases where the inquiries are required to be sent by registered post 7 days after the date when the inquiries would in ordinary course of post be delivered;

(*b*) in cases where the inquiries are required to be advertised in the *London Gazette* 7 days after the date of such advertisement.

INTERPRETATION.

(9) In these Regulations the expression "owner of the copyright" has the same meaning as in section 19 (2) of the Copyright Act, 1911.

Dated this 7th day of June, 1912.

H. LLEWELLYN SMITH,
Secretary to the Board of Trade.

THE DESIGNS RULES, 1912. DATED JUNE 26, 1912.

By virtue of the provisions of the Patents and Designs Act, 1907, and the Copyright Act, 1911, the Board of Trade do hereby make the following Rules:—

PRELIMINARY.

1. These Rules may be cited as the Designs Rules, 1912, and shall come into operation on the 1st day of July, 1912.

DESIGNS EXCLUDED FROM PROTECTION UNDER COPYRIGHT ACT, 1911.

2. A design shall be deemed to be used as a model or pattern to be multiplied by any industrial process within the meaning of section 22 of the Copyright Act, 1911—

(*a*) When the design is reproduced or is intended to be reproduced in more than fifty single articles, unless all the articles in which the design is reproduced or is intended to be reproduced together form only a single set, as defined by Rule 5 of the Designs Rules, 1908;

(*b*) Where the design is to be applied to (1) printed paper hangings, (2) carpets, floor cloths or oil cloths, manufactured or sold in lengths or pieces, (3) textile piece goods, or textile goods manufactured or sold in lengths or pieces, (4) lace, not made by hand.

Dated this 26th day of June, 1912.

H. Llewellyn Smith,
Secretary to the Board of Trade.

REGULATIONS DATED JUNE 19, 1912, MADE BY THE COMMISSIONERS OF CUSTOMS AND EXCISE UNDER SECTION 14 OF THE COPYRIGHT ACT, 1911 (1 & 2 GEO. 5, c. 46) AS TO THE DETENTION AND FORFEITURE OF COPIES INFRINGING COPYRIGHT.

The Commissioners of Customs and Excise in pursuance of the powers vested in them by section fourteen of the Copyright Act, 1911, hereby prescribe the following Regulations which are to be observed on and after the first day of July, nineteen hundred and twelve.

1. The notice in writing to be given to the Commissioners of Customs and Excise (hereinafter referred to as the said Commissioners) under section fourteen of the Copyright Act, 1911, by the owner of the copyright in any book or other printed work in which copyright subsists under the said Act, or his agent who is desirous that copies thereof printed or reprinted out of the United Kingdom shall not be imported

into the United Kingdom shall be in the Form No. 1 in the Schedule hereto or as near thereto as circumstances permit.

2. Any notice in regard to any book or other printed work in which copyright subsisted on the 30th day of June, nineteen hundred and twelve, which was given to and accepted by the said Commissioners on or before that day pursuant to section forty-two of the Customs Consolidation Act, 1876, or section one of the Revenue Act, 1889, shall for a period of twelve months from the first day of July, nineteen hundred and twelve, if the copyright so long subsists be treated as a notice given under section fourteen of the Copyright Act, 1911, unless the notice is withdrawn or superseded or the said Commissioners require a further notice to be given.

3. The notice in writing to be given to the said Commissioners under section fourteen of the Copyright Act, 1911, by the owner of the copyright in any work (other than a book or other printed work) in which copyright subsists under the said Act or his agent who is desirous that copies thereof made out of the United Kingdom shall not be imported into the United Kingdom may be either a general notice in the Form No. 2, in the Schedule hereto or as near thereto as circumstances permit or a special notice in the Form No. 3, in the same schedule relating to a particular importation.

4. Every notice given in pursuance of these Regulations in the Form No. 1 or No. 2 in the Schedule hereto shall be accompanied by a statutory declaration in the Form No. 4 in the same Schedule.

5. Before any article which appears, or is alleged, to be a copy of a work to which a notice applies is detained, or any further proceedings with a view to the forfeiture thereof under the law relating to the Customs are taken, the person who signed the notice whether as owner or agent shall, if required so to do, give to the said Commissioners in writing such further information, and evidence, verified if so required by a statutory declaration, as they consider necessary to satisfy them that the article in question is liable to detention and forfeiture.

6. In the case of any detention in consequence of a notice in the Form No. 3 given to the said Commissioners the person who signed the notice whether as owner or agent must if so required deposit with the Collector of Customs and Excise or other Chief Officer of Customs and Excise at the port or place of detention a sum of money sufficient in the opinion of that Officer to cover any expense which may be incurred in the examination required by reason of his notice of the goods detained, and if upon the examination of the goods the said Collector or other Chief Officer is satisfied that there is no ground for their detention, they will be delivered.

7. If any goods are placed under detention in consequence of any notice given in pursuance of these Regulations, the said Commissioners may require the person who signed the notice to give an undertaking in writing to reimburse them all expenses and damages incurred in respect of the detention, and of any proceedings for forfeiture subsequently taken if such an undertaking has not already been given, and may also require him within four days after the detention to enter into a bond with two approved sureties in such form and for such amount as the said Commissioners may require.

8. Any deposit of money previously made will be returned on the completion of the bond.

9. In these Regulations—

"Owner of the copyright" has the same meaning as in section fourteen of the Copyright Act, 1911.

"Book or other printed work" means every part or division of a book, pamphlet, sheet or letterpress, sheet of music, map, plan, chart, or table separately published.

Dated this 19th day of June, 1912.

Signed by Order of the Commissioners of Customs and Excise.

J. P. BYRNE,
E. C. CUNNINGHAM,
Secretaries.

THE SCHEDULE.

FORM No. 1.

NOTICE.

Relating to Copyright Books and other printed works.

To the Commissioners of Customs and Excise:

I, ... of ....., hereby give you notice that copyright in the original work (1) ..... mentioned in the Schedule hereto now subsists under the Copyright Act, 1911, and that (2) ..... the owner of the copyright in the said work (1) ..... and that (3) ..... desirous that copies of the said work (1) ..... printed or reprinted out of the United Kingdom shall not be imported into the United Kingdom.

Dated this ..... day of ....., 19....

(Signature) .....

(4).....

SCHEDULE.

Title of Book (5).

Description of printed work, if not a book.

Full name of Author or Authors.

Whether Author or Authors alive, if not, date of death.

When and where (6) book or printed work first published.

(Note—Where advantage has been taken of the provisions of the Copyright Act, 1911, as to simultaneous publication, the date and place stated should be those which entitle the work to copyright in the United Kingdom.)

1—or works.
2—If notice is given by the owner insert "I am"; if given by an agent insert name of owner and the word "is."
3—"I am" or "he is."
4—If an agent insert "Agent of owner."
5—The notice may apply to a number of books or printed works, in which case the particulars in the Schedule must be given as respects each book or printed work.
6—It is sufficient to state the *country* of first publication.

FORM NO. 2.

NOTICE.

Relating to Copyright Works, other than Books or other printed Works.

To the Commissioners of Customs and Excise:

I, ..., of ....., hereby give you notice that copyright in the original work mentioned in the Schedule hereto now subsists under the Copyright Act, 1911, and that (a) ..... the owner of the copyright in the said work, and that (b) desirous that copies of the said work made out of the United Kingdom shall not be imported into the United Kingdom.

Dated this ..... day of ....., 19....

(Signature).....

(c).....

SCHEDULE.

Title of Work (if any).
Full description of Work.
Initials or Marks (if any) usually placed on copies of work.
Full name of Author or Authors.
Whether Author or Authors alive, if not, date of death.
When and where (d) work first published.

(NOTE.—Where advantage has been taken of the provisions of the Copyright Act, 1911, as to simultaneous publication, the date and place stated should be those which entitle the work to copyright in the United Kingdom.)

If work not published:

Whether Author British subject or not.

If not a British subject name of country in which Author was resident, or domiciled at date of the making of the work.

In the case of photographs, phonographic records and music rolls, date of making the original negative or original plate.

(a)—If notice is given by the owner, insert "I am," if given by an agent, insert name of owner and the word "is."
(b)—"I am" or "he is."
(c)—If an agent, insert "Agent of owner."
(d)—It is sufficient to state the *country* of first publication.

FORM NO. 3.

NOTICE.

Relating to a particular importation.

To the Commissioners of Customs and Excise:

I, ..., of ....., hereby give you notice that I am the owner (a) ..... of the copyright in a certain original work as to which copyright now subsists under the Copyright Act, 1911, and

that the undermentioned goods, that is to say, (b) ..... are about to be imported into the (c) ..... Port of ..... on or about the ..... day of ..... next in the (d) ..... from .....

That such goods are liable to detention and forfeiture as being (e) .....

And I request that the said goods may be detained and dealt with accordingly, and I hereby undertake to reimburse the Commissioners of Customs and Excise all expenses and damages to be incurred in respect of the detention, and of any proceedings for forfeiture which may be subsequently taken.

Dated this ..... day of ....., 19....

(Signature) .....

(f) .....

(a)—or agent for the owner.
(b)—Describe the goods, number of packages, marks used, and any other particulars necessary for their identification.
(c)—or Sub-Port.
(d)—Describe the ship, and give name or indication.
(e)—State if the goods are copies of the original work made out of the United Kingdom, or how otherwise the goods are liable to detention and forfeiture.
(f)—If an agent, insert "Agent of owner."

FORM NO. 4.

STATUTORY DECLARATION.

I, ... of ....., do solemnly and sincerely declare that the contents of the Notice hereto annexed are true, and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act, 1835.

Declared by the above-named ....., at ....., this ..... day of ....., 19...., before me ....., a Commissioner for Oaths.

CANADIAN COPYRIGHT LAW

EXCERPT FROM CIRCULAR NO. 4A.

—OF THE—

CANADIAN DEPARTMENT OF AGRICULTURE.

Copyright and Trade Mark Branch.

"Canadian Copyright of a work will be registered in favor of a citizen of the United States upon the applicant showing that he has subsisting British copyright of such work and otherwise complying with the requirements of the Act, Rules and Forms."

CANADIAN COPYRIGHT ACT

(R. S. 1906, Ch. 70, as amended.)

SHORT TITLE.

1. This Act may be cited as the Copyright Act. **Short title.**

INTERPRETATION.

2. In this Act, unless the context otherwise requires— **Definitions.**

(*a*) "Minister" means the Minister of Agriculture;

(*b*) "Department" means the Department of Agriculture;

(*c*) "legal representatives" includes heirs, executors, administrators and assigns, or other legal representatives.

PART I.

REGISTERS OF COPYRIGHTS.

3. The Minister shall cause to be kept, at the Department, books to be called the Registers of Copyrights, in which proprietors of literary, scientific and artistic works or compositions, may have the same registered in accordance with the provisions of this Act. **Minister shall cause to be kept.**

SUBJECTS AND CONDITIONS OF COPYRIGHTS.

4. Any person domiciled in Canada or in any part of the British possessions, or any citizen of any country which has an international copyright treaty with the United Kingdom, who is the author of any book, map, chart or musical composition, or of any original painting, drawing, statue, sculpture or photograph, or who invents, designs, etches, engraves or causes to be engraved, etched or made from his own design, any print, cut, or engraving, and the legal representatives of such person or citizen, shall for the term of twenty-eight years, from the time of recording the copyright thereof in the manner hereinafter directed, have the sole and exclusive right and liberty of printing, reprinting, publishing, reproducing and vending such **Who may have copyright.** **For twenty-eight years.**

literary, scientific or artistic work or composition, in whole or in part, and of allowing translations of such work from one language into other languages to be printed or reprinted and sold.

Translations.

Duration.

5. In no case shall the said sole and exclusive right and liberty in Canada continue to exist after it has expired elsewhere.

Conditions for obtaining copyright.

6. The condition for obtaining such copyright shall be that the said literary, scientific or artistic works shall be printed and published or reprinted and republished in Canada, or in the case of works of art that they shall be produced or reproduced in Canada, whether they are so published or produced for the first time, or contemporaneously with or subsequently to publication or production elsewhere.

Exception as to immoral works.

7. No literary, scientific or artistic work which is immoral, licentious, irreligious, or treasonable or seditious, shall be the legitimate subject of such registration or copyright.

Copyright in Canada of British copyright works.

8. Every work of which the copyright has been granted and is subsisting in the United Kingdom, and copyright of which is not secured or subsisting in Canada, under any Act of the Parliament of Canada, or of the Legislature of the late province of Canada, or of the legislature of any of the provinces forming part of Canada, shall, when printed and published, or reprinted and republished in Canada, be entitled to copyright under this Act; but nothing in this Act shall, except as hereinafter provided, be held to prohibit the importation from the United Kingdom of copies of any such work lawfully printed there.

Importation.

Foreign reprints imported may be sold.

2. If any such copyright work is reprinted subsequently to its publication in the United Kingdom, any person who has, previously to the date of entry of such work upon the Registers of Copyright, imported any foreign reprints, may dispose of such reprints by sale or otherwise; but the burden of proof of establishing the extent and regularity of the transaction shall in such case be upon such person.

Burden of proof.

Registration of work first published in separate articles in periodical.

9. Any literary work intended to be published in pamphlet or book form, but which is first published in separate articles in a newspaper or periodical, may be registered under this Act while it is so preliminarily published, if the title of the manuscript and a short analysis of the work are

deposited at the Department, and if every separate article so published is preceded by the words, *Registered in accordance with the Copyright Act:* Provided that the work, when published in book or pamphlet form, shall be subject, also, to the other requirements of this Act.

Books published anonymously.

10. If a book is published anonymously, it shall be sufficient to enter it in the name of the first publisher thereof, either on behalf of the un-named author or on behalf of such first publisher, as the case may be.

Deposit of copies in Department.

11. No person shall be entitled to the benefit of this Act unless he has deposited at the Department three copies of the book, map, chart, musical composition, photograph, print, cut, or engraving, and in the case of paintings, drawings, statuary and sculpture, unless he has furnished a written description of such works of art; and the Minister shall cause the copyright of the same to be recorded forthwith in a book to be kept for that purpose, in the manner adopted by him, or prescribed by the rules and forms made, from time to time, as herein provided.

Record of copyright.

One copy to Library of Parliament and British Museum.

12. The Minister shall cause one of such three copies of such book, map, chart, musical composition, photograph, print, cut, or engraving, to be deposited in the Library of the Parliament of Canada and one in the British Museum.

As to second and subsequent editions.

13. It shall not be requisite to deliver any printed copy of the second or of any subsequent edition of any book unless the same contains very important alterations or additions.

Notice of copyright to appear on work.

14. No person shall be entitled to the benefit of this Act unless he gives information of the copyright being secured,—

(*a*) if the work is a book, by causing to be inserted in the several copies of every edition published during the term secured, on the title page, or on the page immediately following; or,

(*b*) if the work is a map, chart, musical composition, print, cut, engraving or photograph, by causing to be impressed on the face thereof; or,

(*c*) if the work is a volume of maps, charts, music, engravings or photographs, by causing to be impressed upon the title page or frontispiece thereof;

the words, "Copyright, Canada, 190 , by A. B." Form.

Exception.

2. As regards paintings, drawings, statuary and sculptures, the signature of the artist shall be deemed a sufficient notice of such proprietorship.

Interim copyright, how obtainable.

15. The author of any literary, scientific or artistic work, or his legal representatives, may, pending the publication or republication thereof in Canada, obtain an interim copyright therefor by depositing at the Department a copy of the title or a designation of such work, intended for publication or republication in Canada.

Registration.

2. Such title or designation shall be registered in an interim copyright register at the Department to secure to such author aforesaid or his legal representatives, the exclusive rights recognized by this Act, previous to publication or republication in Canada.

Duration.

3. Such interim registration shall not endure for more than one month from the date of the original publication elsewhere, within which period the work shall be printed or reprinted and published in Canada.

Notice.

4. In every case of interim registration under this Act, the author or his legal representatives shall cause notice of such registration to be inserted once in the *Canada Gazette.*

Application for registration.

16. The application for the registration of a copyright, or of a temporary or of an interim copyright may be made in the name of the author or of his legal representatives, by any person purporting to be agent of such author or legal representatives.

Unauthorized assumption of agency.

2. Any damage caused by a fraudulent or an erroneous assumption of such authority shall be recoverable in any court of competent jurisdiction.

ASSIGNMENTS AND RENEWALS.

Copyright and right to obtain it assignable.

17. The right of an author of a literary, scientific or artistic work to obtain a copyright, and the copyright when obtained, shall be assignable in law, either as to the whole interest or any part thereof, by an instrument in writing,

In duplicate.

made in duplicate, and which shall be registered at the Department on production of both duplicates and payment of the fee hereinafter mentioned.

Duplicates disposal of.

2. One of the duplicates shall be retained at the Department and the other shall be returned, with a certificate of registration, to the person depositing it.

Copyright to assignee of author.

18. Whenever the author of a literary, scientific or artistic work or composition which may be the subject of copyright has executed the same for another person, or has sold the same to another person for due consideration, such author shall not be entitled to obtain or to retain the proprietorship of such copyright, which is, by the said transaction, virtually transferred to the purchaser, and such purchaser may avail himself of such privilege, unless a reserve of the privilege is specially made by the author or artist in a deed duly executed.

Extension of term.

19. If, at the expiration of the said term of twenty-eight years, the author, or any of the authors when the work has been originally composed and made by more than one person, is still living, or if such author is dead and has left a widow or a child, or children living, the same sole and exclusive right and liberty shall be continued to such author, or to such authors still living, or, if dead, then to such widow and child or children, as the case may be, for the further term of fourteen years; but in such case, within one year after the expiration of such term of twenty-eight years, the title of the work secured shall be a second time registered, and all other regulations herein required to be observed in regard to original copyrights shall be complied with in respect to such renewed copyright.

Title to be again registered.

Notice of renewal to be published.

20. In all cases of renewal of copyright under this Act the author or proprietor shall, within two months from the date of such renewal, cause notice of the registration thereof to be published once in the *Canada Gazette*.

CONFLICTING CLAIMS TO COPYRIGHT.

How determined.

21. In case of any person making application to register as his own, the copyright of a literary, scientific or artistic work already registered in the name of another person, or in case of simultaneous conflicting applications, or of an application made by any person other than the person entered as proprietor of a registered copyright, to cancel the said copyright, the person so applying shall be notified by the Minister that the question is one for the decision of a court of competent jurisdiction, and no further proceedings shall be had or taken by the Minister concerning the application until a judgment is produced maintaining, cancelling or otherwise deciding the matter.

Court.

Duty of Minister.

2. Such registration, cancellation or adjustment of the said right shall then be made by the Minister in accordance with such decision.

Exchequer Court.

3. The Exchequer Court of Canada shall be a competent court within the meaning of this Act, and shall have jurisdiction to adjudicate upon any question arising under this section, upon information in the name of the Attorney General of Canada, or at the suit of any person interested.

UNAUTHORIZED PUBLICATION OF MANUSCRIPT.

Printing of manuscript without authority.

22. Every person who, without the consent of the author or lawful proprietor thereof first obtained, prints or publishes or causes to be printed or published, any manuscript not previously printed in Canada or elsewhere, shall be

Damages.

liable to the author or proprietor for all damages occasioned by such publication, and the same shall be recoverable in any court of competent jurisdiction.

LICENSES TO RE-PUBLISH.

Copyrighted work out of print.

23. If a work copyrighted in Canada becomes out of print, a complaint may be lodged by any person with the Minister, who, on the fact being ascertained to his satisfaction, shall notify the owner of the copyright of the complainant and of the fact; and if, within a reasonable time, no remedy is applied by such owner, the Minister may

License.

grant a license to any person to publish a new edition or to import the work, specifying the number of copies and the royalty to be paid on each to the owner of the copyright.

FEES.

Registration fees.

24. The following fees shall be paid to the Minister before an application for any of the following purposes is received, that is to say:—

Registering a copyright	$1.00
Registering an interim copyright	0.50
Registering a temporary copyright	0.50
Registering an assignment	1.00
Certified copy of registration	0.50
Registering any decision of a court of justice, for every folio	0.50

For office copies.

For office copies of documents not above mentioned, the following charges shall be made:—

Every single or first folio of one hundred words, certified copy.....$0.50
Every such subsequent folio (fractions of or under one-half not being counted, and of one-half or more being counted)..... 0.25

Fees in full of all services.

2. The said fees shall be in full of all services performed under this Act by the Minister or by any person employed by him.

Application.

3. All fees received under this Act shall be paid over to the Minister of Finance and shall form part of the Consolidated Revenue Fund of Canada.

No exemption from payment of fees.

4. No person shall be exempt from the payment of any fee or charge payable in respect of any services performed under this Act for such person, and no fee paid shall be returned to the person who paid it.

RIGHT TO REPRESENT SCENE OR OBJECT.

Saved.

25. Nothing herein contained shall prejudice the right of any person to represent any scene or object, notwithstanding that there may be copyright in some other representation of such scene or object.

FOREIGN NEWSPAPERS AND MAGAZINES.

May be imported.

26. Newspapers and magazines published in foreign countries, and which contain together with foreign original matter, portions of British copyright works republished with the consent of the author or his legal representatives, or under the law of the country where such copyright exists, may be imported into Canada.

CLERICAL ERRORS NOT TO INVALIDATE.

Corrected by Minister.

27. Clerical errors which occur in the framing or copying of any instrument drawn by any officer or employee in or of the Department, shall not be construed as invalidating such instrument, but when discovered they may be corrected under the authority of the Minister.

IMPORTATION.

If copyright owner licenses reproduction in Canada.

28. If a book as to which there is subsisting copyright under this Act has been first lawfully published in any part of His Majesty's dominions, other than Canada, and

if it is proved, to the satisfaction of the Minister that the owner of the copyright so subsisting and of the copyright acquired by such publication has lawfully granted a license to reproduce in Canada, from movable or other types, or from stereotype plates, or from electroplates, or from lithograph stones, or by any process for facsimile reproduction, an edition or editions of such book designed for sale only in Canada, the Minister may, notwithstanding anything in this Act, by order under his hand, prohibit the importation into Canada, except with the written consent of the licensee, or any copies of such book printed elsewhere: Provided that two such copies may be especially imported for the *bona fide* use of any public free library or any university or college library, or for the library of any duly incorporated institution or society for the use of the members of such institution or society.

Minister may prohibit importation.

Proviso.

Suspension or revocation of prohibition.

29. The Minister may at any time in like manner, by order under his hand, suspend or revoke such prohibition upon importation if it is proved to his satisfaction that,—

(*a*) the license to reproduce in Canada has terminated or expired; or,

(*b*) the reasonable demand for the book in Canada is not sufficiently met without importation; or,

(*c*) the book is not, having regard to the demand therefor in Canada, being suitably printed or published; or,

(*d*) any other state of things exists on account of which it is not in the public interest to further prohibit importation.

Licensee if required to furnish copy of any edition.

30. At any time after the importation of a book has been so prohibited, any person resident or being in Canada may apply, either directly or through a book-seller or other agent, to the person so licensed to reproduce such book, for a copy of any edition of such book then on sale and reasonably obtainable in the United Kingdom or any other part of His Majesty's dominions, and it shall thereupon be the duty of the person so licensed, as soon as reasonably may be, to import and sell such copy to the person so applying therefor, at the ordinary selling price of such copy in the United Kingdom, or such other part of His Majesty's dominions, with the duty and reasonable forwarding charges added.

2. The failure or neglect, without lawful excuse, of the person so licensed to supply such copy within a reasonable time shall be a reason for which the Minister may, if he sees fit, suspend or revoke the prohibition upon importation.

Otherwise prohibition may be revoked.

31. The Minister shall forthwith inform the Department of Customs of any order made by him under this Act.

Prohibition to be notified to Customs.

EVIDENCE.

32. All copies or extracts certified from the Department shall be received in evidence without further proof and without production of the originals.

Certified copies.

33. All documents, executed and accepted by the Minister shall be held valid, so far as relates to official proceedings under this Act.

Validity of documents.

RULES AND REGULATIONS.

34. The Minister may, from time to time, subject to the approval of the Governor in Council, make such rules and regulations, and prescribe such forms as appear to him necessary and expedient for the purposes of this Act; and such regulations and forms, circulated in print for the use of the public, shall be deemed to be correct for the purposes of this Act.

Minister to make rules and forms.

OFFENCES AND PENALTIES.

35. Every person who wilfully makes or causes to be made any false entry in any of the registry books, hereinbefore mentioned, or who wilfully produces or causes to be tendered in evidence, any paper which falsely purports to be a copy of an entry in any of the said books, is guilty of an indictable offense, and shall be punished accordingly.

Making false entries.

Indictable offense.

36. Every person who fraudulently assumes authority to act as agent of the author, or of his legal representative, for the registration of a copyright, or of a temporary or of an interim copyright, is guilty of an indictable offence and shall be punished accordingly.

Fraudulent assumption of authority.

Indictable offense.

37. Every person who,—

(*a*) after the interim registration of the title of any book according to this Act, and within the term herein limited, or after the copyright is secured and during the term or terms of its duration,

Infringement of copyright of a book.

prints, publishes, or reprints or republishes, or imports, or causes to be so printed, published or imported, any copy or any translation, of such book without having first obtained the right so to do by assignment from the person lawfully entitled to the copyright thereof; or,

(*b*) knowing the same to be so printed or imported, publishes, sells or exposes for sale, or causes to be published, sold or exposed for sale, any copy of such book without such consent;

Forfeiture. shall forfeit every copy of such book to the person then lawfully entitled to the copyright thereof; and shall forfeit and pay for every such copy which is found in his possession, either printed or being printed, published, imported or exposed for sale, contrary to the provisions of this Act, such sum, not exceeding one dollar, and not less than ten cents, as the court determines, which forfeiture

Recovery. shall be enforceable or recoverable in any court of competent jurisdiction.

Application. 2. A moiety of such sum shall belong to His Majesty for the public uses of Canada, and the other moiety shall belong to the lawful owner of such copyright.

Infringement of copyright of painting, etc. 38. Every person who, after the registering of any painting, drawing, statue or other work of art, and within the term or terms limited by this Act, reproduces in any manner, or causes to be reproduced, made or sold, in whole or in part, any copy of any such work of art, without the consent of the proprietor shall forfeit the plate or plates on which such reproduction has been made, and every sheet thereof so reproduced to the proprietor of the copyright

Forfeiture. thereof; and shall also forfeit for every sheet of such reproduction published or exposed for sale, contrary to this Act, such sum, not exceeding one dollar and not less than ten cents, as the court determines, which forfeiture shall be enforceable or recoverable in any court of competent jurisdiction.

Application. 2. A moiety of such sum shall belong to His Majesty for the public uses of Canada, and the other moiety shall belong to the lawful owner of such copyright.

39. Every person who, without the consent of the proprietor of the copyright first obtained—

(*a*) after the registering of any print, cut or engraving,

map, chart, musical composition or photograph, according to the provisions of this Act, and within the term or terms limited by this Act, engraves, etches, or works, sells or copies, or causes to be engraved, etched or copied, made or sold any such print, cut or engraving, map, chart, musical composition or photograph, or any part thereof, either as a whole or by varying, adding to or diminishing the main design with intent to evade the law; or, Infringement of copyright of print, chart, music, etc.

(*b*) prints or reprints or imports for sale, or causes to be so printed or reprinted or imported for sale, any such map, chart, musical composition, print, cut or engraving, or any part thereof; or,

(*c*) knowing the same to be so reprinted, printed or imported without such consent, publishes, sells or exposes for sale, or in any manner disposes of any such map, chart, musical composition, engraving, cut, photograph, or print;

shall forfeit the plate or plates on which such map, chart, musical composition, engraving, cut, photograph or print has been copied, and also every sheet thereof, so copied or printed as aforesaid, to the proprietor of the copyright thereof; and shall also forfeit, for every sheet of such map, musical composition, print, cut or engraving found in his possession, printed or published or exposed for sale, contrary to this Act, such sum, not exceeding one dollar and not less than ten cents, as the court determines, which forfeiture shall be enforceable or recoverable in any court of competent jurisdiction. Forfeiture. Recovery.

2. A moiety of such sum shall belong to His Majesty for the public uses of Canada, and the other moiety shall belong to the lawful owner of such copyright. Application.

40. Every person who has not lawfully acquired the copyright of a literary, scientific or artistic work, and who inserts in any copy thereof printed, produced, reproduced or imported, or who impresses on any such copy, that the same has been entered according to this Act, or words purporting to assert the existence of a Canadian copyright in relation thereto, shall incur a penalty not exceeding three hundred dollars. Falsely pretending to have copyright. Penalty.

Registering interim copyright without publishing. Penalty.

41. Every person who causes any work to be registered in the register of interim copyright and fails to print and publish, or reprint and republish the same within the time prescribed shall incur a penalty not exceeding one hundred dollars.

Procedure.

42. Every penalty incurred under either of the last two preceding sections shall be recoverable in any court of competent jurisdiction.

Application.

2. A moiety of any such penalty shall belong to His Majesty for the public uses of Canada, and the other moiety shall belong to the person who sues for the same.

Unlawful importation of books.

43. All books imported in contravention of any order, prohibiting such importation, made under the hand of the Minister, by the authority of this Act, may be seized by any officer of Customs, and shall be forfeited to the Crown and destroyed; and any person importing, or causing or permitting the importation of any book in contravention of such order shall, for each offence, be liable, upon summary conviction, to a penalty not exceeding one hundred dollars.

Limitation of actions.

44. No action or prosecution for the recovery of any penalty under this Act, shall be commenced more than two years after the cause of action arises.

PART II.

APPLICATION.

When to come into force.

45. This Part shall come into force on a day to be named by proclamation of the Governor General.

Works excepted.

46. Nothing in this Part contained shall be deemed to—

(*a*) prohibit the importation from the United Kingdom of copies of works of which the copyright is there existing and which are lawfully printed and published there; or,

(*b*) except as in this Part otherwise expressly provided, apply to any work for which, before the coming into force of this Part, copyright had been obtained in the United Kingdom, or in any country which has an international copyright treaty with the United Kingdom, in which Canada is included.

2. The law in force at the time at the coming into effect of this Part shall be deemed to continue in force as respects such works. Subject to former law.

REPEAL.

47. Sections four, five, six and eight of Part I, of this Act are repealed. Sections 4, 5, 6 and 8.

SUBJECTS AND CONDITIONS OF COPYRIGHT.

48. Any person domiciled in Canada or in any part of the British possessions, or any citizen of any country which has an international copyright treaty with the United Kingdom, in which Canada is included, who is the author of any book, map, chart or musical or literary composition, or of any original painting, drawing, statue, sculpture or photograph, or who invents, designs, etches, engraves or causes to be engraved, etched or made from his own design, any print or engraving, and the legal representatives of such person or citizen, shall, for the term of twenty-eight years from the time of recording the copyright thereof, have the sole and exclusive right and liberty of printing, reprinting, publishing, reproducing and vending such literary, scientific, musical or artistic work or composition, in whole or in part, and of allowing translations of such literary work, from one language into other languages, to be printed or reprinted and sold in the manner and on the conditions, and subject to the restrictions hereinafter set forth. Who may have copyright. For twenty-eight years. Translations.

49. The conditions for obtaining such copyright shall be that the said literary, scientific, musical or artistic work shall, before publication or production elsewhere, be registered in the office of the Minister, by the author or his legal representative, and further that such work shall be printed and published or produced in Canada, or reprinted and republished or reproduced in Canada, within one month after publication or production elsewhere. Conditions for obtaining copyright.

50. In no case shall the sole and exclusive right and privilege in Canada continue to exist after it has expired in the country of origin. Duration.

LICENSES.

51. If any person entitled to copyright of a work under this Act— Minister may grant licenses to print and

publish in Canada.

(*a*) neglects or fails to take advantage of its provisions; or,

(*b*) having obtained copyright thereunder, at any time after the first publication in Canada of the work for which copyright has been so obtained, fails to print and publish the work in Canada in sufficient numbers and in such manner as to meet the demand in Canada for such work;

the Minister may grant a license or licenses to any person or persons domiciled in Canada to print and publish or to reproduce such work in Canada, but no such license shall convey any exclusive right to print and publish and reproduce any work.

No exclusive right.

Royalty of 10 p. c.

2. A license shall be granted to any applicant agreeing to pay the author or his legal representatives a royalty of ten per centum on the retail price of each copy or reproduction issued of the work which is the subject of the license, and giving security for such payment to the satisfaction of the Minister.

Governor in Council may revoke such licenses.

52. As to any work for which copyright has been obtained in Canada, the Governor in Council may, upon its being established to his satisfaction that the holder of such copyright is prepared and *bona fide* intends, during the remaining period of his term of copyright, to print and publish such work in Canada in sufficient numbers and in such manner as to supply the demand for such work in Canada, revoke all licenses for the printing and publication of such work then in force.

Saving.

2. Such revocation shall not render unlawful the subsequent sale and disposal in Canada of all or any of the copies of such work then printed under the authority of the license so revoked.

How royalty collected and paid.

53. The royalty in this part provided for shall be collected by the officers of the Department of Inland Revenue, and paid over to the persons entitled thereto, under regulations approved by the Governor in Council; but the Government shall not be liable to account for any such royalty not actually collected.

Governor in Council may prohibit importation.

54. Whenever, under the foregoing provisions of this Part, a license has been issued permitting the printing and publishing or the producing of any work, and evidence has been adduced to the satisfaction of the Governor in Coun-

cil that such work is in course of being printed and published or produced in such manner as to meet the demand therefor in Canada, the Governor General may, by proclamation published in the *Canada Gazette*, prohibit the importation, while the author's copyright or that of his assigns is in force, or would have been in force had copyright for the work been obtained in Canada under the foregoing provisions of this Part, of any copies or reproductions of the work to which such license relates.

And revoke prohibition.

2. If, at any time thereafter, it is made to appear to the Governor in Council that such work is not, under such license, printed and published or produced in such manner as to meet such demand, the Governor General may, by proclamation published as aforesaid, revoke such prohibition.

5 GEO. V CH. 12 SEC. 4.

508a. Any person who, without the written consent of the owner of the copyright or of his legal representative, knowingly performs or causes to be performed in public and for private profit the whole or any part, constituting an infringement, of any dramatic or operatic work or musical composition in which copyright subsists in Canada, shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding two hundred and fifty dollars, or in the case of a second or subsequent offence, either to such fine or to imprisonment for a term not exceeding two months, or to both.

508b. Any person who makes or causes to be made any change in or suppression of the title, or the name of the author, of any dramatic or operatic work or musical composition in which copyright subsists in Canada, or who makes or causes to be made any change in such work or composition itself, without the written consent of the author or of his legal representative, in order that the same may be performed in whole or in part in public for private profit, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding five hundred dollars, or in the case of a second or subsequent offence, either to such fine or to imprisonment for a term not exceeding four months, or to both.

RULES AND FORMS OF THE DEPARTMENT OF AGRICULTURE.

UNDER

THE COPYRIGHT ACT.

Approved by the Governor in Council, on the 3rd day of December, 1907.

RULES.

I.

There is no necessity for any personal appearance at the Department of Agriculture, unless specially called for by order of the Minister or the Deputy, every transaction being carried on by writing.

II.

In every case the applicant or depositor of any paper is responsible for the merits of his allegations and for the validity of the instruments furnished by him or his agent.

III.

The correspondence is carried on with the applicant or his agent, but with one person only, and will be conveyed through the Canadian mails free of charge.

IV.

All papers are to be clearly and neatly written on foolscap paper, and every word of them is to be distinctly legible.

All copies of books deposited shall be bound in boards, and all copies of maps and photographs shall be mounted.

V.

An application for registration shall be signed by the applicant or by an agent duly authorized.

A partner may sign for a firm. A director or secretary or other principal officer of a company may sign for the company.

VI.

All communications to be addressed in the following words:—To the Minister of Agriculture, (Trade-Mark and Copyright Branch), Ottawa.

VII.

As regards proceedings not specially provided for in the following forms, any form being conformable to the letter and spirit of the law will be accepted, and if not so conformable will be returned for correction.

VIII.

A copy of the Act and the Rules with a particular section marked, sent to any person making an inquiry, is intended as a respectful answer by the office.

IX.

Information as to subsisting registrations will not be furnished by the office, the registers and indexes being open for inspection free of charge.

FORMS

FORM A.

DOMINION OF CANADA.

The Copyright Act.

Application for registration of Copyright. (Except copyright of Original Artistic Work.)

(*By the Proprietor.*)

I, ... of the ..... of ..... in the ..... of ..... hereby declare that I am lawfully entitled to the Copyright of the (1) ....entitled "....." and that the said (1) ..... has been printed in Canada; and I hereby request you to register the Copyright of the said (1) .... in my name in accordance with the provisions of the Copyright Act.

I herewith forward three copies of the said (1) .....

Signed at ..... the ..... day of ....., 19...., in the presence of the two undersigned witnesses.

Witnesses:

.....
.....
.....

To the Minister of Agriculture,
Ottawa.

1.—Book, map, chart, musical composition, photograph, print, cut or engraving.

FORM A1.

DOMINION OF CANADA

The Copyright Act.

Application for registration of Copyright. (Except Copyright of original artistic work.)

(*By the Agent of the Proprietor*)

I, ... of the .....
of ..... in the ..... of .....
hereby declare that I am the duly authorized agent of .....
of the ..... of ..... in the
..... of .....
that the said ..... is lawfully entitled to the Copyright of
the (1) ..... entitled "....." and that
the said (1) ..... has been printed in Canada and I
hereby request you to register the Copyright of the said (1).....
..... in the name of the said ..... in
accordance with the provisions of the Copyright Act.

I herewith forward three copies of the said (1)

Signed at ..... the ..... day of
....., 19...., in the presence of the two undersigned witnesses.

Witnesses:

.....
.....
.....

To the Minister of Agriculture.
Ottawa.

1.—Book, map, chart, musical composition, photograph, print, cut or engraving.

FORM B.

DOMINION OF CANADA.

The Copyright Act.

Application for registration of Copyright of Original Artistic Work.

(*By the Proprietor.*)

I, ... of the .....
of ..... in the ..... of .....
hereby declare that I am lawfully entitled to the Copyright of the (1).....
..... entitled ..... that the said (1)
..... has been produced in Canada and I hereby request you to register the Copyright of the said (1) .....
in accordance with the terms of the Copyright Act in my name. The following is a description of the said (1) .....

Signed at ..... the ..... day of
....., 19...., in the presence of the two undersigned witnesses.

Witnesses:

.....
.....
.....

To the Minister of Agriculture,
Ottawa.

1.—Original painting, drawing, statue or sculpture.

FORM B1.

DOMINION OF CANADA.

The Copyright Act.

Application for registration of Copyright of original artistic work.

(*By the Agent of the Proprietor.*)

I, ... of the .....
of ..... in the ..... of .....
hereby declare that I am the duly authorized agent of.....
of the ..... of ..... in the .....
of ..... that the said ..... is lawfully entitled to the Copyright of the (1) ..... entitled "..... ....." and that the said (1) ..... has been produced in Canada and I hereby request you to register the Copyright of the said (1) ..... in the name of the said .....
in accordance with the provisions of the Copyright Act.

