

An Unhurried View  
of COPYRIGHT

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# I. The First Three Hundred Fifty Years

AS A veteran listener at many lectures by copyright specialists over the past decade, I know it is almost obligatory for a speaker to begin by invoking the "communications revolution" of our time, then to pronounce upon the inadequacies of the present copyright act, and finally to encourage all hands to cooperate in getting a Revision Bill passed. But as I wish not so much to keep the specialists bemused as to introduce the intelligent general lawyer to the law and mystique of copyright, I think I should begin at an earlier point—the Gutenberg revolution, which started it all.

To strike a personal note, I felt the need to learn about the evolution of copyright when I first read the celebrated opinion of Judge Learned Hand in *Sheldon v. Metro-Goldwyn Pictures Corp.* in 1936.<sup>1</sup> Had the company's movie *Letty Lynton* infringed the play *Dishonored Lady* by Sheldon and Barnes? Both the play and the movie took off from the public domain source of the old Scottish murder trial of Madeleine

<sup>1</sup> 1 F.2d 40 (2d Cir.), cert. denied, 298 U.S. 669 (1936).

Smith.<sup>2</sup> The movie was also entitled to make use of a novelized version of that story by Mrs. Belloc Lowndes, since she had given license. But it was claimed that the movie had trespassed on some original elements of the play. So Judge Hand held. The elements consisted of various features of the plot of the play, and a few characterizations. The movie had not copied the dialogue of the play; in many other respects including the dénouement it was quite different from the play.

Now I could see why copying a work word-for-word might be a legal wrong; and no doubt one must go further and punish copying with merely colorable variations. That liability should extend to so indefinite a use or appropriation as seemed to me involved in the *Sheldon* case, however, was not at all obvious or self-proving. I reflected that if man has any "natural" rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry, and "progress," if it is not entirely an illusion, depends on generous indulgence of copying. Thus for me it became a matter of some interest to discover how our law attained to such a result as the *Sheldon* decision.

The object of this lecture is modest: I shall retrace my own search and show you how copyright began and how, under impulsion of various forces, including the economic and the literary, copyright protection extended itself to take in more than the simplest cases of copying.

Caxton founded his press in Westminster in 1476, and soon

<sup>2</sup>Madeleine Smith has been recently commemorated by C. Day Lewis in the dramatic monologue "Not Proven," published in his collection *Requiem for the Living* 9 (1964).

afterward the Crown began to take an acute interest in this dangerous art and to assert prerogative rights regarding it. A Royal Printer appeared in 1485, and from 1518 onward came a stream of royal grants of privileges and patents for the exclusive printing of particular books or books of stated kinds. With the religious and political upheaval of the Act of Supremacy of 1534, the prerogative was employed in a negative way to impose a general censorship through official licensing.<sup>3</sup> But such a system has always been found a slippery and inefficient business. In a later reign it was thought strategic to enlist in aid of the censorship the covetous self-interest of the very printers and booksellers. When Queen Mary chartered the stationers by letters patent of 4 May 1557,<sup>4</sup> the fellowship, in exchange for the large trade advantages they then secured, undertook to become in practical effect spongers and pursuivants of the royal censorship, to play the part of "licitory constables." Printing was confined to members of the Stationers' Company and such others as might be authorized by the Queen; correspondingly the Master and Wardens of the Company were empowered to search out and seize and destroy illicit presses and unlawful books. In Elizabeth's time the partnership of Company and government for maintaining a closed circle of loyal printers, and for licensing books and otherwise regulating the trade, was articulated in a comprehensive Star Chamber decree of 23 June 1586,<sup>5</sup> said to be the work of Archbishop Whitgift (an unpleasant man). This scheme of the Tudor monarchs—comprising grants of

<sup>3</sup>Proclamation of 16 November 1538, reprinted in 1 Tudor Royal Proclamations 270 (Hughes & Larkin eds. 1964); see also Proclamation of 8 July 1546, *id.* at 373.

<sup>4</sup>AREEN, A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON xxviii (1875).

<sup>5</sup>2 AREEN, *id.* at 807.

patents for specified works, confinement of printing to authorized presses, licensing of books before publication, use of the trade organization and special governmental agencies for enforcement—formed the pattern for subsequent regulatory efforts right down to the emancipation of the English press in 1695.<sup>6</sup>

How does all this relate to copyright? To mangle Sir Henry Maine's aphorism, copyright has the look of being gradually secreted in the interstices of the censorship. The patents for books, in that they conferred exclusive rights, bear some family resemblances to the later legal institution of copyright. They did not, however, stand on any notion of original composition, for they might be granted for ancient as well as new works. In the end a large number of patents came into the hands of the major stationers. Besides the patented books, books could be published if they were licensed by the official licensers and printed by an authorized press. A stationer before proceeding to print must in the usual course of Company practice obtain allowance from officers of the Company, and note of the allowance—called entry—was to be made on the Company's Register. At least among members of the Company the entry came to betoken ownership of the "copy" of the book, the exclusive right to print and publish it; in general, priority of entry spelled priority of right. Some such scheme of allocation to members was needed for the practical distribution, so to speak, of the authority to print vested in the Company as a community. Again, as between this right of copy by means of entry and a modern copyright the resemblances are merely familial: entries were made not only of new but of old

<sup>6</sup>The story is summarized in SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476-1776* (1952).

books. How far a search of the Register was initially made to see whether a proposed entry would infringe on one previously made, we do not know. Various claims of infringement were heard by the Court of Assistants of the Company, and scattered accounts appear in the incomplete records of that court,<sup>7</sup> but the tendency to compromise was so strong that we get little impression of any prevailing notions of piracy or plagiarism. We can, however, surmise that the question would have been viewed with printer's or publisher's not author's eyes. And while there was an idea of piracy of content which might reach beyond verbatim copying,<sup>8</sup> we should not suppose that any abstruse or refined ideas of literary theft could have been entertained.