The following is a description of the said (1) .....

Signed at ..... the ..... day of
....., 19...., in the presence of the two undersigned witnesses.

Witnesses:

.....
.....
.....

To the Minister of Agriculture,
Ottawa.

1.—Original painting, drawing, statue or sculpture.

FORM C.

DOMINION OF CANADA.

The Copyright Act.

Application for registration of Interim Copyright.

(*By the Proprietor.*)

I, ... of the .....
of ..... in the ..... of .....
hereby declare that I am lawfully entitled to the Copyright of the (1) .....
..... entitled ..... and I hereby request you
to register the Interim Copyright of the said (1) .....
under the Copyright Act in my name .....
A copy of the title or a designation of the said (1) ..... is
hereunto annexed.

Signed at ..... the ..... day of
....., 19...., in the presence of the two undersigned witnesses.

Witnesses:

.....
.....
.....

To the Minister of Agriculture,
Ottawa.

1.—Literary, scientific or artistic work.

FORM C1.

DOMINION OF CANADA.

The Copyright Act.

Application for registration of Interim Copyright.

(*By the Agent of the Proprietor.*)

I, ... of the .....
of ..... in the ..... of .....
hereby declare that I am the duly authorized agent of .....
of the ..... of ..... in the .....
of ..... that the said ..... is
lawfully entitled to the Copyright of the (1) .....
entitled "....." and I hereby request you to register
the Interim Copyright of the said (1) ..... under the
Copyright Act in the name of the said.....
A copy of the title or a designation of the said (1) .....
is hereunto annexed.

Signed at ..... the ..... day of
....., 19...., in the presence of the two undersigned witnesses.

Witnesses:

.....
.....
.....

To the Minister of Agriculture,
Ottawa.

1.—Literary, scientific or artistic work.

FORM D.

DOMINION OF CANADA.

The Copyright Act.

Application for registration of Temporary Copyright.

(*By the Proprietor.*)

I, ... of the .....
of ....., in the ..... of .....
hereby declare that I am lawfully entitled to the Copyright of the literary work entitled "....." which is being preliminarily published in separate articles in a newspaper or periodical and I hereby request you to register the Temporary Copyright of the said literary work under the Copyright Act in my name.

A copy of the title of the said literary work and a short analysis thereof are hereunto annexed.

Signed at ..... the ..... day of ....., 19...., in the presence of the two undersigned witnesses.

Witnesses:

.....
.....
.....

To the Minister of Agriculture,
Ottawa.

FORM D1.

DOMINION OF CANADA.

The Copyright Act.

Application for registration of Temporary Copyright.

(*By the Agent of the Proprietor.*)

I, ... of the .....
of ..... in the ..... of .....
hereby declare that I am the duly authorized agent of .....
of the ..... of ..... in .....
of ..... that the said ..... is lawfully entitled to the Copyright of the literary work entitled "..... ....." which is being preliminarily published in separate articles in a newspaper or periodical and I hereby request you to register the Temporary Copyright of the said literary work under the Copyright Act in the name of the said .....

A copy of the title of the said literary work and a short analysis thereof are hereunto annexed.

Signed at ..... the ..... day of ....., 19...., in the presence of the two undersigned witnesses.

Witnesses:

.....
.....
.....

To the Minister of Agriculture,
Ottawa.

AUSTRALIAN COPYRIGHT ACT OF 1912

AN ACT RELATING TO COPYRIGHT.

Be it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

PART I.—PRELIMINARY.

1. This Act may be cited as the Copyright Act, 1912. Short title.

2. This Act is divided into Parts as follows:— Division of Act.

Part 1.—Preliminary.
Part II.—Copyright.
Part III.—Summary Remedies.
Part IV.—The Copyright Office.
Part V.—Miscellaneous.

3. In this Act, unless the context otherwise requires— Definitions.

(*a*) "the British Copyright Act" means the Copyright Act, 1911, of the United Kingdom (1 & 2 Geo. 5, c. 46);

(*b*) words and expressions defined in the British Copyright Act have the same meanings as in that Act;

(*c*) "Territory" means a Territory of the Commonwealth which is part thereof.

4. The Copyright Act, 1905, is repealed. Repealing Clause.

5. The Copyright Office established under the Copyright Act, 1905, and any officers appointed under that Act, shall continue as if established or appointed under this Act. Copyright Office.

6. Where, in pursuance of any proclamation issued under the Copyright Act, 1905, the administration of any State Copyright Act has become transferred to the Commonwealth, such administration shall continue to be so transferred to the same extent and subject to the same terms and conditions as if the Copyright Act, 1905, still remained in force. Existing administrative provisions continued.

Registers of copyright.

7. All Registers of Copyrights established under the Copyright Act, 1905, shall continue as if established under this Act.

PART II.—COPYRIGHT.

British Copyright Act adopted.

8. The British Copyright Act, a copy of which is set out in the Schedule to this Act, shall, subject to any modifications provided by this Act, be in force in the Commonwealth, and shall be deemed to have been in force therein as from the first day of July, One thousand nine hundred and twelve.

Adoption of various provisions to Australian conditions.

9. In the application of the British Copyright Act to the Commonwealth—

(*a*) any powers of the Board of Trade under sections three may be exercised by the Governor-General;

(*b*) the reference in sub-section (4) of section nineteen to arbitration shall be read as a reference to arbitration under the law of the State or Territory in which the dispute occurs, and the reference in sub-section (6) of that section to the Board of Trade shall be read as a reference to the Governor-General;

(*c*) the reference in section twenty-two to the Patents and Designs Act, 1907, shall be read as a reference to the Designs Act, 1906, and the reference in that section to section eighty-six of the Patents and Designs Act, 1907, shall be read as a reference to section forty-one of the Designs Act, 1906; and

(*d*) the reference in section twenty-four to the *London Gazette* and two London newspapers shall be read as a reference to the *Commonwealth Gazette* and one newspaper published in each of the capital cities of the Australian States.

Importation of infringing copies prohibited.

10.—(1) Copies made out of the Commonwealth of any work in which copyright subsists which if made in the Commonwealth would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agents to the Comptroller-General of Customs, that he is desirous that such copies should not be imported into the Commonwealth, shall not be so imported and shall, subject to the provisions of this section, be deemed to be

prohibited imports within the meaning of the Customs Acts, 1901-1910.

(2) Before detaining any such copies, or taking any further proceedings with a view to the forfeiture thereof, the Comptroller-General of Customs or the Collector of Customs for the State may require the regulations under this section, whether as to information, conditions, or other matters, to be complied with, and may satisfy himself in accordance with those regulations that the copies are such as are prohibited by this section to be imported.

(3) The Governor-General may make regulations, either general or special, respecting the detention and forfeiture of copies, the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) The regulations may apply to copies of all works, the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the Comptroller-General of Customs or the Collector of Customs for the State all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide for notices under the Copyright Act, 1905, being treated as notices given under this section, and also that notices given to the Commissioner of Customs and Excise of the United Kingdom and communicated by them to the Comptroller-General of Customs shall be deemed to have been given by the owner to the Comptroller-General.

(6) This section shall have effect as the necessary modification of section fourteen of the British Copyright Act.

Reciprocal Imperial English Copyright.

11.—(1) Subject to this section, the Governor-General in Council may, by Order, direct that the British Copyright Act and this Act shall extend to literary, musical, dramatic, and artistic works first produced or published in any part of the King's dominions to which the British

Copyright Act does not extend, in like manner as if the works had been first published or produced in the Commonwealth.

Provisos as to foregoing.

(2) Any order made in pursuance of this section may provide—

(*a*) that the term of copyright shall not exceed that conferred by the law of the part of the King's dominions to which the Order relates;

(*b*) that the enjoyment of the rights conferred by virtue of the Order shall extend to the Commonwealth only, and shall be subject to the accomplishment of such conditions and formalities as are prescribed by the Order;

(*c*) for the modification of any provision of the British Copyright Act or this Act as to ownership of copyright or otherwise, having regard to the law of the part of the King's dominions to which the Order relates; and

(*d*) that the British Copyright Act and this Act may extend to existing works in which copyright subsists in the part of the King's dominions to which the Order relates, but subject to such modifications restrictions and provisions as are set out in the Order.

(3) An Order in pursuance of this section shall only be made in case the Governor-General in Council is satisfied that the part of the King's dominions in relation to which the Order is proposed to be made has made, or has undertaken to make, such provisions, if any, as he thinks sufficient for the protection of works first produced or published in the Commonwealth and entitled to copyright therein.

Orders in Council.

12.—(1) The Governor-General in Council may make Orders for altering, revoking, or varying any Order in Council made by him in pursuance of any power conferred upon him by the British Copyright Act or this Act, but any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests.

(2) Every Order in Council made by the Governor-General in pursuance of any power conferred upon him by the

British Copyright Act or this Act shall be published in the *Gazette*, and shall be laid before both Houses of the Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act.

Saving clause as to certain British copyrights.

13.—(1) Where copyright subsisted in the United Kingdom in respect of any musical, dramatic, or artistic work at or after the commencement of the Copyright Act, 1905, and before the first day of July, One thousand nine hundred and twelve, the copyright shall, subject to this section, be deemed to have subsisted in the Commonwealth as from the commencement of the Copyright Act, 1905, or from the date of the commencement of the copyright in the work, as the case requires, to the same extent as if copyright therein had subsisted in the Commonwealth under the law of the United Kingdom.

Saving clause as to acts lawful before passage of Act.

(2) Where a person has before the commencement of this Act taken any action whereby he has incurred any expenditure or liability in connection with the reproduction of any musical, dramatic or artistic work in a manner which at the time was lawful, or for the purpose of or with a view to the production of any such work at a time when such reproduction would, but for this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interest arising from or in connection with such action which were subsisting and valuable at the first day of July, One thousand nine hundred and twelve, unless the person, who, by virtue of this section, becomes entitled to restrain such reproduction, agrees to pay such compensation as, failing agreement, may be determined by arbitration.

PART III.—SUMMARY REMEDIES.

Criminal infringement.

14.—(1) If any person knowingly—

(*a*) makes for sale or hire any infringing copy of a work in which copyright subsists; or

(*b*) sells or lets for hire or by way of trade exposes or offers for sale or hire, any infringing copy of any such work; or

(*c*) distributes infringing copies of any such work either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(*d*) by way of trade exhibits in public any infringing copy of any such work; or

(*e*) imports for sale or hire into the Commonwealth any infringing copy of any such work,

he shall be guilty of an offense under this Act and be liable on summary conviction to a fine not exceeding forty shillings for every copy dealt with in contravention of this section, but not exceeding fifty pounds in respect of the same transaction; or in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

(2) If any person knowingly makes or has in his possession any plate for the purposes of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he shall be guilty of an offence under this Act, and be liable on summary conviction to a fine not exceeding fifty pounds, or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

Disposal of infringing copies or plates.

(3) The Court before which any such proceedings are taken may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in possession of the alleged offender which appear to it to be infringing copies or plates for the purpose of making infringing copies, to be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the Court may think fit.

Liability for use of theaters, etc., for infringing performance.

15. Any person who, for his private profit, permits any theatre or other place of entertainment to be used for the performance in public of any musical or dramatic work, without the consent of the registered owner of the sole right to perform or authorise the performance of the work in the State or part of the Commonwealth where the theatre or place is situated shall be guilty of an offence, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of the right to perform or authorise the performance of the work.

Penalty: Ten pounds.

Issuance of search warrants for and seizure of piratical copies.

16.—(1) A justice of the peace may, upon the application of the registered owner of the copyright in any literary, dramatic, musical or artistic work or of the agent of such owner appointed in writing—

(*a*) if satisfied by evidence that there is reasonable ground for believing that infringing copies of the work are being sold, or offered for sale—issue a warrant, in accordance with the form prescribed, authorising any constable to seize the infringing copies and to bring them before a Court of summary jurisdiction;

(*b*) if satisfied by evidence that there is reasonable ground for believing that infringing copies of the work are to be found in any house, shop, or other place—issue a warrant, in accordance with the form prescribed, authorising any constable to search, between sunrise and sunset, the place where the infringing copies are supposed to be, and to seize and bring them or any copies reasonably suspected to be infringing copies of the work before a Court of summary jurisdiction.

(2) A court of summary jurisdiction may, on proof that any copies brought before it in pursuance of this section are infringing copies of the work, order them to be destroyed or to be delivered up, subject to such conditions, if any, as the Court thinks fit, to the owner of the copyright in the work.

Wrongful performance. Penalty.

17.—(1) The registered owner of the sole right to perform, or authorise the performance, of a musical or dramatic work in the Commonwealth or any part thereof, or the agent of such owner appointed in writing, may, by notice in writing in accordance with the prescribed form, forbid the performance in public of the work in infringement of his right, and require any person to refrain from performing or taking part in the performance in public of the work, in infringement of his right, and every person to whom a notice has been given in accordance with this section shall refrain from performing or taking part in the performance in public of the work in infringement of the right of such owner.

Penalty: Ten pounds.

(2) A person shall not give any notice in pursuance of this section without just cause.

Penalty: Twenty pounds.

(3) In any prosecution under sub-section (2) of this section, the defendant shall be deemed to have given the notice without just cause unless he proves to the satisfaction of the Court that, at the time of giving the notice, he was the registered owner of the sole right to perform, or authorise the performance, of the work in the Commonwealth or any part thereof, or the agent of such owner appointed in writing, and had reasonable ground for believing that the person to whom the notice was given was about to perform or take part in the performance of the work in infringement of the right of such owner.

Distribution of penalties.

18. Where proceedings are instituted in any Court of summary jurisdiction, by or on behalf of the owner of the copyright in any work or the owner of the sole right to perform, or authorise the performance, of any work, in respect of any offence in infringement of his right, any penalty imposed shall be paid to him by way of compensation for the injury sustained by him, but in any other case any penalty imposed in respect of any offence against this Act shall be paid to the Commonwealth.

Limitation of proceeding.

19. No proceedings shall be instituted in a Court of summary jurisdiction in respect of any offence against this Act after the expiration of six months from the date of the offence.

Appeals in summary proceedings.

20. An appeal shall lie from any conviction or order (including any dismissal of any information, complaint, or application) of a Court of summary jurisdiction in respect of any offence or matter under this Act, and such appeal shall be to the Court, and shall be made within the time and in the manner, provided by the law of the State or Territory in which the conviction or order was made in case of appeals from Courts of summary jurisdiction in that State or Territory.

Works of architecture excepted from part of Act.

21. This Part of this Act shall not apply to any case to which section nine of the British Copyright Act, relating to infringement of copyright in the case of a work of architecture, applies.

PART IV.—THE COPYRIGHT OFFICE.

Division 1.—General.

Copyright Office.

22. There shall be, for the purposes of this Act, an office called the Copyright Office.

Registrar.

23. The Copyright Office shall be in charge of an officer called the Registrar of Copyrights.

Powers of Registrar.

24. The Registrar of Copyrights shall have such powers and functions as are conferred upon him by this Act and the regulations.

Seal of Copyright Office.

25.—(1) There shall be a seal of the Copyright Office, and impressions thereof shall be judicially noticed.

(2) The seal of the Copyright Office in use at the commencement of this Act shall, until altered, be the seal of the Copyright Office.

Division 2.—Registration.

Registration.

26. Registration of copyright shall be optional, but the special remedies provided for by sections fifteen, sixteen, and seventeen of this Act can only be taken advantage of by registered owners.

Copyright Registers.

27. The following Registers of Copyrights shall be kept by the Registrar at the Copyright Office:—

The Register of Literary (including Dramatic and Musical) Copyrights.

The Register of Fine Arts Copyrights.

The Register of International and State Copyrights.

28. The owner of any copyright under this Act, or of the sole right to perform, or authorise the performance, of any musical or dramatic work in the Commonwealth or any part thereof, may obtain registration of his right in the manner prescribed.

Registration of assignments, licenses, etc.

29. When any person becomes entitled to any registered copyright or other right under this Act by virtue of any assignment or transmission, or to any interest therein by licence, he may obtain registration of the assignment, transmission, or licence in the manner prescribed.

Method of registration.

30. The registration of any copyright or other right under this Act, or of any assignment or transmission thereof or of any interest therein by licence, shall be effected by entering in the proper register the prescribed particulars relating to the right, assignment, transmission, or licence.

Registration of works in more than one part.

31. In the case of an encyclopaedia, newspaper, review, magazine, or other periodical work, or a work published in a series of books, or parts, a single registration for the whole work may be made.

Trusts not to be registered.

32.—(1) No notice of any trust express, implied, or constructive shall be entered in any Register of Copyrights under this Act or be receivable by the Registrar.

Equitable rights saved.

(2) Subject to this section, equities in respect of any copyright under this Act may be enforced in the same manner as equities in respect of other personal property.

Registers or extracts therefrom, evidence.

33. Every Register of Copyrights under this Act shall be *prima facie* evidence of the particulars entered therein, and documents purporting to be copies of any entry therein or extracts therefrom certified by the Registrar and sealed with the seal of the Copyright Office, shall be admissible in evidence in all Federal or State Courts, or the Courts of any Territory, without further proof or production of the originals.

Certified copies.

34. Certified copies of entries in any register under this Act or of extracts therefrom shall on payment of the prescribed fee be given to any person applying for them.

Inspection of register.

35. Each register under this Act shall be open to public inspection at all convenient times on payment of the prescribed fee.

Correction of register.

36. The Registrar may, in prescribed cases and subject to the prescribed conditions, amend or alter any register under this Act by—

(*a*) correcting any error in any name, address, or particular; and

(*b*) entering any prescribed memorandum or particular relating to copyright or other right under this Act.

37.—(1) Subject to this Act the Supreme Court of any State or a judge thereof may, on the application of the Registrar or of any person aggrieved, order the rectification of any register under this Act by—

(*a*) the making of any entry wrongly omitted to be made in the register; or

(*b*) the expunging of any entry wrongly made in or remaining on the register; or

(*c*) the correction of any error or defect in the register.

(2) An appeal shall lie to the High Court from any

order for the rectification of any register made by a Supreme Court or a judge under this section.

Deposit of copies.

38.—(1) Every person who makes application for the registration of the copyright in a book shall deliver to the Registrar one copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and bound, sewed, or stitched together and on the best paper on which the book is printed.

(2) Every person who makes application for the registration of the copyright in a work of art shall deliver to the Registrar one copy of the work of art or a representation of it.

(3) The Registrar shall refuse to register the copyright in any book until sub-section (1) of this section has been complied with, or the copyright in a work of art until sub-section (2) of this section has been complied with.

(4) Each copy or representation delivered to the Registrar in pursuance of this section shall be retained at the Copyright Office.

False representations on registration, etc.

39. A person who wilfully makes any false statement or representation to deceive the Registrar or any officer in the execution of this Part of this Act, or to procure or influence the doing or omission of any thing in relation to this Part of this Act or any matter thereunder shall be guilty of an indictable offence.

Penalty: Imprisonment for three years.

PART V.—MISCELLANEOUS.

Delivery of copies of books to Librarian of Parliament.

40.—(1) The publisher of every book which is first published in the Commonwealth after the commencement of this section, and in which copyright subsists under this Act, shall within one month after the publication deliver, at his own expense, a copy of the book to the Librarian of the Parliament, who shall give a written receipt for it.

(2) The copy delivered to the Librarian of the Parliament shall be a copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the books are published, and bound, sewed, or stitched together, and on the best paper on which the book is printed.

(3) If a publisher fails to comply with this section, he

shall be liable on summary conviction to a fine not exceeding five pounds and the value of the book.

(4) For the purposes of this section the expression "book" includes every part or division of a book, pamphlet, sheet of letter-press, map, plan, chart, or table, but shall not include any second or subsequent edition of a book unless that edition contains additions or alterations either in the letterpress or in the maps, prints, or other engravings belonging thereto or any book published by any State or any authority of a State.

41. Nothing in this Act shall be deemed to affect the existing provisions of any Act of the Parliament of a State which require or relate to the delivery to any specified Public or other Library of the State of copies of books published in the State or to affect the power of the Parliament of a State to make laws requiring or relating to such delivery.

Provision of administrative regulations.

42. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for giving effect to this Act or for the conduct of any business relating to the Copyright Office.

(A schedule is annexed to the act containing the British Copyright Act of 1911.)

NOTE.—A French translation of the Rules adopted pursuant to the foregoing Act, will be found in Le Droit d'Auteur of May 15, 1914.

NEW ZEALAND

1913. No. 4.

AN ACT RELATING TO COPYRIGHT.

(22nd November, 1913.)

Be it enacted by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

Short title and commencement.

1. This Act may be cited as the Copyright Act, 1913, and shall commence on the first day of April, nineteen hundred and fourteen.

Interpretation.

2.—(1) In this Act, unless the context otherwise requires,—

"Literary work" includes maps, charts, plans, tables, and compilations:

"Dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting-form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting-form or the combination of incidents represented gives the work an original character:

"Artistic work" includes works of painting, drawing, sculpture, and artistic craftsmanship, and architectural works of art, and engravings and photographs:

"Work of sculpture" includes casts and models:

"Architectural work of art" means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure; provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction:

"Engravings" include etchings, lithographs, woodcuts, prints, and other similar works not being photographs:

"Photograph" includes photo-lithograph and any work produced by any process analogous to photography:

"Cinematograph" includes any work produced by any process analogous to cinematography:

"Collective work" means—

(*a*) An encyclopaedia, dictionary, year-book, or similar work;

(*b*) A newspaper, review, magazine, or similar periodical; and

(*c*) Any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated:

"Infringing" when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made or imported in contravention of the provisions of this Act:

"Performance" means any acoustic representation of a work, and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument:

"Delivery" in relation to a lecture, includes delivery by means of any mechanical instrument:

"Plate" includes any stereotype or other plate, stone, block, mould, matrix, transfer, or negative used or intended to be used for printing or reproducing copies of any work and any matrix or other appliance by which records, perforated rolls, or other contrivances for the acoustic representation of the work are or are intended to be made:

"Lecture" includes address, speech, and sermon:

"Court of summary jurisdiction" means a magistrate or two or more justices exercising jurisdiction under the Justices of the Peace Act, 1908.

(2) Except for the purposes of infringement of copyright, a work shall not be deemed to be published or performed in public, and a lecture shall not be deemed to be delivered in public, if published, performed in public, or delivered in public without the consent or acquiescence of the author, his executors, administrators, or assigns.

(3) For the purposes of this Act a work shall be deemed to be first published in New Zealand notwithstanding that it has been published simultaneously in some other place,

unless the publication in New Zealand is colourable only and is not intended to satisfy the reasonable requirements of the public; and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days, or such longer period as may for the time being, be fixed by the Governor in Council.

(4) Where, in the case of an unpublished work, the making of a work has extended over a considerable period the conditions of this Act conferring copyright shall be deemed to have been complied with if the author was during any substantial part of that period a British subject or resident in New Zealand.

(5) For the purposes of the provisions of this Act as to residence, an author of a work shall be deemed to be a resident in New Zealand if he is domiciled therein.

PART I.—COPYRIGHT.

Rights.

Copyright.

3.—(1) Subject to the provisions of this Act, copyright shall subsist in New Zealand for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work if—

(*a*) In the case of a published work, the work was first published in New Zealand; and

(*b*) In the case of an unpublished work, the author was at the date of the making of the work a British subject or resident in New Zealand;

but in no other works, except so far as the protection conferred by this Act is extended by the Governor in Council pursuant to this Act.

(2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever; to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; and if the work is unpublished, to publish the work or any substantial part thereof: and shall include the sole right—

(*a*) To produce, reproduce, perform, or publish any translation of the work;

(*b*) In the case of a dramatic work, to convert it into a novel or other non-dramatic work;

(*c*) In the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work by way of performance in public or otherwise;

(*d*) In the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;

and to authorise any such acts as aforesaid.

(3) For the purposes of this Act "publication" in relation to any work means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but for the purposes of this provision the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works.

No copyright except as provided by this Act.

4. No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or of any other statutory enactment for the time being in force; but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

Infringement of copyright.

5.—(1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright:

Provided that the following acts shall not constitute an infringement of copyright:—

(*a*) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary:

(*b*) Where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or

study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work:

(*c*) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situated in a public place or building, or the making or publishing of paintings, drawings, engravings, or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art:

(*d*) The publication in a collection, mainly composed of non-copyrighted matter, *bona fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists:

Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged:

(*e*) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph shall affect the provisions in paragraph (*a*) as to newspaper summaries:

(*f*) The reading or recitation in public by one person of any reasonable extract from any published work.

(2) Copyright in a work shall also be deemed to be infringed by any person who—

(*a*) Sells or lets for hire, or by way of trade exposes or offers for sale or hire; or

(*b*) Distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(*c*) By way of trade exhibits in public; or

(*d*) Imports for sale or hire into New Zealand, any work which to his knowledge infringes copyright or would infringe copyright if it had been made in New Zealand.

(3) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

Term of copyright.

6. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after his death:

Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the commencement of this Act thirty years, from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work, and that he has paid in the prescribed manner, to or for the benefit of the owner of the copyright, royalties in respect of all copies of the work sold by him, calculated at the rate of ten per centum on the price at which he publishes the work; and for the purposes of this proviso the Governor may, by Order in Council gazetted, make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if he thinks fit) regulations requiring payment in advance or otherwise securing the payment of royalties.

Compulsory licenses.

7. If at any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work, or has refused to allow the performance in public of the work, and that by reason

of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a license to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the said Court may think fit.

Ownership of copyright, etc.

8.—(1) Subject to the provisions of this Act the author of a work shall be the first owner of the copyright therein:

Provided that—

(*a*) Where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person, and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright; and

(*b*) Where the author was in the employment of some other person under a contract of service or apprenticeship, and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright; but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical.

(2) The owner of the copyright in any work may assign the right, either wholly or partially, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by license; but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent:

Provided that where the author of a work is the first owner of the copyright therein no assignment of the copyright, and no grant of any interest therein made by him (otherwise than by will) after the commencement of this

Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period, shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him, as to the disposition of such reversionary interest shall be null and void; but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work, or a license to publish a work or part of a work as part of a collective work.

(3) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly.

CIVIL REMEDIES.

Civil remedies for infringement of copyright.

9.—(1) Where copyright in any work has been infringed the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.

(2) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the Court.

(3) In any action for infringement of copyright in any work the work shall be presumed to be a work in which copyright subsists, and the plaintiff shall be presumed to be the owner of the copyright unless the defendant puts in issue the existence of the copyright or, as the case may be, the title of the plaintiff; and where any such question is in issue, then—

(*a*) If a name purporting to be that of the author of the work is printed, or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is

proved, be presumed to be the author of the work:

(*b*) If no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein.

Rights of owner against persons possessing or dealing with infringing copies, etc.

10. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

Exemption of innocent infringer from liability to pay damages, etc.

11. Where proceedings are taken in respect of the infringement of the copyright in any work, and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.

Restriction on remedies in the case of architecture.

12.—(1) Where the construction of a building or other structure which infringes, or which if completed would infringe, the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction to restrain the construction of such building or structure or to order its demolition.

(2) Such of the other provisions of this Act as provide that an infringing copy of a work shall be deemed to be the property of the owner of the copyright, or as impose summary penalties shall not apply in any case to which this section applies.

Limitation of actions.

13. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

SUMMARY REMEDIES.

14.—(1) Every person who knowingly—

(*a*) Makes for sale or hire any infringing copy of a work in which copyright subsists; or

(*b*) Sells or lets for hire, or by way of trade exposes or offers for sale or hire, any infringing copy of any such work; or

(*c*) Distributes infringing copies of any such work either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(*d*) By way of trade exhibits in public any infringing copy of any such work; or

(*e*) Imports for sale or hire into New Zealand any infringing copy of any such work,

is liable on summary conviction to a fine not exceeding two pounds for every copy dealt with in contravention of this section, but not exceeding fifty pounds in respect of the same transaction, or, in the case of a second or subsequent offence, either to such fine or to two months' imprisonment.

(2) Every person who knowingly makes or has in his possession any plate for the purpose of making infringing copies of any work in which copyright subsists, or who knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, is liable on summary conviction to a fine of fifty pounds, or, in the case of a second or subsequent offence, either to such fine or to two months' imprisonment.

(3) The Court before which any such proceedings are taken may, whether the alleged offender is convicted or not, order that all copies of the work, or all plates in possession of the alleged offender which appear to it to be infringing copies or plates for the purpose of making infringing copies, be destroyed, or delivered up to the owner of the copyright, or otherwise dealt with as the Court may think fit.

Permitting unauthorized performances.

15. Every person who for his private profit permits any theatre or other place of entertainment to be used for the performance in public of any musical or dramatic work without the consent of the registered owner of the sole right to perform or authorise the performance of the work

in New Zealand, or any part of New Zealand where the theatre or place is situated, is liable on summary conviction to a fine of ten pounds, unless he was not aware and had no reasonable ground for suspecting that the performance would be an infringement of the right to perform or authorise the performance of the work.

Search warrant.

16.—(1) Any justice may, on the application of the registered owner of the copyright in any literary, dramatic, musical, or artistic work, or of the agent of such owner appointed in writing,—

(*a*) If satisfied by evidence that there is reasonable ground for believing that infringing copies of the work are being sold or offered for sale, issue a warrant in accordance with the form prescribed authorising any constable to seize the infringing copies and to bring them before a Court of summary jurisdiction:

(*b*) If satisfied by evidence that there is reasonable ground for believing that infringing copies of the work are to be found in any house, shop, or other place, issue a warrant in accordance with the form prescribed authorising any constable to search, between sunrise and sunset the place where the infringing copies are supposed to be, and to seize and bring them or any copies reasonably suspected to be infringing copies of the work before a Court of summary jurisdiction.

(2) A Court of summary jurisdiction may, on proof that any copies brought before it in pursuance of this section are infringing copies of the work, order them to be destroyed, or to be delivered up, subject to such conditions, if any, as the Court thinks fit, to the owner of the copyright in the work.

Owner of performing right may forbid performance in infringement of right.

17.—(1) The registered owner of the sole right to perform or authorise the performance of a musical or dramatic work in New Zealand or any part thereof, or the agent of such owner appointed in writing, may, by notice in writing in the prescribed form, forbid the performance in public of the work in infringement of his right, and require any person to refrain from performing or taking part in the performance in public of the work in infringement of his right; and every person to whom a notice has

been given in accordance with this section who performs or takes part in the performance in public of the work in infringement of the right of such owner is liable on summary conviction to a fine not exceeding ten pounds.

(2) Every person who gives notice in pursuance of this section without just cause is liable on summary conviction to a fine of twenty pounds.

(3) In any prosecution under the last preceding subsection the defendant shall be deemed to have given the notice without just cause unless he proves to the satisfaction of the Court that at the time of giving the notice he was the registered owner of the sole right to perform or authorise the performance of the work in New Zealand, or any part thereof, or the agent of such owner appointed in writing, and had reasonable ground for believing that the person to whom the notice was given was about to perform or take part in the performance of the work in infringement of the right of such owner.

Application of fines.

18. Where proceedings are instituted in any Court of summary jurisdiction, by or on behalf of the owner of the copyright in any work or the owner of the sole right to perform or authorise the performance of any work, in respect of any offence in infringement of his right, any fine imposed shall be paid to him by way of compensation for the injury sustained by him, but in any other case any fine imposed in respect of any offence against this Act shall be paid into the Consolidated Fund.

Limitation of summary proceedings.

19.—(1) No proceedings shall be instituted in a Court of summary jurisdiction in respect of any offence against this Act after the expiration of six months from the date of the offence.

(2) An appeal to the Supreme Court shall lie from any conviction or order (including any dismissal of any information, complaint, or application) of a Court of summary jurisdiction in respect of any offence or matter under this Act, and such appeal shall be made within the time and in the manner provided by regulations.

Certain provisions not to apply to work of architecture.

20. Sections fourteen to eighteen hereof shall not apply to any case to which section twelve hereof, relating to infringement of copyright in the case of a work of architecture, applies.

IMPORTATION OF COPIES.

Importation of infringing copies.

21.—(1) Copies made out of New Zealand of any work in which copyright subsists which if made in New Zealand would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Minister of Customs that he is desirous that such copies should not be imported into New Zealand, shall not be so imported, and shall, subject to the provisions of this section, be deemed to be prohibited imports within the meaning of the Customs Law Act, 1908. For the purposes of this section notices given to the Commissioners of Customs and Excise of the United Kingdom, and communicated by them to the Minister of Customs, shall be deemed to have been given by the owner to the Minister of Customs.

(2) Before detaining any such copies or taking any further proceedings with a view to the forfeiture thereof, the Minister of Customs may require the regulations under this section, whether as to information, conditions, or other matters, to be complied with, and may satisfy himself in accordance with those regulations that the copies are such as are prohibited by this section to be imported.

(3) There shall be publicly exposed in the office of the Collector of Customs at every port in New Zealand lists of all works in which copyright subsists and as to which the owner of the copyright, by himself or his agent, has duly given a notice to the Minister of Customs pursuant to sub-section one hereof.

(4) The Governor may, by Order in Council gazetted, make regulations, either general or special, respecting the detention and forfeiture of copies the importation of which is prohibited by this section; and may by such regulations determine the information, notices, and security to be given, and the evidence requisite, for any of the purposes of this section, and the mode of verification of such evidence.

(5) The regulations may apply to copies of all works the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(6) The regulations may provide for the informant reimbursing the Minister of Customs all expenses and dam-

ages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide for notices under any enactment repealed by this Act being treated as notices given under this section.

Repeal.

(7) Section ninety-two of the Customs Law Act, 1908, and the first paragraph of the Third Schedule to the said Act (relating to the importation of prohibited books) are hereby repealed.

SPECIAL PROVISIONS AS TO CERTAIN WORKS.

22.—(1) In the case of a work of joint authorship, copyright shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer; and references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter; and in the provisions of this Act with respect to the grant of compulsory licenses a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

(2) Where, in the case of a work of joint authorship, some one or more of the joint authors do not satisfy the conditions conferring copyright laid down by this Act, the work shall be treated for the purposes of this Act as if the other author or authors had been the sole author or authors thereof:

Provided that the term of the copyright shall be the same as it would have been if all the authors had satisfied such conditions as aforesaid.

(3) For the purposes of this Act "a work of joint authorship" means a work produced by the collaboration of two or more authors, in which the contribution of one author is not distinct from the contribution of the other author or authors.

(4) Where a married woman and her husband are joint

authors of a work the interest of such married woman therein shall be her separate property.

Posthumous works.

23.—(1) In the case of a literary, dramatic, or musical work, or an engraving, in which copyright subsists at the date of the death of the author or, in the case of a work of joint authorship, at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter; and the proviso to section six hereof shall, in the case of such a work, apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid.

(2) The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author, and the manuscript is of a work which has not been published, nor performed in public, nor delivered in public, shall be *prima facie* proof of the copyright being with the owner of the manuscript.

Provisions as to Government publications.

24. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government Department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

Provisions as to mechanical instruments.

25.—(1) Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works; but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for

the purposes of this Act to reside in New Zealand if it has established a place of business in New Zealand.

(2) It shall not be deemed to be an infringement of copyright in any musical work for any person to make in New Zealand records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves—

(*a*) That such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and

(*b*) That he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned:

Provided that—

(i) Nothing herein shall authorize any alterations in or omissions from the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and

(ii) For the purposes of this provision a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.

(3) The rate at which such royalties as aforesaid are to be calculated shall—

(*a*) In the case of contrivances sold within two years after the commencement of this Act by the person making the same, be two and one-half per centum; and

(*b*) In the case of contrivances sold as aforesaid after the expiration of that period, five per centum,

on the ordinary retail selling price of the contrivance calculated in the prescribed manner, so, however, that the

royalty payable in respect of a contrivance shall in no case be less than a halfpenny for each separate musical work in which copyright subsists reproduced thereon, and, where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing:

Provided that, if at any time after the expiration of seven years from the commencement of this Act it appears to the Governor in Council that such rate as aforesaid is no longer equitable, he may, after such public inquiry as he may direct, make an Order either decreasing or increasing that rate to such extent as under the circumstances may seem just; but any Order so made shall be provisional only, and shall not have any effect unless and until confirmed by Parliament; but, where an Order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists, and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration.

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then for the purposes of this section the owners of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time.

(6) For the purposes of this section the Governor in Council may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties; and any such regulations may include regulations requiring payment in advance or otherwise securing the payment of royalties.

(7) In the case of musical works published before the commencement of this Act the foregoing provisions shall

have effect, subject to the following modifications and additions:—

(*a*) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work, shall not apply.

(*b*) The rate of two and one-half per centum shall be substituted for the rate of five per centum as the rate at which royalties are to be calculated; but no royalties shall be payable in respect of contrivances sold before the first day of April, nineteen hundred and fifteen, if contrivances reproducing the same work had been lawfully made or placed on sale in New Zealand before the commencement of this Act.

(*c*) Notwithstanding any assignment made before the commencement of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives, and not to the assignee, and the royalties aforesaid shall be payable to and for the benefit of the author of the work or his legal personal representatives.

(*d*) The saving contained in this Act of the rights and interests arising from or in connection with action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the commencement of this Act, except on the terms and subject to the conditions laid down in this section.

(*e*) Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country, the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the

making of records, perforated rolls, or other contrivances by means of which the work may be mechanically performed.

(8) Notwithstanding anything in this Act, where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived:

Provided that—

(*a*) The person who at the commencement of this Act is the owner of such original plate shall be the first owner of such copyright; and

(*b*) Nothing herein shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance if this provision had been in force at the time of the making of the first-mentioned contrivance.

Provision as to political speeches.

26. Notwithstanding anything in this Act, it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

Provisions as to photographs.

27. The term for which copyright shall subsist in photographs shall be fifty years from the making of the original negative from which the photograph was directly or indirectly derived; and the person who was the owner of such negative at the time when such negative was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside in New Zealand if it has established a place of business in New Zealand.

Reciprocal protection of copyright.

28.—(1) The Governor may by Order in Council direct that this Act shall extend—

(*a*) To works first published in any part of the British dominions to which the Order relates in like manner as if such works were first published in New Zealand; and

(*b*) In respect of residence in any part of the British

dominions to which the Order relates, in like manner as if such residence were residence in New Zealand;

and thereupon, subject to the provisions of this section and of the Order, this Act shall apply accordingly.

(2) Any Order made in pursuance of this section may provide—

(*a*) That the term of copyright shall not exceed that conferred by the law of the part of the British dominions to which the Order relates;

(*b*) That the enjoyment of the rights conferred by virtue of the Order shall extend to New Zealand only, and shall be subject to the accomplishment of such conditions and formalities as are prescribed by the Order;

(*c*) For the modification of any provision of this Act as to ownership of copyright or otherwise, having regard to the law of the part of the British dominions to which the Order relates; and

(*d*) That this Act may extend to existing works in which copyright subsists in the part of the British dominions to which the Order relates, but subject to such modifications, restrictions, and provisions as are set out in the Order.

(3) An Order in pursuance of this section shall be made only if the Governor in Council is satisfied that the part of the British dominions in relation to which the Order is proposed to be made has made, or has undertaken to make, such provisions, if any, as he thinks sufficient for the protection of works first produced or published in New Zealand, and entitled to copyright therein.

Provisions as to Orders in Council.

29.—(1) The Governor may by Order in Council alter, revoke, or vary any Order in Council made by him in pursuance of any power conferred upon him by this Act; but any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests.

(2) Every Order in Council made by the Governor in Council in pursuance of any power conferred upon him by this Act shall be published in the *Gazette*, and shall be laid before Parliament as soon as may be after it is made.

Provisions as to designs registrable under the Patents, Designs, and Trade Marks Act.

30.—(1) This Act shall not apply to designs capable of being registered under the Patents, Designs, and Trade Marks Act, 1911, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

(2) Regulations may be made under section one hundred and twenty-three of the Patents, Designs, and Trade Marks Act, 1911, for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

Works of foreign authors first published in New Zealand.

31. If it appears to the Governor in Council that a foreign country does not give or has not undertaken to give adequate protection to the works of New Zealand authors, he may by Order in Council direct that such of the provisions of this Act as confer copyright on works first published in New Zealand shall not apply to works published after the date specified in the Order the authors whereof are subjects or citizens of such foreign country and are not resident in New Zealand, and thereupon those provisions shall not apply to such works.

Existing works.

32.—(1) Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall as from that date be entitled to the substituted right set forth in the second column of that Schedule, or to the same interest in such a substituted right, and to no other right or interest; and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder:

Provided that—

(*a*) If the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has before that date assigned the right, or granted any interest therein for the whole term of the right, then at the date when but for the passing of this Act the right would have expired the substituted right conferred by this section

shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine; but the person who immediately before the date at which the right would so have expired was the owner of the right or interest shall be entitled, at his option, either—

(i) On giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration; or

(ii) Without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore, subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author, as, failing agreement, may be determined by arbitration; or, where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment.

The notice above referred to must be given not more than one year nor less than six months before the date at which the right would have so expired, and must be sent by registered post to the author, or, if he cannot with reasonable diligence be found, must be advertised in the *Gazette* and in the *Patent Office Journal*, and in one newspaper published in each of the Cities of Wellington, Auckland, Christchurch, and Dunedin.

(*b*) Where any person has, before the first day of July, nineteen hundred and thirteen, taken any action whereby he has incurred any expenditure or liability in connection with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a

work at a time when such reproduction or performance would but for the passing of this Act have been lawful, nothing in this section shall diminish or prejudice any rights or interest arising from or in connection with such action which are subsisting and valuable at the said date, unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

(2) For the purposes of this section the expression "author" includes the legal personal representatives of a deceased author.

(3) Subject to the provisions of sub-sections seven and eight of section twenty-five hereof, copyright shall not subsist in any work made before the commencement of this Act otherwise than under and in accordance with the provisions of this section.

PART II.—INTERNATIONAL COPYRIGHT.

Power to extend Act to foreign works.

33.—(1) The Governor may by Order in Council direct that this Act (except such of the provisions thereof, if any, as may be specified in the Order) shall extend—

(*a*) To works first published in a foreign country to which the Order relates, in like manner as if they were first published in New Zealand;

(*b*) To literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were at the time of the making of the work subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects;

(*c*) In respect of residence in a foreign country to which the Order relates, in like manner as if such residence were residence in New Zealand;

and thereupon, subject to the provisions of this Part of this Act and of the Order, this Act shall apply accordingly:

Provided that—

(*a*) Before making an Order in Council under this section in respect of any foreign country (other than a country with which His Majesty has entered

into a convention relating to copyright), the Governor shall be satisfied that, that foreign country has made or has undertaken to make such provisions, if any, as it appears to the Governor expedient to require for the protection of works entitled to copyright under the provisions of Part I, of this Act:

(*b*) The Order in Council may provide that the term of copyright in New Zealand shall not exceed that conferred by the law of the country to which the Order relates:

(*c*) The provisions of section fifty hereof (relating to the delivery of copies of books to the Registrar) shall not apply to works first published in such country, except so far as is provided by the Order:

(*d*) The Order in Council may provide that the enjoyment of the rights conferred by this Act shall be subject to the accomplishment of such conditions and formalities, if any, as may be prescribed by the Order:

(*e*) In applying the provisions of this Act to the ownership of copyright, the Order in Council may make such modifications as appear necessary having regard to the law of the foreign country:

(*f*) In applying the provisions of this Act as to existing works, the Order in Council may make such modifications as appear necessary, and may provide that nothing in those provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased.

(2) An Order in Council under this section may extend to all the several countries named or described therein.

PART III.—COPYRIGHT OFFICE.

Registrar of copyright.

34.—(1) The Governor may from time to time appoint such person as he thinks fit to be Registrar of Copyright, and in like manner may appoint a place to be the Copyright Office.

(2) The person who at the commencement of this Act

holds the office of Registrar under the Copyright Act, 1908, shall be and act as Registrar under this Act.

(3) The place at the commencement of this Act used as the Copyright Office shall be deemed to have been appointed under this Act. Copyright office.

35.—(1) The Governor may at any time appoint a fit and proper person to be Deputy Registrar to act in the case of the illness, incapacity, or absence of the Registrar, or in the case of any vacancy in the office of Registrar; and while so acting such Deputy shall have all the powers and privileges, and shall perform all the duties and be subject to the responsibilities, of the Registrar. Deputy registrar.

(2) The fact of the Deputy Registrar acting as aforesaid shall be conclusive evidence of his authority so to do, and no person shall be concerned to inquire whether the occasion has arisen requiring or authorising him so to act.

36. There shall be a seal of the Copyright Office, and impressions thereof shall be judicially noticed and admitted in evidence. Seal.

37. There shall be paid in respect of application for the registration of copyrights and in respect of other matters with relation to copyrights such fees as may from time to time be prescribed by the Governor in Council, and those fees shall be paid into the Public Account and form part of the Consolidated Fund. Fees.

38. Registration of copyright shall be optional, but the special remedies provided for by sections fifteen, sixteen, and seventeen of this Act may be taken advantage of only by registered owners. Registration optional.

39. The following Registers of Copyright shall be kept by the Registrar at the Copyright Office:— Copyright registers.

(*a*) The Register of Literary (including Dramatic and Musical) Copyright.

(*b*) The Register of Fine Arts Copyrights.

40. The owner of any copyright under this Act, or of the sole right to perform or authorise the performance of any musical or dramatic work in New Zealand or any part thereof may obtain registration of his right in the manner prescribed. Mode of registration.

41. When any person becomes entitled to any registered copyright or any other right under this Act by virtue of any assignment or transmission, or to any interest therein Registration of assignments, etc.

by license, he may obtain registration of the assignment, transmission, or license in the manner prescribed.

How registration is to be effected.

42. The registration of any copyright or other right under this Act, or of any assignment or transmission thereof, or of any interest therein by license, shall be effected by entering in the proper register the prescribed particulars relating to the right, assignment, transmission, or license.

Registration of work published in a series.

43. In the case of an encyclopædia, newspaper, review, magazine, or other periodical work, or a work published in a series of books or parts, a single registration for the whole work may be made.

Trusts not registered.

44.—(1) No notice of any trust (expressed, implied or constructive) shall be entered in any Register of Copyrights under this Act or be receivable by the Registrar.

(2) Subject to this section, equities in respect of any copyright under this Act may be enforced in the same manner as equities in respect of other personal property.

Register to be evidence.

45. Every Register of Copyrights under this Act shall be *prima facie* evidence of the particulars entered therein; and documents purporting to be copies of an entry therein or extracts therefrom certified by the Registrar and sealed with the seal of the Copyright Office shall be judicially noticed and admitted in evidence without further proof or production of the originals.

Certified copies.

46. Certified copies of entries in any register under this Act or of extracts therefrom shall, on payment of the prescribed fee, be given to any person applying for them.

Public inspection of registers.

47. Each register under this Act shall be open to public inspection at all convenient times on payment of the prescribed fee.

Correction of register.

48. The Registrar may, in prescribed cases and subject to the prescribed conditions, amend or alter any register under this Act by—

(*a*) Correcting any error in any name, address, or particular; and

(*b*) Entering any prescribed memorandum or particular relating to copyright or other right under this Act.

Rectification of register by the Court.

49.—(1) Subject to this Act the Supreme Court may, on the application of the Registrar or of any person ag-

grieved, order the rectification of any register under this Act by—

(*a*) The making of any entry wrongly omitted to be made in the register; or

(*b*) The expunging of any entry wrongly made in or remaining on the register; or

(*c*) The correction of any error or defect in the register.

(2) An appeal shall lie to the Court of Appeal from any order for the rectification of any register made by the Supreme Court or a judge thereof under this section.

Copies to be delivered on registration.

50.—(1) Every person who makes application for the registration of a copyright in a book shall deliver to the Registrar one copy of the whole book, with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and bound, sewed, or stitched together, and on the best paper on which the book is printed.

(2) Every person who makes an application for the registration of the copyright in a work of art shall deliver to the Registrar one copy of the work of art or a representation of it.

(3) The Registrar shall refuse to register the copyright in any book until sub-section one of this section has been complied with, or the copyright in a work of art until sub-section two of this section has been complied with.

(4) Each copy or representation delivered to the Registrar in pursuance of this section shall be retained at the Copyright Office.

False representation to registrar.

51. Every person who wilfully makes any false statement or representation to deceive the Registrar or any officer in the execution of this Act, or to procure or influence the doing or omission of anything in relation to this Act or any matter thereunder, is liable on summary conviction to imprisonment for a term not exceeding two years.

Copies to be delivered to General Assembly Library.

52.—(1) The publisher of every book which is first published in New Zealand after the commencement of this Act, and in which copyright subsists under this Act, shall within one month after the publication deliver at his own expense two copies of the book to the Librarian of the General Assembly Library, who shall give a written receipt for them.

(2) The copies delivered to the Librarian of the General Assembly Library shall be copies of the whole book, with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and bound, sewed, or stitched together, and on the best paper on which the book is printed.

(3) If a publisher fails to comply with this section he shall be liable on summary conviction to a fine not exceeding five pounds and the value of the copies.

(4) For the purpose of this section the expression "book" includes every part or division of a book, pamphlet, sheet of letterpress, map, plan, chart, or table, but shall not include any second or subsequent edition of a book unless that edition contains additions or alterations either in the letterpress or in the maps, prints, or other engravings belonging thereto.

Power to make regulations.

53. The Governor in Council may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for giving effect to this Act or for the conduct of any business relating to the Copyright Office.

Repeals.

54.—(1) The Copyright Act, 1908, and section one hundred and thirty-two of the Patents, Designs, and Trade Marks Act, 1911, are hereby repealed.

(2) The Imperial enactments referred to in the Second Schedule hereto shall, as from the commencement of this Act, cease to have any force or effect in New Zealand.

NOTE.—A French translation of the Rules adopted pursuant to the foregoing Act will be found in Le Droit d'Auteur of July 15, 1914.

SCHEDULES.

FIRST SCHEDULE.

EXISTING RIGHTS.

Existing Right.	Substituted Right.
(a) In the case of Works other than Dramatic and Musical Works.	
Copyright	Copyright as defined by this Act (*a*).
(b) In the case of Musical and Dramatic Works.	
Both copyright and performing right....	Copyright as defined by this Act (*a*).
Copyright, but not performing right....	Copyright as defined by this Act, except the sole right to perform or authorise the performance of the work or any substantial part thereof in public.
Performing right, but not copyright.....	The sole right to perform or authorise the performance of the work in public, but none of the other rights comprised in copyright as defined by this Act.

For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings:—

"Copyright" in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date, and statutory copyright wherein depends on publication, includes the right at common law, if any, to restrain publication or other dealing with the work:

"Performing right" in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law, if any, to restrain the performance thereof in public.

SECOND SCHEDULE.

IMPERIAL ENACTMENTS.

8 Geo. II. c. 13—The Engraving Copyright Act, 1734.
7 Geo. III. c. 38—The Engraving Copyright Act, 1767.
17 Geo. III. c. 57—The Prints Copyright Act, 1777.
54 Geo. III. c. 56—The Sculpture Copyright Act, 1814.
3 & 4 Will. IV. c. 15—The Dramatic Copyright Act, 1833.

5 & 6 Will. IV. c. 65—The Lectures Copyright Act, 1835.

6 & 7 Will. IV. c. 59—The Prints and Engravings Copyright Act, 1836.

5 & 6 Vict. c. 45—The Copyright Act, 1842.

7 & 8 Vict. c. 12—The International Copyright Act, 1844.

(*a*) In the case of an essay, article, or portion forming part of and first published in a review, magazine, or other periodical or work of a like nature, the right shall be subject to any right of publishing the essay, article, or portion in a separate form to which the author is entitled at the commencement of this Act, or would, if this Act had not been passed, have become entitled under sect. 18 of the Imperial Copyright Act, 1842.

10 & 11 Vict. c. 95—Colonial Copyright Act, 1847.

15 & 16 Vict. c. 12—The International Copyright Act, 1852.

25 & 26 Vict. c. 68—The Fine Arts Copyright Act, 1862.

38 & 39 Vict. c. 12—The International Copyright Act, 1875.

39 & 40 Vict. c. 36—The Customs Consolidation Act, 1876; Section 152 (prohibiting the importation of foreign reprints of books under copyright).

45 & 46 Vict. c. 40—The Copyright (Musical Compositions) Act, 1882.

49 & 50 Vict. c. 33—The International Copyright Act, 1886.

51 & 52 Vict. c. 17—The Copyright (Musical Compositions) Act, 1888.

NEWFOUNDLAND.

The British Copyright Act, 1911, was put into force in this colony, as of July 1, 1912, by a statute passed April 18, 1912.

BRITISH INDIA.

The British Copyright Act, 1911, was proclaimed law in this country on October 30, 1912.

GERMAN COPYRIGHT ACTS

LAW RESPECTING COPYRIGHT IN WORKS OF LITERATURE AND MUSIC, OF JUNE 19, 1901, AS AMENDED BY THE LAW OF MAY 22, 1910.

We, William, German Emperor, King of Prussia, etc., by God's grace, do hereby decree in the name of the Empire, after consent of the Bundesrath and the Reichstag, as follows:

PART I.

CONDITIONS OF THE PROTECTION.

SEC. 1. In accordance with the provisions of this Law protection is accorded—

(1) the author of writings (Schriftwerken) and such lectures (Vortragen) or speeches as serve to promote edification, education or amusement.

(2) the author of musical works.

(3) the author of such scientific or technical illustrations as are not to be deemed works of art in view of their principal object. Plastic representations are to be deemed included in such illustrations.

*Choreographic works and pantomimes are protected to the same extent as writings even though their stage action is fixed in some way other than by writing.**

SEC. 2. The creator of a work is its author. In the case of a translation, the translator and in the case of any other alteration of a work, he who so alters it is to be deemed its author.

If a literary or musical work is reproduced through a personal performance on devices for instruments serving to reproduce it mechanically for hearing, the device thus made stands upon the same basis as an alteration of the work. This result also follows when such adaptation, takes place as a result of perforations, raised figures (Stanzen) or arrangement of points (Stiften) or as a result of any similar labour and such labour must be considered as an artistic achievement. In the case

* The italicized portions represent changes made in the law of 1901 by the Law of 1910.

contemplated by the first sentence the performer and in the case contemplated by the second, the executant of the record, is to be deemed its adapter.

SEC. 3. Persons or corporations having an official juridical status who publish a work in that capacity, whose creator, is not named on the title page, dedication, preface or at the end, will be deemed the author thereof in the absence of agreement to the contrary.

SEC. 4. If a work consists of the separate contributions of several persons (compilation) the publisher (Herausgeber) is to be deemed the author of the work as an entirety. If no publisher is named, the printer (Verleger) is to be deemed the publisher (Herausgeber).

SEC. 5. If a writing is bound with a musical work or illustrations, the creator of each is to be deemed its author, after they have been bound together.

SEC. 6. If several persons have formulated a work in common in such a way that their work is not separable they have ownership in common (Gemeinschaft nach Bruchteilen) therein as authors, in accordance with the Civil Code covering such ownership.

SEC. 7. If a published work contains the name of its creator on the title page, in the preface or at its end, it will be presumed that he is the author of the work. If the work is formed through the contribution of several, it suffices if the name is placed at the beginning or end of the contribution.

In the case of works which are published under a pseudonym or anonymously, the publisher or printer if the publisher's name is not given, is entitled to exercise the rights of an author with respect thereto.

In the case of works which are publicly performed or represented, before or after publication, the author is to be deemed the person who is designated as the creator of the work, in the announcement of such performance or representation.

SEC. 8. The rights of an author pass to his heirs. If the Fiskus or any other person having an official juridical status is made heir by law, the right is extinguished as respects the decedent, on his death. Copyright may be assigned, conditionally or unconditionally, to others; and assignments may be limited territorially.

SEC. 9. In cases of the transfer of copyright, the assignee has not the right in the absence of agreement to make additions, omissions or other changes in the work itself, in its title or designation of the author.

Changes are permitted which the person otherwise entitled to forbid could not in good faith refuse to sanction.

SEC. 10. Neither copyright nor an author's work may be seized by legal process for the payment of his debts, without his consent. The

consent cannot be given by a receiver of his property. As against an author's heirs, such seizure is only permissible without their consent, if the work has been published.

PART II.

RIGHTS OF THE AUTHOR.

SEC. 11. The author has the exclusive right to multiply copies of the work and to distribute them commercially. The exclusive right does not extend to lending. The author has further the exclusive right to make a work public where its physical embodyment has not theretofore been made public.

The copyright in a dramatic or musical work also embodies the exclusive right to the public performance of the work.

The author of a writing or lecture has the exclusive right to its public presentation as long as it is unpublished.

SEC. 12. The exclusive rights which belong to the author of a work itself as outlined in Sec. 11 extend also to alterations made upon the work.

The rights of the author extend in especial to:—

(1) translation into another language or another dialect of the same language even though the translation is written in verse;
(2) retranslation into the language of the original;
(3) rendition of a narrative (Erzahlung) into dramatic form or of a dramatic work into narrative form;
(4) production of excerpts out of musical works as well as arrangements of such works for single or several voices or instruments;
(5) *to adaptation of the work upon devices for instruments serving for the mechanical reproduction of sound, in especial upon interchangeable discs, plates, cylinders, rolls or other articles accessory to such instruments;*
(6) *to use a writing for a pictorial representation reproducing the subject matter of the original work, by means of cinematography or some similar process.*

SEC. 13. Saving the exclusive rights belonging to an author under Sec. 12, subd. 2, the free use of his work is permissible if as a result thereof an original work is produced.

In the case of a musical work, no use is permissible, through which a melody is taken from the work so that it can be recognized and made the basis of a new work.

SEC. 14. In cases of the transfer of copyright in the absence of contrary agreement, an author retains his exclusive rights:—

(1) to the translation of the work into another language or into another dialect;
(2) to the rendition of a narrative into dramatic form or of a dramatic composition into narrative form;
(3) to the alteration of a musical work in so far as this does not involve the taking of an excerpt or transposition into another key or register;
(4) *to the use of the work for the purpose of mechanical reproduction of sound;*
(5) *to the use of a writing for reproduction in motion pictures.*

SEC. 15. Any copying without the consent of the person entitled to that right is unlawful irrespective of the method in which it is done. It is also immaterial whether the work is reproduced into one or more copies.

A copy for personal use may be made when not made for the purpose of profit.

SEC. 16. Reproduction of law books, laws, decrees, official edicts and decisions as well as of other official writings designed for official purposes is lawful.

SEC. 17. It is lawful:—
(1) to reproduce a lecture or speech in newspapers or periodicals insofar as the lecture or speech was a matter of public delivery;
(2) to multiply copies of lectures or speeches which were made before the Courts or in political, municipal or ecclesiastical meetings.

Such reproduction is however, not permitted when it occurs in a collection containing chiefly speeches by the same author.

SEC. 18. The reproduction of single articles out of newspapers, *into other newspapers,* is lawful, if the articles were not accompanied by a notice of reservation of rights therein, but the only reproduction which is lawful is one which does not pervert the sense of the original. The source must be plainly indicated in connection with such reproduction.

The reproduction of articles of a scientific, technical or entertaining nature is not lawful, even though there is no reservation of rights.

Miscellaneous accounts of facts and news may always be copied by newspapers or periodicals.

SEC. 19. Copying is lawful:—
(1) when single passages or smaller parts of a writing, lecture or speech, after it has been made public, are inserted in an original literary work;
(2) when single compositions of small size or single poems, after publication, are included in an individual work of learning;
(3) when single poems, after publication, are included in a collection

which includes the works of a larger number of authors and is designed for use in vocal performances;

(4) when single compositons of small size, single poems or smaller parts of a writing are included, after publication, in a compilation, which includes the works of a larger number of writers and is intended for church, school or educational purposes or for a particular literary purpose. The personal consent of the author is necessary, as long as he lives, to a compilation for a particular literary purpose.

The consent is deemed given if the author does not make objection within a month after he is informed of the intention of the compiler.

SEC. 20. Multiplication of copies is permissible when small parts of a poem or verses of small size, are reproduced, after publication, combined as text with a new musical work.

For the performance of such work, the poetry may be reproduced alone, in so far as the copies are exclusively intended for the use of the audience.

The copying of poetry of a kind intended for use in connection with musical compositions is not permitted.

The provisions of the first subdivision do not apply in so far as the text is to be multiplied in copies in combination with the mechanical reproduction of a musical work (Sec. 12, subd. 2 No. 5).

SEC. 21. Copying is permitted:—

(1) when single passages of a previously published musical work are reproduced in an individual literary work;

(2) when small compositions are included, after publication, in an individual scientific work;

(3) when small compositions are, after publication, included in a compilation which includes the works of a larger number of composers and is intended for instruction purposes in schools other than music schools.

SEC. 22. *If the author of a musical work authorizes another person to multiply copies of a musical work commercially, for purposes of mechanical reproduction (Sec. 12, sub. 2 No. 5) any other third person, having a principal industrial establishment or domicile in the country, may, after the work has been published, demand that the author give him a similar authorization, for a fair compensation. This demand may be made whether or not the author has conferred the right to such reproduction with or without the exclusive right to use of the work. The authorization is only effective as to circulation within the country and as to export into such States as where the author is not protected against mechanical reproduction of his work. The Chancellor of the Empire*

may decide with respect to relations with a State where he deems reciprocity in such matters guaranteed, by a proclamation inserted in the "Reichs-Gesetzblatt", how far a third person who has not an industrial establishment nor domicile in the Empire, may demand such authorization and decree that the authorization also apply to export to such State.

If a protected writing belongs to the musical work, as text thereto, and its author has permitted another to multiply it commercially for purposes of mechanical reproduction, the provisions of the preceding paragraph apply to the text. Provided nevertheless that the author of the musical work is entitled and bound to give such authorization in place of the author of the text but must, after he gives the authorization, pay to the author of the text a fair share of the compensation receivable for the authorization.

SEC. 22a. *Mechanical devices made pursuant to an authorization under Section 22 may, subject to the limitation laid down in Sec. 22 par. 1, sentence 2, be used, for public performances, without the necessity for a further authorization. If the author before or after this provision takes effect, assigned the exclusive right of performance to another, he must pay him a fair part of the compensation received for the authorization.*

The provisions of paragraph 1 also apply to a case where the author has voluntarily given another the right to multiply copies of the work for mechanical reproduction.

SEC. 22b. *If the author has partially assigned the exclusive right to mechanical reproduction, he must, nevertheless, grant the authorization prescribed by Sec. 22. In case of an unlimited assignment, the authorization must be given by the assignee.*

SEC. 22c. *The Courts of the City of Leipzig are given jurisdiction of cases for enforcing demand for the granting of the authorization where the author has no domestic legal situs in Germany.*

Temporary relief may be decreed even though the conditions laid down by Sections 935, 940 of the Code of Civil Procedure do not exist.

SEC. 23. Copying is permissible when single illustrations out of a published work are added to another solely for explanation of its text.

SEC. 24. The copying of a foreign work pursuant to Sections 19 to 23 is only lawful when no change is made in the parts reproduced. Nevertheless, in so far as the purpose of the reproduction requires, translations of a writing and such alteration of a musical work as only set forth extracts or transpositions in another key or part or arrangements for the instruments designated in Section 12 is permitted. If single extracts, single poems or small parts of a writing are comprised in a compilation for school use, the changes requisite for this use are lawful

provided that the author's personal consent must be obtained as long as he lives. The consent will be deemed given, if he does not raise objection within one month after notice is given him of the contemplated change.

SEC. 25. Anyone who uses the work of another pursuant to Sections 19 to 23 must clearly indicate the source.

SEC. 26. Where a work may be copied pursuant to Sections 16 to 21, 23 and 24, without permission of the proprietor, it may also be distributed, publicly represented and publicly performed.

SEC. 27. The consent of the proprietor of a published musical work is not necessary for its public performance, when this serves no commercial purpose and the audience may hear it gratuitously. In other cases such performances are permitted without the consent of the proprietor:

(1) when they take place at popular festivals other than music festivals;
(2) when the performance is solely for philanthropic purposes and the performers receive no compensation for their efforts;
(3) when they are given by social organizations and any members and persons belonging to their households are permitted to attend them.

These provisions do not apply to scenic productions of an opera or other musical work, having a text.

SEC. 28. Where there are several having legal rights in the premises, the consent of each is requisite to organize a public performance.

In the case of an opera or another musical work having a text, the organizer of a performance only requires the consent of the owner of the copyright in the musical portion of the work.

PART III.

DURATION OF PROTECTION.

SEC. 29. The protection of copyright terminates 30 years after the death of the author and in every case lasts at least ten years after first publication of the work. If the publication has not taken place within 30 years after the author's death, it will be presumed that the copyright passed to the owner of the work.

SEC. 30. If the copyright belongs to several in common, the death of the last survivor furnishes the time for calculation of the copyright term, in so far as time of death determines the period of protection.

SEC. 31. If the true name of the author is not given on publication,

pursuant to Section 7, subdiv. 1, 3, the protection ends on the passing of 30 years after publication.

If the true name of the author is given during the 30 year period, pursuant to Section 7, subdiv. 1, 3, or is furnished by the person having the legal right to do so, for entry in the Register (Sec. 56), the provisions of Section 29 apply. This is also the rule where the work is first published after the author's death.

SEC. 32. If copyright belongs to a juridical person pursuant to Secs. 3, 4, the protection ends on the passage of 30 years after publication. Nevertheless, the protection ends on the expiration of the periods stated in Section 29 if the work is first published after the death of the author.

SEC. 33. In the case of works consisting of several volumes, published at intervals, as well as in the case of continued reports or works in parts, each volume, report or part is to be deemed an individual work in calculating the periods of protection.

In the case of works published in installments, the period of protection is calculated from the last installment.

SEC. 34. The periods of protection begin with the expiration of the calendar year in which the author died or the work was published.

SEC. 35. In so far as the period of protection given by this law is dependent upon the time when a work was published or otherwise made public or its essential contents were communicated publicly, reference is only had to a publication or communication, made by or through the proprietor.

PART IV.

VIOLATIONS OF RIGHTS.

SEC. 36. Anyone who intentionally or negligently, in violation of the exclusive right of the author, copies a work, or distributes it commercially, or communicates its essential contents to the public, is bound to make good the resultant damage to the person whose rights are violated.

SEC. 37. Anyone who intentionally or negligently publicly performs or presents a work in violation of the exclusive right of the author, is bound to make good the resultant damage to the person whose rights are violated. The same obligation is imposed upon one who, intentionally or negligently, publicly performs a dramatic adaptation forbidden by Section 12 *or exhibits publicly a pictorial representation, unlawful under the provisions of Section 12.*

SEC. 38. A fine up to 3,000 marks is imposed on:

(1) anyone who intentionally, save in cases permitted by law, copies a work or distributes it commercially, without the consent of the person whose legal rights are violated;

(2) anyone who intentionally, save in cases permitted by law, publicly performs a dramatic composition, a musical composition or a dramatic adaptation forbidden by Section 12, *or exhibits publicly a pictorial representation forbidden by the terms of Section 12*, or publicly presents an unpublished work without the consent of the person whose legal rights are violated.

If the consent of such person was only necessary because there have been changes in the work itself, in its title, or designation of the author, the fine is up to 300 marks.

If an uncollectable fine is changed to imprisonment, it is not to exceed, 6 months in cases specified in subdiv. 1 or 1 month in cases specified in subdiv. 2.

SEC. 39. Anyone who intentionally and without authority of the person whose rights he violates, communicates the essential portion of a work to the public, before it has been made public, is subject to a fine up to 1,500 marks. If an uncollectable fine is changed to imprisonment, it is not to exceed 3 months.

SEC. 40. On demand of the person whose rights have been violated there may be decreed, in addition to the fine, a payment to him up to 6,000 marks by way of penalty. Persons adjudged to pay this penalty pay as joint debtors.

If a penalty is awarded, it precludes any further claim for damages.

SEC. 41. The acts designated in Sections 36 to 39 are also in violation of the law if a work has only been partially copied, distributed, publicly communicated, represented, exhibited or performed.

SEC. 42. Unlawfully manufactured or distributed copies as well as apparatus exclusively designed for unlawful copying, such as forms, plates, stones and stereotype, shall be destroyed. If only part of a work is manufactured or distributed unlawfully, that part and the apparatus designed to manufacture it, are to be destroyed.

This destruction shall extend to all copies and apparatus which are found belonging to persons who took part in the manufacture or circulation of such infringing copies as well as of their heirs.

The destruction shall also be decreed if the manufacture and distribution was neither intentional nor negligent. The same rule applies where the manufacture is incomplete.

The destruction shall take place as soon as judgment has been legally rendered against the owner.

As far as the copies or apparatus may be made harmless by some method other than by destruction this must be done, if the owner bears the expense thereof.

SEC. 43. The person whose rights have been violated may demand that

instead of being destroyed, the copies and apparatus be turned over to him, either in whole or part, on payment of a fair compensation not exceeding, at most, the cost of manufacture.

SEC. 44. Anyone who omits to mention the source of matter used by him in violation of Section 18 subdiv. 1 or Section 1 is subject to a fine not exceeding 150 marks.

SEC. 45. A prosecution in the cases specified in Sections 38, 39, 44 will only take place if a complaint is made. The complaint may be withdrawn.

SEC. 46. The destruction of copies, unlawfully manufactured or distributed, as well as of apparatus exclusively designed for purposes of unlawful reproduction may be demanded in civil or criminal proceedings.

SEC. 47. The destruction of copies or apparatus may be decreed in criminal proceedings only if especially demanded by the person whose rights have been violated. The demand may be withdrawn before destruction has taken place.

The person whose rights have been violated may demand the destruction of copies or apparatus in an independent action. In such cases, Sections 477 to 479 of the Code of Criminal Procedure are applicable, with the provision that the person whose rights have been violated may act as private plaintiff.

SEC. 48. Where the rights given by Section 43 are asserted, Sections 46 and 47 have a corresponding application.

SEC. 49. Boards of experts shall be constituted in all the confederated States who shall be bound on demand of the courts and public prosecutors to give their opinions on such questions as may be addressed to them.

The boards of experts are authorized, on demand of the parties, to try and decide as arbitrators, questions of damages, of the destruction of copies or apparatus, as well as those arising under the right designated in Section 43, *and in addition in the cases of authorizations contemplated by Section 22.*

The Chancellor of the Empire shall decree the regulations for the organization and duties of the boards of experts.

Individual members of the boards shall not be required to be heard as expert witnesses by the Courts without their consent and the authorization of the Chairman.

SEC. 50. Actions for damages and criminal proceedings for illegal copying are barred by time after the expiration of three years.

This time begins to run on the day on which infringing copies were first put into circulation.

SEC. 51. An action for damages and a criminal proceeding for unlawful distribution, or representation as well as for unlawful performance, is barred by time after the expiration of three years. This is also the rule in cases arising under Sections 36, 39. The time begins to run on the day when the unlawful act took place for the last time.

SEC. 52. Complaint for the destruction of illegally manufactured or distributed copies, as well as apparatus exclusively designed for illegal copying, may be made as long as such copies or apparatus are in existence.

SEC. 53. The statute of limitations begins to run on the day when the work was first made public, in cases punishable under Section 44.

PART V.

FINAL RULES.

SEC. 54. All persons who are residents of the Empire (Reichsangehorigen) have the benefit of the protection prescribed by this law for all their works, whether published or not.

SEC. 55. A non-resident enjoys the proteetion for each of his works published in Germany unless he has permitted the work or a translation thereof to be published at an earlier date outside of Germany. *In cases involving the protection prescribed by Section 2, subdiv. 2, the multiplication of devices takes the place of publication for the purposes of this paragraph.*

Subject to the same conditions he (i. e., a non-resident) enjoys the same protection for each of his works which he publishes in Germany in the form of a translation. The translation in such case is considered the original work.

SEC. 56. The Register for the entries provided for in Section 31 subd. 2 will be kept by the municipal authorities (Stadträthe) at Leipzig. They will make the entries without examining into the rights of the person requesting registration or the correctness of the facts furnished for registration.

When registration is refused, the interested party may complain to the Chancellor of the Empire.

SEC. 57. The Chancellor of the Empire will issue regulations for the management of the Register. Inspection of the Register is open to everyone. Extracts may be required to be furnished and must be furnished on demand.

Entries will be published in the "Borsenblatt für den deutschen Buchhandel" or if this paper ceases, by publication in another newspaper to be designated by the Chancellor.

SEC. 58. Applications, agreements, declarations and other documents involving entry in the Register do not require to be stamped.

For every entry, for every certificate of entry, and for every other extract from the register, a fee of 1½ marks will be required. The person requesting registration will also be required to defray the cost of publishing notice of the registration.

SEC. 59. In civil actions in which a claim is based on the provisions of this law, either by way of complaint or counterclaim, the trial and decision of the matter is, in the final instance, referred to the Supreme Court of the Empire, pursuant to Section 8 of the Introductory Law of the Judicial Law.

SEC. 60. The period of protection provided for by Sec. 29 also applies to a posthumous work, unpublished at the time when this law goes into effect, although the previously existing period of protection has expired.

SEC. 61. Where the right to perform a musical work was not reserved, the protection against performance provided by this law may, after it takes effect, be secured for it, if the work thereafter bear this reservation. Nevertheless the future performance of such a work remains lawful though without the author's consent, provided that music which does not bear the reservation is not used in the performance.

The exclusive right of public performance of a work protected in accordance with these provisions belongs to the author.

SEC. 62. The exclusive rights of the author of a protected work shall be in accordance with the provisions of this law, even though it was created before the law went into effect. If however, a translation or other alteration or a compilation consisting of the works of various authors made for school purposes, has been lawfully made before this law goes into effect, the right of the person who made it, to multiply, distribute, or publicly perform it remains unaffected by the foregoing provision.

SEC. 63. In so far as a case of copying would be unlawful after this law takes effect but was lawful prior to its passage, if the printing of copies had begun it may be completed. Devices then on hand such as forms, plates, stones, and stereotype may be used until six months have expired. Copies made pursuant to these provisions or completed prior to the passage of this law, may be put into circulation.

SEC. 63a. *The provisions of Sec. 12, subdiv. 2, No. 5, have no application to musical works which were used in Germany, by permission prior to May 1, 1909, for devices for mechanical reproduction. Moreover, the provisions of Sec. 63 have a corresponding application. Copies, whose circulation is permissible pursuant hereto, may be used for public performances.*

The provisions of Section 22 apply to literary and musical works composed before that section came into effect to the extent that such works previously enjoyed protection against mechanical reproduction. To the extent, however, that the author, previously had an exclusive right to use the work for mechanical reproduction and transferred this to a third person, the latter remains entitled to such use as against the author and other third persons, to the extent prescribed by prior law. In such cases also, if the author, pursuant to prior law, licenced another to use the protected work for mechanical reproduction, without assigning the exclusive right thereto, this furnishes no ground for third persons to demand that a similar licence shall also be given to them.

SEC. 64. This law shall go into effect January 1, 1902. Secs. 1 to 56, 61 and 62 of the law respecting copyright in writings, etc., of June 11, 1870, are repealed as of the same day, except that they remain unrepealed in so far as they are declared by statute to be applicable to the protection of works of plastic art,* photographs,* designs and models.

NOTE.—The relations between publishers and authors are regulated by an elaborate statute. (Law of June 19, 1901, as amended May 22, 1910.)

LAW RESPECTING COPYRIGHT IN WORKS OF PLASTIC (BILDENDEN) ART AND PHOTOGRAPHY, OF JANUARY 9, 1907, AS AMENDED MAY 22, 1910.†

We, William, by grace of God, Emperor of Germany, King of Prussia, etc., decree, in the name of the Empire, the Bundesrat and Reichstag, having consented thereto, as follows:

PART I.

CONDITIONS OF THE PROTECTION.

SEC. 1. The authors of works of plastic art and photography are protected to the extent and as provided in this law.

SEC. 2. Works of industrial art (Kunstgewerbe) are included in works of plastic art, as are also architectural works in so far as these serve artistic purposes.

Designs for works of industrial art, as well as for architectural works of the kind specified in the previous sentence, are also to be deemed works of plastic art.

* See Law of 1907 (*post*).

†—The italicized portions represent changes made in the Law of 1907 by the Law of 1910.

SEC. 3. Works which are produced by a process similar to photography are to be deemed photographs.

SEC. 4. The law respecting copyright in works of literature and music of June 19, 1901, has no application to designs in so far as these are to be deemed works of plastic art.

SEC. 5. Official juridical persons who have a work published which does not bear the author's name are deemed its author, in the absence of agreement to the contrary.

SEC. 6. If a work consists of the separable contributions of several (compilation), the publisher (Herausgeber) is deemed the author of the work as an entirety. If he is not named, the manufacturer (Verleger) is deemed the publisher.

SEC. 7. If a work of plastic art is combined with a photographic work, the author of each is to be deemed the author of his work even after they are combined. The same result follows if a work of figurative art or a photographic work is combined with a literary or musical work or a protected design.

SEC. 8. If several have collaborated in the creation of their work so that their work is not separable, they have, as authors, a property in common in the work, in accordance with the Civil Code.

SEC. 9. If the name of an author is given or indicated by distinctive marks upon a work, he will be presumed to be the author of the work.

In cases of works which are published under a name other than the author's true name or without an author's name, the publisher (Herausgeber) or if he is not named, the manufacturer (Verleger) is authorized to protect the author's rights.

SEC. 10. The rights of the author pass to his heirs. If the Fiskus or any other person having an official judicial status is made heir by law, the right is extinguished, as respects the decedent, on his death.

Copyright may be assigned conditionally or unconditionally to others. The assignment may be limited territorially.

The transfer of the ownership in a work does not, in the absence of agreement to the contrary, include an assignment of copyright therein.

SEC. 11. The author, may, unless the surrounding circumstances indicate that the publisher was to receive the exclusive right to multiply copies and distribute them, make such other disposition as he see fit of a contribution accepted for publication in a newspaper, magazine or other periodical composite work.