Right of copy was the stationer's not the author's. Living authors furnished some of the material for the printing mills, and increasingly these manuscripts had to be purchased in a business way (usually payment was made in a lump sum); but upon entry the author dropped away and it was the stationer who had the right of multiplication of copies against others of the Company, which is to say, speaking imprecisely, against all those eligible to print. Augustine Birrell is right to suggest that John Milton was making no declaration for authors' rights when he exclaimed in *Areopagitica* about "the just retaining of each man his several copy, which God forbid should be gainsaid."<sup>9</sup>

The Stationers' Company did by no means go along all

<sup>7</sup>RECORDS OF THE COURT OF THE STATIONERS' COMPANY 1576-1602 (Greg & Boswell eds. 1930); *id.* 1602-1640 (Jackson ed. 1957).

<sup>8</sup>See the case of Adams, in Jackson, *supra* at 51, 83, 350, 351; the case of Jaggard, *id.* at 178, cf. 204, 326, 327, 328, 334, 335.

<sup>9</sup>MILTON, *AREOPAGITICA* 50 (Cottrell ed. 1961); BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 77 (1899).

serene in the retaining of each man his several copy. I shall forbear an account of the gradual decay of the Company,<sup>10</sup> and merely make the point that the Company's strength was dependent in large part upon its alliance with the official censorship. When, after the Restoration, Parliament in 1662 passed a Printing Act duly restricting printing and reinstalling licensing,<sup>11</sup> the stationers must dearly have hoped that the system would stick. It did not. It wobbled and expired through nonrenewal in 1695. Macaulay, writing deliciously of the demise of the censorship, shows that it was due to general disgust at the variable stupidity of the censors.<sup>12</sup>

Three cheers for freedom of the press; but what, now, was to become of the stationers? Anarchical publication lay ahead which the stationers, habituated to protection, were not equipped to meet. So, as Lord Camden later said, "They"—the stationers, whose property by that time "consisted of all the literature of the Kingdom; for they had contrived to get all the copies into their own hands"—"came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce Parliament to grant them a

<sup>10</sup>See BLAGDEN, *THE STATIONERS' COMPANY: A HISTORY* 1403-1959 (1960).

<sup>11</sup>13 & 14 Car. 2, c. 33.

<sup>12</sup>History of ENGLAND 348-62 (1855). Copyright lawyers may take wry amusement from the fact that Charles Blount, who by a ruse hoisted the last official censor, and thus has some claim to be called the liberator of the English press, was, according to Macaulay, "one of the most unscrupulous plagiarists that ever lived. . . . The literary workmanship of Blount resembled the architectural workmanship of those barbarians who used the Coliseum and the Theatre of Pompey as quarries, who built hovels out of Ionian friezes and propped cowhouses on pillars of lazulite." *Id.* at 354.

statutory security."<sup>13</sup> Whence came the Statute of Anne.<sup>14</sup>

The act secured the existing copy of books already printed for a term of twenty-one years from 10 April 1710. With respect to new books, it vested the copy in the authors or their assigns for a period of fourteen years from the date of publication, with provision for returning the copy to the authors for another term of fourteen years if they should be living when the initial term expired. The copy, according to the statute, was "the sole liberty of printing and reprinting" a book, and this liberty could be infringed by another who should "print, reprint, or import" the book without consent. Offenders were to forfeit their books to the owners of the copy who were forthwith to "damask and make waste paper of them"; and offenders were to forfeit also a penny a sheet, one moiety to the Queen and the other to the person suing for the same. And to prevent infringement through innocent mistake, it was provided that the forfeiture and penalty could not be exacted with respect to new books unless the title to the copy was entered, before publication, in the register book at the Hall of the Stationers' Company. (So passed the ancient glory of the worshipful Company. Only in this ministerial clause, and the further one requiring deposit of specimen books for transmission to the great libraries, was the Company mentioned.)

I doubt that the statute was any more grounded on a thoughtful review of policy than the defeat of official licensing had been. The stationers made the case that they could not produce the fragile commodities called books, and thus en-

<sup>13</sup>Donaldson v. Becket (H.L. 1774), as reported in 17 HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 953, 995 (1813).

<sup>14</sup>8 Anne, c. 19 (1710).

courage learned men to write them, without protection against piracy; but no one, we can be sure, deliberated what strange results might follow if the same logic were applied to other fragile ventures outside the book field. It is hard to know how far the interests of authors were considered in distinction from those of publishers. There is an apparent tracing of rights to an ultimate source in the fact of authorship, but before attaching large importance to this we have to note that if printing as a trade was not to be put back into the hands of a few as a subject of monopoly—if the statute was indeed to be a kind of "universal patent"—a draftsman would naturally be led to express himself in terms of rights in books and hence of initial rights in authors. A draftsman would anyway be aware that rights would usually pass immediately to publishers by assignment, that is, by purchase of the manuscripts as in the past. (It was held, incidentally, that the possibility of reversion after the fourteen years could also be assigned.)<sup>18</sup> Although references in the text of the statute to authors, together with dubious intimations in later cases that Swift, Addison, and Steele took some significant part in the drafting,<sup>19</sup> have lent color to the notion that authors were themselves intended beneficiaries of the parliamentary grace, I think it nearer the truth to say that publishers saw the tactical advantage of putting forward authors' interests together with their own, and this tactic produced some effect on the tone of the

<sup>18</sup>See *Fred Fisher Music Co. v. M. Wilmart & Sons*, 318 U.S. 643, 648 (1943).

<sup>19</sup>See the remarks of counsel for the appellants in *Donaldson v. Becket*, 2 Bro. P.C. 129, 139, 140, 1 Eng. Rep. 837, 843; and of Lord Chancellor Apsley in the same case, as reported in 17 *HANSARD*, *supra* note 13, at 1002. See also Lord Chief Baron Abinger in *D'Almaine v. Boosey*, 1 Y. & C. Ex. 288, 299, 160 Eng. Rep. 117, 122 (Ex. 1835).

statute. Next, considering what was thought protectible under the statute and how it was to be protected, I venture to say, first, that the distinction between old and new books was intended or could be easily taken to mean that to qualify for protection as a new book a work must have some ingredient of fresh authorship and be not merely a reissue or, perhaps, not an existing work merely *réchauffé*—rewarmed. Second, the draftsman was thinking as a printer would—of a book as a physical entity; of rights in it and offenses against it as related to "printing and reprinting" the thing itself; of punishment for illicit reprinting as involving in the first instance destruction of the very duplicating book. But conjectures about what the draftsman may have thought are vain: copyright was now going to be submitted to rationalization by the judges.