With respect to a contribution in connection with which the publisher received the exclusive right to multiply copies and distribute them, the author may, in the absence of agreement to the contrary, make such other

disposition thereof as he deem fit, after a year has passed after expiration of the calendar year in which the contribution was published.

These provisons apply to contributions to a non-periodical compilation, where the author has no right to payment for his contribution.

SEC. 12. In cases of the transfer of copyright, the assignee has not the right in the exercise of his rights, in the absence of agreement to the contrary, to make changes in the work itself, in its title or indication of the author.

Changes are permitted which the person otherwise entitled to forbid could not in good faith refuse to sanction.

SEC. 13. The name or mark of an author cannot be placed upon a work as its author, by a third person, without the author's consent.

SEC. 14. Copyright may not be seized by legal process for the payment of an author's debts without his consent. The consent cannot be given by a receiver of his property. Such seizure is only permissible as against an author's heirs without their consent, if the work or a copy thereof has been published.

The same provisions apply with respect to seizure of forms, plates, stones or other similar apparatus exclusively destined for multiplying the work in copies.

PART II.

RIGHTS OF THE AUTHOR.

SEC. 15. The author has the exclusive right to multiply copies of the work, to distribute them commercially and to exhibit them commercially by means of mechanical or optical devices. The exclusive right does not extend to lending. Mere imitation (nachbilden) also is deemed copying as is, in the case of architectural works and plans therefore, duplication by building.

One who produces another work of the plastic arts or of photography through reproduction of another has the rights prescribed by the preceding paragraph but he can only exercise these rights in so far as the author of the original work also enjoys protection for his work by consent of the latter.

SEC. 15a. *If a work reproduced by cinematography or any similar process is to be regarded as an original creation because of its stage action or the method of combination of the incidents portrayed, copyright extends to the pictorial representation of the action thus presented, in such other form. The author has the exclusive right to exhibit the work publicly.*

SEC. 16. The free use of a work which brings forth an original creation is lawful.

SEC. 17. Copying without the consent of the person having the right to forbid it is unlawful no matter what the method is by which it is done. It is also immaterial whether the work is reproduced into one or more copies.

SEC. 18. The making of a copy for personal use, except as to reproduction by way of building, is lawful provided it is not done for pecuniary gain.

In the case of portraits, the person ordering them and his legal representative, may multiply them in copies, in the absence of agreement to the contrary. If the portrait is a work of plastic art, it shall be unlawful to multiply it in copies except by means of photography as long as the artist lives, except as permitted in the preceding paragraph.

It is forbidden to place the name or any other designation of the author upon the copies in such a way that it may lead to deception.

SEC. 19. Copying and distribution of copies is lawful in cases where single works are inserted in an original scientific work or in one destined for school or educational use solely for purposes of explanation of the text. This provision does not apply to works which have not been published or publicly exhibited in a permanent way.

Any person using the work of another in this way must plainly indicate the source of the work as far as this is stated upon the work.

SEC. 20. The multiplication of copies of works which are permanently situated in public ways, streets or places, by means of painting, drawing or photography is lawful. Such copying may not be made by means of an architectural work.

The right to multiply copies of architectural works only extends to their exterior view.

To the extent that a work may be copied pursuant to this law, the copies may also be distributed and exhibited.

SEC. 21. Copying pursuant to Sections 19 and 20 is only lawful when no changes are made in the work so reproduced, in making the copies. Nevertheless such changes of size and other alterations are permissible as are involved in the process used for making the copies.

SEC. 22. Portraits may only be reproduced or publicly exhibited with the consent of the person portrayed. In doubtful cases the consent is deemed given if the person portrayed received pay for being portrayed. The consent of the next of kin of the person portrayed is essential for ten years, after his death. Next of kin for the purposes of this law mean the surviving husband or wife or children of the person portrayed or in the absence of these, his parents.

SEC. 23. There may, however, be distributed and exhibited without the consents provided for by Section 22:

(1) portraits from the field of current history;

(2) pictures, in which the persons only appear as accessories, to a landscape or some similar scene;

(3) pictures of meetings, processions or other similar events in which the persons portrayed took part;

(4) portraits, not made to order, in so far as their distribution or exhibition serves a high artistic purpose.

However, this right does not extend to a circulation or exhibition of a portrait which would injure a legitimate interest of the person portrayed or, if dead, of his next of kin.

SEC. 24. For purposes of the administration of justice and public security, the authorities may copy portraits without the consent of the person portrayed and the person having the right to the portrait and may circulate and publicly exhibit them.

PART III.

DURATION OF COPYRIGHT.

SEC. 25. The protection of copyright in a work of plastic art expires 30 years after the death of the author.

If the copyright belongs to a juridical person, pursuant to Sections 5 and 6, the protection ends 30 years after publication of the work. Nevertheless the protection ceases with the expiration of the period prescribed in the first sentence, if the work is first published after the death of its creator.

SEC. 26. The protection of copyright in a photographic work expires ten years after publication of the work. Nevertheless the protection ends ten years after its author's death if the work had not been published at that time.

SEC. 27. If the copyright belongs to several in common, the death of the last survivor furnishes the time for calculation of the copyright term, in so far as time of death determines the period of protection.

SEC. 28. In the case of works consisting of several parts, made public at intervals, as well as in the case of continued sheets or volumes, every part, sheet or volume, is deemed an individual work in calculating the period of protection.

In the case of works published in installments the period of protection is calculated from the publication of the last installment.

SEC. 29. The periods of protection begin with the expiration of the calendar year in which the author died or the work was published.

SEC. 30. In so far as the period of protection given by this law is dependent on the time when a work was published, reference is only had to a publication made by or through the proprietor.

PART IV.

VIOLATIONS OF COPYRIGHT.

SEC. 31. Anyone who intentionally or negligently, in violation of the exclusive rights of the author, multiplies copies of a work, distributes it commercially, or performs it commercially by means of mechanical or optical devices, is bound to make good the resultant damage to the person whose right has been violated. *A public performance is deemed a commercial performance in case of cinematography or similar devices.*

SEC. 32. Anyone who, save in cases where permitted by this law, intentionally, without the consent of the person having the right to forbid it, multiplies copies of a work, distributes it commercially or performs it commercially by means of mechanical or optical devices is subject to a fine not exceeding 3000 marks. *A public performance is deemed a commercial performance in case of cinematography or similar devices.*

If an uncollectable fine is changed into imprisonment, its duration shall not exceed six months in the cases specified in the first paragraph nor one month in the cases specified in the second paragraph.

SEC. 33. He is punished with a fine not exceeding 1000 marks:

(1) who in violation of the provisions of Secs. 18, subdiv. 3, intentionally places the name or some other designation of the author of the work on a copy;

(2) who in violation of the provisions of Sections 22, 23, intentionally distributes a portrait or publicly exhibits it.

If an uncollectable fine is changed into imprisonment, its duration may not exceed one month.

SEC. 35. On demand of the person whose rights have been violated, a penalty not exceeding 6000 marks may be awarded to him by the court, in addition to the foregoing punishment. Persons adjudged to pay this penalty do so as joint debtors.

The judicial award of a penalty prevents a further suit for damages.

SEC. 36. The acts designated in Sections 31-32 are also illegal if the work is only partially copied, distributed or exhibited.

SEC. 37. Illegally manufactured, distributed or exhibited copies and such apparatus as is exclusively designed for illegal copying or exhibition, such as forms, plates and stones, are subject to destruction. The same rule applies to illegally distributed or publicly exhibited portraits and the apparatus exclusively designed for their multiplication in copies.

If only a part of a work is illegally manufactured, distributed or exhibited the destruction of such part and the corresponding apparatus must be adjudged.

This destruction shall extend to all copies and apparatus which are found belonging to persons who took part in the manufacture or circulation of such infringing copies as well as of their heirs.

The destruction shall also be decreed if the manufacture and distribution was neither intentional nor negligent. The same rule applies where the manufacture is incomplete.

The destruction shall take place as soon as judgment has been legally rendered against the owner.

As far as the copies or apparatus may be made harmless by some method other than by destruction this must be done, if the owner bears the expense thereof.

The foregoing provisions do not apply to works of architecture.

SEC. 38. The person whose rights have been violated may demand that instead of being destroyed, the copies and apparatus be turned over to him, either in whole or part, on payment of a fair compensation not exceeding, at most, the cost of manufacture.

SEC. 39. If a compilation or any other collection consisting of several works combined together, is subject to partial destruction under Sec. 37, paragraph 1, the owner of copies which would be subject to destruction may demand that he be decreed to have the right to prevent such destruction and to distribute the copies commercially, on payment of compensation to the person whose rights have been violated. Such demand shall not be granted when such owner has intentionally or negligently violated the author's exclusive rights.

The Court shall grant the demand where the destruction would cause the owner an excessive loss. The Court shall fix the compensation to be paid fairly, according to the facts.

These provisions have no application to the destruction of a portrait distributed or publicly exhibited in violation of Sections 22 and 23.

SEC. 40. Anyone who omits in violation of Section 19, sentence 2, to indicate the source used by him shall be punished by a fine not exceeding 150 marks.

SEC. 41. Prosecution in cases specified in Sections 32, 33 and 40 will only take place if a complaint is made. The complaint may be withdrawn.

SEC. 42. The destruction of copies, unlawfully manufactured or distributed, as well as of apparatus exclusively designed for purposes of unlawful reproduction, may be demanded in civil or criminal proceedings.

SEC. 43. The destruction of copies or apparatus may be decreed in

criminal proceedings only if especially demanded by the person whose rights have been violated. The demand may be withdrawn before destruction has taken place.

The person whose rights have been violated may demand the destruction of copies or apparatus in an independent action. In such cases Sections 477 to 479 of the Code of Criminal Procedure are applicable, with the provision that the person whose rights have been violated may act as private plaintiff.

SEC. 44. Where the rights given in Section 38 are asserted, Sections 42 and 43 have a corresponding application.

SEC. 45. The demand designated in Sec. 39 is to be made in a proceeding to procure destruction of copies, if this is pending. If such a proceeding is not pending, the demand can only be made to a Court competent, pursuant to the provisions of the Code of Civil Procedure, to decree the destruction of copies.

The owner may be permitted to obtain a temporary order, by giving security, to prevent the destruction and to permit the commercial distribution of copies. When this relief is granted during the course of a civil action, the general rules of law governing provisional relief apply.

If the owner is not granted the right by the Court to prevent destruction of the articles and to be allowed to distribute them commercially on payment of suitable compensation, he must pay the person whose rights have been violated compensation for any copies distributed by him under the protection of such temporary order. The Court shall fix the amount of such compensation fairly, according to the facts.

SEC. 46. Boards of experts shall be constituted in all the confederated States who shall be bound on demand of the Courts and public prosecutors to give their opinions on such questions as may be addressed to them.

The boards of experts are authorized, on demand of the parties, to try and decide, as arbitrators, questions of damages, of the destruction of copies or apparatus as well as those arising in connection with the granting of the right designated in Sec. 38.

The Chancellor of the Empire shall decree the regulations for the organization and procedure of the Boards of Experts.

Individual members of the boards shall not be required to be heard as expert witnesses by the Courts without their consent and the authority of the Chairman.

SEC. 47. Actions for damages and criminal proceedings for illegal copying are barred by time after the expiration of three years.

This time begins to run on the day on which the copying is completed.

If the copying was done for the purpose of distribution the time only begins to run on the day on which a distribution took place.

SEC. 48. An action for damages and criminal proceedings for unlawful distribution or exhibition of a work, as well as criminal proceedings for illegal distribution or exhibition of a portrait, are barred by time after the expiration of 3 years.

The time begins to run on the last day on which the illegal act took place.

SEC. 49. The time in which acts punishable under Sec. 40 are barred by lapse of time begins to run on the day on which the first distribution took place.

SEC. 50. Complaint for the destruction of copies and apparatus may be made as long as such copies or apparatus are in existence.

PART V.

FINAL RULES.

SEC. 51. All persons who are residents of the Empire (Reichsangehörigen) have the protection given an author for all their works, whether published or not.

SEC. 52. In civil actions in which a claim is based on the provisions of this law, either by way of complaint or counterclaim, the trial and decision of the matter is, in the last instance, referred to the Supreme Court of the Empire, pursuant to Sec. 8 of the Introductory Law of the Judicial Law.

SEC. 53. The exclusive rights of the author of a work which was protected at the time this law went into effect are in accordance with the provisions of this law. Its provisions apply to a photographic work, unpublished when this law takes effect, even though the previously existing period of protection thereof had expired.

Anyone who lawfully used a work in the course of his business before this law went into effect for the purpose of designating, ornamenting or advertising goods, may continue to use the work for this purpose.

If a published work has been exhibited commercially, by means of mechanical or optical devices, before this law went into effect, it does not enjoy protection against unauthorized exhibition.

SEC. 54. In so far as a multiplication of copies unlawful after this law takes effect was lawful previously, existing apparatus therefor such as forms, plates and stones may continue to be used for a period of three years. Apparatus whose manufacture was begun may be completed and used during the same period of time. The distribution of copies manu-

factured pursuant to these provisions, as well as those completed before this law goes into effect, is lawful.

SEC. 55. This law goes into effect July 1, 1907. Secs. 1 to 16, 20 and 21 of the Law respecting copyright in works of plastic art, dated January 9, 1876, as well as the Law respecting the protection of photographs against unlawful copying, dated January 10, 1876, are repealed as of the same date.

FRENCH COPYRIGHT LAWS

(*Introductory Note.* There is not in France, as in most great States, a single law dealing with literary and artistic property. The provisions which deal with the subject are scattered. The original French text of the pertinent laws and decrees up to 1896 will be found in "*Lois de la propriete litteraire et artistique*" by M. M. Ch. Lyon-Caen & Paul Delalain and in "*Le Droit d'Auteur*" after that time. Various explanatory footnotes appended to the translations which follow have been taken from the work cited. The laws and decrees are arranged chronologically.)

LAW RELATING TO THEATRES AND THE RIGHT TO PRESENT AND PERFORM DRAMATIC AND MUSICAL WORKS.

(January 13-19, 1791.)

ART. 1. Any citizen may open a public theatre and give performances of pieces of every kind provided that he has, previous to the establishment of his theatre, made a declaration to the local municipality.

ART. 2. The works of authors dead five years or more, before the passage of this law, are public property and may notwithstanding all former privileges which are hereby abolished, be performed in all theatres without distinction.

ART. 3. The works of living authors may not be represented in any public theatre throughout France without the formal written consent of the author under penalty of the confiscation of the gross receipts of the performances for the benefit of the author.

ART. 4. The provisions of Art. 3 apply to works previously performed, whatever the former regulations may have been. Nevertheless agreements which may have been made between actors and living or dead authors must be performed.

ART. 5. The heirs and assigns of authors shall be the proprietors of their works for five years after the death of the author.*

* The duration of such rights has been successively increased. See Law of July 14, 1866 (*post*).

LAW RELATING TO THEATRES AND TO THE RIGHT TO PRESENT AND PERFORM DRAMATIC AND MUSICAL WORKS.

(July 19-August 7, 1791.)

ART. 1. Pursuant to the provisions of articles 3 and 4 of the law of January 13th, last, concerning theatrical performances *(spectacles)*, the works of living authors may not be performed in any public theatre throughout France, even though performed before that date and whether or not they were engraved or printed, without the formal written consent of the author, or without that of their heirs or assigns in the case of authors dead more than five years, under penalty of confiscation of the gross receipts of the performances for the benefit of the author or his heirs or assigns.

ART. 2. Agreements between authors of theatrical works and managers shall be perfectly free and neither the municipal authorities nor any other public officers shall have any right to tax said works nor to decrease or increase the agreed price, and the compensation of authors or their legal representatives to be paid them, by agreement, by managers may neither be seized on execution nor attached by creditors of the managers.

LAW RELATING TO THE PROPERTY RIGHTS OF AUTHORS OF WRITINGS OF ALL KINDS, COMPOSERS OF MUSIC, PAINTERS AND DRAUGHTSMEN.[1]

(July 19, 1793.)

ART. 1. The authors of writings of all kinds, the composers of music[2], painters and draughtsmen, who engrave pictures or drawings *(dessins)* shall enjoy for life, the exclusive right to sell, permit to be sold and distribute their works within the territory of the Republic and to assign the property therein in whole or in part.[3] Sculptors and ornamental designers shall have the same rights whatever the merit or purpose of the work may be.[4]

1—This law, as amended, is the fundamental French Copyright Act.

2—The words "architects, sculptors" were inserted at this place by the law of March 11, 1902, (*post*).

3—The enumeration of works in this article is held non-exclusive. Thus it has been held to apply to works of architecture and photographs, as far as copyrightable. The rule as to the latter appears much the same as that outlined in Burrow Giles Lithographic Co. v. Sarony, 111 U. S. 53. Non-artistic drawings, and models are not included in the law. (See Lyon-Caen & Delalain (*op. cit.*) p. 15-16.)

4—This sentence was added by the law of March 11, 1902, (*post*).

ART. 2. Their heirs or assigns shall enjoy the same right for a period of ten years after the death of the author.[5]

ART. 3. The magistrates[6] shall be bound to have all copies printed or engraved without the formal written consent of authors, composers, painters, draughtsmen or others, their heirs or assigns, confiscated for their benefit, on their demand.

ART. 4. Every infringer shall be bound to pay to the true proprietor a sum equivalent to the price of 3000 copies of the original edition.[7]

ART. 5. Every seller of an infringing edition, if not convicted of piracy, shall be bound to pay to the true proprietor a sum equal to the price of 500 copies of the original edition.

ART. 6. Every citizen who produces a work whether of literature or engraving of whatever kind, must deposit two copies in the National Library or in the Stamp Office of the Republic, for which he will receive a receipt signed by the Librarian, failing which he shall have no right to sue infringers.[8]

ART. 7. The heirs of the author of a work of literature or engraving or of any other production of intellect or genius belonging to the fine arts shall have the exclusive property therein for ten years.[9]

LAW RELATING TO THEATRES AND TO THE RIGHT OF PERFORMANCE OF MUSICAL AND DRAMATIC WORKS.

(September 1, 1793.)

The National Convention being desirous of securing to the authors of dramatic works the property in their works, and to guarantee to them the means of disposing of the same with equal freedom whether by way of printing or performance and to terminate a difference existing between theatres in Paris and the provinces which is both an abuse and unjust,

Decrees as follows:

ART. 1. The National Convention repeals the law of August 30th, 1792, relating to dramatic works.

ART. 2. The laws of January 13, 1791, and July 19, 1793, shall apply, in all their provisions, to such works.

ART. 3. The supervision of theatrical performances shall continue to

5—Increased to 50 years by the law of July 14, 1866 (*post*).

6—Now superintendents of police or in their absence police magistrates (Decree of Feb. 5, 1810; Law of June 25, 1795).

7—See also Penal Code, 1910, Sec. 425 (*post*), which permits judges to vary a penalty as to amount.

8—Now regulated by Law of July 29, 1881 (*post*).

9—Now fifty years (Law of July 14, 1866, *post*).

belong exclusively to the municipal authorities. Managers or their partners shall be bound to have a reg ster in which they shall inscribe and have countersigned by the police officer on duty, after each performance, the pieces played to show the number of performances of each.

LAW RELATING TO THE AUTHORITIES CHARGED WITH DETERMINING CRIMES OF INFRINGEMENT.

(June 13, 1795.)

ART. 1. The duties assigned to magistrates by Article 3 of the law of July 19, 1793, will be, in future, performed by the police superintendents and by the police magistrates in places where there are no superintendents of police.

DECREE CONCERNING THE RIGHTS OF PROPRIETORS OF POSTHUMOUS WORKS.

(March 22, 1805.)

Napoleon, French Emperor, with respect to the laws dealing with literary property, considering that they declare the works of authors dead for more than 10 years public property, that the depositaries, purchasers, heirs or proprietors of the posthumous works of authors dead more than 10 years, hesitate to publish the works for fear of having their exclusive property disputed and because of the uncertainty of the duration of the property; that an unpublished work is like a non-existent work and that he who publishes it has the rights of the deceased author and should enjoy them for life; that however, if there were reprinted at the same time and in a single publication with posthumous works, works by the same author previously published, there would result in his favor a kind of privilege for the sale of works which had become public property: the Council of the State having been heard, decrees as follows:

ART. 1. The proprietors by inheritance, or any other title, of a posthumous work have the same rights as the author and the provisions of law with respect to the exelusive rights of authors and of their duration are applicable thereto, always provided, that posthumous works must be printed separately and without joining thereto a new edition of works heretofore published and become public property.

ART. 2. The Chief Justice, Minister of Justice and the Ministers of the Interior and General Police are charged, each as far as applicable, with the execution of this decree.

DECREE CONCERNING THE PRINTING OF CHURCH, DEVOTIONAL AND PRAYER BOOKS.

(March 29, 1805.)

ART. 1. Church, devotional and prayer books may not be printed or reprinted without the permission of the diocesan bishops. This permission must be quoted and printed at the beginning of each copy.

ART. 2. The printers and booksellers who shall print or reprint church, devotional or prayer books without having obtained this permission will be prosecuted in accordance with the law of July 19, 1793.

ART. 3. The Chief Justice, Minister of Justice and the Ministers of General Police and of Worship are charged, each as far as applicable, with the execution of this decree.

DECREE RELATING TO THEATRES AND THE RIGHT OF PERFORMANCE OF POSTHUMOUS DRAMATIC AND MUSICAL WORKS.

(June 8, 1806.)
(Unrepealed part.)

CHAPTER III.

ART. 10. Authors and managers shall be free to determine between them by mutual agreement the recompense to be paid for first performances either in a fixed amount or otherwise.

ART. 11. The local authorities shall watch over the execution of these agreements rigorously.

ART. 12. The proprietors of posthumous dramatic works have the same rights as the author and the provisions respecting the property of authors and its duration, as provided by the law of March 22, 1805, apply to such works.

DECREE RESPECTING THE PUBLICATION OF MANUSCRIPTS BELONGING TO LIBRARIES AND OTHER PUBLIC INSTITUTIONS.

(February 20, 1809.)

ART. 1. Manuscripts in the archives of our Ministry of Foreign Relations and those of the national,[10] departmental or municipal libraries or other governmental public institutions, whether they are manuscripts remaining in the places to which they pertain, whether they have been

10—Literally, "imperial."

taken from there or whether their rough drafts have not been deposited in accordance with the former rules, are State property and may not be printed nor published without authority.

ART. 2. This authorization shall be given by our Minister of Foreign Relations for publication of works in which are contained copies, extracts or quotations from manuscripts which pertain to the archives of his Ministry and by our Minister of the Interior, for such works as contain copies, extracts or citations from manuscripts which pertain to any of the other public institutions mentioned in the preceding paragraph.

ART. 3. Our Ministers of Foreign Relations and of the Interior are charged, each as far as applicable, with the execution of this decree.

DECREE REGULATING PRINTING AND BOOKSELLING.

(February 5, 1810.)
(Unrepealed portions.)

ART. 41. Confiscation and fine for the benefit of the State shall take place, without prejudice to the application of the provisions of the Penal Code:

(7) If there is an infringement, that is to say, if a work is printed without the consent, or to the prejudice, of the author or publisher or their legal representatives.

ART. 45. Offences shall be established by the inspectors of printing houses and bookselling establishments, police officers and besides by the customs inspectors as to books coming from abroad.

PENAL CODE OF 1810.

ART. 420. Every publication of writings, musical compositions, drawings, paintings or of any other publication, printed and engraved, in whole or in part, in violation of the laws and regulations relating to the property of authors is an infringement and every infringement is a misdemeanor *(délit)*.

ART. 426. The sale of piratical works and the introduction into French territory of works which after having been printed in France, have been illegally copied abroad are crimes of the same kind.

ART. 427. The punishment of the manufacturer of the infringement or introducer shall be a fine not less than 100 francs nor more than 2000 francs and of the seller a fine not less than 25 nor more than 500 francs.

Confiscation of the piratical edition shall be decreed as well against the manufacturer as against the introducer or seller.

The plates, models or matrices of the piratical objects shall also be confiscated.

ART. 428. Every director, or theatrical manager and every company of artists which shall perform in his or its theatre, dramatic works in violation of the laws and regulations relating to the property of authors shall be punished by a fine of not less than 50 nor more than 500 francs and by confiscation of the gross receipts.

ART. 429. In cases covered by the four preceding Articles, the product of confiscations or the confiscated receipts shall be turned over to the proprietor to compensate him, to that extent, for the wrong which he has suffered or the entire indemnity, if there has been neither sale of confiscated objects nor seizure of receipts, shall be regulated in the usual method.

ART. 463. In all cases where the punishment of imprisonment or that of fine shall be prescribed by the Penal Code, if the circumstances appear extenuating, the criminal courts are authorized, even in the case of a second offence, to reduce imprisonment even below six days and fine even below sixteen francs. They may also separately award one or another of these punishments and even substitute fine for imprisonment, provided that in no case shall the punishment be below that fixed for violations of ordinary police regulations *(simple police)*.

DECREE RELATING TO THE RIGHTS OF LITERARY AND ARTISTIC PROPERTY IN WORKS PUBLISHED ABROAD.[11]

(March 28, 1852.)

Louis Napoleon, President of the French Republic, upon the report of the Keeper of the Seals, the Secretary-Minister of State, at the Department of Justice, considering the law of July 19, 1793, the decrees of March 22, 1805, February 5, 1801, June 13, 1795 and articles 425, 426, 427 and 429 of the Penal Code, decrees:

ART. I. The piratical copying in French territory of works published abroad and mentioned in Article 425 of the Penal Code shall be a misdemeanor *(délit)*.

ART. II. It is the same with respect to the sale, exportation and shipment of piratical works. The exportation and shipment of such works

11—In accordance with this decree, which has the force of statute, works appearing abroad are placed on precisely the same footing as those appearing in France, except, it seems, as to the right of public performance, and except that it seems doubtful if such rights can exceed those enjoyed by the author in the country of origin. The Statute only applies, however, in the absence of treaty. See Lyon-Caen & Delalain, p. 35-8.

shall be a crime of the same kind as the introduction into French territory of works which after having been printed in France have been unlawfully reproduced abroad.

ART. III. The crimes referred to in the preceding Articles shall be punished as prescribed in Articles 427 and 429 of the Penal Code.

Article 463 of the same Code may be applied.

ART. IV. Nevertheless, actions at law are only permitted after fulfilment of the conditions with respect to works published in France, especially of Article 6 of the law of July 19, 1793.[12]

DECREE PROVIDING THAT THE LAWS AND OTHER DECREES WHICH GOVERN LITERARY AND ARTISTIC PROPERTY IN FRANCE SHALL BE IN FORCE IN THE COLONIES OF FRANCE.

(December, 1857.)

This decree, while unrepealed, is, apparently, superseded by the Decree of October 29, 1887 *(post)*.

DECREE RELATING TO THE LIBERTY OF THE THEATRE.[13]

(January 6, 1864.)

ART. 3. Every dramatic work before being performed must, pursuant to the provisions of the decree of December 30, 1852, be examined and authorized by the Minister of our Household and of the Fine Arts, in the case of Parisian theatres and by the prefects, in the case of provincial theatres.

This authorization may always be rescinded for reasons of public order.

LAW RELATING TO MECHANICAL MUSICAL INSTRUMENTS.

(May 16, 1866.)

ART. 1. The manufacture and sale of instruments serving to reproduce mechanically musical airs which are private property, does not constitute the act of musical piracy specified in and punished by the law of July 19-24, 1793, taken in connection with Articles 425 and following of the Penal Code.[14]

12—The formalities prescribed with respect to deposit are now regulated by the law of July 29, 1881 (*post*).

13—Only the Article dealing especially with copyright is reproduced in this work.

14—This law is not applicable to nationals of countries which are parties to the Berne Conventions.

LAW RELATING TO THE DURATION OF THE RIGHTS OF HEIRS AND LEGAL REPRESENTATIVES OF AUTHORS, COMPOSERS OR ARTISTS.

(July 14, 1866.)

ART. 1. The duration of the rights given by laws heretofore enacted to heirs, those who inherit out of the regular order *(successeurs irréguliers)*, donees or legatees of authors, composers or artists is extended to fifty years after the death of the author.

During this period of fifty years, the surviving husband or wife, whatever may be the matrimonial status, and irrespective of the rights which might result in favor of such husband or wife if the matrimonial status is that of community of property, has the personal enjoyment of the rights which the deceased author has not disposed of by assignment during life or by will.

However, if the author leaves residuary legatees this enjoyment of the right is reduced for their benefit in proportion and in accordance with the distinctions established by Articles 913 and 915 of the Civil Code.

This enjoyment of the right does not exist where a legal separation, decreed against the surviving spouse, is in force at the time of the other's death and it ceases if the surviving spouse remarries.

The rights of residuary legatees and of heirs or legal successors shall, in other respects, during this period of fifty years, be governed by the provisions of the Civil Code.

In cases of escheat, the exclusive right ceases, without prejudice, however, to the rights of creditors and to the performance of contracts for transfer which have been made by the author or his representatives.

ART. 2. All the provisions of prior laws contrary to those of this law are hereby repealed.

LAW ON THE LIBERTY OF THE PRESS.

(July 29, 1881.)

CHAPTER I.

Concerning printing and book selling establishments.

ART. 3. Upon publication of any printed matter, the printer must make a deposit of two copies for the national collections, under penalty of a fine of from 16 to 300 francs if he does not make it. This deposit shall be made with the Minister of the Interior in Paris; at the office of

the Prefect, in the chief towns of Departments; at the office of the Subprefect at the chief places in *Arrondissements* and in other towns at the Mayoralty. The entry of the deposit shall show the title of the printed work and the number of the edition. Voting lists, commercial and trade circulars and so-called *ouvrages de ville* and *bilboquets*, are excepted from this provision.

ART. 4. The preceding provisions are applicable to every kind of printed matter. Nevertheless, in the case of prints, music and, in general, of productions other than those which are printed, the deposit shall consist of three copies.

DECREE DECLARING THE PROVISIONS OF LAW WHICH GOVERN LITERARY AND ARTISTIC PROPERTY IN FRANCE APPLICABLE TO THE COLONIES.

(October 29, 1887.)

The President of the French Republic, on the report of the Minister of Marine and of the Colonies and of the Keeper of the Seals and Minister of Justice, having regard to Articles 7, 8 and 18 of the decree of the Senate of May 3, 1854, and the decree of December 9, 1857, respecting literary and artistic property in the colonies, decrees:

ART. 1. The provisions of law which govern literary and artistic property in France are made applicable to the Colonies.

ART. 2. The Minister of Marine and of the Colonies and the Keeper of the Seals and Chief Justice, are each charged, as far as applicable to him, with the execution of this decree which shall be published in the official Journal of the Republic and the official Bulletin for the Administration of Colonies.

LAW CONCERNING FRAUDS WITH RESPECT TO ARTISTIC WORKS.

(February 9, 1895.)

ART. 1. There shall be punished by imprisonment of not less than one year nor more than five years and by a fine of not less than 16 nor more than 3000 francs, without prejudice to an action for damages:

(1) those who shall have fraudulently placed or caused to appear, a name not belonging to them, upon a painting, work of sculpture, drawing, engraving or of music;

(2) those who shall have fraudulently and with the aim of deceiving the purchaser with respect to the personality of the author, imitated his signature or a mark adopted by him.

ART. 2. The same punishments are applicable to any dealer or commission merchant who knowingly receives, places on sale or in circulation, objects bearing such names, signatures or marks.

ART. 3. Such illegal objects shall be confiscated and turned over to the complainant or destroyed, if he refuses to receive them.

ART. 4. This law applies to works not fallen into the public domain, without prejudice however to the application of Article 423 of the Penal Code.

ART. 5. Article 463 of the Penal Code shall apply to cases covered by Articles 1 and 2.

LAW EXTENDING THE APPLICATION OF THE LAW OF JULY 19-24, 1793, RESPECTING ARTISTIC AND LITERARY PROPERTY TO WORKS OF SCULPTURE.

(March 11, 1902.)

ART. 1. The words "architects, sculptors" are added to Article 1 of the Law of July 19-24, 1793, after the words "the authors of writings of every kind, the composers of music."

ART. 2. The paragraph following is added to Article 1 of the law of July 19-24, 1793: "Sculptors and ornamental designers shall have the same rights, whatever the merit or purpose of the work may be."

LAW RESPECTING THE PROTECTION OF THE RIGHT OF AUTHORS WITH RESPECT TO REPRODUCTION OF WORKS OF ART.

(April 9, 1910.)

The transfer of the right to a work of art does not, in the absence of agreement to the contrary, involve a transfer of the right to reproduce it.[15]

15—Works produced for the State or purchased by it, are not covered by this law but by the Decree of November 3, 1878, as amended by Decree of March 18, 1913. The text will be found in Le Droit d'Auteur, June 15, 1913. Such works may not be reproduced without the consent of the State.

INTERNATIONAL COPYRIGHT CONVENTIONS

TEXT OF THE CONVENTION CREATING THE INTERNATIONAL COPYRIGHT UNION, SEPTEMBER 5, 1887, TOGETHER WITH ADDITIONAL ARTICLES, SIGNED AT PARIS, MAY 4, 1896.

The treaty was signed at Berne on September 9, 1886, by the plenipotentiaries of ten nations, and ratifications were exchanged at Berne, on September 5, 1887, the *procès-verbal* being signed by the representatives of Great Britain, Germany, Belgium, Spain, France, Haïti, Italy, Switzerland, and Tunis.

The following countries have joined the International Copyright Union subsequent to the date of its formation: Luxembourg, on June 20, 1888; Monaco, on May 30, 1889; Montenegro, on July 1, 1893 (but withdrew from the Union on April 1, 1900); Norway, on April 13, 1896; Japan, on July 15, 1899; Denmark, on July 1, 1903; Sweden, on August 1, 1904; Great Britain's colonies, the Transvaal, and the Orange River Colony, on May 6, 1903; Liberia, on October 16, 1908; Portugal and colonies, on March 29, 1911; The Netherlands, on November 1, 1912, and for its colonies, the Dutch Indies, Curaçao and Surinam, on April 1, 1913.

The three nations of first rank not yet members of the Union are, the United States, Russia, and Austria-Hungary.

BERNE INTERNATIONAL COPYRIGHT UNION.

Text of the Convention creating an International Union for the protection of Literary and Artistic Works, Signed at Berne, Switzerland, September 9, 1886, Ratified September 5, 1887.

ARTICLE I.

The contracting States are constituted into an Union for the protection of the rights of authors over their literary and artistic works.

Union to protect literary and artistic works.

ARTICLE II.

Authors of any one of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives.

Authors to enjoy in other countries the rights granted to natives.

The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection granted in the said country of origin.

Conditions and formalities of country of origin to be fulfilled.

Term of protection.

The country of origin of the work is that in which the work is first published, or if such publication takes place simultaneously in several countries of the Union, that one of them in which the shortest term of protection is granted by law.

Country of first publication to be considered country of origin.

For unpublished works the country to which the author belongs is considered the country of origin of the work.[1]

Unpublished works.

ARTICLE II. The first paragraph of Article II shall run as follows:

"Authors of any countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, either not published or published for the first time in one of those countries, the rights which the respective laws do now or shall hereafter grant to natives."

A fifth paragraph is further more added, which runs thus:

"Posthumous works are included amongst protected works."

1—Amendments to the International Copyright Convention of September 9, 1886, agreed to at Paris, May 4, 1896, will be found in smaller type immediately following Article Amended.

ARTICLE III.

Publishers of works published in one of the countries of the Union protected.

The stipulations of the present Convention apply equally to the publishers of literary and artistic works published in one of the countries of the Union, but of which the authors belong to a country which is not a party to the Union.

ARTICLE III. Article III shall run as follows:

"Authors, not subjects of one of the countries of the Union, but who shall have published, or caused to be published for the first time, their literary or artistic works in one of those countries, shall enjoy for those works the protection accorded by the Berne Convention, and by the present additional act."

ARTICLE IV.

Definition of "literary and artistic works."

The expression "literary and artistic works" comprehends books, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions with or without words; works of design, painting, sculpture, and engraving; lithographs, illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture, or science in general; in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction.

ARTICLE V.

Exclusive right of translation.

Authors of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries the exclusive right of making or authorizing the translation of their works until the expiration of ten years from the publication of the original work in one of the countries of the Union.

Works published in incomplete parts.

For works published in incomplete parts ("livraisons") the period of ten years commences from the date of publication of the last part of the original work.

Works published in several volumes.

For works composed of several volumes published at intervals, as well as for bulletins or collections ("cahiers") published by literary or scientific societies, or by private persons, each volume, bulletin or collection is, with regard to the period of ten years, considered a separate work.

Terms to date from end of year of publication.

In the cases provided for by the present article, and for the calculation of the period of protection, the 31st of De-

cember of the year in which the work was published is admitted as the date of publication.

ARTICLE V. The first paragraph of Article V shall run as follows:

"Authors of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries the exclusive right of making or authorizing the translation of their works during the whole duration of the right in the original work. But the exclusive right of translation shall cease to exist when the author shall not have made use of it within a period of ten years from the first publication of the original work, by publishing or causing to be published in one of the countries of the Union, a translation in the language for which protection shall be claimed."

Right of translation expires after ten years.

ARTICLE VI.

Authorized translations are protected as original works. They consequently enjoy the protection stipulated in Articles II and III as regards their unauthorized reproduction in the countries of the Union.

Translations protected.

It is understood that, in the case of a work for which the translating right has fallen into the public domain, the translator cannot oppose the translation of the same work by other writers.

New translations by other writers.

ARTICLE VII.

Articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the authors or publishers have expressly forbidden it. For periodicals it is sufficient if the prohibition is made in a general manner at the beginning of each number of the periodical.

Reproduction of newspaper articles.

This prohibition cannot in any case apply to articles of political discussion, or to the reproduction of news of the day or *current topics*.

Articles of political discussion, etc., not protected.

ARTICLE VII. Article VII shall run as follows:

"Serial novels ('Romans-feuilletons'), including novels published in newspapers or periodicals of one of the countries of the Union, cannot be reproduced, in original or in translation, in the other countries, without the authorization of their authors or of their lawful representatives.

Serial novels protected.

"This applies equally to other articles in newspapers or periodicals, whenever the authors or publishers shall have ex-

Newspaper articles protected.

pressly declared in the paper or periodical in which they may have published them, that they forbid their reproduction.

Periodicals protected.

"For periodicals it is sufficient if the prohibition is made in a general way, at the beginning of each number.

Reproduction permitted if credit is given.

"In the absence of prohibition, reproduction will be permitted on condition of indicating the source.

"This prohibition cannot in any case apply to articles of political discussion, to the news of the day, or to current topics."

ARTICLE VIII.

Extracts from literary or artistic works.

As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies, the matter is to be decided by the legislation of the different countries of the Union, or by special arrangements existing or to be concluded between them.

ARTICLE IX.

Representation of dramatic or dramatico-musical works.

The stipulations of Article II apply to the public representation of dramatic or dramatico-musical works, whether such works be published or not.

Translations of dramatic works.

Authors of dramatic or dramatico-musical works, or their lawful representatives, are, during the existence of their exclusive right of translation, equally protected against the unauthorized public representation of translations of their works.

Public performance of musical works.

The stipulations of Article II apply equally to the public performance of unpublished musical works, or of published works in which the author has expressly declared on the title page or commencement of the work that he forbids the public performance.

ARTICLE X.

Adaptations, etc., considered as infringement.

Unauthorized indirect appropriations of a literary or artistic work of various kinds, such as *adaptations, arrangements of music, etc.*, are specially included amongst the illicit reproductions to which the present Convention applies, when they are only the reproduction of a particular work, in the same form, or in another form, with non-essential alterations, or abridgements, so made as not to confer the character of a new original work.

Courts of the various countries to con-

It is agreed that, in the application of the present article, the tribunals of the various countries of the Union will, if

there is occasion, conform themselves to the provisions of their respective laws.

form to their own laws.

ARTICLE XI.

In order that the authors of works protected by the present Convention shall, in the absence of proof to the contrary, be considered as such, and be consequently admitted to institute proceedings against pirates before the courts of the various countries of the Union, it will be sufficient that their name be indicated on the work in the accustomed manner.

Author's name to be indicated on work.

For anonymous or pseudonymous works, the publisher whose name is indicated on the work is entitled to protect the rights belonging to the author. He is, without other proof, reputed the lawful representative of the anonymous or pseudonymous author.

Publisher of anonymous or pseudonymous works considered as representative of author.

It is, nevertheless, agreed that the tribunals may, if necessary, require the production of a certificate from the competent authority to the effect that the formalities prescribed by law in the country of origin have been accomplished, as contemplated in Article II.

Courts may require certificate of accomplishment of formalities.

ARTICLE XII.

Pirated works may be seized on importation into those countries of the Union where the original work enjoys legal protection.

Seizure of pirated copies.

The seizure shall take place conformably to the domestic law of each State.

ARTICLE XII. Article XII shall run as follows:

"Pirated works may be seized by the competent authorities of the countries of the Union where the original work has a right to legal protection.

"The seizure will take place conformably to the domestic legislation of each country."

ARTICLE XIII.

It is understood that the provisions of the present Convention cannot in any way derogate from the right belonging to the Government of each country of the Union to permit, to control, or to prohibit, by measures of domestic legislation or police, the circulation, representation, or exhibition of any works or productions in regard to which

Each government to exercise supervision.

the competent authority may find it necessary to exercise that right.

ARTICLE XIV.

Convention to apply to all works not in public domain at the time of its going into force.

Under the reserves and conditions to be determined by common agreement,[a] the present Convention applies to all works which at the moment of its coming into force have not fallen into the public domain in the country of origin.

ARTICLE XV.

Right of governments to make separate treaties reserved.

It is understood that the Governments of the countries of the Union reserve to themselves respectively the right to enter into separate and particular arrangements between each other, provided always that such arrangements confer upon authors or their lawful representatives more extended rights than those granted by the Union, or embody other stipulations not contrary to the present Convention.

ARTICLE XVI.

International office.

An International Office is established, under the name of "Office of the International Union for the Protection of Literary and Artistic Works."

This Office, of which the expenses will be borne by the Administrations of all the countries of the Union, is placed under the high authority of the Superior Administration of the Swiss Confederation, and works under its direction. The functions of this Office are determined by common accord between the countries of the Union.

ARTICLE XVII.

Revisions of Convention.

The present Convention may be submitted to revisions in order to introduce therein amendments calculated to perfect the system of the Union.

Future conferences.

Questions of this kind, as well as those which are of interest to the Union in other respects, will be considered in Conferences to be held successively in the countries of the Union by delegates of the said countries.

Alterations of Convention must be by unanimous consent.

It is understood that no alteration in the present Convention shall be binding on the Union except by the unanimous consent of the countries comprising it.

a—See paragraph 4 of Final Protocol, p. 11.

ARTICLE XVIII.

Accession of other countries.

Countries which have not become parties to the present Convention, and which grant by their domestic law the protection of rights secured by this Convention, shall be admitted to accede thereto on request to that effect.

Such accession shall be notified in writing to the Government of the Swiss Confederation, who will communicate it to all the other countries of the Union.

Such accession shall imply full adhesion to all the clauses and admission to all the advantages provided by the present Convention.

ARTICLE XIX.

Accession for colonies or foreign possessions.

Countries acceding to the present Convention shall also have the right to accede thereto at any time for their colonies or foreign possessions.

They may do this either by a general declaration comprehending all their colonies or possessions within the accession, or by specially naming those comprised therein, or by simply indicating those which are excluded.

ARTICLE XX.

Convention to take effect three months after exchange of ratifications.

The present Convention shall be put in force three months after the exchange of the ratifications, and shall remain in effect for an indefinite period until the termination of a year from the day on which it may have been denounced.

Withdrawal from the Convention.

Such denunciation shall be made to the Government authorized to receive accessions, and shall only be effective as regards the country making it, the Convention remaining in full force and effect for the other countries of the Union.

ARTICLE XX. The second paragraph of Article XX shall run as follows:

Denunciation of treaty.

"This denunciation shall be addressed to the Government of the Swiss Confederation. It shall only take effect in respect of the country which shall have made it, the Convention remaining operative for the other countries of the Union."

ARTICLE XXI.

Convention to be ratified within one year.

The present Convention shall be ratified, and the ratifications exchanged at Berne, within the space of one year at the latest.

ADDITIONAL ARTICLE.

Convention not to affect existing conventions conferring more extended rights.

The Convention concluded this day in no wise affects the maintenance of existing conventions between the contracting States, provided always that such conventions confer on authors, or their lawful representatives, rights more extended than those secured by the Union, or contain other stipulations which are not contrary to the said Convention.

FINAL PROTOCOL.

Protection of photographs.

1. As regards Article IV, it is agreed that those countries of the Union where the character of artistic works is not refused to photographs, engage to admit them to the benefits of the Convention concluded to-day, from the date of its coming into effect. They are, however, not bound to protect the authors of such works further than is permitted by their own legislation, except in the case of international engagements already existing, or which may hereafter be entered into by them.

Photograph of work of art protected.

It is understood that an authorized photograph of a protected work of art shall enjoy legal protection in all the countries of the Union, as contemplated by the said Convention, for the same period as the principal right of reproduction of the work itself subsists, and within the limits of private arrangements between those who have legal rights.

Choregraphic works admitted to the benefits of the Convention in countries whose legislation includes them.

2. As regards Article IX, it is agreed that those countries of the Union whose legislation implicitly includes choregraphic works amongst dramatico-musical works, expressly admit the former works to the benefits of the Convention concluded this day.

It is, however, understood that questions which may arise on the application of this clause shall rest within the competence of the respective tribunals to decide.

Mechanical reproduction of music not infringement.

3. It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical airs which are copyright, shall not be considered as constituting an infringement of musical copyright.

ARTICLE II.

The "Protocole de Clôture" annexed to the Convention of the 9th September, 1886, is modified as follows:

1. No. 1. This number shall run as follows:

"1. With regard to Article IV, it is agreed as follows:

Works of architecture protected.

"(a.) In the countries of the Union in which protection is accorded not only to architectural designs, but to the actual works of architecture, those works are admitted to the benefit of the provisions of the Convention of Berne and of the present additional act.

Photographic works.

(b.) Photographic works, and those obtained by similar processes, are admitted to the benefit of the provisions of these acts, in so far as the domestic legislation allows this to be done, and according to the measure of protection which it gives to similar national works.

It is understood that the authorized photograph of a protected work of art enjoys legal protection in all the countries of the Union, within the meaning of the Convention of Berne and the present additional act, as long as the principal right of reproduction of this work itself lasts, and within the limits of private conventions between those who have legal rights."

4. The common agreement alluded to in Article XIV of the Convention is established as follows:

Application of the Convention.

The application of the Convention to works which have not fallen into the public domain at the time when it comes into force, shall operate according to the stipulations on this head which may be contained in special conventions, either existing or to be concluded.

Each country to regulate for itself the manner in which Convention shall apply.

In the absence of such stipulations between any countries of the Union, the respective countries shall regulate, each for itself, by its domestic legislation, the manner in which the principle contained in Article XIV is to be applied.

2. No. 4. This number shall run as follows:

4. "The common agreement provided for in Article XIV of the Convention is determined as follows:

Application of the Convention.

"The application of the Convention of Berne and of the present additional act to works that had not fallen into the public domain in the country of origin when these acts came into force, shall take effect according to the stipulations relative to this point which are contained in special conventions either now existing or to be concluded to this effect.

"In the absence of such stipulations between countries of the Union, the respective countries shall regulate, each for itself, by its domestic legislation, the manner in which the principle contained in Article XIV is to be applied.

Exclusive right of translation.

"The stipulations of Article XIV of the Convention of Berne and of the present number of the 'Protocole de Clôture' apply equally to the exclusive right of translation, as granted by the present additional act.

"The above-mentioned temporary provisions are applicable in case of new accessions to the Union."

Organization of International Office.

5. The organization of the International Office, established in virtue of Article XVI of the Convention, shall be fixed by a regulation which shall be drawn up by the Government of the Swiss Confederation.

Official language to be French.

The official language of the International Office will be French.

Duties of International Office.

The International Office will collect all kinds of information relative to the protection of the rights of authors over their literary and artistic works. It will arrange and publish such information. It will study questions of general utility likely to be of interest to the Union, and, by the aid of documents placed at its disposal by the different administrations, will edit a periodical publication in the French language treating questions which concern the Union. The Governments of the countries of the Union reserve to themselves the faculty of authorizing, by common accord, the publication by the Office of an edition in one or more other languages, if experience should show this to be requisite.

The International Office will always hold itself at the disposal of members of the Union, with the view to furnish them with any special information they may require relative to the protection of literary and artistic works.

Country where a conference is to be held to prepare programme.

The Administration of the country where a Conference is about to be held, will prepare the programme of the Conference with the assistance of the International Office.

Director of the International Office.

The Director of the International Office will attend the sittings of the Conferences, and will take part in the discussion without a deliberate voice. He will make an annual report on his administration, which shall be communicated to all the members of the Union.

Expenses of the International Office to be shared by contracting states.

The expenses of the Office of the International Union shall be shared by the contracting States. Unless a fresh arrangement be made, they cannot exceed a sum of sixty thousand francs a year. This sum may be increased by the decision of one of the Conferences provided for in Article XVII.

Method of sharing expenses.

The share of the total expense to be paid by each country shall be determined by the division of the contracting and acceding States into six classes, each of which shall contribute in the proportion of a certain number of units, viz:

First class .....25 units
Second class .....20 units
Third class .....15 units
Fourth class .....10 units.
Fifth class ..... 5 units
Sixth class ..... 3 units

These coefficients will be multiplied by the number of States of each class, and the total product thus obtained will give the number of units by which the total expense is to be divided. The quotient will give the amount of the unity of expense.

Each State will declare, at the time of its accession, in which of the said classes it desires to be placed.

Swiss Administration to prepare the budget of the International Office, etc.

The Swiss Administration will prepare the budget of the Office, superintend its expenditure, make the necessary advances, and draw up the annual account, which shall be communicated to all the other Administrations.

Next Conference to be held at Paris.

6. The next Conference shall be held at Paris between four and six years from the date of the coming into force of the Convention.

The French Government will fix the date within these limits after having consulted the International Office.

Exchange of ratifications.

7. It is agreed that, as regards the exchange of ratifications contemplated in Article XXI, each contracting party shall give a single instrument, which shall be deposited, with those of the other States, in the Government archives of the Swiss Confederation. Each party shall receive in exchange a copy of the *procès-verbal* of the exchange of ratifications, signed by the plenipotentiaries present.

Present Protocol integral part of Convention.

The present Final Protocol, which shall be ratified with the Convention concluded this day, shall be considered as forming an integral part of the said Convention, and shall have the same force, effect, and duration.

ARTICLE III.

Accession of other countries.

The countries of the Union which have not become parties to the present Additional Act shall be allowed to accede to it at any time, on their request to that effect. The same rule shall apply to the countries which may eventually accede to the Convention of the 9th September, 1886. It shall be sufficient for the purpose if a notification is addressed in writing to the

Swiss Federal Council, who will, in turn, notify this accession to the other Governments.

ARTICLE IV.

Additional Act to be ratified.

The present Additional Act shall have the same force and duration as the Convention of the 9th September, 1886.

It shall be ratified, and the ratifications shall be exchanged at Paris in the form adopted for that Convention, as soon as possible, and within a year at the latest.

It shall come into force between the countries who have ratified it three months after this exchange.

DECLARATION INTERPRETING CERTAIN PROVISIONS OF THE CONVENTION OF BERNE OF SEPTEMBER 9, 1886, AND OF THE ADDITIONAL ACT, SIGNED AT PARIS, MAY 4, 1896.

1. By the terms of paragraph 2 of Article II of the Convention, the protection granted by the aforementioned Acts depends solely on the accomplishment in the country of origin of the work of the conditions and formalities that may be prescribed by the legislation of that country. The same rule applies to the protection of the photographic works mentioned in No. 1 (b), of the modified "Protocole de Clôture."

2. By *published* works must be understood works actually issued to the public in one of the countries of the Union. Consequently, the representation of a dramatic or dramatico-musical work, the performance of a musical work, the exhibition of a work of art, do not constitute publication in the sense of the aforementioned Acts.

3. The transformation of a novel into a play, or of a play into a novel, comes under the stipulations of Article X.

The countries of the Union which are not parties to the present Declaration shall be allowed to accede thereto at any time on their request to that effect. The same rule shall apply to countries which may accede either to the Convention of the 9th September, 1886, or to this Convention or to the Additional Act of the 4th May, 1896. It will be sufficient for this purpose if a notification be addressed in writing to the Swiss Federal Council, who will, in turn, notify this accession to the other Governments.

The present Declaration shall have the same force and duration as the Acts to which it refers.

It shall be ratified, and the ratifications shall be exchanged at Paris, in the form adopted for those Acts, as soon as possible, and within a year at the latest.

ADDITIONAL PROTOCOL TO THE INTERNATIONAL COPYRIGHT CONVENTION OF BERLIN, NOVEMBER 13, 1908, SIGNED AT BERNE, MARCH 20, 1914.

French Text with English Translation Immediately Following.

Les Pays membres de l'Union internationale pour la protection des œuvres littéraires et artistiques, désirant autoriser une limitation facultative de la portée de la Convention du 13 novembre 1908, ont, d'un commun accord, arrêté le Protocol suivant:

The countries, members of the International Union for the protection of literary and artistic works, desiring to authorize an optional limitation of the extent of the Convention of November 13, 1908, have by mutual agreement adopted the following Protocol:

1. Lorsqu'un pays étranger à l'Union ne protège pas d'une manière suffisante les œuvres des auteurs ressortissant à l'un des pays de l'Union, les dispositions de la Convention du 13 novembre 1908 ne peuvent porter préjudice, en quoi que ce soit, au droit qui appartient au pays contractant de restreindre la protection des œuvres dont les auteurs sont, au moment de la première publication de ces œuvres, sujets ou citoyens dudit pays étranger et ne sont pas domiciliés effectivement dans l'un des pays de l'Union.

1. When a country not belonging to the Union does not protect in a sufficient manner the works of authors within the jurisdiction of a country of the Union, the provisions of the Convention of November 13, 1908, can not prejudice, in any way, the right which belongs to the contracting countries to restrict the protection of works by authors who are, at the time of the first publication of such works, subjects or citizens of the said country not being a member of the Union, and are not actually domiciled in one of the countries of the Union.

2. Le droit accordé aux Etats contractants par le présent Protocole appartient également à chacune de leurs Possessions d'outre-mer.

2. The right accorded to the contracting States by the present Protocol, belongs also to each of their trans-marine possessions.

3. Aucune restriction établie en vertu du n° 1 ci-dessus ne devra porter préjudice aux droits qu'un auteur aura acquis sur une œuvre publiée dans un pays de l'Union avant la mise à exécution de cette restriction.

3. No restriction established by virtue of No. 1, above, shall prejudice the rights which an author has acquired in a work published in one of the countries of the Union prior to the putting into force of this restriction.

4. Les États qui, en vertu du présent Protocole, restreindront la protection des droits des auteurs, le notifieront au Gouvernement de la Confédération Suisse par une déclaration écrite où seront indiqués les pays vis-à-vis desquels la protection est restreinte, de même que les restrictions auxquelles les droits des auteurs ressortissant à ces pays sont soumis. Le Gouvernement de la Confédération Suisse communiquera aussitôt le fait à tous les autres États de l'Union.

4. The countries which, by virtue of the present Protocol, limit the protection accorded to authors, shall notify the Government of the Swiss Confederation by a written declaration indicating the countries against which the protection is restricted, and also the restrictions to which the rights of authors belonging to these countries are subject. The Government of the Swiss Confederation will at once communicate the fact to all the other States of the Union.

5. Le présent Protocole sera ratifié, et les ratifications seront déposées à Berne dans un délai maximum de douze mois comptes à partir de sa date. Il entrera en vigueur un mois aprés l'expiration de ce délai, et aura même force et durée que la Convention à laquelle il se rapporte.

En foi de quoi, les Plénipotentiaries des Pays membres de l'Union ont signé le présent Protocole, dont une copie certifiée sera remise à chacun des Gouvernements unionistes.

Fait à Berne, le 20 mars 1914, en un seul exemplaire, déposé aux Archives de la Confédération Suisse.

[SIGNATURES.]

5. The present Protocol shall be ratified, and the ratifications shall be deposited at Berne within a maximum period of twelve months from its date. It shall enter into force one month after the expiration of this period and shall have the same force and duration as the Convention to which it relates.

In witness whereof the Plenipotentiaries of the countries members of the Union have signed the present Protocol, of which a certified copy shall be transmitted to each of the Governments of the Union.

Done at Berne, the 20th day of March, 1914, in a single copy, deposited in the Archives of the Swiss Confederation.

Signed by the representatives of the following eighteen countries: Belgium, Denmark, France, Germany, Great Britain, Haiti, Italy, Japan, Liberia, Luxembourg, Monaco, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and Tunis.

CONVENTION CREATING AN INTERNATIONAL UNION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, SIGNED AT BERLIN, NOVEMBER 13, 1908.[1]

ARTICLE 1.

Union to protect literary and artistic works.

The contracting countries are constituted into a Union for the protection of the rights of authors in their literary and artistic works.

ARTICLE 2.

Definition of "literary and artistic works."

The expression "literary and artistic works" includes all productions in the literary, scientific or artistic domain, whatever the mode or form of reproduction, such as: books, pamphlets and other writings; dramatic or dramatico-musical works; choreographic works and pantomimes, the stage directions (*"mise en scène"*) of which are fixed in writing or otherwise; musical compositions with or without words; drawings, paintings; works of architecture and sculpture; engravings and lithographs; illustrations; geographical charts; plans, sketches and plastic works relating to geography, topography, architecture, or the sciences.

Translations, arrangements, and adaptations protected.

Translations, adaptations, arrangements of music and other reproductions transformed from a literary or artistic work, as well as compilations from different works, are protected as original works without prejudice to the rights of the author of the original work.

The contracting countries are pledged to secure protection in the case of the works mentioned above.

Works of art applied to industry.

Works of art applied to industry are protected so far as the domestic legislation of each country allows.

ARTICLE 3.

Photographic works to be protected.

The present Convention applies to photographic works and to works obtained by any process analogous to photog-

1—For original in French, see post.

raphy. The contracting countries are pledged to guarantee protection to such works.

ARTICLE 4.

Authors to enjoy in countries of the Union the rights granted to natives.

Authors within the jurisdiction of one of the countries of the Union enjoy for their works, whether unpublished or published for the first time in one of the countries of the Union, such rights, in the countries other than the country of origin of the work, as the respective laws now accord or shall hereafter accord to natives, as well as the rights specially accorded by the present Convention.

No formalities required.

The enjoyment and the exercise of such rights are not subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the stipulations of the present Convention, the extent of the protection, as well as the means of redress guaranteed to the author to safeguard his rights, are regulated, exclusively according to the legislation of the country where the protection is claimed.

Definition of country of origin.

The following is considered as the country of origin of the work: for unpublished works, the country to which the author belongs; for published works, the country of first publication, and for works published simultaneously in several countries of the Union, the country among them whose legislation grants the shortest term of protection. For works published simultaneously in a country outside of the Union and in a country within the Union, it is the latter country which is exclusively considered as the country of origin.

Published works.

By published works (“*œuvres publiées*”) must be understood, according to the present Convention, works which have been issued (“*œuvres éditées*”). The representation of a dramatic or dramatico-musical work, the performance of a musical work, the exhibition of a work of art and the construction of a work of architecture do not constitute publication.

ARTICLE 5.

Authors of countries of the Union have

Authors within the jurisdiction of one of the countries of the Union who publish their works for the first time in

same rights as natives of other countries.

another country of the Union, have in this latter country the same rights as national authors.

ARTICLE 6.

Authors not belonging to countries of the Union also protected if they first publish in a Union country.

Authors not within the jurisdiction of any one of the countries of the Union, who publish for the first time their works in one of these countries, enjoy in that country the same rights as national authors, and in the other countries of the Union the rights accorded by the present Convention.

ARTICLE 7.

Term of protection: Life and 50 years.

The term of protection granted by the present Convention comprises the life of the author and fifty years after his death.

If not adopted; Laws of country to govern term.

In case this term, however, should not be adopted uniformly by all the countries of the Union, the duration of the protection shall be regulated by the law of the country where protection is claimed, and can not exceed the term granted in the country of origin of the work. The contracting countries will consequently be required to apply the provision of the preceding paragraph only to the extent to which it agrees with their domestic law.

Term for photographic, posthumous, anonymous or pseudonymous works.

For photographic works and works obtained by a process analogous to photography, for posthumous works, for anonymous or pseudonymous works, the term of protection is regulated by the law of the country where protection is claimed, but this term may not exceed the term fixed in the country of origin of the work.

ARTICLE 8.

Exclusive right of translation for entire term.

Authors of unpublished works within the jurisdiction of one of the countries of the Union, and authors of works published for the first time in one of these countries, enjoy in the other countries of the Union during the whole term of the right in the original work the exclusive right to make or to authorize the translation of their works.

ARTICLE 9.

Serial novels protected when published in newspapers or periodicals.

Serial stories (*"romans-feuilletons"*), novels and all other works, whether literary, scientific or artistic, whatever may be their subject, published in newspapers or

periodicals of one of the countries of the Union, may not be reproduced in the other countries without the consent of the authors.

Reproduction of newspaper articles.

With the exception of serial stories and of novels (*"romans-feuilletons et des nouvelles"*) any newspaper article may be reproduced by another newspaper if reproduction has not been expressly forbidden. The source, however, must be indicated. The confirmation of this obligation shall be determined by the legislation of the country where protection is claimed.

News items not protected.

The protection of the present Convention does not apply to news of the day or to miscellaneous news having the character merely of press information.

ARTICLE 10.

Extracts from literary or artistic works for educational publications.

As concerns the right of borrowing lawfully from literary or artistic works for use in publications intended for instruction or having a scientific character, or for chrestomathies, the provisions of the legislation of the countries of the Union and of the special treaties existing or to be concluded between them shall govern.

ARTICLE 11.

Representation of dramatic or dramatico-musical works.

The stipulations of the present Convention apply to the public representation of dramatic or dramatico-musical works and to the public performance of musical works, whether these works are published or not.

Representation of translations of dramatic works.

Authors of dramatic or dramatico-musical works are protected, during the term of their copyright in the original work, against the unauthorized public representation of a translation of their works.

Notice of reservation of performance not required.

In order to enjoy the protection of this article, authors, in publishing their works, are not obliged to prohibit the public representation or public performance of them.

ARTICLE 12.

Adaptations, etc., considered as infringements.

Among the unlawful reproductions to which the present Convention applies are specially included indirect, unauthorized appropriations of a literary or artistic work, such as adaptations, arrangements of music, transformations of a romance or novel or of a poem into a theatrical piece and vice-versâ, etc., when they are only the repro-

duction of such work in the same form or in another form with non-essential changes, additions or abridgements and without presenting the character of a new, original work.

ARTICLE 13.

Adaptation of musical works to mechanical instruments.

Authors of musical works have the exclusive right to authorize: (1) the adaptation of these works to instruments serving to reproduce them mechanically; (2) the public performance of the same works by means of these instruments.

Each country to regulate for itself the manner in which Convention shall apply.

The limitations and conditions relative to the application of this article shall be determined by the domestic legislation of each country in its own case; but all limitations and conditions of this nature shall have an effect strictly limited to the country which shall have adopted them.

Not retroactive.

The provisions of paragraph 1 have no retroactive effect, and therefore are not applicable in a country of the Union to works which, in that country, shall have been lawfully adapted to mechanical instruments before the going into force of the present Convention.

Importation of mechanical musical appliances prohibited.

The adaptations made by virtue of paragraphs 2 and 3 of this article and imported without the authorization of the parties interested into a country where they are not lawful, may be seized there.

ARTICLE 14.

Reproduction by cinematograph.

Authors of literary, scientific or artistic works have the exclusive right to authorize the reproduction and the public representation of their works by means of the cinematograph.

Cinematographic productions protected.

Cinematographic productions are protected as literary or artistic works when by the arrangement of the stage effects or by the combination of incidents represented, the author shall have given to the work a personal and original character.

Cinematographic copyrightable.

Without prejudice to the rights of the author in the original work, the reproduction by the cinematograph of a literary, scientific or artistic work is protected as an original work.

The preceding provisions apply to the reproduction or

production obtained by any other process analogous to that of the cinematograph.

Also any analogous production.

ARTICLE 15.

In order that the authors of the works protected by the present Convention may be considered as such, until proof to the contrary, and admitted in consequence before the courts of the various countries of the Union to proceed against infringers, it is sufficient that the author's name be indicated upon the work in the usual manner.

Author's name indicated on work sufficient proof of authorship.

For anonymous or pseudonymous works, the publisher whose name is indicated upon the work is entitled to protect the rights of the author. He is without other proofs considered the legal representative of the anonymous or pseudonymous author.

Publisher of anonymous or pseudonymous works considered as representative of author.

ARTICLE 16.

All infringing works may be seized by the competent authorities of the country of the Union where the original work has a right to legal protection.

Seizure of pirated copies.

Seizure may also be made in these countries of reproductions which come from a country where the copyright in the work has terminated, or where the work has not been protected.

The seizure takes place in conformity with the domestic legislation of each country.

Seizure to be made according to the laws of each country.

ARTICLE 17.

The provisions of the present Convention may not prejudice in any way the right which belongs to the Government of each of the countries of the Union to permit, to supervise, or to forbid, by means of legislation or of domestic police, the circulation, the representation or the exhibition of every work or production in regard to which competent authority may have to exercise this right.

Each government to exercise supervision as to circulation, representation or exhibition of works.

ARTICLE 18.

The present Convention applies to all works which, at the time it goes into effect, have not fallen into the public domain of their country of origin because of the expiration of the term of protection.

Convention to apply to all works not in public domain at the time of its going into force.

But if a work by reason of the expiration of the term of

protection which was previously secured for it has fallen into the public domain of the country where protection is claimed, such work will not be protected anew.

Special Conventions and domestic legislation may govern.

This principle will be applied in accordance with the stipulations to that effect contained in the special Conventions either existing or to be concluded between countries of the Union, and in default of such stipulations, its application will be regulated by each country in its own case.

Provisions of Convention to apply to new accessions.

The preceding provisions apply equally in the case of new accessions to the Union and where the term of protection would be extended by the application of Article 7.

ARTICLE 19.

More extensive rights may be granted by domestic legislation.

The provisions of the present Convention do not prevent a claim for the application of more favorable provisions which may be enacted by the legislation of a country of the Union in favor of foreigners in general.

ARTICLE 20.

More extensive right may be secured by special treaties.

The governments of the countries of the Union reserve the right to make between themselves special treaties, when these treaties would confer upon authors more extended rights than those accorded by the Union, or when they contain other stipulations not conflicting with the present Convention. The provisions of existing treaties which answer the aforesaid conditions remain in force.

ARTICLE 21.

Bureau of the International Union.

The international office instituted under the name of "Bureau of the International Union for the Protection of Literary and Artistic Works" ("Bureau de l'Union internationale pour la protection des œuvres littéraires et artistiques") is maintained.

Under control of Switzerland.

This Bureau is placed under the high authority of the Government of the Swiss Confederation, which controls its organization and supervises its working.

Language of Bureau to be French.

The official language of the Bureau is the French language.

ARTICLE 22.

Duties of International Bureau.

The International Bureau brings together, arranges and publishes information of every kind relating to the protec-

tion of the rights of authors in their literary and artistic works. It studies questions of mutual utility interesting to the Union, and edits, with the aid of documents placed at its disposal by the various administrations, a periodical in the French language, treating questions concerning the purpose of the Union. The governments of the countries of the Union reserve the right to authorize the Bureau by common accord to publish an edition in one or more other languages, in case experience demonstrates the need.

Will furnish information as to copyright.

The International Bureau must hold itself at all times at the disposal of members of the Union to furnish them, in relation to questions concerning the protection of literary and artistic works, the special information of which they have need.

Annual report of Director of International Bureau.

The Director of the International Bureau makes an annual report on his administration, which is communicated to all the members of the Union.

ARTICLE 23.

Expenses of the International Bureau to be shared by contracting states.

The expenses of the Bureau of the International Union are shared in common by the contracting countries. Until a new decision, they may not exceed sixty thousand francs per year. This sum may be increased when needful by the simple decision of one of the Conferences provided for in Article 24.

Method of sharing expenses.

To determine the part of this sum total of expenses to be paid by each of the countries, the contracting countries and those which later adhere to the Union are divided into six classes each contributing in proportion to a certain number of units, to wit:

1st class	25 units
2d class	20 units
3d class	15 units
4th class	10 units
5th class	5 units
6th class	3 units

These coefficients are multiplied by the number of countries of each class, and the sum of the products thus obtained furnishes the number of units by which the total expense is to be divided. The quotient gives the amount of the unit of expense.

Each country shall declare, at the time of its accession,

in which of the above-mentioned classes it desires to be placed.

Swiss Administration to prepare the budget of the International Bureau, etc.

The Swiss Administration prepares the budget of the Bureau and superintends its expenditures, makes necessary advances and draws up the annual account, which shall be communicated to all the other administrations.

ARTICLE 24.

Revisions of Convention.

The present Convention may be subjected to revision with a view to the introduction of amendments calculated to perfect the system of the Union.

To take place successively in the countries of the Union.

Questions of this nature, as well as those which from other points of view pertain to the development of the Union, are considered in the Conferences which will take place successively in the countries of the Union between the delegates of the said countries. The administration of the country where a Conference is to be held will, with the cooperation of the International Bureau, prepare the business of the same. The Director of the Bureau will attend the meetings of the Conferences and take part in the discussions without a deliberative voice.

Changes require unanimous consent.

No change in the present Convention is valid for the Union except on condition of the unanimous consent of the countries which compose it.

ARTICLE 25.

Accession of other countries.

The States outside of the Union which assure legal protection of the rights which are the object of the present Convention, may accede to it upon their request.

To be made known by Switzerland.

This accession shall be made known in writing to the Government of the Swiss Confederation and by the latter to all the others.

May substitute provisions of previous conventions.

Such accession shall imply full adhesion to all the clauses and admission to all the advantages stipulated in the present Convention. It may, however, indicate such provisions of the Convention of September 9, 1886, or of the Additional Act of May 4, 1896, as it may be judged necessary to substitute provisionally, at least, for the corresponding provisions of the present Convention.

ARTICLE 26.

Accession for colonies or foreign possessions.

The contracting countries have the right to accede at any time to the present Convention for their colonies or foreign possessions.

They may, for that purpose, either make a general declaration by which all their colonies or possessions are included in the accession, or name expressly those which are included therein, or confine themselves to indicating those which are excluded from it.

This declaration shall be made known in writing to the Government of the Swiss Confederation, and by the latter to all the others.

ARTICLE 27.

Present Convention to replace Berne Convention and Additional Articles.

But Berne Convention remains in force between countries not signatory to present Convention.

The present Convention shall replace, in the relations between the contracting States, the Convention of Berne of September 9, 1886, including the Additional Article and the Final Protocol of the same day, as well as the Additional Act and the Interpretative Declaration of May 4, 1896. The conventional acts above-mentioned shall remain in force in the relations with the States which do not ratify the present Convention.

Signatory States may declare themselves bound by former Conventions upon certain points.

The States signatory to the present Convention may, at the time of the exchange of ratifications, declare that they intend, upon such or such point, still to remain bound by the provisions of the Conventions to which they have previously subscribed.

ARTICLE 28.

Convention to be ratified not later than July 1, 1910.

The present Convention shall be ratified, and the ratifications shall be exchanged at Berlin, not later than the first of July, 1910.

Instrument to be filed with Swiss Government.

Each contracting party shall send, for the exchange of ratifications, a single instrument, which shall be deposited, with those of the other countries, in the archives of the Government of the Swiss Confederation. Each party shall receive in return a copy of the *procès-verbal* of the exchange of ratifications, signed by the Plenipotentiaries who shall have taken part therein.

ARTICLE 29.

Convention to take effect three months after exchange of ratifications.

The present Convention shall be put into execution three months after the exchange of the ratifications and shall remain in force for an indefinite time, until the expiration of one year from the day when denunciation of it shall have been made.

Withdrawal from the Convention.

This denunciation shall be addressed to the Government of the Swiss Confederation. It shall be effective only as regards the country which shall have made it, the Convention remaining in force for the other countries of the Union.

ARTICLE 30.

Adoption of term of life and 50 years to be notified.

The States which introduce into their legislation the term of protection of fifty years [1] provided for by Article 7, paragraph 1, of the present Convention, shall make it known to the Government of the Swiss Confederation by a written notification which shall be communicated at once by that Government to all the other countries of the Union.

Notice shall be given of renouncement of any reservations.

It shall be the same for such States as shall renounce any reservations made by them in virtue of Articles 25, 26, and 27.

Signatures.

In testimony of which, the respective Plenipotentiaries have signed the present Convention and have attached thereto their seals.

Date of signing, November 13, 1908.

Done at Berlin, the thirteenth of November, one thousand nine hundred eight, in a single copy, which shall be deposited in the archives of the Government of the Swiss Confederation, and of which copies, properly certified, shall be sent through diplomatic channels to the contracting countries.

1. Article 7 provides for a general term of protection for life and *fifty years.*

CONVENTION DE BERNE REVISÉE POUR LA PROTECTION DES ŒUVRES LITTÉRAIRES ET ARTISTIQUES DU 13 NOVEMBRE 1908.

ARTICLE 1. Les Pays contractants sont constitués à l'état d'Union pour la protection des droits des auteurs sur leurs œuvres littéraires et artistiques.

ART. 2. L'expression "œuvres littéraires et artistiques" comprend toute production du domaine littéraire, scientifique ou artistique, quel qu'en soit le mode ou la forme de reproduction, telle que: les livres, brochures, et autres écrits; les œuvres dramatiques ou dramatico-musicales, les œuvres chorégraphiques et les pantomimes, dont la mise en scène est fixée par écrit ou autrement; les compositions musicales avec ou sans paroles; les œuvres de dessin, de peinture, d'architecture, de sculpture, de gravure et de lithographie; les illustrations, les cartes géographiques; les plans, croquis et ouvrages plastiques, relatifs à la géographie, à la topographie, à l'architecture ou aux sciences.

Sont protégés comme des ouvrages originaux, sans préjudice des droits de l'auteur de l'œuvre originale, les traductions, adaptations, arrangements de musique et autres reproductions transformées d'une œuvre littéraire ou artistique, ainsi que les recueils de différentes œuvres.

Les Pays contractant sont tenus d'assurer la protection des œuvres mentionées ci-dessus.

Les œuvres d'art appliqué à l'industrie sont protégées autant que permet de le faire la législation intérieure de chaque pays.

ART. 3. La présente Convention s'applique aux œuvres photographiques et aux œuvres obtenues par un procédé analogue à la photographie. Les Pays contractants sont tenus d'en assurer la protection.

ART. 4. Les auteurs ressortissant à l'un des pays de l'Union jouissent, dans les pays autres que le pays d'origine de l'œuvre, pour leurs œuvres, soit non publiées, soit publiées pour la première fois dans un pays de l'Union, des droits que les lois respectives accordent actuellement ou accorderont par la suite aux nationaux, ainsi que des droits spécialement accordés par la présente Convention.

La jouissance et l'exercice de ces droits ne sont subordonnées à aucune formalité; cette jouissance et cet exercice sont indépendants de l'existence de la protection dans le pays d'origine de l'œuvre. Par suite, en dehors des stipulations de la présente Convention, l'étendue de la protection ainsi que les moyens de recours garantis à l'auteur pour sauvegarder ses droits se règlent exclusivement d'après la législation du pays où la protection est réclamée.

Est considéré comme pays d'origine de l'œuvre: pour les œuvres non publiées, celui auquel appartient l'auteur; pour les œuvres publiées, celui de la première publication, et pour les œuvres publiées simultanément dans plusieurs pays de l'Union, celui d'entre eux dont la législation accorde la durée de protection la plus courte. Pour les œuvres publiées simultanément dans un pays étranger à l'Union et dans un pays de l'Union, c'est ce dernier pays qui est exclusivement considéré comme pays d'origine.

Par œuvres publiées, il faut, dans le sens de la présente Convention, entendre les œuvres éditées. La représentation d'une œuvre dramatique ou dramatico-musicale, l'exécution d'une musicale, l'exposition d'une œuvre d'art et la construction d'une œuvre d'architecture ne constituent pas une publication.

ART. 5. Les ressortissants de l'un des pays de l'Union, qui publient pour la

première fois leurs œuvres dans un autre pays de l'Union, ont, dans ce dernier pays, les mêmes droits que les auteurs nationaux.

ART. 6. Les auteurs ne ressortissant pas à l'un des pays de l'Union, qui publient pour la première fois leurs œuvres dans l'un de ces pays, jouissent, dans ce pays, des mêmes droits que les auteurs nationaux, et dans les autres pays de l'Union, des droits accordés par la présente Convention.

ART. 7. La durée de la protection accordée par la présente Convention comprend la vie de l'auteur et cinquante ans après sa mort.

Toutefois, dans le cas où cette durée ne serait pas uniformément adoptée par tous les pays de l'Union, la durée sera réglée par la loi du pays où la protection sera réclamée et elle ne pourra excéder la durée fixée dans le pays d'origine de l'œuvre. Les Pays contractants ne seront, en conséquence, tenus d'appliquer la disposition de l'alinéa précédent que dans la mesure où elle se concilie avec leur droit interne.

Pour les œuvres photographiques et les œuvres obtenus par un procédé analogue à la photographie, pour les œuvres posthumes, pour les œuvres anonymes ou pseudonymes, la durée de la protection est réglée par la loi du pays où la protection est réclamée, sans que cette durée puisse excéder la durée fixée dans le pays d'origine de l'œuvre.