The meaning of a statute is apt to be first tested in strange cases on the periphery of the enactment rather than in its heartland. So the first substantial question to arise under the Statute of Anne was that of alleged infringement by translation. Dr. Thomas Burnet's Latin work *Archaeologiae Philosophicae* had been published in 1692 and could presumably claim protection under the statute until 1731. In 1720 the defendants threatened an English translation and when sued in Chancery they justified on the expected ground. The statute, they said, "could be intended only to restrain the mechanical art of printing," but a translation "in some respects may be called a different book, and the translator may be said to be the author, in as much as some skill in language is requisite thereto, and not barely a mechanic art, as in the case of reprinting in the same language." Again, the translator put the book into a different form, and "*forma dat esse rei*."

Finally, a translation was rather within the statute's encouragement of learning than within its prohibition of reprinting. Lord Chancellor Macclesfield said, "a translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it"—which suggested that if the accused book was a work of authorship, it could not at the same time infringe.<sup>17</sup> The case, however, went off on an erratic ground.<sup>18</sup>

Twenty years later we have an opinion on the trying question of abridgment, of which the core meaning is (to use an O.E.D. definition) "a compendium of a larger work, with the details abridged, and less important things omitted, but retaining the sense and substance." Gyles, a bookseller, claiming copyright in an edition of Sir Matthew Hale's *Pless of the Crown*, sought relief against the book *Modern Crown Law* alleged to be "colourable only . . . borrowed verbatim . . . only some old statutes . . . left out which are now repealed; and . . . all the Latin and French quotations . . . translated into English." Lord Chancellor Hardwicke framed the question as being whether the defendant's book was "the same with" the Hale edition. Books only "colourably shortened" were piracies, according to the Chancellor; "but," said he, "this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of

<sup>17</sup>*Burnett v. Chetwood*, 2 Mer. 441, 35 Eng. Rep. 1008-09 (Ch. 1720).

<sup>18</sup>The Lord Chancellor thought the book "contained strange notions, intended by the author to be concealed from the vulgar in the Latin language." In its "superintendency over all books," the court would "restrain the printing or publishing any that contained reflections on religion or morality"—at least reflections in English! *Ibid.*

the author is shown in them, and in many cases are extremely useful, though in some cases prejudicial, by mistaking and curtailing the sense of an author."<sup>19</sup> So, apparently, we have to look to the nature and extent of the defendant's contribution and, perhaps, also to the question of form. On Lord Hardwicke's suggestion the issue of fair abridgment was referred to arbitration, in which, evidently, the plaintiff failed.<sup>20</sup>

Two more cases on abridgment deserve mention here. Samuel Johnson's *Rasselas* came before the Master of the Rolls, Sir Thomas Clarke, in 1761 on a claim that the defendants had infringed by printing in their *Grand Magazine of Magazines* a part of the narrative, leaving out "all the reflections." Sir Thomas said that on the question of fair abridgment each case must depend on its own circumstances. He then observed that magazines customarily printed abstracts of authors; indeed the plaintiffs had themselves printed an abstract of *Rasselas* in the *London Chronicle*. So business reasoning entered into the dismissal of the bill: the defendants had not interfered unduly with the sale of the book.<sup>21</sup> The second case, evidently to be dated in 1773, is notable for the fact that Lord Chancellor Apsley consulted Justice Blackstone. The defendant Newbery had condensed or abstracted Hawkesworth's *Voyages*—Hawkesworth's authorized reconstruction from original journals of a number of marine exploits including Cook's first circumnavigation of the globe. The Lord Chancellor spoke of change of form, the defendant's

<sup>19</sup>*Gyles v. Wilcox*, 2 Atk. 141, 3 Atk. 269, 26 Eng. Rep. 489, 957; Barn. Ch. 368, 27 Eng. Rep. 682 (Ch. 1740).

<sup>20</sup>See *Tonson v. Walker*, 3 Swans. 672, 679, 36 Eng. Rep. 1017, 1020 (Ch. 1752), stating the result of the arbitration.

<sup>21</sup>*Doddsley v. Kinnersley*, Amb. 403, 27 Eng. Rep. 270 (Ch. 1761).

labor, and advantage to readers. An abridgment preserving "the whole" of a work "in its sense" is "an act of understanding," "in the nature of a new and meritorious work." Newbery was not only excupulated but congratulated for reducing Hawkesworth and preserving the substance in different language perhaps better than the original.<sup>22</sup>

We have now reached the time of the climax of the debate over the greatest of all copyright questions, known as *The Question of Literary Property*, a question which had been stirring since 1731. Private rights could subsist in a work for an indefinite period so long as it remained unpublished and thus outside the range of the Statute of Anne. The question related rather to published works. Did the copyright in published works cease at the expiration of the limited periods specified in the statute, or was there a nonstatutory, common-law copyright of perpetual duration, with the statute merely furnishing accumulative special remedies during the limited periods? In strictness, the embarrassing issue, "wherein consists the identity of a book,"<sup>23</sup> need not have been faced in any of the relevant litigations, for the accused works were word-for-word copies and thus clear piracies if copyright on any terms survived the statutory periods. But practically the issue could not be avoided: a right without limit of time was being claimed, and its horizontal dimension, so to speak, was plainly important. Proponents would be intent to show that

<sup>22</sup>Newbery's Case, *Loft 775*, 98 Eng. Rep. 913 (Ch. 1773). For a recent low estimate of the quality of Hawkesworth's writing, see BYRON'S JOURNAL OF HIS CIRCUMNAVIGATION 1764-1766 (Gallagher ed. 1964), intro. at lxxvi-lxxxii.

<sup>23</sup>See Willes, J., in *Millar v. Taylor*, 4 Burr. 2303, 2310, 98 Eng. Rep. 201, 205 (K.B. 1769).

the perpetual right was narrow enough to be tolerable, while opponents would try to show its inordinate potential breadth as a reason for denying its existence in the first place. So argument proceeded on the shape of copyright considered as property rather than as a mere statutory construct—*propriété* rather than *privilege*, as the French would say.

Lord Mansfield was the brightest intelligence on the side of the respectable stationers. He had appeared as their counsel in the inconclusive first two *Tonson* cases involving works of John Milton, "old books" whose copyright had expired under the statute in 1731.<sup>24</sup> Becoming Chief Justice of King's Bench, Mansfield presided in the aborted third *Tonson* case involving *Spectators* originally published in 1711—"new books."<sup>25</sup> Then came the litigation over James Thomson's *The Seasons*, also a "new book," first published in 1727-30. Under the title *Millar v. Taylor*, King's Bench in 1769 held for the perpetual right.<sup>26</sup> Mansfield spoke himself in judgment, and his voice can also be heard in the remarks of the side Justices Willes and Aston. Mansfield stressed the essential "decency" of securing for the author the opportunity to recover his expenses and earn a profit, the right to decide how his name and work should be presented to the public. (The fact that publishers, not authors, were at bar, was passed over in silence, as usual.) On the dimension of the perpetual right, Mansfield seemed to revert

<sup>24</sup>*Tonson v. Walker* (Ch. 1739), referred to at 4 Burr. 2325, 98 Eng. Rep. 213, *Tonson v. Walker*, 3 Swans. 672, 36 Eng. Rep. 1017 (Ch. 1752).

<sup>25</sup>*Tonson v. Collins*, 1 Black. W. 301, 96 Eng. Rep. 169 (K.B. 1761).

<sup>26</sup>4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769). The *Seasons* of course has figured heavily not only in legal but in literary history. See the analysis of the critical appreciation of the poem over the past two centuries in Professor Ralph Cohen's book *The Art of Discontinuation: Thomson's The Seasons and the Language of Criticism* (1964).



to the printer's old right of copy, "an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters." Copyright of a work did not bar others from using it, still less from dealing with the same subject matter; rather it barred them from reproducing a similar text. Justice Willes accepted that copyright did not prevent "bona fide imitations, translations, and abridgments"; a book "conveys knowledge, instruction, or entertainment; but multiplying copies in print is quite a distinct thing from all the book communicates. And there is no incongruity, to reserve that right; and yet convey the free use of all the book teaches." Justice Aston said that a man who bought a published work "may improve upon it, imitate it, translate it; oppose its sentiments: but he buys no right to publish the identical work."

Lord Mansfield did not produce his usual mesmeric effect on the other associate Justice, Yates,<sup>27</sup> who, dissenting in the *Millar* case, argued that if a copyright could exist at common law it must go the length of protecting the ideas of the work; but these were "quite wild," incapable of *indicia certa*. The theme was taken up and embroidered in *Donaldson v. Becker*,<sup>28</sup> an appeal to the House of Lords from an injunction which had been granted by Chancery, on the strength of the law judgment in the *Millar* case, against the unlicensed reprinting and sale of *The Seasons* by the daring Scottish bookseller Donaldson. Submitting his opinion to the Lords,

<sup>27</sup>Yates had been of counsel for the defendant in the third *Tonson* case, *supra* note 25. For his feelings toward Mansfield when they both sat in King's Bench, see *FIREOOR*, LORD MANSFIELD 47 (1936).

<sup>28</sup>2 Bro. P.C. 129, 1 Eng. Rep. 837, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774), 17 HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 953, 1003 (1813).

Chief Justice DeGrey of Common Pleas suggested that the Mansfield position was self-contradictory, for if a common-law perpetuity could indeed be raised upon "an equitable and moral right," "abridgments of books, translations, notes" must figure as infringements, for these "as effectually deprive the original author of the fruit of his labours, as direct particular copies. . . ." <sup>29</sup> And what of mechanical inventions generally, as to which, it was pretty well conceded by the Mansfield school, no tenable argument of common-law perpetuity could be made? <sup>30</sup> Similarly Lord Camden questioned what would be exempt from the "desultory claim" <sup>31</sup> which must underlie the injunction appealed from. Would it not, horrible thought, take in, as infringements, translations and abridgments as well as lending out of books or transcribing them even for charity?

The *Donaldson* appeal succeeded in 1774 and the common-law perpetuity was repelled and denied. <sup>32</sup> Conceivably judges

<sup>29</sup>17 HANSARD, *supra* note 28, at 990.

<sup>30</sup>Fending off the analogy to mechanical invention, Justice Aston had said in the *Millar* case—rather lamely, it must be owned—that a machine made in imitation of another was necessarily different in "substance, materials, labour and expence," while a "reprinted book is the very same substance," the printing being "the method only of publishing and promulgating the contents of the book." 4 Burr. at 2348, 98 Eng. Rep. at 226. This distinction was early suggested by Bishop Warburton and recurs in the debates on the question of the perpetual right. See Blackstone's argument as counsel for the plaintiff in *Tonson v. Collins*, 1 Black. W. 301, 343, 96 Eng. Rep. 169, 189 (K.B. 1761).

<sup>31</sup>17 HANSARD, *supra* note 28, at 998.

<sup>32</sup>The wiser heads acquiesced in the denial of the perpetuity, although some thought the term of the Statute of Anne was too short. See Samuel Johnson to the publisher William Strahan, 7 March 1774, in 1 CHAPMAN, THE LETTERS OF SAMUEL JOHNSON 398 (1952); David Hume to Strahan, ascribed to Spring 1774, in HULL, LETTERS OF DAVID HUME TO WILLIAM STRAHAN 274 (1888); see also Hume to Strahan, 2 April 1774, *id.* at 280.

might be led to give generous horizontal scope to a copyright which was now definitely short-lived. On the other hand, the *Donaldson* decision centered attention on the text of the Statute of Anne as being the source of rights in published works, and that seemed to provide merely a counterpart to the old right of copy.