ART. 8. Les auteurs d'œuvres non publiées, ressortissant à l'un des pays de l'Union, et les auteurs d'œuvres publiées pour la première fois dans un de ces pays jouissent, dans les autres pays de l'Union, pendant toute la durée du droit sur l'œuvre originale, du droit exclusif de faire ou d'autoriser la traduction de leurs œuvres.

ART. 9. Les romans-feuilletons, les nouvelles et toutes autres œuvres, soit littéraires, soit scientifiques, soit artistiques, quel qu'en soit l'object, publiés dans les journaux ou recueils périodiques d'un des pays de l'Union, ne peuvent être reproduits dans les autres pays sans le consentement des auteurs.

A l'exclusion des romans-feuilletons et des nouvelles, tout article de journal peut être reproduit par un autre journal, si la reproduction n'en est pas expressément interdite. Toutefois, la source doit être indiquée; la sanction de cette obligation est déterminée par la législation du pays où la protection est réclamée.

La protection de la présente Convention ne s'applique pas aux nouvelles du jour ou aux faits divers qui ont le caractère de simples informations de presse.

ART. 10. En ce qui concerne la faculte de faire licitement des emprunts à des œuvres littéraires ou artistiques pour des publications destinées à l'enseignement ou ayant un caractére scientifique, ou pour des chrestomathies, est réservé l'effet de la législation des pays de l'Union et des arrangements particuliers existants ou à conclure entre eux.

ART. 11. Les stipulations de la présente Convention s'appliquent à la représentation publique des œuvres dramatiques ou dramatico-musicales, et à l'exécution publique des œuvres musicales, que ces œuvres soient publiées ou non.

Les auteurs d'œuvres dramatiques ou dramatico-musicales sont, pendant la durée de leur droit sur l'œuvre originale, protégés contre la représentation publique non autorisée de la traduction de leurs ouvrages.

Pour jouir de la protection du présent article, les auteurs, en publiant leurs œuvres, ne sont pas tenus d'en interdire la représentation ou l'exécution publique.

ART. 12. Sont spécialement comprises parmi les reproductions illicites auxquelles s'applique la présente Convention, les appropriations indirectes non autorisées d'un ouvrage littéraire ou artistique, telles que adaptations, arrangements de musique, transformations d'un roman, d'une nouvelle ou d'une poésie en pièce de théâtre et réciproquement, etc., lorsqu'elles ne sont que la reproduction de cet ouvrage, dans la

même forme ou sous une autre forme, avec des changements, additions ou retranchements, non essentiels, et sans présenter le caractére d'une nouvelle œuvre originale.

ART. 13. Les auteurs d'œuvres musicales ont le droit exclusif d'autoriser: 1° l'adaptation de ces œuvres à des instruments servant à les reproduire mécaniquement; 2° l'exécution publique des mêmes œuvres au moyen de ces instruments.

Des réserves et conditions relatives à l'application de cet article pourront être déterminées par la législation intérieure de chaque pays, en ce qui le concerne; mais toutes réserves et conditions de cette nature n'auront qu'un effet strictement limité au pays qui les aurait établies.

La disposition de l'alinéa 1er n'a pas d'effet rétroactif et, par suite, n'est pas applicable, dans un pays de l'Union, aux œuvres qui, dans ce pays, auront été adaptées licitement aux instruments mécaniques avant la mise en vigueur de la présente Convention.

Les adaptations faites en vertue des alinéas 2 et 3 du présent article et importées, sans autorisation des parties intéressées, dans un pays où elles ne seraient pas licites, pourront y être saisies.

ART. 14. Les auteurs d'œuvres littéraires, scientifiques ou artistiques ont le droit exclusif d'autoriser la reproduction et la représentation publique de leurs œuvres par la cinématographie.

Sont protégées comme œuvres littéraires ou artistiques les productions cinématographiques lorsque, par les dispositifs de la mise en scéne ou les combinaisons des incidents représentés, l'auteur aura donné à l'œuvre un caractére personnel et original.

Sans préjudice des droits de l'auteur de l'œuvre originale, la reproduction par la cinématographie d'une œuvre littéraire, scientifique ou artistique est protégée comme une œuvre originale.

Les dispositions qui précèdent s'appliquent à la reproduction ou production obtenue par tout autre procédé analogue à la cinématographie.

ART. 15. Pour que les auteurs des ouvrages protégés par la présente Convention soient, jusqu'à preuve contraire, considérés comme tels et admis, en conséquence, devant les tribunaux des divers pays de l'Union, à exercer des poursuites contre les contrefacteurs, il suffit que leur nom suit indiqué sur l'ouvrage en la maniére usitée.

Pour les œuvres anonymes ou pseudonymes, l'editeur dont le nom est indiqué sur l'ouvrage est fondé à sauvegarder les droits appartenant à l'auteur. Il est, sans auteurs preuves, réputé ayant cause de l'auteur anonyme ou pseudonyme.

ART. 16. Toute œuvre contrefaite peut être saisie par les autorités compétentes des pays de l'Union où l'œuvre originale a droit à la protection légale.

Dans ces pays, la saisies peut aussi s'appliquer aux reproductions provenant d'un pays où l'œuvre n'est pas protégée ou a cessé de l'être.

La saisie a lieu conformément à la législation intérieure de chaque pays.

ART. 17. Les dispositions de la présente Convention ne peuvent porter préjudice, en quoi que ce soit, au droit qui appartient au Gouvernement de chacun des pays de l'Union de permettre, de surveiller, d'interdire, par des mesures de législation ou de police intérieure, la circulation, la représentation, l'exposition de tout ouvrage ou production à l'égard desquels l'autorité compétente aurait à exercer ce droit.

ART. 18. La présente Convention s'applique à toutes les œuvres qui, au moment de son entrée en vigueur, ne sont pas encore tombées dans le domaine public de leur pays d'origine par l'expiration de la durée de la protection.

Cependant, si une œuvre, par l'expiration de la durée de protection qui lui était antérieurement reconnue, est tombée dans le domaine public du pays où la protection est réclamée, cette œuvre n'y sera pas protégée à nouveau.

L'application de ce principe aura lieu suivant les stipulations contenues dans les conventions spéciales existantes ou à conclure à cet effet entre pays de l'Union. A défaut de semblables stipulations, les pays respectifs régleront, chacun pour ce qui le concerne, les modalités relatives à cette application.

Les dispositions qui précèdent s'appliquent également en cas de nouvelles accessions à l'Union et dans le cas où la durée de la protection serait étendue par application do l'article 7.

ART. 19. Les dispositions de la présente Convention n'empêchent pas de revendiquer l'application de dispositions plus larges qui seraient édictées par la législation d'un pays de l'Union en faveur des étrangers en général.

ART. 20. Les Gouvernements des pays de l'Union se réservent le droit de prendre entre eux des arrangements particuliers, en tant que ces arrangements conféreraient aux auteurs des droits plus étendus que ceux accordés par l'Union, ou qu'ils renfermeraient d'autres stipulations non contraires à la présente Convention. Les dispositions des arrangements existants qui réspondent aux conditions précitées restent applicables.

ART. 21. Est maintenu l'office international institué sous le nom de "Bureau de l'Union internationale pour la protection des œuvres littéraires et artistiques".

Ce Bureau est placé sous la haute autorité du Gouvernement de la Confédération Suisse, qui en règle l'organisation et en surveille le fonctionnement.

La langue officielle du Bureau est la langue française.

ART. 22. Le Bureau international centralise les renseignements de tout nature relatifs à la protection des droits des auteurs sur leurs œuvres littéraires et artistiques. Il les coordone et les publie. Il procède aux études d'utilité commune intéressant l'Union et rédige, à l'aide des documents qui sont mis à sa disposition par les diverses Administrations, une feuille périodique, en langue française, sur les questions concernant l'objet de l'Union. Les Gouvernements des pays de l'Union se réservent d'autoriser, d'un commun accord, le Bureau à publier une édition dans une ou plusieurs autres langues, pour le cas où l'expérience en aurait démontré le besoin.

Le Bureau international doit se tenir en tout temps à la disposition des membres de l'Union pour leur fournir, sur les questions relatives à la protection des œuvres littéraires et artistiques, les renseignements spéciaux dont ils pourraient avoir besoin.

Le Directeur du Bureau international fait sur sa gestion un rapport annuel qui est communiqué à tous les membres de l'Union.

ART. 23. Les dépenses du Bureau de l'Union internationale son supportées en commun par les Pays contractants. Jusqu'à nouvelle décision, elles ne pourront pas dépasser la somme de soixante mille francs par année. Cette somme pourra être augmentée au besoin par simple décision d'une des Conférences prévues à l'article 24.

Pour déterminer la part contributive de chacun des pays dans cette somme totale des frais, les Pays contractants et ceux qui adhéreront ultérieurement à l'Union sont divisés en six classes contribuant chacune dans la proportion d'un certain nombre d'unités, savoir:

1re classe	25 unités
2me classe	20 unités
3me classe	15 unités
4me classe	10 unités
5me classe	5 unités
6me classe	3 unités

Ces coefficients sont multipliés par le nombre des pays de chaque classe, et la somme des produits ainsi obtenus fournit le nombre d'unités par lequel la dépense totale doit être divisée. Le quotient donne le montant de l'unité de dépense.

Chaque pays déclarera, au moment de son accession, dans laquelle des susdites classes il demande à être rangé.

L'Administration Suisse prépare le budget du Bureau et en surveille les dépenses, fait les avances nécessaires et établit le compte annuel qui sera communiqué à toutes les autres Administrations.

ART. 24. La présente Convention peut être soumise à des revisions en vue d'y introduire les améliorations de nature à perfectionner le systéme de l'Union.

Les questions de cette nature, ainsi que celles qui intéresant à d'autres points de vue le développement de l'Union, sont traitées dans des Conférences qui auront lieu successivement dans les pays de l'Union entre les délégués desdits pays. L'Administration du pays où doit siéger une Conférence prépare, avec le concours du Bureau international, les travaux de celle-ci. Le Directeur du Bureau assiste aux séances des Conférences et prend part aux discussions sans voix délibérative.

Aucun changement à la présente Convention n'est valable pour l'Union que moyennant l'assentiment unanime des pays qui la composent.

ART. 25. Les Etats étrangers à l'Union et qui assurent la protection légale des droits faisant l'objet de la présente Convention, peuvent y accéder sur leur demande.

Cette accession sera notifiée par écrit au Gouvernement de la Confédération Suissc, et par celui-ci à tous les autres.

Elle emportera, de plein droit, adhesion a toutes les clauses et admission à tous les advantages stipulés dans la présente Convention. Toutefois, elle pourra contenir l'indication des dispositions de la Convention du 9 septembre 1886 ou de l'Acte additionnel du 4 mai 1896 qu'ils jugeraient nécessaire de substituer, provisoirement au moins, aux dispositions correspondantes de la présente Convention.

ART. 26. Les Pays contractants ont le droit d'accéder en tout temps à la présente Convention pour leurs colonies ou possessions étrangères.

Ils peuvent, à cet effet, soit faire une déclaration générale par laquelle toutes leurs colonies ou possessions sont comprises dans l'accession, soit nommer expressément celles qui y sont comprises, soit se borner à indiquer celles qui en sont exclues.

Cette déclaration sera notifiée par écrit au Gouvernement de la Confédération Suisse, et par celui-ci à tous les autres.

ART. 27. La présente Convention remplacera, dans les rapports entre les États contractants, la Convention de Berne du 9 septembre 1886, y compris l'Article additionnel et le Protocole de clôture du même jour, ainsi que l'Acte additionnel et la Déclaration interprétative du 4 mai 1896. Les actes conventionnels précités resteront en vigueur dans les rapports avec les États qui ne ratifieraient pas la présente Convention.

Les États signataires de la présente Convention pourront, lors de l'échange des ratifications, déclarer qu'ils entendment, sur tel ou tel point, rester encore liés par les dispositions des Conventions auxquelles ils ont souscrit antérieurement.

ART. 28. La présente Convention sera ratifiée, et les ratifications en seront échangées à Berlin au plus tard le 1er juillet 1910.

Chaque Partie contractante remettra, pour l'échange des ratifications, un seul instrument, qui sera déposé, avec ceux des autres pays, aux archives du Gouvernement de la Confédération Suisse. Chaque Partie recevra en retour un exemplaire du procés-verbal d'échange des ratifications, signé par les Plénipotentiaries qui y auront pris part.

ART. 29. La présente Convention sera mise à exécution trois mois aprés l'échange des ratifications et demeurera en vigueur pendant un temps indéterminé, jusqu'à l'expiration d'une année à partir du jour où la dénonciation en aura été faite.

Cette dénonciation sera addressée au Gouvernement de la Confédération Suisse. Elle ne produira son effet qu'à l'égard du pays qui l'aura faite, la Convention restant exécutoire pour les autres pays de l'Union.

ART. 30. Les États qui introduiront dans leur législation la durée de protection de cinquante ans prévue par l'article 7, alinéa 1er, de la présente Convention, le feront connaitre au Gouvernement de la Confédération Suisse par une notification écrite qui sera commoniquée aussitôt par ce Gouvernement à tous les autres États de l'Union.

Il en sera de même pour les États qui renonceront aux réserves faites par eux en vertus des articles 25, 26 et 27.

En foi de quoi, les Plénipotentiaries respectifs ont signé la présente Convention et y ont apposé leurs cachets.

Fait à Berlin, le 13 novembre mil neuf cent huit, en un seul exemplaire, qui sera déposé dans les archives du Gouvernment de la Confedération Suisse et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Pays contractants.

(*Suivent les signatures*)

ADDITIONAL PROTOCOL TO THE REVISED CONVENTION OF BERNE OF NOVEMBER 13TH, 1908.*

(Dated March 20th, 1914.)

The States which are members of the International Union for the protection of literary and artistic works, being desirous of authorising an optional limitation as to the application of the Convention of November 13th, 1908, by common agreement, have drawn up the following Protocol:

1. Whenever any country outside the Union fails to give adequate protection to the works of authors who are the subjects or citizens of one of the countries of the Union, nothing in the provisions of the Convention of November 13th, 1908, shall be deemed to prejudice, in any manner whatsoever, the right of the Contracting State to restrict the protection accorded to works the authors of which are, at the time when such works are first published, subjects or citizens of any such country outside the Union and are not actually domiciled in one of the countries of the Union.

2. The right conferred by this Protocol upon the Contracting States belongs equally to each of their possessions beyond the seas.

3. Any restriction imposed by virtue of Article 1 hereof shall be without prejudice to any rights acquired by any author over a work published (*publiee*) in any country of the Union prior to the date when such restrictions came into force.

4. The States which, acting under the provisions of this Protocol, shall restrict the protection of the rights of authors, shall notify the Government of the Swiss Confederation of this by a written declaration which

* Unofficial translation from text in "Le Droit d'Auteur," 1914, p. 45.

shall indicate the countries respecting which the protection is restricted and the nature of the restrictions to which the rights of authors who are subjects or citizens of that country are subjected. The Government of the Swiss Confederation shall forthwith communicate the fact to all other States of the Union.

5. This Protocol shall be ratified and the ratifications shall be deposited at Berne within, at most, twelve months after the date hereof. It shall come into operation one month after the expiration of this period and shall have the same force and duration as the Convention to which it relates.

In witness whereof the Plenipotentiaries of the countries which are members of the Union have signed this Protocol, a copy of which shall be sent to each of the Unionist Governments.

Done at Berne, the 20th day of March, 1914.

CONVENTION, SIGNED AT RIO DE JANEIRO, AUGUST 23, 1906, TO PROTECT PATENTS OF INVENTION, DRAWINGS AND INDUSTRIAL MODELS, TRADE-MARKS, AND LITERARY AND ARTISTIC PROPERTY.

[*Text of Third Pan-American Treaty, from 59th Congress, 2d session, Senate document No. 365, pp. 76-83.*]

ARTICLE 1.

Patents, Trade-marks, Copyrights.

The subscribing nations adopt in regard to patents of invention, drawings and industrial models, trade-marks, and literary and artistic property the treaties subscribed at the Second International Conference of American States, held in Mexico on the 27th of January, 1902, with such modifications as are expressed in the present Convention.

ARTICLE 2.

Union; Bureaus at Havana and Rio de Janeiro.

A union is constituted of the nations of America, which will be rendered effective by means of two Bureaus, which will be maintained, one in the city of Havana and the other in that of Rio de Janeiro, each working closely with the other, to be styled Bureaus of the International American Union for the Protection of Intellectual and Industrial Property, and will have for their object the centralization of the registration of literary and artistic works, patents, trade-marks, drawings, models, etc., which will be registered, in each one of the signatory nations, according to the respective treaties and with a view to their validity and recognition by the others.

Registration optional.

This international registration is entirely optional with persons interested, since they are free to apply, personally or through an attorney-in-fact, for registration in each one of the States in which they seek protection.

ARTICLE 3.

Bureau at Havana.

The Bureau established in the city of Havana will have charge of the registrations from the United States of Amer-

ica, the United States of Mexico, Venezuela, Cuba, Haiti, San Domingo, San Salvador, Honduras, Nicaragua, Costa Rica, Guatemala, Panama, and Colombia.

Bureau at Rio de Janeiro.

The Bureau established in the city of Rio de Janeiro will attend to the registrations coming from the republics of the United States of Brazil, Uruguay, Argentine Republic, Paraguay, Bolivia, Chile, Peru, and Ecuador.

ARTICLE 4.

Bureaus to be considered as one.

For the purpose of the legal unification of the registration, the two International Bureaus, which are divided merely with a view to greater facility of communication, are considered as one, and to this end it is established that (a) both shall have the same books and the same accounts kept under an identical system; (b) copies shall be transmitted monthly from one to the other, authenticated by the Governments in whose territories they have their seat, of all the registrations, communications, and other documents affecting the recognition of the rights of proprietors or authors.

ARTICLE 5.

Copies of registrations to be transmitted.

Each one of the Governments adhering to the Union will send at the end of each month to the proper Bureau, according to Art. 3, authenticated copies of all registrations of trade-marks, patents, drawings, models, etc., and copies of the literary and artistic works registered in them, as well as of all lapses, renunciations, transfers, and other alterations occurring in proprietary rights, according to the respective treaties and laws, in order that they may be sent out or distributed and notice given of them as the case may be by the International Bureau to those nations in direct correspondence therewith.

ARTICLE 6.

Bureaus to transmit to each country concerned certificates of registration.

The registration or deposit of drawings, models, etc., made in the country of origin according to the national law of the same and transmitted by the respective administration to the International Bureau, shall be by such Bureau laid before the other countries of the Union, by which it shall be given full faith and credit, except in the case provided for in Art. 9 of the Treaty on Patents, Trade-

Marks, etc., of Mexico, and in case the requirements essential to the recognition of international property are lacking where literary or artistic works are involved according to the treaty thereon subscribed in Mexico.

Protection to be allowed or refused within one year.

In order that the States forming the Union may accept or refuse the recognition of the rights granted in the country of origin, and for the further legal purposes of such recognition, such States shall be allowed a term of one year from the date of notification by the proper office for the purpose of so doing.

Notification in case protection is not allowed.

In case patents, trade-marks, drawings, models, etc., or the right to literary or artistic works shall fail to obtain recognition on the part of any one of the offices of the States forming the Union, the International Bureau shall be made acquainted with the facts and reasons of the case in order that in its turn these facts may be transmitted by it to the office of origin and to the interested party, for proper action according to local law.

Article 7.

Registration in country of origin to have same effect as registration in each country.

Every registration or recognition of intellectual and industrial rights made in one of the countries of the Union and communicated to the others according to the form prescribed in the preceding articles shall have the same effect that would be produced if said registration or recognition had taken place in all of them, and every nullification or lapse of rights occurring in the country of origin and communicated in the same form to the others shall produce in them the same effect that it would produce in the former.

Term of protection, that of country of origin.

The period of international protection derived from the registration shall be that recognized by the laws of the country where the rights originated or have been recognized; and if said laws do not provide for such matters or do not specify a fixed period, the respective periods shall be: for patents, 15 years; for trade-marks or commercial designs, models, and industrial drawings, 10 years; for literary and artistic works, 25 years, counting from the death of the author thereof. The first two periods may be renewed at will by giving the same form as the case of the first registration.

If no term by law, then: Patents, 15 years; Trade-marks, 10 years; Copyright, 25 years after death of author.

ARTICLE 8.

Regulations to govern Bureaus.

The International Bureaus for the protection of intellectual and industrial property shall be governed by identical regulations, formed with the concurrence of the Governments of the Republics of Cuba and Brazil and approved by all the others belonging to the Union. Their budgets,

Expenses of Bureaus.

after being sanctioned by the said Governments, shall be defrayed by all of the subscribing Governments in the same proportion established for the International Bureau of American Republics at Washington, and in this particular they shall be placed under the control of those Governments within whose territories they are established.

Registration fee, $5 American gold.

To the tax on rights which the country of their origin collects for registration or deposit and other acts resulting from the recognition or guaranty of intellectual and industrial property, shall be added a fee of five dollars, American gold, which fee or the equivalent thereof in the currency of the country in which the payment is made shall be distributed in equal parts among the Governments in whose territory the International Bureaus shall be established, the sole object of this being to contribute to the maintenance of the said Bureaus.

ARTICLE 9.

Functions of Bureaus:

In addition to the functions prescribed in the preceding articles, the International Bureaus shall have the following:

1. To collect and publish information.

1st. To collect information of all kinds regarding the protection of intellectual and industrial property and to publish and circulate the same among the countries of America at proper intervals;

2. May publish official reviews.

2nd. To encourage the study of questions regarding the said subjects, to which end they may publish one or more official reviews containing all documents forwarded to them by the offices of the subscribing countries;

3. To give notice of difficulties.

3rd. To lay before the Governments of the Union any difficulties or obstacles that may arise in the efficacious application of the present Convention, and indicate means to correct or remove such difficulties or obstacles;

4. To originate and prepare for international conferences.

4th. To help the Governments of the Union in the preparation of international conferences for the study and progress of legislation and intellectual and industrial properties, for alterations which it may be proper to introduce in

the regulations of the Union or in the treaties in force on the said subject, and in case such conferences take place the directors of the Bureaus, not appointed to represent any countries, shall have a right to attend the meetings and express their opinions at them, but not to vote;

5. To make yearly report.

5th. To present to the Governments of the countries where they shall have their seats a yearly report of their labors, which shall be communicated to all of the States of the Union;

6. To arrange for the exchange of publications, etc.

6th. To establish relations for the exchange of publications, information and data conducive to the progress of the institution with similar bureaus and institutions, and with scientific, literary, artistic, and industrial corporations of Europe and America;

7. To act as agent for each of the Governments concerned.

7th. To cooperate as agent for each one of the Governments of the Union for the transaction of any business, the taking of any initiative, or the execution of any act conducive to further the ends of the present Convention with the offices of the other Governments.

ARTICLE 10.

Registration required to replace provisions of treaties of Jan. 27, 1902.

The provisions contained in the Treaties of Mexico of January 27th, 1902, on patents of invention, drawings and industrial models, and commercial trade-marks, and on literary and artistic property, so far as regards the formalities of the registration or recognition of said rights in other countries than that of origin, shall be considered as replaced by the provisions of the present Convention as soon as one of the International Bureaus shall have been established, and only with regard to those States which have concurred in its constitution; in all other cases the said treaties shall remain in force and the present Convention shall be considered additional thereto.

ARTICLE 11.

Cuba and Brazil to organize Copyright Bureaus.

The Governments of the Republics of Cuba and the United States of Brazil shall proceed with the organization of the International Bureaus upon the ratification of this Convention by at least two-thirds of the nations belonging to each group mentioned in Article 3. The simultaneous establishment of both Bureaus shall not be necessary; one only may be established if there be the number of

adherent Governments provided above, the Government in which the Bureau has its seat being charged with taking the proper steps to secure this result, availing itself of the powers contained in the eighth article.

Bureau first established to be used until second is organized.

In the event that one of the two offices referred to in this Convention shall have been established, the countries belonging to a group other than that to which the Bureau corresponds shall have the right to join it until the second Bureau shall be established. Upon the establishment of the second Bureau the first Bureau shall transmit to the same all the data referred to in Article 12.

ARTICLE 12.

Adhesions to treaty to be communicated to Brazil.

As regards the adhesion of the American nations to the present Convention, it will be communicated to the Government of the United States of Brazil, which will lay it before the others, these communications taking the place of an exchange of notes.

Brazil to notify Bureau of each adhesion.

The Government of Brazil will also notify the International Bureau of this adhesion, and this Bureau will forward to the newly adhering State a complete statement of all the marks, patents, models, drawings, and literary and artistic works registered which at the time shall be under international protection.

In testimony whereof the Plenipotentiaries and Delegates have signed the present Convention and affixed the seal of the Third International American Conference.

Signed at Rio de Janeiro, Aug. 23, 1906.

Made in the City of Rio de Janeiro twenty-third day of August, nineteen hundred and six, in English, Portuguese, and Spanish, and deposited with the Secretary of Foreign Affairs of the United States of Brazil, in order that certified copies thereof be made and sent through diplomatic channels to the signatory States.

CONVENTION TO PROTECT LITERARY AND ARTISTIC PROPERTY, SIGNED AT MEXICO, JANUARY 27, 1902.

[*Text of Second Pan-American Copyright Treaty, from 57th Congress, 1st session, Senate document No. 330, pp. 208-212.*]

ARTICLE 1.

Union to protect literary and artistic property.

The signatory States constitute themselves into a Union for the purpose of recognizing and protecting the rights of literary and artistic property, in conformity with the stipulations of the present Convention.

ARTICLE 2.

Definition of "Literary and artistic works."

Under the term "literary and artistic works" are comprised books, manuscripts, pamphlets of all kinds, no matter what subject they may treat of and what may be the number of their pages; dramatic or melodramatic works; choral music and musical compositions, with or without words; designs, drawings, paintings, sculpture, engravings, photographic works; astronomical and geographical globes; plans, sketches, and plastic works relating to geography or geology, topography or architecture, or any other science; and, finally, every production in the literary and artistic field which may be published by any method of impression or reproduction.

ARTICLE 3.

Definition of Copyright.

The copyright to literary or artistic work consists in the exclusive right to dispose of the same, to publish, sell, and translate the same, or to authorize its translation, and to reproduce the same in any manner, either entirely or partially.

Exclusive right of translation.

The authors belonging to one of the signatory countries, or their assigns, shall enjoy in the other signatory countries and for the time stipulated in Article 5 the exclusive right to translate their works or to authorize their translation.

ARTICLE 4.

Application for copyright and deposit of two copies.

In order to obtain the recognition of the copyright of a work, it is indispensable that the author or his assigns or legitimate representative, shall address a petition to the

official department which each Government may designate, claiming the recognition of such right, which petition must be accompanied by two copies of his work, said copies to remain in the proper department.

One additional copy to be deposited for each country.

If the author or his assigns should desire that this copyright be recognized in any other of the signatory countries, he shall attach to his petition a number of copies of his work equal to that of the countries he may therein designate. The said department shall distribute the copies mentioned among those countries, accompanied by a copy of the respective certificate, in order that the copyright of the author may be recognized by them.

Copies and certificates of registration to be transmitted.

Any omissions which the said department may incur in this respect shall not give the author or his assigns any rights to present claims against the State.

ARTICLE 5.

Authors shall enjoy in other countries rights secured in country of origin.

Term not to exceed that of country of origin.

The authors who belong to one of the signatory countries, or their assigns, shall enjoy in the other countries the rights which their respective laws at present grant, or in the future may grant, to their own citizens, but such right shall not exceed the term of protection granted in the country of its origin.

Works in parts or in several volumes.

For the works composed of several volumes which are not published at the same time, as well as for bulletins or installments of publications of literary or scientific societies or of private parties, the term of property shall commence to be counted from the date of the publication of each volume, bulletin, or installment.

ARTICLE 6.

Country of first publication to be considered country of origin.

The country in which a work is first published shall be considered as the country of its origin, or, if such publication takes place simultaneously in several of the signatory countries, the one whose laws establish the shortest period of protection shall be considered as the country of its origin.

ARTICLE 7.

Translations protected.

Lawful translations shall be protected in the same manner as original works. The translators of works in regard to which there exists no guaranteed right of property, or the right of which may have been extinguished, may secure

the right of property for their translations, as established in Article 3, but they shall not prevent the publication of other translations of the same work.

ARTICLE 8.

Newspaper articles. Newspaper articles may be reproduced, but the publication from which they are taken must be mentioned, and the name of the author given, if it should appear in the same.

ARTICLE 9.

Works bearing names of authors or pseudonyms protected. Copyright shall be recognized in favor of the persons whose names or acknowledged pseudonyms are stated in the respective literary or artistic work or in the petition to which Article 4 of this Convention refers, excepting case of proof to the contrary.

ARTICLE 10.

Addresses. Addresses delivered or read in deliberative assemblies, before the courts of justice, and in public meetings may be published in the newspaper press without any special authorization.

ARTICLE 11.

Fragments of literary or artistic works. The reproduction in publications devoted to public instruction or chrestomathy of fragments of literary or artistic works confers no right of property, and may therefore be freely made in all the signatory countries.

ARTICLE 12.

Infringement defined. All unauthorized indirect use of a literary or artistic work which does not present the character of an original work shall be considered as an unlawful reproduction.

It shall be considered in the same manner unlawful to reproduce in any form an entire work, or the greater part of the same, accompanied by notes or commentaries, under the pretext of literary criticism or of enlargement or complement of an original work.

ARTICLE 13.

Fraudulent copies to be sequestrated, etc. All fraudulent works shall be liable to sequestration in the signatory countries in which the original work may have the right of legal protection, without prejudice to the in-

demnity or punishments to which the falsifiers may be liable according to the laws of the country in which the fraud has been committed.

ARTICLE 14.

Each one of the Governments of the signatory countries shall remain at liberty to permit, exercise vigilance over, or prohibit the circulation, representation and exposition of any work or production in respect to which the competent authorities shall have power to exercise such right.

Each Government to exercise supervision.

ARTICLE 15.

The present Convention shall take effect between the signatory States that ratify it, three months from the day they communicate their ratification to the Mexican Government, and shall remain in force among all of them until one year from the date it is denounced by any of said States. The notification of such denouncement shall be addressed to the Mexican Government and shall only have effect in so far as regards the country which has given it.

Convention to take effect three months after ratification

ARTICLE 16.

The Government of the signatory states, when approving the present Convention, shall declare whether they accept the adherence to the same by the nations which have had no representation in the Second International American Conference.

Adherence of nations not represented at 2d Int. Am. Conference.

In testimony whereof the Plenipotentiaries and Delegates sign the present Convention and set thereto the seal of the Second International American Conference.

Made in the City of Mexico, on the twenty-seventh day of January, nineteen hundred and two, in three copies written in Spanish, English, and French, respectively, which shall be deposited at the Department of Foreign Relations of the Government of the Mexican United States, so that certified copies thereof may be made, in order to send them through the diplomatic channel to the signatory States.

Signed at Mexico, Jan. 27, 1902.

TEXT OF TREATY ON PATENTS OF INVENTION, INDUSTRIAL DRAWINGS, AND MODELS AND TRADE-MARKS, SIGNED AT MEXICO, JANUARY 27, 1902.

(From 57th Congress, 1st session, Senate document No. 330, pp. 220-225.)

ARTICLE 1.

Trade-marks and patents.

The citizens of each of the signatory States shall enjoy in other nations the same advantages granted by them to their own citizens in regard to trade-marks of commerce or of manufacture, to models and industrial drawings, and to patents of invention.

Consequently they shall have the right to the same protection and to identical remedies against any attack upon their rights.

ARTICLE 2.

Domiciled foreigners.

For the purpose of this treaty, foreigners domiciled in any of the signatory countries, or who may have in them an industrial or commercial establishment, shall be considered the same as citizens.

ARTICLE 3.

Importation of patents, drawings, models, and trade-marks.

Patents of invention and those of industrial drawings and models, as well as of trade-marks of commerce or manufacture, granted in the country of their origin, may be imported to the other signatory States, for registration and publication as may be required by the laws of the respective countries, and they shall be protected in the same manner as those granted in the State itself. This provision does not remove the obligation imposed by national laws requiring the privileged articles to be manufactured in the country enacting such laws.

ARTICLE 4.

Consular agents considered as legal representatives.

The consular agents of the nation to which belong or wherein reside the owners of patents, drawings, models, or trade-marks shall be considered as the legal representatives of said owners for the purpose of complying with the for-

malities and conditions established, in order to present the application and secure the filing of said patents, drawings, models, or trade-marks in the country wherein it is intended to use them.

ARTICLE 5.

Country of origin.

The country in which the grantee has his principal establishment or domicile shall be considered as the country of origin.

In case he should not have any such establishment in any of the signatory countries, that State of the signatory nations of which the claimant is a citizen shall be considered as the country of origin.

ARTICLE 6.

Priority of patents, etc.

For the purpose of preserving the right of priority of patents of invention, models or designs, and of imported trade-marks, a term of one year is granted as to the former and of six months as to the latter, to be counted from the date of their having been originally issued, for the presentation of the application of the same to the respective authority of the country into which the patent right is to be imported.

ARTICLE 7.

Priority and date of application.

All questions which may arise regarding the priority of an invention and regarding the adoption of a trade-mark shall be decided with due regard to the date of the application for the respective patent or trade-mark in the countries in which they have been granted.

ARTICLE 8.

Definition of inventions.

The following shall be considered as inventions: any new method of manufacturing industrial products; any mechanical or manual apparatus which may be used for the manufacture of said products; the discovery of any new industrial product; and the application of improved methods for the purpose of producing results superior to those already known. The drawings and models of manufacture are subject to the rules of inventions and discoveries in all that does not apply specially to the latter.

The signs, emblems, or exterior names that merchants or

manufacturers may adopt or apply to their goods or products in order to distinguish them from those of other manufacturers or merchants who deal in articles of the same kind shall be considered as trade-marks of commerce or manufacture.

ARTICLE 9.

Not patentable.

No patent of invention can be granted with respect to the following:

1. Inventions and discoveries which may have been published in any country, whether it be a party to this treaty or not.

2. Those that are contrary to morals or to the laws of the country in which the patents of inventions are to be granted or to be recognized.

ARTICLE 10.

Trade-marks of commerce or manufacture which are in the class provided for in Paragraph 2 of the foregoing article are likewise debarred from being granted or recognized.

ARTICLE 11.

Rights of patentees.

The ownership of a patent of invention or of a trade-mark of commerce or manufacture covers the right to enjoy the products of the invention or the use of the trade-mark and the right to assign them to others.

ARTICLE 12.

Term of patent.

The number of years of the patent right shall be that which the laws of the country in which it is desired to make them effective may establish. Such term may be limited to that established by the laws of the country in which the patent of invention was originally granted if the latter should be shorter.

ARTICLE 13.

Civil and criminal responsibilities.

The civil and criminal responsibilities which those who injure the rights of inventors incur shall be prosecuted and punished in accordance with the laws of the country in which the injury has been committed.

The falsification, adulteration, or unauthorized use of

trade-marks of commerce and manufacture shall likewise be prosecuted in accordance with the laws of the State in whose territory the infringement has been committed.

ARTICLE 14.

Nullity of a patent.

The declaration of nullity of a patent or trade-mark made in the country of its origin shall be communicated in an authentic form to the other signatory countries, so that they may decide in an administrative manner regarding the recognition which may be solicited for the respective patent or trade-mark granted in the foreign country, and as to what effect such declaration is to produce with regard to the patents or trade-marks previously imported into said countries.

ARTICLE 15.

Previous treaties.

The treaties on patents of invention and trade-marks of commerce and manufacture previously concluded by and between the countries subscribing to the present treaty shall be substituted by the present treaty from the time of its being duly perfected, as far as the relations between the signatory countries are concerned.

ARTICLE 16.

Ratification of this treaty.

The communications which the Governments ratifying the present treaty shall address to the Government of Mexico for the purpose of making them known to the remaining contracting countries shall be considered equal to the customary exchange of ratifications. The Government of Mexico shall likewise communicate to them its ratification of this treaty if it should resolve to ratify the same.

ARTICLE 17.

The exchange of copies in the form of the foregoing article having been made by two or more countries, this treaty shall take effect thenceforward for an indefinite time.

ARTICLE 18.

Abrogation of the treaty.

In case any one of the signatory powers should desire to withdraw from this treaty, it shall make its abrogation known in the manner prescribed in Article 16, and the effect of this treaty, as far as the respective nation is con-

cerned, shall cease one year from the date of the receipt of the respective communication.

ARTICLE 19.

Countries which may adhere.

The countries of America that may not have signed this treaty originally may adhere to the same in the manner prescribed by Article 16.

In testimony whereof the Plenipotentiaries and Delegates sign the present treaty and affix thereto the seal of the Second International American Conference.

Signed at Mexico, Jan. 27, 1902.

Made in the City of Mexico this twenty-seventh day of January, nineteen hundred and two, in three copies, written in Spanish, English, and French, respectively, which shall be deposited at the Department of Foreign Relations of the Government of the Mexican United States, so that certified copies thereof may be made, in order to send them through the diplomatic channel to the signatory States.

CONVENTION CONCERNING LITERARY AND ARTISTIC COPYRIGHT, SIGNED AT BUENOS AIRES, AUGUST 11, 1910.

ARTICLE 1.

Obligation.

The signatory States acknowledge and protect the rights of literary and artistic property in conformity with the stipulations of the present convention.

ARTICLE 2.

Definition of "literary and artistic work."

In the expression "literary and artistic works" are included books, writings, pamphlets of all kinds, whatever may be the subject of which they treat and whatever the number of their pages; dramatic or dramatico-musical works; choreographic and musical compositions, with or without words; drawings, paintings, sculpture, engravings; photographic works; astronomical or geographical globes; plans, sketches or plaster works relating to geography, geology or topography, architecture or any other science; and, finally, all productions that can be published by any means of impression or reproduction.

ARTICLE 3.

Effect of copyright.

The acknowledgment of a copyright obtained in one state, in conformity with its laws, shall produce its effects of full right in all the other states without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property right.

ARTICLE 4.

Privileges.

The copyright of a literary or artistic work includes for its author or assigns the exclusive power of disposing of the same, of publishing, assigning, translating, or authorizing its translation and reproducing it in any form whether wholly or in part.

ARTICLE 5.

In whose right recognized.

The author of a protected work, except in case of proof to the contrary, shall be considered the person whose name or well-known nom de plume is indicated therein; consequently suit brought by such author or his representative against counterfeiters or violators, shall be admitted by the courts of the signatory States.

ARTICLE 6.

Reciprocal rights of authors.

The authors or their assigns, citizens or domiciled foreigners, shall enjoy in the signatory countries the rights that the respective laws accord, without those rights being allowed to exceed the term of protection granted in the country of origin.

For works comprising several volumes that are not published simultaneously, as well as for bulletins, or parts, or periodical publications, the term of the copyright will commence to run, with respect to each volume, bulletin, part, or periodical publication, from the respective date of its publication.

ARTICLE 7.

Country of origin.

The country of origin of a work will be deemed that of its first publication in America, and if it shall have appeared simultaneously in several of the signatory countries, that which fixes the shortest period of protection.