We hear finally from Lord Mansfield in *Sayre v. Moore*.<sup>33</sup> Sitting at Guildhall in 1785, he tried this action under a statute covering maps and charts as copyrightable subject matter.<sup>34</sup> The plaintiff, "laying down" from extant charts and resorting to printed and manuscript accounts of travelers, had prepared and published at considerable expense four sea charts. The defendant had combined the four charts into one, on which he corrected some soundings and, evidently applying the Mercator principle, corrected latitudes and longitudes, thus rendering the whole more useful to navigation. Here was a difficult problem for which the earlier debates, which had chiefly in mind literary works of imagination, had made no room. Maps necessarily resemble one another in form, the more so as they accurately picture the reality. So form could not be the key to copyrightability or infringement. To require a map maker in 1785 to forbear the sedulous use of the earlier art might be not only impractical but dangerous. In the translation and abridgment cases the defendants had escaped infringement by contributing "somewhat intellectual" notwithstanding they had used the plaintiffs' works pervasive-

<sup>33</sup> 1 East 361 n., 102 Eng. Rep. 139 n. (K.B. 1785). The judgment by Mansfield in *Bach v. Longman*, 2 Cowp. 623, 98 Eng. Rep. 1274 (K.B. 1777), holding a musical composition to be a writing within the Statute of Anne, is also of some interest.

<sup>34</sup> See 7 Geo. 3, c. 38 (1766); 17 Geo. 3, c. 57 (1777).

ly. Lord Mansfield said: "whoever has it in his intention to publish a chart may take advantage of all prior publications." Was the accused map a "servile imitation" or something more? Here it embodied alterations and corrected errors. "If an erroneous chart be made, God forbid it should not be corrected even in a small degree." On such a charge, the jury was for the defendant.

Lord Mansfield had begun in the *Sayre* case with the famous passage: "we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded." Recalling the decisions so far, we can say that the infringement problem was being answered, seventy-five years after the basic statute, by looking not so much to what the defendant had taken as to what he had added or contributed. And the treatment of the abstract of *Rasselas* suggested that even a bodily taking without addition or improvement could be defended if it was conceived not to interfere unduly with the normal economic exploitation of the copyright.

In the *Sayre* opinion, histories and dictionaries were mentioned as being analogous to maps. Distinctions, however, might be taken. Change of form might be required as a condition of lifting from histories and even from dictionaries, but could not be feasibly demanded in the case of maps. And though amplified or corrected maps must usually be published entire, one might be able to insist, as to informational works

in literary form, that the later author publish only his additions or changes and steer clear of duplicating the original. Yet if the logic of the *Sayre* case was accepted, it would seem pointless or stultifying to require either device as a means of avoiding infringement, and the *Sayre* case therefore did seem to look to easy appropriation from any informational work if the later author added some significant elements of information.

Now in the period between the *Sayre* decision and the recodification of copyright law by the first Victorian statute of 1842, the English courts dealt repeatedly with informational works ranging from roadbooks and directories to commonplace histories and treatises. And Lord Mansfield's opinion was soon brought into question.

A bare four years after the *Sayre* case, Lord Kenyon tried *Trusler v. Murray*,<sup>35</sup> an action for pirating a book of chronology. We are told that "though some parts of the defendant's work were different, yet in general it was the same, and particularly from page 20 to 34 it was a literal copy." Lord Kenyon said, "if such were the fact"—presumably referring to the fourteen pages—the defendant was liable "though other parts of the [defendant's] work were original."<sup>36</sup> Possible conflict with the *Sayre* case arose if the chronology was thought of as a compilation of facts on which the defendant had engrafted factual changes or additions of consequence. The issue between Kenyon and Mansfield was put thus in the argument

<sup>35</sup>1 East 362 n., 102 Eng. Rep. 140 n. (K.B. 1789). Lord Kenyon seems to misconceive the result in Newbery's Case, *supra* note 22, regarding the abridgment of Hawkesworth's *Voyages*.

<sup>36</sup>By agreement, the matter was submitted to arbitration. It is reported in *Matthewson v. Stockdale*, 12 Ves. Jun. 270, 273, 33 Eng. Rep. 103, 104 (Ch. 1806), that the plaintiff prevailed.

of counsel for defendant in a later case involving an East India calendar: "either the public cannot have the corrections; or the author of them must include the original work in his."<sup>37</sup>

The question, however, was not squarely faced; the course of decision was ambiguous and halting.<sup>38</sup> Lord Chancellor Erskine showed a certain sensitivity to the point.<sup>39</sup> Finally Lord Chancellor Eldon, a great vacillator, did move, if I read him aright, to a formulation distinct from Mansfield's. The break perhaps comes in *Longman v. Winchester* in 1809.<sup>40</sup> The defendant's "Imperial Calendar" absorbed much of the information in the plaintiff's elaborate calendar or directory, but it evidently made additions and corrections. Lord Eldon bore down on the fact that the defendant had availed himself of the plaintiff's labor; he had not replowed the field. The plaintiff to the extent of his independent labor could hold a copyright, and the defendant in the degree that he leaned on the plaintiff's labor was an infringer. Lord Eldon did not say whether the defendant had altered the form of presentation, nor did he comment on the significance of form.

The trend away from the position I have ascribed to Mansfield continued, although with lapses, in the decisions of the

<sup>37</sup>*Matthewson v. Stockdale*, *supra* note 36, 12 Ves. Jun. at 272, 33 Eng. Rep. at 104.

<sup>38</sup>Note the curious perversities of the roadbook cases, *Carman v. Bowles*, 2 Bro. C.C. 80, 29 Eng. Rep. 45 (Ch. 1786); *Gary v. Faden*, 5 Ves. Jun. 24, 31 Eng. Rep. 453 (Ch. 1799); *Gary v. Longman*, 1 East 358, 102 Eng. Rep. 138 (K.B. 1801); *Gary v. Kearsley*, 4 Esp. 168, 170 Eng. Rep. 679 (K.B. 1802).

<sup>39</sup>See his judgment in *Matthewson v. Stockdale*, *supra* note 36, continuing an injunction after an earnest but futile search for additions or improvements.

<sup>40</sup>16 Ves. Jun. 269, 33 Eng. Rep. 987 (Ch. 1809).

next thirty years on informational works.<sup>41</sup> And the notion of prohibited taking became more sophisticated. Lord Chancellor Cottenham developed the thought—which soon influenced Justice Story in a leading American case<sup>42</sup>—that the question of the substantiality of an infringement was not necessarily a quantitative matter but might involve a qualitative judgment as to the importance of the part appropriated.<sup>43</sup> Then we have the expansive notions suggested by legislation adopted to reach works outside the book field. Thus the act on engravings prohibited copying “in whole or in part, by varying, adding to, or diminishing from the main design”<sup>44</sup> (compare this with the simple printing-reprinting formula of the Statute of Anne). We find one court prepared to hold a defendant liable where he had followed the plaintiff’s design as a model but changed the embellishments materially;<sup>45</sup> a judge in another case defined “copy” as “that which comes so near to the original as to give every person seeing it the *idea* created by the original.”<sup>46</sup> In like spirit was the analysis in *D’Almaine v. Boosey*,

<sup>41</sup>See *Mawman v. Tegg*, 2 Russ. 385, 38 Eng. Rep. 380 (Ch. 1826); *Nichols v. Loder*, 2 Coop. T. Cott. 217, 47 Eng. Rep. 1135 (Ch. 1831); *Bramwell v. Halcomb*, 2 My. & Cr. 737, 40 Eng. Rep. 1110 (Ch. 1836); *Lewis v. Fullarton*, 2 Beav. 6, 48 Eng. Rep. 1080 (Ch. 1839); *Kelly v. Hooper*, 1 Y. & C.C.C. 197, 62 Eng. Rep. 852 (1841). Many years later Scrutton could still say: “The English law lays too much stress on new matter added, too little on old matter taken.” SCRUTTON, COPYRIGHT 144 (4th ed. 1903).

<sup>42</sup>*Gray v. Russell*, 10 Fed. Cas. 1035, 1039 (No. 5728) (C.C.D.Mass. 1839).

<sup>43</sup>*Bramwell v. Halcomb*, 2 My. & Cr. 737, 40 Eng. Rep. 1110 (Ch. 1836).

<sup>44</sup>8 Geo. 2, c. 13, §1 (1735).

<sup>45</sup>*Roworth v. Wilkes*, 1 Camp. 94, 170 Eng. Rep. 889 (K.B. 1807). This, however, involved illustrations of standard fencing positions. The defendant had allegedly represented the same figures, “but disguised by a different costume.”

<sup>46</sup>*West v. Francis*, 5 B. & Ald. 737, 743, 106 Eng. Rep. 1361, 1363 (K.B. 1822) (italics in text supplied).

the first important treatment of musical infringement. The defendant had taken certain airs of Auber’s opera *Leicester* and reset or rearranged them for dances as quadrilles and waltzes. Vainly did the defendant argue on analogy to abridgment. “Substantially,” said Lord Chief Baron Abinger, “the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in the principle.”<sup>47</sup>

If an “improvement” by the defendant could not justify a substantial direct taking, as the *Longman* calendar case taught, what might justify such a taking? Lord Eldon ruminated in *Wilkins v. Atkin*<sup>48</sup> about the hypothetical case of a man writing a history of the mapping of Middlesex who reproduced maps published by another. Eldon suggested that if the taking were for the purpose merely of illustrating the history, it might be permissible; but the decision would be different if under color of a cartographic history the copyist sought to make a profit from republishing the maps themselves. This recalls the dispute over the abstract of *Rasselas* and hints at a modern doctrine sometimes called “fair use.” Some other references to appropriations defensible because of the peculiar uses to which they were put appeared in the cases;<sup>49</sup> it was common ground that quotation could be justified when needed for criticism or review.<sup>50</sup>

Despite the reshuffling of doctrine which I have just

<sup>47</sup>1 Y. & C. Ex. 288, 302, 160 Eng. Rep. 117, 123 (Ex. 1835).

<sup>48</sup>17 Ves. Jun. 422, 34 Eng. Rep. 163 (Ch. 1810).

<sup>49</sup>See, e.g., *Martin v. Wright*, 6 Sim. 297, 58 Eng. Rep. 605 (Ch. 1833); *Saunders v. Smith*, 3 My. & Cr. 711, 40 Eng. Rep. 1100 (Ch. 1838).

<sup>50</sup>*Bell v. Whitehead*, 3 Jur. 68 (Ch. 1839).

described, the translation and abridgment rules continued undisturbed. I find no exactly pertinent case on a translation,<sup>81</sup> but cases did continue to arise on abridgments. It should perhaps be noted that the freedom of a magazine to publish an outline of the plot of a current play (the *corpus delicti* was Poole's *Who's Who*, or *The Double Imposture*) was accepted as a matter of course, evidently as a situation well within the abridgment rule.<sup>82</sup>

The developments after Mansfield looking in the main to enlarged copyright protection were not, I suggest, merely spun out of logical analysis. They reflected great environmental changes—social and economic changes, changes in the literary and artistic outlook.

An indulgent attitude toward using other people's works seemed increasingly out of keeping with the realities of the market. The business of publishing and distributing books had become bigger, more competitive, more impersonal; the stakes were higher, the risks more serious. In this atmosphere there would be ever greater anxiety about marking out metes and bounds of literary ownership, and courts might be expected to respond to arguments about protection of investment.

With the decline of patronage, writers had to stand on their own feet; and as a reading public grew, writers began to feel themselves members of a professional class, and occasionally to speak out with their own demands for recog-

<sup>81</sup>It was held that a translation could itself hold a copyright, *Wyat v. Barnard*, 3 Ves. & B. 77, 35 Eng. Rep. 408 (Ch. 1814), but that was distinct from the question whether an unlicensed translation of a copyrighted work was an infringement. See also *Murray v. Bogue*, 1 Drew. 353, 61 Eng. Rep. 487 (Ch. 1852).