ARTICLE 8.

Loss of right to copyright.

A work which was not originally copyrighted shall not be entitled to copyright in subsequent editions.

ARTICLE 9.

Authorized translations shall be protected in the same manner as original works.

Translations.

Translators of works concerning which no right of guaranteed property exists, or the guaranteed copyright of which may have been extinguished, may obtain for their translations the rights of property set forth in Article 3d but they shall not prevent the publication of other translations of the same work.

ARTICLE 10.

Addresses and discourses.

Addresses or discourses delivered or read before deliberative assemblies, courts of justice, or at public meeting may be printed in the daily press without the necessity of any authorization, with due regard, however, to the provisions of the domestic legislation of each nation.

ARTICLE 11.

Newspapers.

Literary, scientific, or artistic writings, whatever may be their subjects, published in newspapers or magazines in any one of the countries of the union, shall not be reproduced in the other countries without the consent of the authors. With the exception of the works mentioned, any article in a newspaper may be reprinted by others if it has not been expressly prohibited, but in every case the source from which it is taken must be cited.

News and miscellaneous items published merely for general information do not enjoy protection under this convention.

ARTICLE 12.

Fragments of literary works.

The reproduction of extracts from literary or artistic publications for the purpose of instruction or chrestomathy does not confer any right of property, and may, therefore, be freely made in all the signatory countries.

ARTICLE 13.

Illicit reproductions.

The indirect appropriation of unauthorized parts of a literary or artistic work having no original character shall be deemed an illicit reproduction, in so far as affects civil liability.

The reproduction in any form of an entire work, or of the greater part thereof, accompanied by notes or commentaries, under the pretext of literary criticism or amplification, or supplement to the original work, shall also be considered illicit.

ARTICLE 14.

Fraudulent works liable to sequestration.

Every publication infringing a copyright may be confiscated in the signatory countries in which the original work had the right to be legally protected, without prejudice to the indemnities or penalties which the counterfeiters may have incurred according to the laws of the country in which the fraud may have been committed.

ARTICLE 15.

Rights of individual governments.

Each of the Governments of the signatory countries shall retain the right to permit, inspect, or prohibit the circulation, representation, or exhibition of works or productions, concerning which the proper authority may have to exercise that right.

ARTICLE 16.

Deposit of ratification.

The present convention shall become operative between the signatory States which ratify it three months after they shall have communicated their ratification to the Argentine Government, and it shall remain in force among them until a year after the date, when it may be denounced. This denunciation shall be addressed to the Argentine Government and shall be without force except with respect to the country making it.

Made and signed in the city of Buenos Aires on the 11th day of August in the year 1910, in Spanish, English, Portuguese, and French, and deposited in the ministry of foreign affairs of the Argentine Republic, in order that certified copies be made for transmission to each one of the signatory nations through the appropriate diplomatic channels.

(Reprinted from Senate Documents, 62nd Congress, 3rd Sess. Vol. 10).

APPENDIX B

FORMS.

FORM OF BILL OF COMPLAINT.

UNITED STATES DISTRICT COURT.
.....DISTRICT OF.....

....., Plaintiff,

—against—

....., Defendants.

To the Honorable, the Judges of the District Court of the United States, for the ..... District of .....

The plaintiff, by ....., its attorney, complaining of the defendants, respectfully shows to this Court and alleges:

First: That at all the times hereinafter mentioned, the plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of ....., and a resident of the ..... District of ....., and now has its principal place of business at No. ....., in the ....., City of ....., District of ....., and now and for some years past has been engaged in the business of publishing and selling music and musical compositions in sheet music form.

Second: That at all the times hereinafter mentioned, the defendants were and now are copartners doing business under the name of....., and are residents of the ....., District of ....., and have their principal place of business at No. ....., in the ....., City of .....

That said defendants now are and for some years past have been engaged in the business of publishing and selling music and musical compositions in sheet music form.

Third. That at all the times hereinafter mentioned, the ..... was and now is a corporation organized and existing under and by virtue of the laws of the State of ....., and having its principal place of business in the ....., City of ....., and District of ....., and now and for some years past has been engaged in the business of producing and presenting musical comedies and other theatrical representations.

Fourth: On information and belief that heretofore and prior to the ..... day of ....., 19...., the aforesaid .....

made and entered into agreements with one ..... and one ..... wherein and whereby the said ..... employed the said ..... and ..... to compose and write the music and lyrics of a dramatico-musical composition or musical comedy, and the said ..... and ..... accepted such employment.

Fifth: On information and belief that thereafter and prior to the ..... day of ....., 19...., and pursuant to the aforesaid agreements, and the said ....., being a citizen of the United States, composed, wrote and originated the music and lyrics of a dramatico-musical composition or musical comedy, which was given the title "....."

Sixth: On information and belief that thereafter and prior to the ..... day of ....., 19...., and pursuant to the aforesaid agreements, the said ..... and ..... delivered to the said ..... and the said ...., became the proprietor of the music and lyrics of the said dramatico-musical composition or musical comedy, together with all right, title and interest therein and thereto and of the whole thereof. That the said music and lyrics so composed and written by the said ..... and .... were the original conception and invention of the said .... and .....

Seventh: That the said dramatico-musical composition or musical comedy entitled "....." consisted, among other things, of several complete song numbers, or lyrics set to music, each of which song numbers is in itself a complete and separate musical composition.

Eighth: That one of the said song numbers was entitled "....." That the music thereof was composed by said ..... and the lyrics thereof were written by, said ....., as above set forth.

Ninth: That heretofore and on or about the ..... day of ....., 19...., the said ..... for value received, duly sold, assigned, transferred and set over unto the plaintiff the sole and exclusive right, license, privilege and authority to publish, copyright, print, reprint, copy and vend in sheet music form the said musical composition or song entitled "....."

Tenth: That thereafter and on or about the ..... day of ....., 19...., the plaintiff, being then the sole and exclusive proprietor and owner of the said musical composition or song entitled "....." so written and composed as aforesaid by said ..... and ....., and the same having never before been printed or published in this or any foreign country, and the same being a work copyrightable under the Copyright Law of the United States, and the said ..... being then domiciled within the United States, and the said ..... being then a citizen of the United States, did secure copyright for the said musical composition "..... ....." by publishing the same and offering the same for sale to the general public with the following notice of copyright inscribed upon the first page of music of said composition "....." That said notice of copyright was and has been affixed upon each copy of said musical composition published or offered for sale in the United States.

Eleventh: That thereafter and on or about the ..... day of ....., 19...., the plaintiff duly registered its claim to copyright with the Register of Copyrights at Washington, in the District of Columbia, and did, on said ..... day of ....., 19.., deposit in the Copyright Office, Washington, District of Columbia, two complete copies of the best edition of the said musical composition "....." then published, and thereupon the Register of Copyrights issued unto the plaintiff a certificate of copyright registration of the said musical composition.

That annexed hereto, marked Exhibit 1, is a copy of the said musical composition, "....."

That annexed hereto, marked Exhibit 2, is a copy of a certificate of the Register of Copyrights, Washington, District of Columbia, showing that two copies of the said musical composition were duly deposited in the Copyright Office on the ..... day of ....., 19...., and that the registration for copyright was duly made upon the same day.

Twelfth: That by reason of the foregoing, the plaintiff became the sole and exclusive proprietor of the said musical composition, "....." and of the whole thereof, including the title and name as well as the manuscript and copyright thereof, and all rights to publish, print, reprint, copy and vend the same, and the plaintiff has ever since been and now is the sole and exclusive proprietor of the said musical composition and of the whole thereof, and the copyright therein and thereto and the right to publish, print, reprint, copy and vend the same.

Thirteenth: That the said musical composition or song entitled "....." has acquired popularity and plaintiff is of the opinion that it will achieve a valuable reputation, and the same will become very successful and a source of great benefit and advantage to the plaintiff.

Fourteenth: That the defendants, cognizant of the popularity and character of the said musical composition "....." and with full knowledge of the rights of the plaintiff therein and thereto, and with full knowledge of the copyright thereof, did, on or about the ..... day of ....., 19...., and thereafter, unlawfully cause, and still continue, and threaten to continue, to cause to be published and placed upon the market for sale in various music stores in the City of ....., and throughout the different cities of the United States a musical composition entitled "....." That the said musical composition so published by defendants, is taken and copied from the plaintiff's musical composition entitled "....."

That annexed hereto and marked Exhibit 3, is a copy of said composition entitled "....." as published and sold by the defendants.

Fifteenth: That the said publication by the defendants was and is without the consent or authority of the plaintiff or its predecessors in interest. That the said wrongful acts of the defendants in publishing the said composition, "....." as aforesaid, are causing great injury and damage to the business and profits of the plaintiff, and if allowed to continue, will destroy the value of the plaintiff's copyright in and to the musical composition or song "....." and that if the defendants be permitted to continue such wrongful and unlawful acts, the plaintiff will be irreparably injured. That a continuance of the acts upon the part of the defendants will lead others to follow their example and weaken and gradually break down the exclusive right which plaintiff has in and to the said musical composition "....." and the right to publish, print, reprint,

copy and vend the same, and that the continuance of the acts of the defendants will damage the plaintiff to such an extent that no damages recovered by an action at law will afford it adequate relief, and the damages which may be suffered by the plaintiff are not capable of exact estimation or calculation.

Sixteenth: That the plaintiff's said musical composition "....." is of great value, in that it exceeds in value the sum of ..... ($....) Dollars.

Seventeenth: That the plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays:

1. That a writ of subpoena issue out of this Honorable Court directed to the defendants, commanding them and each of them to appear and answer this bill within twenty days after service of said writ.

2. That the defendants and each of them be restrained and enjoined during the pendency of this action and perpetually thereafter from publishing, printing, reprinting, copying, vending or offering for sale, either directly or by agent, the music of the song entitled "....." or any other imitation or colorable imitation of the plaintiff's musical composition entitled "....."

3. That the defendants be compelled to account under oath for the number of copies of the said musical composition "....." published, printed, reprinted or sold by them.

4. That the defendants pay unto the plaintiff such damages as may have been sustained by the plaintiff in consequence of the defendants' said unlawful acts and doings, besides the costs and a reasonable counsel fee.

5. That the plaintiff have such other and further relief in the premises as may be just and honorable.

.....,
Attorney for Plaintiff,
Office and P. O. Address,
.....
.....
.....

[Verification]

A SECOND FORM OF COMPLAINT.

DISTRICT COURT OF THE UNITED STATES,
..... DISTRICT OF .....

....., Complainants,
—against—
....., Defendant.

To the Honorable, the Judges of the District Court of the United States, for the ..... District of .....:

....., a domestic corporation, organized and existing under the laws of the State of ....., and citizen of the State of ....., ... a citizen of the State of ....., and ....., a citizen of the State of ....., and ....., as Administrator of the Goods, Chattels and Effects, of ....., deceased, a citizen of the State of ....., bring this their Bill of Complaint against ....., a corporation organized and existing under and by virtue of the laws of the State of ....., and a citizen of the State of ....., and the ....., a corporation organized and existing under and by virtue of the laws of the State of ..... Thereupon your complainants complain and show:

That your complainant ....., is a domestic corporation, organized and existing under and by virtue of the laws of the State of ....., and is a citizen of the State of ....., carrying on business in the City and State of ....., and within the ..... District of ....., and has its office for the transaction of its business in the City of ..... That it now is, and for some time past has been, engaged in the business of publishing, acquiring, vending and selling books, magazines, publications and literary productions, in the City of ...., and ..... District of ..... and in various other Cities and States in the United States, and elsewhere.

That your complainants, ..., at all the times hereinafter mentioned were and still are co-partners, doing business under the firm name and style of ....., and each of them was and is a citizen of the State of ....., having their office for the transaction of their business in the City of ....., in the ..... District of ..... That your complainants ....., have for many years been, and still are engaged in the business of purchasing, acquiring, licensing and producing dramatic compositions and plays upon the stage in the City of ....., and ..... District of ....., and in various other cities of the United States and elsewhere.

That your complainant, ..., is, and at all the times hereinafter mentioned, was a citizen of the State of ..... That he is the son of ....., the author of the book, entitled "..... ....." to which reference will hereafter be made, who at the time of his death was a citizen of the State of ..... (where the said .....

resided at the time of his death), and a resident and inhabitant of ....., County of ..... That said ..... died in the year ....., at ....., leaving a Last Will and Testament, which was duly admitted to probate in the ..... Circuit Court of the State of ....., wherein and whereby his wife, ..., was named and appointed Executrix of the said Last Will and Testament, and made sole legatee and devisee thereunder. That Letters Testamentary were duly issued to ....., who duly qualified as such Executrix, and entered upon the duties of her office and performed the same and administered the trust imposed upon her by said Will.

That the said ....., died intestate on the ..... day of ....., in the State of ....., leaving as her only heir and next of kin, your complainant, ... That on or about the ..... day of ....., the said ..... was duly appointed Administrator of the Goods, Chattels and Effects of the said ..... deceased, by the ..... Circuit Court of ....., and is now acting as such administrator. That at the time of her death, the said ..... resided in the County of ....., State of ....., and within the jurisdiction of the ..... District Court of .....

That the defendant, ..., is a foreign corporation, organized and existing under the laws of the State of ....., and a citizen of the State of .....

That heretofore, and prior to the commencement of this action, and the securing of the copyright and the exclusive rights, hereinafter more particularly referred to, ..., the father of your complainant, ..., hereinbefore referred to, invented, originated, composed and wrote, a certain book, entitled "....." a Tale of ..... That the said book and the title thereof was original with the said ..... The word "....." meaning "....." and the two words in conjunction meaning "....."

That on or about the ..... day of ....., the said ....., being then the author and the sole and exclusive proprietor and owner of the said book, which was then in manuscript form and unpublished, and had never been adapted to be performed upon the stage, or in any manner or in any manner or form dedicated to the public, did sell, assign, transfer and set over *unto the firm of* ..... *the said book* "....." and all his right in and to the same, and the title thereof, and of all other nature and kind, including the right to copyright the same, and the sole liberty of printing, reprinting, publishing, completing, copying, finishing and vending the same, and of dramatizing, adapting or arranging the said book, or any part thereof, for public performance or representation, or causing it to be dramatized, adapted or arranged, performed or represented by others; that at the same time the said .... delivered to the said firm of ..... the manuscript of said book. That at said time the firm of ..... was composed of ....., all citizens of the State of ....., and of the United States. That the said firm of ..... being then citizens of the United States, and the owners and sole and exclusive proprietors of the said book, did, *on or about* the ..... *day of* ....., 19...., publish said book with the notice of copyright affixed thereto hereinafter specified and

did deposit in the mail within the United States addressed to the Librarian of Congress, at Washington, D. C., on or about the ..... day of ....., 19...., two copies of the best edition of such copyrighted book, then published which were printed from type set within the limits of the United States, and from plates made therefrom, and bound therein, together with a written claim of copyright therein, and the said ..... in all respects complied with the provisions of the existing acts of Congress relating to copyrights. That the said ..... gave notice of the said copyright by inserting in the several copies of every edition published, sold or publicly distributed, on the title page, or the page following, the following words or substance: "Copyright ...., 19...., by ....." That annexed hereto and marked Exhibit "A" is a certificate of the Librarian of Congress of the said filing and deposit of the title of the said book in his office; and annexed hereto and marked Exhibit "B" is a certificate of the Librarian of Congress of the deposit in his office of two printed copies of said book, that a copy of said copyrighted book is deposited with the Clerk of this Court upon the filing of this bill, and your complainants beg leave to produce the same upon the hearing or trial of this action or any motion made in the course of this suit.

For a valuable consideration the said book and the copyright thereof, and all other right, title and interest of every nature, and kind in and to the said book and the title thereof, and in and to the copyright of the said book, and of all and every right which the said firm of ..... had or possesed in, to, or over the said book, or title thereof, and the copyright of the said book and title, and the right to dramatize the same for production on the stage, were sold, assigned, transferred and set over to your complainant ....., prior to .....

That the said book was capable of being dramatized and of dramatic representation, and that the characters depicted in the said book by the words, expression and action as told in the said book unveiled a story and made its representation on the stage practical and effective.

And your complainants further show that in ....., your complainants caused the said book to be dramatized and arranged for stage production, with the consent and approval of the ..... and said ....., by one ....., who was employed for that purpose, and the manuscript of the dramatization of the said ....., was delivered, assigned and transferred to the said ...., and your complainants ....., being the proprietors and owners of the said dramatic composition, did on or about the ..... day of ....., 19...., publish said book with the notice of copyright affixed thereto hereinafter specified and did deposit in the mail within the United States addressed to the Librarian of Congress at Washington, D. C., on or about the ..... day of ....., 19...., two printed copies of the best edition of such dramatic composition then published, which said two copies were printed from type set within the limits of the United States, and from plates made therefrom and bound therein, together with a written claim of copyright therein; and the said ..... in all respects complied with the provisions of the existing Acts of Congress relating to copyright. That the said ..... gave notice of said copyright by inserting in the several copies of every edition of the said dramatic composition published, on the title page or the page immediately following, the following in words or substance: "Copyright

....., 19...., by ....." That annexed hereto and marked Exhibit "C" is a certificate of the Librarian of Congress of the filing and deposit in his office of the said title of the said dramatic composition; and annexed hereto and marked Exhibit "D" is a certificate of the Librarian of Congress of the deposit of the said two copies of said dramatic composition.

And your complainants further show that in the year ....., by agreement entered into between your complainants ..... and ....., the said ..... (two of your complainants) acquired and were granted on the payment of certain royalties, the sole and exclusive right and privilege of producing upon the stage, and of authorizing others to produce upon the stage, and to perform and cause to be performed the said dramatic composition under the said title, "....." That it was made one of the conditions of the said right, license and privilege, that the said ..... should only produce the said play under the said title "....." by first class companies, and that the said play should be equipped and produced in a manner adequate to every requirement for the proper preservation of the atmosphere and scenic character of the story and with a carefully selected cast of players to interpret the characters of such dramatic version. That accordingly, your complainants, ..., did organize a first class company of players to produce the said play, and gave one of the most stupendous and expensive stage productions ever attempted. That they expended, in producing said play, upwards of One hundred thousand ($100,000) Dollars, and the said play immediately became a great artistic and financial success. That it has been played continuously in the City of ....., ... and the ..... in the City of ..... having been performed for about ..... months at the ..... and it has been played during every theatrical season since ....., and is now being performed by your complainants ..... That there has been expended, in advertising the said play, by ....., upwards of ..... ($.....) Dollars, and there has been paid to your complainants, ..., and the said ..... and his Executrix and your complainant, ..., upwards of the sum of ..... ($.....) Dollars in royalties. That the said play is being produced nightly by your complainants ....., with great success and profit, and your complainants, ... and ..... are receiving weekly large royalties from the production of the said play given by said .....

Your complainants further show that the defendants, ... and ....., both carry on business and have offices for the transaction of business in the ....., within the ..... District of ....., and produce and cause to be produced upon the stage, under the title of "....." a substantial reproduction of the scenes, incidents and characters of the book "....." and of the dramatization of the said book, advertising and announcement that the said representation and stage production is adapted from .....'s famous book "....." and of the play "....." with the scenes, characters and incidents.

That the said defendant, ..., has caused pictures to be taken of the various scenes and characters and incidents of the said book of .... entitled "....." which in connection with certain machines used by the defendant ....., permit a repro-

sentation on the stage of the said characters, scenes and incidents of the said book and dramatization of "....." which pictures are what is commonly called "moving pictures" representing the different characters in action, so as to tell the story of "....." as produced by your orators upon the stage. The representation is given upon the stage and the moving pictures show all the characters and scenes in action, as produced by your complainants and tell the story as told in the book of ....., and in the dramatization thereof herein referred to. That the said defendants, for a small sum, give performance and stage representations of the scenes, characters and incidents of the said book and dramatic composition, "....." advertising and announcing the fact, and have caused and licensed others to give productions of the said scenes, characters and incidents under the said title, deriving a large revenue therefrom. That most of these productions given by the said defendants, and their licensees are productions of a cheap order, in theatres and places of exhibition, charging not more than five or ten cents admission, and the said defendants and their licensees have given and threaten to continue to give, productions within the .... District of ....., and in various other cities and places, and widely advertise their intention to continue to give representations of the said play, and widely advertise their intention to license others to give similar productions. That the productions, as given by the defendants and their licensees, are not only given under the said title of "....." but are published, advertised and announced and declared to be the play "....." dramatized and adapted from the book of the said ....., and the production and representation as given tell the same story told in the book of the said ..... and the said dramatization of the said book hereinbefore referred to. That the defendants, in canvassing and offering to produce and license others to produce the said stage production of "....," represent it to be the stage production of the complainants, by means of advertisements, post cards and public announcements, adopting such and other divers means to mislead the public in believing that the productions given are of the said copyrighted play "....." That the exclusive rights to the production are in the complainants by reason of the facts hereinabove set forth.

That annexed hereto, marked Exhibit "E," is the card of the defendant, ..., announcing and advertising said production of "....." with one of the scenes taken from the said book of ..... (also known as .....); and annexed hereto, marked Exhibit "F," is a card of the ....., advertising the production of the said play.

Exhibit "E" was received at the office of the defendant, ..., as your complainants allege on information and belief, and the scenes described on the card Exhibit "F" are of the various scenes taken from and found in the said novel of ....., and the said production thereof, and the said scenes, as produced, tell the story as contained in the book and play.

Your complainants further show that the said representations by defendants are given without the license, consent, authority or permission of your claimants or any of them.

Your complainants further show that they have been deriving large profits from the publication, representation and performance of the said dramatization of the said book, and that your complainants ..... and ....., have been realizing and earning large royalties by reason of representation and performance of the said dramatization given by your complainants, ...,

and your complainants expect to realize in the future large earnings and profits by reason of the said performances and representations.

And your complainants further show that if the said defendants are permitted and allowed to give said dramatic representations of said play "....." as aforesaid, without the license, consent, authority or permission of your complainants, or to license, or cause others to produce the same, and to advertise their intention to continue to produce and license others to produce the said play, it will seriously injure your complainants in their profits and royalties, and will lessen and diminish the value of the said book "....." and of the said dramatization thereof; and that the said injury cannot be accurately ascertained and computed and that compensation therefore cannot be made by damages. That the dangerous example and course of the defendants, if permitted, notwithstanding the proper rights of your complainants will entail upon your complainants, not only a great pecuniary loss and irreparable damage, but tend to destroy the value of their property in and to the said book and play. That the value to your complainants in the said dramatization and book consists in the fact that they have the exclusive right to produce and license others to produce the play, and that they can be protected in the courts in such exclusive right, and that the Courts will enforce its orders, granted and entered, for the purpose of securing said production, and that if the defendants, or any other person, should represent the said play, or a literal simulation or colorable adaptation thereof, or otherwise use the title or a simulation thereof, your complainants would be greatly and irreparably injured in their business and rights, and suffer great loss and damage pecuniary.

In consideration thereof, and in as much as your complainants can only have relief in the premises in this Honorable Court, where matters of this nature are properly cognizable and relievable, complainants pray that defendants be required to make true, full and perfect answers to all and singular the matters hereinbefore stated and charged (but not under oath), as fully and particularly as if the same were here repeated, and that the defendants be decreed to render a full and true account to your complainants of all moneys and profits derived from, or by reason of any performance by them of "....," either by them or any of their licensees, and that the said defendants, their agents, servants, licensees and employees, and any other person acting under their direction, control or permission, may be enjoined and restrained until a further hearing, pending the action, and thereafter perpetually, from playing, producing, exhibiting upon the stage, printing, publishing, translating, copying, adapting, advertising, or causing or licensing to be produced, represented, played, exhibited, printed, published, translated, copied, adapted or advertised, or other exercising, or assuming to exercise or cause to be exercised or assumed, any control, ownership or dominion of, in, to or over the book entitled "....." the said dramatic composition entitled "....." or any of its scenes, incidents, plots, or story, or any simulation or colorable imitation, or adaptation from the said book or dramatic composition under the title of "....." or otherwise.

And in order that your complainants may have such other relief as may be just, may it please your honors to grant unto your complainants a writ of subpoena of the United States of America, issuing out and under the seal of this Honorable Court, directed to the said defendants ..... and ....., demanding them and each of them on a day therein to be named, and under a certain penalty, to be and appear in this Honorable Court, then and there to answer all and singular the premises and to stand to and perform and abide such further order,

direction or decree as may be made against them, and may it please your honors to grant unto your complainants a writ of injunction out of and under the seal of this Honorable Court, issued by one of your Honors, according to the form of the Statute in such case made and provided, and directing and restraining the said defendants, their agents, servants, licensees and employees, and all other persons acting under their direction, control or license, as hereinbefore prayed for, and for such other and further relief as to the Court may seem proper.

.....,
Solicitors for Complainants,
Office and P. O. Address,
.....
.....
.....

Of Counsel.

ANOTHER FORM OF COMPLAINT.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

...., Complainant,
—against—
...., Defendant.

To the Honorable, the Judges of the District Court of the United States for the ..... District of ....., sitting as a Court of Equity:

....., of the City of ..... in the State of ....., and a citizen of said State of ....., brings this his bill of complaint against ....., of said City of ....., and an inhabitant of the ..... District of ....., and hereinafter designated the defendant and alleges as follows:

And thereupon your complainant shows unto your Honors:

I. That your complainant is and at all the times hereinafter mentioned, was a citizen of the United States, and is by profession an author and dramatist.

II. That the defendant is a corporation existing and duly organized under the laws of the State of ..... having its principal office and place of business in the ....., in the City of ....., in said ..... District of .....

III. That during the year ...., your complainant was a citizen of the United States, and the author of a certain original literary work in the form of a story entitled "....;" and that during the times hereinafter mentioned, the ..... was, and now is, a corporation duly organized under the laws of the State of ....., and during the year ....., was engaged in the publishing business in the City of ....., and was the proprietor and publisher of a certain periodical published each month at said

City of ....., and entitled and known as "....," which said periodical was composed of stories, novels, poems and other literary compositions, and the periodical numbers of the same were, as your complainant is informed and believes, duly entered for and protected by copyright under the laws of the United States.

IV. That on or about the ..... day of ....., 19...., the said ..... did, for a valuable consideration to him, then paid by the said ..... sell and assign to said ...., the said story entitled "....."

V. That complainant's said literary work was thereafter published in print on or about the ..... day of ....., 19...., under the title of "....." in and as part of the number of the said "..... ....." for ....., 19...., by said .... at the said City of ..... on the ..... day of ....., 19.... That when so published said work had affixed to its title page notice of copyright in words and figures as follows, to wit: "..... ....." and that said notice has been affixed to the title page of each and every copy of said work sold, published, or, and, publicly distributed by or under the authority of the complainant.

VI. That said number of "....." for ....., 19...., was a volume of about ..... printed pages, and consisted of the said literary work entitled "....." therein published as aforesaid, and other literary compositions.

VII. And your complainant further says, upon information and belief, that said ..... did, on the ..... day of ....., 19...., and immediately after the first publication thereof, as aforesaid, deposited or caused to be deposited in the mail, addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition of said work then published together with a written claim of copyright therein, and an affidavit showing that said work was printed from plates made in the United States from type set therein and bound therein, and that the copyright in said work was thereupon duly registered by the Librarian of Congress.

VIII. That by reason of the premises the said ..... acquired the sole liberty and exclusive right of printing, reprinting, publishing, vending, dramatizing and translating, in whole and in part, the said number of "..... ....." for ....., 19...., consisting in part of complainant's said literary work entitled "....." for the term of twenty-eight years from the ..... day of ....., 19....

IX. And your complainant further says that on or about the ..... day of ....., 19...., by a certain agreement in writing, bearing date on the day last aforesaid, made and entered into by and between said .... and your complainant, said ..... for a good and sufficient consideration, assigned to your complainant its copyright in said number of "....." for ....., 19...., so far as said copyright applies to, covers and protects your complainant's said literary work, forming part of said copyrighted book or periodical and entitled "..... ....." together with all its property, title, interest and rights in, to and respecting said literary work under said copyright of "....."

for ....., 19...., and, also, its claims and demands against all persons who theretofore had infringed any of the rights and privileges of .... in and to said literary work entitled "....." under said copyright of said "....." for ....., 19...., a copy of which written assignment is hereto annexed and marked Exhibit No. 3 and the original is ready to be produced in court, if required.

X. And your complainant further says that the said assignment was duly recorded in the office of the Librarian of Congress at Washington, District of Columbia, on the ..... day of ....., 19...., as will more fully and at large appear from a certificate of the record thereof under the signature and seal of the Librarian of Congress, appended to said assignment, a copy of which certificate is also hereto annexed and marked Exhibit 4, and the original is ready to be produced in court, if required.

XI. And your complainant further says, on information and belief, that after the ..... day of ....., 19...., and before the commencement of this action, and without the consent and against the will of your complainant and of said ....., and in infringement of the said copyright and in violation of the rights of your complainant in his said literary work entitled "....." the said defendant, ..., obtained and has caused and is now causing to be publicly performed within the United States, a dramatization of your complainant's said literary work, which was made without the consent and against the will of your complainant and of said ....., and is entitled "....." and that said unauthorized dramatization herein referred to contains the entire plot, all of the dramatic situations arranged in the same order and sequence, all of the characters and nearly all of the incidents and ideas invented, devised, composed and written by your complainant in his said literary work or story entitled "..... ....." copied and recomposed and arranged for representation on the stage.

XII. And your complainant further shows, upon information and belief, that the said defendant, without the consent and against the will of said .... and of your complainant, has, since the ..... day of ....., 19...., caused to be publicly performed and represented in the City of ....., and at other places within the United States, and is now causing to be publicly performed and represented within the United States, the said unlawful dramatization of your complainant's said literary work or story, under the title "....." to the great profit of the defendant and to the great injury and damage of your complainant.

XIII. And your complainant further says that prior to the commencement of this suit your complainant has notified the defendant of such infringement and requested the defendant to discontinue the same but the defendant has refused to do so and, as your orator believes, will continue the same in violation of the rights of your complainant and to his great damage, unless restrained by the order and injunction of this Honorable Court.

XIV. In consideration whereof and because your complainant cannot have adequate relief except in a court of equity and in this court, wherefore complainant prays and demands that the said ..... may answer all and singular the matters and things hereinbefore set forth and complained of, and that the said ....., its servants, agents, attorneys, employees, work-

men and confederates, be forthwith restrained by injunction as well perpetually as during the pendency of this suit from publicly performing or representing or causing to be publicly performed or represented said play or dramatic composition entitled "....." or any play or dramatic composition which is a dramatization of complainant's said work, or literary composition entitled "....." or of any material part thereof; and that said ..... may be required to account to your complainant for all said public performances and representations of said play entitled "....." so caused by the defendant, as aforesaid, and to pay over to your orator all profits made by its said wrongful acts; and that your orator may have such further relief in the premises as may be equitable and as the nature of the case may require.

....,
Complainant.

.....
Complainant's Solicitor and of Counsel.

COMPLAINT FOR INFRINGEMENT OF COPYRIGHT OBTAINED UNDER SECTION 11 OF THE ACT.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

...., Complainant, —against— ...., Defendants.	In Equity, No.....

To the Honorable, the Judges of the United States District Court for the .....
District of .....:

....., a corporation of the State of ....., with its principal office at No. ....., City of ....., State of ....., complainant, brings this, its bill of complaint against ...., citizens of the United States and residents and inhabitants of the ..... District of ....., in the State of ....., in which District and elsewhere the acts of infringement and wrong complained of herein have occurred.

FIRST: Heretofore and prior to the ..... day of ....., 19....., ..., a citizen and subject of the Kingdom of ....., was the original and sole author and proprietor of a certain original unpublished motion picture film or photograph, entitled "....." in three (3) parts, depicting a motion picture drama of great artistic and literary merit, and of the copyright thereon and therein, and of each and all of the rights and privileges thereon and therein, in and for the United States of America and the territories and territorial possessions thereof in the said Kingdom of ....., and elsewhere.

SECOND: On information and belief that the said Kingdom of ....., at all the times hereinbefore and hereinafter mentioned granted and grants by a treaty, Convention, agreement and law, the benefit of copyright to citizens of the United States on substantially the same basis as its own subjects and is a party to an international agreement which provides for reciprocity in the granting of copyright to which the United States, at its pleasure, pursuant to its provisions may become a party as has been duly proclaimed by the President of the United States, by a proclamation in writing, as by said proclamation here ready in Court to be produced will fully and at large appear.

THIRD: That the said ....., having duly and fully complied in all respects with the Law in such cases made and provided, and said photographs or moving picture photoplay not having been reproduced in copies for sale, said ....., did, on or about the ..... day of ....., 19...., while author and proprietor of the said photographs or moving picture photoplay aforesaid, file or cause to be filed with the Register of Copyrights at the Library of Congress, Washington, D. C., the title and description of said photographs or moving picture photoplay, together with one photographic print taken from each act or scene of the said photoplay entitled "....." Parts I, II and III thereof, which said prints were then and there entered as Class ....., and numbered therein .....; and that there was issued to ..... under the seal of the Copyright Office, and signed by the Register of Copyrights, a Certificate of Registration thereof, as ....., and that thereby and therein, as aforesaid there was secured unto ....., its successors and assigns as provided for by law for the term of twenty-eight (23) years from the ..... day of ....., 19...., the exclusive rights and privileges in and to the copyright of the said photographs or motion picture drama throughout the United States and the territories thereof, as by said Certificate of Registration here ready in Court to be produced will fully and at large appear.

FOURTH: After said registration of the copyright and before the filing of this complaint and the wrongs and infringements herein charged against the defendant, ..., assigned to the complainant all right, title and interest in and to the said pictures and in and to the copyright thereon, for the United States and Territories thereof.

FIFTH: The said defendants ....., well knowing the premises and the rights and privileges of complainant and contriving to injure and deprive him of the gains and profits which otherwise would have accrued to it from its ownership of said copyright and the exclusive rights and privileges thereunder, did, prior to the commencement of this action and after the ..... day of ....., 19...., and the aforesaid assignment to complainant, within the ..... District of ....., and elsewhere in the United States, wrongfully and unlawfully conspire and confederate together against complainant to and did wrongfully and unlawfully and without the license or permission of complainant or of its predecessor in title to said copyright, make or cause to be made copies of the said photographs covered thereby and possess themselves of copies of the said photographs and exhibit the same to the public for profit as moving picture films or photoplays in exact reproduction of said copyrighted photographs and did lease or

otherwise transfer to others possession of said copyrighted photographs or the piratical copies thereof for the purpose and with the intent of having them reproduced by others as moving picture films, in violation of the said copyright thereon and that the said defendants, ..., do now intend and threaten to continue such unlawful acts and practices, all in infringement of the exclusive rights and privileges of complainant and to its manifold wrong and injury.

SIXTH: But for the wrongful acts and conduct herein complained of, complainant would now be in exclusive enjoyment of its aforesaid rights to reproduce and exhibit said copyrighted photographs and would have enjoyed large gains and profits thereby, and by reason of such wrongful acts and conduct by and of the defendants complainant is now prevented and hindered from enjoying such gains and profits and is threatened with great and irreparable damage unless the said infringing and wrongful acts and conduct shall be restrained, enjoined and prevented by an order of this Honorable Court to this effect, not only permanently but temporarily pending this suit.

SEVENTH: That the complainant's said motion picture photoplay is of great value in that it and the copyright therein did exceed in value the sum of Two Thousand ($2000) Dollars.

FORASMUCH as your complainant has no plain, adequate and complete relief except in this Court of Equity, complainant therefore humbly prays:

First: That there be issued out of and under the seal of this Honorable Court a subpoena and respondendum of the United States of America, directed to the said defendants, ... commanding them on a day certain to appear and make answer to this bill of complaint and to abide and perform such other orders and decrees herein as may be made.

Second: That the said defendants, ..., be required, under order of this Court to deliver upon oath, to be empounded during the pendency of this action upon such terms and conditions as this Court may prescribe, all photographs or moving picture films now in their possession or in any manner under their control embodying the photographs covered by said copyrights hereinbefore set forth, and that the said defendants may likewise be required by such order to deliver up under oath, to be empounded or held for destruction as this Court may direct, not only the photographs or films referred to but as well all plates, negatives, posters, advertisements and other instruments or means for making or exhibiting such infringing copies.

Third: That the said defendants, ..., and their attorneys, clerks, servants, agents and employees, be enjoined and restrained provisionally or temporarily pending this action and permanently or perpetually by decrees of this Court from directly or indirectly possessing infringing copies of said copyrighted photographs or making or causing to be made copies of the same, and from exhibiting, selling or offering for sale, leasing or offering for lease and otherwise disposing of or transferring possession of, infringing copies of said copyrighted photographs and in every other manner or way violating or infringing the rights and privileges of your complainant herein.

Fourth: That the defendants, ..., shall full, true, direct and perfect answer make, but not under oath, answer under oath being hereby specifically waived, according to the best of their knowledge, remembrance, information and belief, to the several matters hereinbefore averred and charged, as

fully and particularly as if the same were here repeated paragraph for paragraph and the defendants severally specifically interrogated thereto.

Fifth: That the said defendants, ..., be compelled by a decree of this Honorable Court to account to complainant for all of such infringing photographs or moving picture films possessed by them or at any time in their possession and to account for and pay over unto complainant all of such gains and profits as have accrued to or been derived by or received by said defendants and all such gains and profits as complainant would have received but for said wrongful acts and conduct of the said defendant and all damages complainant has sustained thereby, or in lieu of actual damages and profits such damages as to this Court shall appear to be just and proper within the provisions of the Act of Congress in such cases made and provided; and

Sixth: That the defendants, ..., pay over to your complainant all the reasonable costs, charges and disbursements of this suit, and that your complainant may have such other and further relief as to this Court may seem meet herein and conformable to the course and principles of equity.

.....,
Complainant.

.....,
Solicitor and Counsel for Complainant.
Office and P. O. Address,
.....
.....
.....

ORDER TO SHOW CAUSE WHY TEMPORARY INJUNCTION SHOULD NOT ISSUE.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

....., Plaintiff, —against— ....., Defendants.	In Equity No.....

Upon the subpoena, the complaint and exhibits thereto attached, and upon the annexed affidavits,

LET the defendants or their attorneys show cause before me or one of the Judges of this Court at a Stated Term thereof, to be held in the Court House in the ....., in the ....., City of ....., on the ..... day of ....., 19...., at ..... o'clock in the .....noon or as soon thereafter as counsel can be heard, why an order should not be made enjoining the defendants, their and each of their agents, servants and employees, during the pendency of this action, from publishing, printing, reprinting, copying, vending, offering for sale or

otherwise distributing the musical composition entitled "....," or any other imitation or colorable imitation of the plaintiff's musical composition entitled "....," and for such other and further relief as may be just and proper.

Sufficient reason appearing therefor, LET service of a copy of this order and the papers upon which the same is granted on the defendants, on or before the ..... day of ....., 19...., be sufficient service of this order and notice of this application.

Dated, ..., 19....,

.....
U. S. D. J.

ORDER DIRECTING ISSUANCE WRIT OF SEIZURE.