<sup>82</sup>*Whittingham v. Wooler*, 2 Swans. 428, 36 Eng. Rep. 679 (Ch. 1817).

nition and protection.<sup>83</sup> Emergence of the professional man of letters in our modern sense had indeed been delayed not advanced by the Restoration, as the critic Beljame has shown,<sup>84</sup> but if Dryden was not the first such figure, Pope does so qualify.

Literary criticism became less friendly to imitation. The classical or neoclassical attitude was still dominant when Mansfield flourished, but it was being modified gradually by conceptions anticipating the Romantic revival. Edward Young's *Conjectures on Original Composition*, that wondrous effluence from a dark poet, was written in 1759, and Young's appeal for a new kind of genius seemed to be answered by Shelley and Keats after the turn of the century.

From the classical writers, as expounded by critics of the Italian and French Renaissance, the Elizabethans had received the notion that artistic excellence lay in imitating the best works of the past, not in attempting free invention.<sup>85</sup> All the needed, indeed all the possible, subjects and materials for literary production were already disclosed in existing writings, the "*publica materies*" to which Horace referred.<sup>86</sup> What was required of an author was to give to the old materials an expression compatible with his own time. To be sure, servile imitation was not admired. The author must select and rein-

<sup>83</sup>On the changing conditions of publishing and authorship, see MILLER, *THE PROFESSIONAL WRITER IN ELIZABETHAN ENGLAND* (1959); COLLINS, *AUTHORSHIP IN THE DAYS OF JOHNSON* (1959); COCHRANE, DR. JOHNSON'S PRINTER: THE LIFE OF WILLIAM STRAHAN (1964); BARNES, *FREE TRADE IN BOOKS: A STUDY OF THE LONDON BOOK TRADE SINCE 1800* (1964).

<sup>84</sup>BELJAME, *MEN OF LETTERS AND THE ENGLISH PUBLIC IN THE EIGHTEENTH CENTURY 1660-1744* (Eng. ed. by Dobie 1948).

<sup>85</sup>See, generally, WHITE, *PLAGIARISM AND IMITATION DURING THE ENGLISH RENAISSANCE* (1935).

<sup>86</sup>*Ars Poetica*, l. 131.

terpret; here lay the improvement which was uniquely his, but which could be levied on in a similar way by later authors. The author was not, like a crow, to try to patch up a disguise with peacock's feathers; like a bee he must steal, but then he must transform, the sweetness of the flowers. Still, in the final count, imitation was essential, innovation was dangerous. The classical doctrine of imitation, as well as imitative practice in and out of conformity with the classical ideal, persisted long after Elizabethan times; and it is not hard to find a correspondence between Mansfield's narrow view of plagiarism and the definition that was supplied, although for a different purpose, by the classical teaching.

Now Edward Young and those who followed spoke for original as against imitative genius, for innovation as desirable in itself. The literary hero is one who, having little learning or disdaining whatever learning he has, takes a fresh look at nature and feeds his art direct from that source. The confrontation must be personal, not filtered through past authority. Bacon's formula for scientific invention is to be applied to literary and artistic composition: let the artist strive to know and revere himself, let him have confidence in his own power to create, as some primordial ancestor must have done before there was any authority to go by. In placing a high value on originality, the new literary criticism, I suggest, tended to justify strong protection of intellectual structures in some respect "new," to encourage a more suspicious search for appropriations even of the less obvious types, and to condemn these more roundly when found.<sup>57</sup> It may be objected that Romantic literary ideas have little relevance to the class of pedestrian,

<sup>57</sup>Cf. Umbreit, *A Consideration of Copyright*, 87 U. Pa. L. Rev. 932, 947-48 (1939).

nonimaginative works which was the main subject of copyright litigation. But this category cannot be marked off clearly from the other; and the courts traditionally have not been careful to distinguish the various classes of works on functional grounds. It is also possible that the easy business appeal for liability of cases of pilfering compilations or the like carried over to works of higher literary quality. In all events we are dealing with forces that worked themselves out over a long period of time, and not in an even flow.

The year 1830 or thereabouts is the right time to take leave of Westminster Hall and visit the United States. Previous events in this country can be quickly sketched in. By the time of the Constitutional Convention the original states excepting Delaware had passed copyright laws.<sup>58</sup> But as Madison later explained in *Federalist* No. 43, the states could not "separately make effectual provision" for copyright or patent. Hence article I, section 8, clause 8 of the Constitution. Evidently viewing the copyright-patent incentive or "headstart" as a means of releasing the energies of creative workers, the clause provides in a pure attractive style that "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." The first national copyright act, resembling the Statute of Anne except in formal details, was approved by President Washington on 31 May 1790.<sup>59</sup>

<sup>58</sup>Collected in *COPYRIGHT ENACTMENTS OF THE UNITED STATES 1783-1906* (Copyright Office Bull. No. 3, 1906), pp. 11-31.

<sup>59</sup>Act of 31 May 1790, ch. 15, 1 Stat. 124. The act covered books, maps, and charts.

History plagiarized itself by bringing to our Supreme Court a dispute on the lines of *Donaldson v. Becket*. This was *Wheaton v. Peters*,<sup>60</sup> a suit upon Wheaton's contributions as reporter to certain volumes of Supreme Court reports bearing his name, infringed, so it was claimed, by Peters's *Condensed Reports*. The bill was framed as well upon the common law as the statute; this caution was used because, of the four formal steps prescribed for going under the statute<sup>61</sup>—recording the title, inscribing the record in the book, advertising the record in newspapers, delivering a copy of the book to the Secretary of State—there was doubt whether the two latter steps had actually been taken with respect to the Wheaton volumes. As the statutory period of protection on those books had not expired, the *Donaldson* question of a right without limit of time could have been avoided by following English authority to the effect that failure to satisfy a formality—registration at Stationers' Hall—merely defeated recovery of the statutory penalties for infringement and left intact claims for general relief.<sup>62</sup> But counsel and the Court went far more broadly; the opinions review *The Question of Literary Property*; and it was held—out-Englishing the English—that copyright was a statutory construct to the point of demanding exact compliance with the formalities as a condition of any protection for a published

<sup>60</sup>33 U.S. (8 Pet.) 591 (1834). McLean, J., wrote for the Court. Thompson and Baldwin, JJ., dissented. Baldwin's text does not appear in the first or second edition of 8 Peters, but may be found in the third edition by Frederick C. Brighly, New York 1884.