At a Term of the United States District Court for the ..... District of ....., held at the Court House in the ....., on the ..... day of .....

Present—The Honorable ....., United States District Judge Holding the Court.

....., Complainant, vs. ....., Defendants.	In Equity, No.....

On reading and filing the bill of complaint herein and the affidavit of ....., verified the ..... day of ....., 19...., and on filing by the complainant of a bond for the prompt prosecution of the above entitled action, for the return of the articles seized, to the defendants, if they or any of them are adjudged not to infringe, or if the action abates or is discontinued before they are returned to the defendants, and for the payment to the defendant of any damages which the Court may award to them against the foregoing complainant, said bond having been approved by the Court, and on motion of ....., Esq., of counsel for complainant, it is hereby

ORDERED that the Clerk issue a writ directed to the Marshal of the United States District Court for the ..... District of ....., directing the said Marshal forthwith to seize the infringing photographs or films entitled "....," renamed "....," or any part thereof now at the places of business of the said defendants, ..., or either of them, at Nos. ...., or elsewhere as they may be found in said District, together with all posters or advertisements used in connection with the exhibition of said infringing photographs or films, and to hold the same subject to the further order of this Court.

.....
United States District Judge.

AFFIDAVIT FOR WRIT OF SEIZURE.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

....., Complainant, vs. ....., Defendants.	In Equity, No.....

UNITED STATES OF AMERICA,
..... DISTRICT OF .....
STATE OF ....., COUNTY OF .....

....., being duly sworn, deposes and says: I reside at ....., and am employed by the defendant herein in the capacity of ..... On information and belief I state that there is one infringing copy of the photograph or motion picture drama or film, entitled "....." at the place of business of ....., at ..... The reasonable value of this copy does not exceed ..... ($.....) dollars. This moving picture has been re-named "....," and was shown or exhibited as such at said .....'s place of business on .....

I have been engaged in the business of dealing in motion picture films for ..... years and am familiar with the reasonable value of such films. The source of my information and the ground of my belief as above stated are ....

(jurat).

UNDERTAKING FOR WRIT OF SEIZURE.

KNOW ALL MEN BY THESE PRESENTS, that we, ...
.....,
a corporation organized under the laws of ....., with its office and usual place of business at ....., as Surety, and ....., of No. ....., County and State of ...., are held and firmly bound unto ....., in the sum of ..... ($.....) Dollars, to be held to the said ..... for the payment of which well and truly to be made we bind ourselves, our successors and assigns, firmly by these presents.

Seal with our seals and dated this
..... day of ....., 19....

WHEREAS, ..., complainant, has brought suit against ....., defendants in the United States District Court for the ..... District of .....,

which suit is based upon the alleged infringement of the copyrighted films or photographs entitled "....."

NOW, THEREFORE, the condition of this obligation is such that if the above bounden ..... shall promptly prosecute this suit and shall return to the defendants all copies, films, photographs and other means of making the alleged infringing copies, if they or any of them shall be adjudged not to be infringements, or if the aforesaid action abates or is discontinued before they are returned to the defendants, ..., and shall pay any damages the Court may award against the complainant, not exceeding the sum of ..... ($.....) Dollars, then this obligation is to be void, otherwise to be and remain in full force and virtue.

....., Principal.

....., Surety.

(Add Acknowledgments.)

WRIT OF SEIZURE.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

....., Complainant, vs. ....., Defendants.	In Equity, No.....

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE MARSHAL OF THE ..... DISTRICT OF .....
Greeting:

WHEREAS, pursuant to the rules of practice and procedure under Section 25 of an act to amend and consolidate the acts respecting copyright, approved March 4, 1909, to take effect July 1, 1909, Chapter 320, 35 Stat., 1075, and promulgated by the Supreme Court of the United States June 1, 1909, the ....., the complainant herein, through ....., solicitor and counsel for complainant, filed herein with the Clerk of the United States District Court, for the ..... District of ....., a sufficient bond and undertaking approved by the Court;

NOW, THEREFORE, you are hereby COMMANDED forthwith to seize the infringing photographs or films entitled "....." re-named "....." or any part thereof, now in the possession of the defendants, ..., or either of them, at their places of business, No. ....., or elsewhere in said District that they may be found together with all posters, or advertisements used in connection with the exhibition of said infringing photographs or films and to hold the same subject to the further order of this Court;

AND what you have done in the premises do you make return hereof together with this writ, on the ..... day of ....., at 10 o'clock in the forenoon, if the same shall be a day of jurisdiction, or otherwise on the next day of jurisdiction thereafter.

Witness, the Honorable .....,
Judge of said Court in the ..... District
of ....., on the ..... day of
....., and the .....
year of the Independence of the United States.

.....,
Clerk.

NOTICE OF HEARING TO ASCERTAIN DAMAGES ON SEIZURE.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

....., Complainant, —against— ....., Defendants.	In Equity, No.....

PLEASE TO TAKE NOTICE that the above entitled cause having been decided in favor of the defendants herein, the Court will proceed to take proof as to the damages sustained by reason of the issuance of the writ of seizure in the above entitled action, and chargeable against the complainant as principal and the ....., as Surety thereon, by reason of the bonds executed as a condition of the issuance of said writ of seizure; and that the Court will take proofs thereon at a Term thereof to be held in Room ....., in the ....., on ....., at ..... o'clock ..... M.

The foregoing notice is served upon you by direction of Honorable ...., District Judge presiding.

Yours &c.,

.....,
Attorney for defendants,
Office and P. O. Address,
.....
.....
.....

TO

.....,
Complainant.
.....,
Surety.

NOTICE OF MOTION FOR COUNSEL FEE.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

.....,
Complainant,
v.
.....,
Respondent.

PLEASE TO TAKE NOTICE, that upon the decision of Judge .... herein, and all the papers and proceedings in the above entitled cause, the undersigned will move this Court at a Term thereof for the hearing of motions to be held in the United States District Court for the ..... District of ....., on ....., at ..... o'clock ..... M. of the said day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein allowing to the defendant herein pursuant to Section 40 of the United States Copyright Code a reasonable counsel's fee as part of the costs, as the prevailing party, and for such other and further relief as may be just and proper.

Dated .....

Yours etc.,

.....,
Attorney for defendants,
Office and P. O. Address,
.....
.....
.....

TO

.....,
Clerk.

.....,
Attorney for complainant.

INTERLOCUTORY JUDGMENT IN FAVOR OF COMPLAINANT.

At a Stated Term of the District Court of the United States for the ..... District of ..... held in the ..... Building, in the Borough of ....., City of ....., on the ..... day of ....., 19....

PRESENT—HON. .....,
Judge.

....., Complainant, —against— ....., Defendant.	In Equity, No.....

This cause having come on to be heard upon the pleadings and proofs herein had on behalf of both parties, and after hearing ....., of Counsel for complainant, and ....., of Counsel for defendant, and after due proceedings had, it is, upon consideration,

ORDERED, ADJUDGED AND DECREED as follows:

1. That ....., above named, is the author of the certain book or literary composition in the complainant's bill mentioned and entitled "....."

2. That on or about the ..... day of ....., 19...., the said ..... sold and assigned the said book or literary composition to the ..... and that on the ..... day of ....., 19...., the ..... duly obtained copyright for the said book or literary composition in the publication entitled "..... for ....., 19...., Volume ....., Number ....." and the exclusive right to dramatize said book or literary composition; and that thereafter and on or about the ..... day of ....., 19...., by an instrument in writing, the said ..... duly assigned to the said ..... the said copyright, so far as it applies to, covers and protects the said work or literary composition entitled "....." and, also, all the property, title, interest and rights of said ..... in, to and respecting said literary composition under said copyright, together with all claims and demands of said ..... against all persons who had before that day infringed any of the rights and privileges of the said ..... in and to said book or literary composition entitled "....." which assignment was duly recorded in the office of the Librarian of Congress on or about the ..... day of ....., 19.....

3. That the said defendant, ..., has infringed and violated the said copyright and the exclusive rights of said .....,

of the complainant to dramatize the said book or literary composition entitled "....," and to give representations and public performances of such dramatization by giving and causing to be given public performances and representations for profit throughout the United States, of a certain play or dramatic composition entitled "....," which said play or dramatic composition is an unlawful dramatization of the said book or literary composition entitled "...."

4. That the complainant recover of the defendant the gains and profits made by it by making use of said play, entitled "...." by giving public performances thereof, by causing or licensing public performances thereof, to be given or in any other way, form or manner.

5. It is hereby referred to ...., Counsellor at Law, of the City of ...., as Special Master, to ascertain and report the amount of such gains and profits, and that complainant on such accounting have the right to cause an examination of the officers of the .... *ore tenus* or otherwise, and also the production of the books, vouchers and documents of the defendant, and that said defendant attend for such purposes before said Master from time to time as said Master shall direct.

6. That a writ of injunction be issued out of and under the seal of this Court perpetually restraining and enjoining the said defendant ...., its agents, employees, servants, workmen or others acting by or under its authority from publicly performing or representing or causing or licensing to be publicly performed or represented said play or dramatic composition entitled "...., or any other play or dramatic composition which is a dramatization of complainant's said work or literary composition entitled "...," or of any material part thereof, and from in these ways or in any other way, form or manner whatever infringing the said copyright and the exclusive right of the complaint thereunder to dramatize said work.

7. That complainant also recover of the defendant, ..., his costs and disbursements of this suit, to be taxed by the Clerk of this Court.

8. Jurisdiction of this suit is retained for the purpose of making any further orders, necessary to carry into effect this decree and to determine the amount to be awarded to the complainant, and any further order necessary or proper to be made to effect a final adjustment and settlement of this controversy between complainant and defendant.

9. The defendant, however, is not enjoined from publishing and using the title "...." to a play not containing the theme or plot of the copyrighted story, nor is the defendant enjoined from using the auxiliary stage business, characters and incidents now used by it and which are not a part of the copyrighted story in conjunction with another or different theme or plot than that which is the subject of this controversy.

U. S. J.

FINAL DECREE IN FAVOR OF DEFENDANT.

At a Trial Term of the United States District Court, for the ..... District of ....., held in and for the said District, in the....., in the ....., on the ..... day of .....

PRESENT—HON. .....,
District Judge.

....., Complainant, vs. ....., Defendants,	In Equity, No.....

The complainant in the above entitled cause having filed its bill of complaint on the ..... day of ....., and a writ of subpoena having duly issued thereon and been returned personally served, and a writ of seizure having also issued upon the said bill of complaint and writ of subpoena on the said date, commanding the seizure of a certain motion picture film known as "..... .....;" and the said writ of subpoena having been duly returned personally served, and the said writ of seizure having also been duly returned, from which return it appeared that the said motion picture film "....." was seized by the Marshal of this District on or about the said date, and at all times thereafter has been and still is in his possession and control pursuant to the said writ; and the defendants having duly filed their answer to the said bill of complaint, and afterwards and at the ....., Term of this Court the said cause having duly come on to be heard before Honorable ....., District Judge, and the proofs of the parties having been heard and submitted, and an opinion having been duly rendered on the ..... day of..... directing that the said bill of complaint be dismissed with costs; and defendants having thereupon moved upon the affidavit of ....., duly verified ....., for the allowance of a reasonable counsel fee to the prevailing party, and upon due notice to the ..... surety upon complainant's bond, to assess the damages caused by said seizure, and the proofs and arguments of the parties as to said matters having been duly heard and submitted on ....., and .....;

NOW, upon motion of ....., Esq., solicitor for the defendants, it is

ORDERED, ADJUDGED AND DECREED that the said bill of complaint be dismissed upon the merits, and that the said defendants have judgment against the complainant and its said surety, the ....., for the damages assessed against said bond by reason of said seizure in the sum of .... ($.....) dollars with interest thereon from .....; and also against complainants for their costs to be taxed wherein shall be included a counsel fee of ..... ($.....) dollars; and it is further

ORDERED, ADJUDGED AND DECREED, that the writ of seizure of the said motion picture film, "....." be and the same hereby is vacated, and the Marshal is hereby directed to deliver the same to the Solicitor of the defendants herein and that complainant has ten days' stay of all proceedings.

Enter

....,
U. S. D. J.

FINAL DECREE IN FAVOR OF COMPLAINANT.

At a Stated Term of the District Court of the United States of America, for the ..... District of ....., held in the United States Court House at ....., in the ....., on the ..... day of ....., 19....

PRESENT—HON. ....,
District Judge.

....,
Complainants,
—against—
....,
Defendant.

This cause came on to be heard at this Term, upon the Bill of Complaint, the plea for the defendant ....., the replication of the complainants and the agreed statement of facts, and the defendant ..... having consented that if the plea be overruled, it waives its right to answer the bill of complaint, and the cause having been argued by counsel;

Now, therefore, upon consideration of the said Bill and the pleas thereto of the defendant ....., the replication of the complainants and the said agreed statement of facts, it is, by the Court

Ordered, adjudged and decreed as follows, to wit:

That the statement of facts as stipulated by counsel for the complainants and defendant be and they hereby are, made the findings of fact of this Court; and it is further

Ordered, adjudged and decreed, that the plea of the defendant, ..., be and it is hereby in all respects overruled, and it is further

Ordered, adjudged and decreed, that as the said defendant ....., has duly waived its right to answer the said bill of complaint, that the said ...., its agents, servants, licensees, employees, and any other person acting under its direction, control or permission, be and they hereby are perpetually enjoined and restrained from in any manner or by any means producing, playing, exhibiting, printing, publishing, translating, copying, advertising or causing or licensing to be produced, represented, copied, adapted, or advertised, or otherwise exercising or assuming to exercise or assume any control, ownership or dominion of, in, to or over the book entitled "....." "....." or the dramatic composition entitled "....." or any of its characters,

scenes, incidents, plot or story, or any simulated or colorable imitation or adaptation from the said book, or dramatic composition of "....," or otherwise; and it is further

Ordered, adjudged and decreed, that the complainants herein recover of the defendant ....., the costs and disbursements of this action to be taxed by the Clerk of this Court.

.....,
U. S. C. J.

Approved as to form,

.....,
Solicitors for Defendant .....

ASSIGNMENT WITH RESERVATION OF LICENSE BY THE ASSIGNOR.

In consideration of the sum of one dollar in hand paid to ....., a corporation organized under the laws of the State of ....., by ....., of the City of ....., ... hereby assigns to said ..... its copyright in a certain book, entitled "....." for ....., 19...., entered by said Company for copyright on the ..... day of ....., 19...., so far as said copyright applies to, covers and protects a certain literary composition, forming part of said copyrighted book, and entitled "....." and of which said literary composition the said ..... is the author and said ..... also assigns to said ....., all its property, title, interest and rights in to and respecting the said literary composition under said copyright of said book and, also, its claims and demands against all persons who have heretofore infringed any of the rights and privileges of ..... in and to said literary composition, entitled "....." under said copyright of said book.

Said ..... hereby licenses said company to print, publish and vend copies of the said literary composition, entitled "....." during the term of said copyright, but upon the express condition that said company shall, at the time of such publication, give full copyright notice, as required by the laws of Congress.

In witness whereof, ... has hereunto caused its corporate seal to be affixed, and the name to be signed by its proper officer thereunto duly authorized, and the said ..... has hereunto set his hand and seal the ..... day of ....., 19....

.....,
By.....,
.....

.....[SEAL]

NOTICE OF MOTION TO VACATE WRIT OF SEIZURE.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

....., Complainant, —against— ....., Defendant.	In Equity. No. .....

Upon the bill of complaint and affidavit and all the papers and proceedings had herein, and the affidavit of ....., duly verified .....;

LET the complainant show cause before the Judge of this Court holding a term thereof for the hearing of motions in the Court Room of said Court in the ....., in the Borough of ....., City of ....., on the ..... day of ....., 19...., at ..... o'clock of the said day, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein vacating and setting aside the writ of seizure herein granted and setting aside the seizure hereinbefore made by the Marshal of this District, pursuant to said order on the ground that the said seizure is contrary to law, and on the other grounds set forth in the said affidavit, and appearing from the said papers and for such other and further relief as may be just and proper.

Due and sufficient cause appearing therefor,

LET service of this order and the affidavit upon which it is based upon the Solicitor for the complainant on or before the ..... day of ....., 19...., at ..... o'clock, be deemed sufficient, and

LET service of any answering affidavits on the part of the complainant he shall use upon the said motion, be made upon the solocitor for the defendant on or before the ..... day of ....., 19...., at ..... o'clock.

Dated ....., 19....

.....,
U. S. D. J.

NOTICE OF JUSTIFICATION OF SURETIES.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

....., Complainant, —against— ....., Defendant.	In Equity. No. .....

To ....., Esq.,
Solicitor for the defendant.

Sir:

Please take notice that on ....., at ..... A. M. or as soon thereafter as counsel may be heard, I shall attend at Court in the above entitled cause and be prepared to justify the sureties of complainant's bond should such justification be deemed necessary by the Court.

Respectfully,
.....,
Solicitor and of counsel for complainant.

Dated ....., 19....

STIPULATION AS TO ENTRY OF FINAL DECREE.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

....., Complainant, —against— ....., Defendant

It is hereby stipulated that this cause is submitted to Hon. ....., District Judge for final decision upon the bill of complaint, answer, the stipulation of facts, dated ....., and the affidavits submitted on the motion for a temporary injunction, and that a final decree may be entered upon the decision herein.

Dated ....., 19....

.....,
Solicitor for Complainant,
.....,
Solicitor for Defendant.

PETITION AND ORDER ALLOWING APPEAL.

....., Complainant, —against— ....., Defendant

To the Honorable Judges of the United States Circuit Court of Appeals for the ..... Circuit:

....., the complainant above named conceiving himself aggrieved by the decree of this Court made and entered in the above entitled action and filed in the office of the Clerk of this Court on ....., hereby appeals to the United States Circuit Court of Appeals for the ..... Circuit and states that his reasons for said appeal are specified in the assignment of errors filed herewith and therefore prays that this appeal may be allowed and a citation granted directed to the above named defendant ....., commanding it to appear before said Circuit Court of Appeals and to do and receive what may appertain to justice to be done in the premises and that a transcript of the record and of the proceedings and papers upon which said decree was made, after due authentication, may be sent to the United States Circuit Court of Appeals for the ..... Circuit.

Dated ....., 19....

.....,
Solicitor for Complainant,
Appellant.

Office and P. O. Address,
.....
.....
.....

It is ordered that said appeal be allowed as prayed for, this ..... day of ....., 19....

.....,
United States District Judge.

ASSIGNMENT OF ERRORS.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

.....,
Complainant,
—against—
.....,
Defendant.

Now comes the above named complainant, ..., by its solicitor, ..., and says that in the records and proceedings of this honorable court in the above entitled cause, and in the decree filed and entered herein on the ..... day of ....., 19...., dismissing the bill of complaint and awarding damages and counsel fee to the defendants, together with the costs, there is manifest error, and for error the said complainant assigns the following, upon its appeal from the said decree, to wit:

(Specify grounds of error in separate paragraphs.)

WHEREAS, and for divers others errors in the record of this cause appearing, complainant-appellant prays that the decree aforesaid may be reversed, and that a decree be directed to be entered sustaining the bill of complaint with costs to the complainant, and vacating and setting aside the decree of ....., 19....
Dated ....., 19....

.....,
Solicitor for Complainant-appellant.

ANOTHER FORM OF ASSIGNMENT OF ERRORS.

UNITED STATES DISTRICT COURT,
..... DISTRICT OF .....

.....,
Complainant,
—against—
.....,
Defendant.

Now comes the above named defendant by its solicitor ....., and says, that in the records and proceedings of this honorable court in the above entitled cause and in the judgment filed and entered herein on the day of ....., 19...., awarding judgment in favor of the complainant and directing that a final injunction issue herein, and awarded damages to the complainant, together with costs, there is manifest error and for error the said defendant assigns the following, upon its appeal from said judgment, to wit:

(Specify grounds of error in separate paragraphs.)

WHEREAS, and for diverse other errors in the record of this cause appearing, defendant-appellant prays that the judgment aforesaid may be reversed and that a judgment be directed to be entered dismissing the bill of complaint with costs to date, and vacating and setting aside the judgment.

Dated ....., 19....

.....,
Solicitor for Complainant-appellant.

ORDER FOR PRINTING EVIDENCE IN QUESTION AND ANSWER FORM.

At a Stated Term of the United States District Court for the ..... District of ....., held in the Court Rooms thereof, in the City of ....., on the ..... day of ....., 19....

PRESENT—HON. .....,
U. S. District Judge.

....., Complainant, —against— ....., Defendant.	In Equity, No.....

On the annexed consents and on motion of ....., Esq., solicitor for complainant-appellant, it is,

ORDERED, that the provisions of Equity Rule 75 be, and the same hereby are waived and that the transcript of the record on appeal may be printed in the form of question and answer.

.....,
U. S. District Judge.

We hereby consent to the entry of the foregoing order.
Dated ....., 19....

.....,
Solicitor for Complainant,

.....,
Solicitor for Defendant.

STIPULATION AS TO EXHIBITS.

....., Complainant, —against— ....., Defendant.

It is hereby stipulated that three copies of each of the photographs annexed to the bill of complaint herein be submitted to the Court on the argument of this appeal, and that the same need not be included with the printed papers.
Dated ....., 19....

.....,
Solicitor for Complainant,

.....,
Solicitor for Defendant.

So ordered.

.....,
U. S. C. J.

STIPULATION AS TO RECORD AND EXHIBITS.

.....,
Complainant,
—against—
.....,
Defendant.

It is hereby stipulated by the solicitors for the respective parties hereto that the record for the appeal in the above entitled action from the judgment of the District Court of the United States for the ..... District of ...., entered in the office of the Clerk of said Court on the ..... day of ..... shall consist of the following papers:

It is further stipulated that the printing of the bond on said appeal is hereby waived.

It is further stipulated that the printing of Exhibit X and Y is hereby waived and that the said exhibits be submitted to the Honorable Judges of the United States Circuit Court of Appeals upon the argument of this appeal.

Dated ....., 19....

.....,
Solicitor for Complainant,
.....,
Solicitor for Defendant.

STIPULATION OF RECORD.

.....,
Complainant,
—against—
.....,
Defendant.

It is hereby stipulated and agreed that the foregoing is a true and correct transcript of the record and proceedings had herein and may be certified by the Clerk of the Court and filed in the office of the Clerk of the Circuit Court of Appeals.

Dated ....., 19....

.....,
Solicitor for Complainant,
.....,
Solicitor for Defendant.

COMPLAINT, IN ACTION AT COMMON LAW, FOR UNFAIR USE OF TITLE.

.....,
.....
.....
.....,
.....

The plaintiffs above named by ..... their attorney, complaining of the defendant allege:

1st. That for several years prior to the commencement of this action the plaintiffs were, continued to be, and still are, owners of the play known as, and entitled "....." and owners of said title.

2nd. That about five years prior to the commencement of this action the plaintiff ....., being the owner thereof, produced a new and original theatrical play under a new and original title and trade name "....."; that he was the first person to own or present a play under said title and trade name and originated the same and the said title and trade name was and continued to be the property of said plaintiff .....

3rd. That thereafter and commencing on or about the ....., day of ....., 19...., the said plaintiff presented said play under said title in a great number of theatres throughout the United States, and thereafter he continued so to present the same together with his co-plaintiffs and co-owners, the plaintiffs ....., and the plaintiffs are still engaged in the presentation of said play throughout the United States under said title and trade name "....." and are the owners thereof.

4th. That the plantiffs have spent exceeding ..... Thousand ($.....) Dollars, in the presentation and production of said play under said title and in the extensive advertisement of said play throughout the United States, having expended large sums of money in advertising said play under said title in the newspapers throughout the United States and for expensive lithographs and other advertising matter distributed throughout the country, all for the purpose of bringing prominently before, and making familiar and well known to the public the said title and trade name "....."

5th. That the said expenditures and the said advertising did make said title and trade name "....." familiar and well known to the public and the said play was and is successful and highly profitable and said play and title and trade name is a highly successful and profitable theatrical property and said play has always been known and identified by the said trade name "....." and is so widely known throughout this State, the United States, Canada and England.

6th. By reason of said extensive advertisement of said title "....." under which the said play has always been advertised and presented by plaintiffs, it became well known to all people engaged in the theatrical business, and in all branches thereof, and to the defendant, and was so known to this defendant prior to the commencement of this action at the time when he appropriated said title.

7th. That plaintiffs have not given any right to said play or said title or trade name or any license therefor, or to the use thereof, to the defendant or to the ..... Company, hereinafter referred to, and said defendant and said ..... Company had and have no right whatever thereto or to the use thereof.

8th. That after plaintiffs had so extensively advertised and established said title and prior to the commencement of this action, the said ..... Company presented a play to which, without right or license and in violation of plaintiff's rights, they gave the name "....," and thereupon proceeded to reproduce the said play by motion pictures.

9th. That the defendant shortly prior to the commencement of this action has advertised and offered for sale and public production the said play so produced by said ..... Company, and moving picture reproductions thereof made by it as aforesaid and is continuing so to offer and advertise the same for sale, license and production.

10th. That heretofore and on or about the ..... day of ....., 19...., the defendant did actually cause to be presented at the ..... Theatre in ....., a play by motion pictures under the title "....." and advertised the same by large posters containing the said title "....." in letters several inches in height.

11th. That the defendant threatens to continue to cause the said play to be presented under said title "....." and refuses to refrain from causing the presentation thereof under said title and refuses to discontinue the use of said title, although notified and warned by plaintiffs to discontinue the use thereof.

12th. That prior to the commencement of this action, and immediately upon learning of the appropriation of plaintiffs' said title and trade name for the said play by the defendant, plaintiffs caused to be sent to the defendant a notice of the plaintiffs' sole and exclusive ownership of said title.

13th. That the plaintiffs are continuing to cause their said play to be presented throughout the United States and Canada in theatres under said title and trade name, and said title, and trade name continue to be extremely valuable as the title of the play.

14th. That the acts of the defendant aforesaid, are all for the purposes of appropriating the benefits of the extensive advertising made by the plaintiffs during the past five (5) years, and the large sums of money spent by them for that purpose as well as appropriating to himself the benefit of the successful production made by plaintiffs and wrongfully to derive for himself the profits which rightfully belong to the plaintiffs in their sole and exclusive right to said play and said trade name "....." and the defendant has done this with full knowledge of the rights of the plaintiff and is deceiving and misleading and intends to deceive and mislead the theatre-going public and the said acts of the defendant have been done and the defendant threatens to continue the same for the purpose of defrauding the plaintiffs out of their exclusive right in said play, said title and said trade name, and the profits to be derived therefrom.

15th. That the defendant has not acquired and does not own any right to produce any play under said title or trade name or to announce the same under such or any similar title or to use the said trade name, "....."

16th. That the defendant has not secured the consent of the plaintiffs or either of them to the use of said title "....," or any other title simulating the title and trade name of the plaintiffs; and the said defendant has done the acts herein complained of with full knowledge of the facts aforesaid, and without the consent of the plaintiffs and in violation of their rights.

17th. That the value of the plaintiffs' said play, consists of the said fact that they have the exclusive right to its presentation and can be protected by the Courts in said exclusive right and ownership and in their sole right to use said title "....," in connection with any play; and in their sole right to the said trade mark "....," and large sums of money have been expended by plaintiffs not only in acquiring said play, but in the advertisement of said title and trade name, and if said defendant or any other person is permitted to use said name or title or any simulation or colorable imitation thereof, plaintiffs will be greatly and irreparably injured in their business and profits and will suffer great loss and immeasurable pecuniary damage. It will tend to destroy the value of their play. It is calculated by the defendant to injure plaintiffs in their said rights and interest and greatly diminish and deprive them of their profits which they are entitled to receive by representation of the said play and the exclusive use of said title and trade name. That the proceeds of the plaintiffs' play are derived from giving productions thereof in theatres throughout this State, the United States and Canada, to which admission fees are charged and the acts of the defendant are all done with the deliberate purpose and intent to mislead the theatre-going public into the belief that the defendant's play is the same as the plaintiffs', thereupon securing the benefit of the patronage which would otherwise be directed to the plaintiffs' play and with the deliberate intent and purpose thus to obtain large profits to the great injury and damage of the plaintiffs. That the use of said name by defendant does mislead and deceive the public into believing the defendant's play to be the plaintiffs' play and will continue so to do and will induce them to attend the defendant's play believing it to be the play of the plaintiffs, thereby enabling the defendant unlawfully and fraudulently to obtain large profits to the great injury of the plaintiffs.

18th. The plaintiffs have demanded of the defendant that he stop the use of said name or any simulation thereof, and the defendant has failed and refused so to do.

19th. That plaintiffs are without any appropriate or adequate remedy or relief at law with respect to the premises and that no compensation for damages in any proceeding at law can be arrived at or ascertained if defendant is permitted to continue to produce and present the said play under the said title or to use the said title "...." or any simulation of the plaintiffs' said title and trade name, and such use is calculated to and will necessarily injure the plaintiffs in their exclusive right and the only assurance and protection of the plaintiffs against such irreparable loss and injury with regard to the premises is and will be the intervention of this Honorable Court by way of and in the nature of an injunction to restrain the said defendant, his agents, officers and servants from so doing as in justice and equity plaintiffs declare and believe and allege the defendant should be restrained.

WHEREFORE, plaintiffs demand judgment against the defendant restraining and enjoining him, his servants, agents, employees, directors, attorneys and representatives from using the name or title "....," or any simulation or imitation thereof as the title or part of a title of any play or motion picture reproduction of any play or photo drama or in connection with any thereof or in any

advertisement thereof or any colorable imitation, adaptation, simulation or modification of said title, and that the defendant account to the plaintiffs for all moneys realized by him from any public performances of any play under said title "..... .....," or any motion picture reproduction of any play under said title, or any colorable imitation, simulation, or adaptation of said title or titles; and third, that the plaintiffs have such other, further or different relief as may seem just and equitable, together with the costs in this action.

.....,
Attorney for Plaintiffs,
Office and P. O. Address,
.....
.....
.....

COMPLAINT, IN ACTION AT COMMON LAW, FOR INFRINGEMENT OF UNPUBLISHED PLAY.

.....,
.....
.....
.....,
.....;

The plaintiff, complaining of the defendant, alleges:

I. That he is an actor by profession, having been engaged in that business more than forty (40) years, and that he is the owner of a certain dramatic composition known as "....," which said dramatic composition was originally composed and written in the English language by .....

II. That the defendant ....., is a corporation duly organized under the laws of the State of ....., and is engaged amongst other things, in the business of renting and distributing films for motion pictures and among other motion picture films that it has and is distributing is the motion picture film entitled "....."

III. That in the year ....., the said ....., author of the said play aforesaid was employed by one ..... as a leading actor and director of the ..... Theatre in ....., and while said ..... was so employed by the said ....., the said ..... assisted by the said ..... at the request of and for a consideration paid by the said ..... to him, adapted and arranged for said ....., the said drama "....." from a novel by ..... entitled "....," for dramtic production, upon the stage, and the said play was thereafter produced in the ..... Theatre, in ....., and in other theatres, with great success. That the said adaptation became known as the "..... Version" of "....," and was the sole property of the said .....

IV. Upon information and belief plaintiff alleges that the said ....., never published the said adaptation, nor were any copies of the same sold or offered for sale, nor was the said adaptation ever copyrighted under the laws of the United States, or of any other country, nor was the same ever dedicated to the public, but the said adaptation remained in manuscript form.

V. That thereafter and on or about the ..... day of ....., the said ....., sold, assigned, transferred and set over to one .....the said manuscript of the said dramatic composition "....." and delivered the said manuscript to said ....., and the said ..... then became the sole and exclusive owner of the same and of the right to produce and to license others to produce the same.

VI. That the said ..... never published said manuscript nor sold nor offered copies of the same for sale, and did not in any way dedicate the same to the public or make any form of dedication; neither was the said adaptation ever copyrighted under the laws of the United States or of any other country, and the said play remained in manuscript form.

VII. That thereafter and on or about the ..... day of ....., the said ..... duly transferred, assigned and set over to the plaintiff the manuscript of the said play "....." and all his right, title and interest in the same and delivered the said manuscript to plaintiff and plaintiff then became and still is the sole and exclusive owner of the said play "....." and of the right to produce the same and to license others to produce the same.

VIII. That plaintiff never published the said play nor sold nor offered for sale copies of the same nor did he in any manner dedicate the same to the public, nor did he copyright the said play under the laws of the United States or of any other country; that the said play never became public property, and has always been kept in manuscript form.

IX. That the said play "....." has been produced almost continuously since it was first written by the said ....., and the plaintiff has played the part of ....., which is the principal role in the said play, almost continuously since the year ....., and has appeared in the said role of ....., in the said play for more than ..... thousand times, and the said play has always been a great artistic and financial success and is of great value.

X. That the defendant has distributed and caused to be produced upon the stage pictures which are commonly called motion pictures, representing the different characters in action so as to tell the story of said play "....." as produced by plaintiff upon the stage. The representation is given upon a stage and the moving picture shows all the characters, scenes and incidents as they are produced by the plaintiff and tells the story as told by the play owned by the plaintiff as aforesaid. That defendant, for moneys had and received by it, distributes films among the proprietors of moving picture houses to enable them to give performances and stage representations of the scenes, characters and incidents of said play, advertising and announcing or causing the advertisement and announcement of the fact aforesaid and deriving a large revenue from such productions. That most of said productions given by persons to whom the defendant distributes and rents the said

films and who are licensed by the defendant to give motion picture productions from the said films are of a cheap order and in theatres and places of exhibition charging not more than from five cents to twenty-five cents admission, and the defendant has distributed and is threatening to continue to distribute films of the said play among the owners of moving picture houses throughout the country and especially throughout the City, County and State of New York, where motion picture exhibition of said plays are given and has widely advertised or caused the advertisements to be issued, of its intentions to give representations of said play or that others will give them, from its films. .

XI. That the said pictures so distributed by the defendant were made, as plaintiff is informed and verily believes, by the ..... Company; that the plaintiff never gave the said ..... Company any right, license, permit or authority to manufacture the said pictures nor has the plaintiff ever given any right, license, consent, authority or permission to the defendant to distribute the said motion pictures amongst the proprietors of moving picture houses.

XII. That motion picture performances of the said play "....," were given from said motion picture films made by the said ..... Company, and distributed by the defendant at the ..... Theatre in the City of ..... on the ..... day of ....., 19...., at the ..... Theatre in the City of New York on the ..... day of ....., 19...., and at other theatres in the City of New York and the characters, scenes and incidents in said motion picture performances are identical with the characters, scenes and incidents in the said play owned by the plaintiff, as aforesaid.

XIII. That the value of the said manuscript "....." owned by the plaintiff, and the value of the exclusive right to give performances thereof so owned and possessed by the plaintiff consists not only in the right to give dramatic performances of the same and to license others to give dramatic performances of said play, but also in the right to give exhibitions of the said dramatic composition in motion picture performances for exhibition in motion picture theatres and the plaintiff has contracted with the ..... Motion Picture Company, manufacturers of motion picture films, for the giving of exhibitions of the said "..... ..... version" of the said play under the title of "....." in motion picture theatres.

XIV. That plaintiff has engaged a Company of actors and actresses who, in costume and with the aid of scenery have given performances of the said play "....." before a high speed camera and positive films have been prepared by the said ..... Motion Picture Company under their aforesaid contract with the plaintiff, and the plaintiff intends to cause to be given exhibitions of his said play "....." in motion picture theatres with the aid of said positive film and performances so given by him and his Company as aforesaid, are to be advertised and announced under the said title of "....."

XV. That any infringement or encroachment upon or violation of the said exclusive right of the plaintiff to exhibit and perform the said play "....." in motion picture theatres will cause the plaintiff irreparable loss and injury which cannot be estimated or fixed in any action at law, nor can the damages be accurately ascertained and determined and the exhibition of the said play of the plaintiff in

motion picture theatres without his authority or consent will irreparably injure the plaintiff in his right to produce and represent the said play upon the stage because if the play is performed in motion picture theatres by persons without any right or authority from the plaintiff it tends to destroy the exclusive right which he possesses to represent and perform in the said play.

XVI. That the only assurance and protection of the plaintiff from such irreparable loss and injury with regard to the premises is the intervention of this Court by way of injunction to restrain the defendant from in any manner distributing amongst the proprietors of moving picture theatres motion picture films representing or purporting to represent the characters, scenes and incidents of his said play "....."

WHEREFORE, the plaintiff demands judgment:

1st. That the defendant be enjoined from producing, exhibiting or causing to be produced or exhibited and from distributing for production and exhibition on the stage or in any theatre or place of amusement any motion picture films containing in whole or in part any of the scenes, incidents, plot or story or any simulation or colorable imitation or adaptation to or of the plaintiff's play, dramatization or dramatic composition "....." under the title "....," or under any title whatsoever.

2nd. That the defendant render a full and true account to the plaintiff of all moneys and profits derived by it from or by reason of any performance given by it or by any other person of the said play or dramatic composition "....." and for damages, and for such other and further relief as to the Court may seem just, together with the costs and disbursements of this action.

.....

EXCERPTS AS TO RELIEF, SUITABLE TO BE INSERTED IN JUDGMENT FOR PLAINTIFF, IN ACTION IN CONNECTION WITH COMMON LAW COPYRIGHT.

It is,

ORDERED, ADJUDGED AND DECREED that the defendant, its licensees, agents, servants and employees and all persons acting by, through or under it, be and they hereby are perpetually enjoined and restrained from producing, exhibiting or causing to be produced or exhibited by means of motion pictures or by the aid of motion picture films, in whole or in part, any of the scenes or incidents of the plaintiff's play, dramatization or dramatic composition, known as the "..... Version" of "....." or any colorable imitation or adaptation thereof and from distributing, using or giving away any motion picture films containing any of the said scenes or incidents; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant render a full and true account and pay to the plaintiff all profits received by it from the use of the said film or any of the films of the said photoplay "....." from license fees, compensation received from renting or loaning said film or films, for exhibition purposes or otherwise, and from all other sources in connection with

the use and exhibition of the said photoplay "....," and it is further

ORDERED, ADJUDGED AND DECREED that ....., Esq., counsellor at law, be and he hereby is appointed sole Referee to take and stage the said account, and that the defendant produce before the said Referee all its books, papers in its possession or under its control, showing the revenue derived and sums of money received by it from any source, from or through the said photoplay "....." and all its dealings and transactions therewith and that the defendant's officers attend before the said Referee and submit to an examination respecting such moneys and profits received and realized by the defendant from and through the use of the said photoplay and its dealings and transactions therewith; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff ....., have judgment against the defendant ..... for the amount which may be found to be due to him on the said accounting, and it is further

ORDERED that the defendant deliver up to the Clerk of this Court for destruction by him, each and every copy of the said film, which it may have in its possession or under its control, and which infringes the rights of the plaintiff as determined by this decree, and it is further

ORDERED, ADJUDGED AND DECREED that final judgment be entered accordingly in favor of the plaintiff ..... and against the defendant together with the costs of this action. Either party may apply for such other, further order and direction to be added at the foot hereof, as may be proper or necessary.

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