<sup>61</sup>Including an amendatory Act of 29 April 1802, ch. 36, 2 Stat. 171.

<sup>62</sup>See *Beckford v. Hood*, 7 T.R. 620, 101 Eng. Rep. 1164 (K.B. 1798). The result of this case was apparently confirmed by 41 Geo. 3, c. 107, esp. §§ 1, 4 (1801).

book.<sup>63</sup> American law thus started from the same baseline as the English, but with us there was added an insistence on punctilios which has continued, with occasional displays almost of savagery in forfeiting copyrights, down to recent days. As the formalities had to be carried out around the time of publication, the hazards became aggravated by growing uncertainties about when, in legal contemplation, a work was "published." Indeed the whole concept of publication, fundamental to the operation of the statute, which for the most part treated of published not unpublished works, suffered over the years from a growing assortment of complexities.<sup>64</sup>

Chief American expositor and reinterpreter of English copyright doctrine was Joseph Story. Between 1839 and 1845 he dealt as Circuit Justice with books not quite of the type of roadbooks and directories but still the result more of industrious collection than imagination: one case arose on grammars, another on a biography drawing on an earlier compendium, a third on arithmetics.<sup>65</sup> In these opinions, as well as in his treatise *Equity Jurisprudence*,<sup>66</sup> Story spoke in terms congenial

<sup>63</sup>In yet another sense the Supreme Court went beyond the English. A 7-4 majority of the judges advising the House of Lords on the *Donaldson* appeal resolved that the author had a post-publication right at common law, but a 6-5 majority resolved that that common-law right was taken away by the Statute of Anne and the statutory right substituted. Professor Nimmer cogently reminds us (Nimmer, Copyright §47.3 [1963]) that our Supreme Court not only scouted the former resolution but said that, even if correct for England, it did not hold for Pennsylvania, the locus of the *Wheaton* dispute. See 33 U.S. (8 Pet.) at 658-61.

<sup>64</sup>See *infra*, Lecture III, pp. 83-85.

<sup>65</sup>*Gray v. Russell*, 10 Fed. Cas. 1035 (No. 5728) (C.C.D.Mass. 1839); *Folsom v. Marsh*, 9 Fed. Cas. 342 (No. 4901) (C.C.D.Mass. 1841); *Emerson v. Davies*, 8 Fed. Cas. 615 (No. 4436) (C.C.D.Mass. 1845).

<sup>66</sup>See §§ 930-43 (3d ed. 1843).

to Eldon but carrying his own inflections. Thus he said that an author working with old materials could achieve copyright of his distinctive selection, combination, or arrangement of the components: a later writer infringed if he took this contribution in a substantial degree, though he remained free to rework the old materials in his own way. Such a taking was proscribed even if some fresh improvements were added.<sup>67</sup> Justice Story proceeded to further refinements. He apparently considered that a plan or scheme of presentation or instruction—as found, say, in a school text—having some pretensions to freshness could itself claim protection: to copy the plan might constitute infringement even if the illustrative details had been altered.<sup>68</sup>

But as copyrightability or infringement began to rest on more than the mere matching of word sequences, the abridgment cases looked out-of-line. Story led no assault on the established English doctrine. Rather he seems to have tried to absorb those cases, as reinterpreted, into a general conception of fair use (still unlabeled as such), that is, to read them as a species of the genus of excused appropriation. In *Folsom v. Marsh*, in which he ultimately found infringement in the defendant's biography of Washington culled from Jared Sparks's compendious work *The Writings of George Washington*, Justice Story enumerated factors bearing on privilege or excuse: "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."<sup>69</sup>

<sup>67</sup>Gray v. Russell, 10 Fed. Cas. at 1038.

<sup>68</sup>Emerson v. Davies, 8 Fed. Cas. at 620.

<sup>69</sup>9 Fed. Cas. at 348. See also *Equity Jurisprudence* §§ 939, 940, 942 (3d ed. 1843).

Later judges did not quite understand the point of Story's gingerly handling of abridgments. In 1847, within two years of Story's death, Justice McLean on circuit held an abridgment of Story's own *Equity Jurisprudence* to be in large part fair and noninfringing.<sup>70</sup> McLean's discussion was hardly as delicate as Story's. He yielded to what he took to be settled English law, but he said he disbelieved the cheerful assertions that abridgments did not really interfere with sales of the originals. He went so far as to suggest that, on analogy to patent doctrine, any book using the "principle" of a prior copyrighted work should be held an infringement.<sup>71</sup>

As to translations—on which Justice Story had said very little<sup>72</sup>—there is a flat decision by Justice Grier in 1853 holding that a rendering in German of the full text of *Uncle Tom's Cabin* did not infringe the copyright.<sup>73</sup> Despite developments since the turn of the century, the Justice clung to the notion of copyright as protecting only the very book, the precise concrete expression. Mansfield, Willes, and Aston were duly cited. Like an abridgment, a translation was a "new" book. The fact that a translation of a work out of copyright was sufficiently new to claim copyright—as had been earlier decided<sup>74</sup>—was offered by the defendant's counsel as proof that a translation could not infringe a copyrighted original, and Justice Grier apparently followed his notion that there could be "no hybrid between a thief and a thinker."<sup>75</sup> Justice Grier said that to

<sup>70</sup>Story's Executors v. Holcomb, 23 Fed. Cas. 171 (No. 13497) (C.C.D. Ohio 1847).

<sup>71</sup>23 Fed. Cas. at 172-73.

<sup>72</sup>There is a bland passage in Emerson v. Davies, 8 Fed. Cas. at 619.

<sup>73</sup>Stowe v. Thomas, 23 Fed. Cas. 201 (No. 13514) (C.C.E.D.Pa. 1853).

<sup>74</sup>See *supra* note 51.

<sup>75</sup>23 Fed. Cas. at 205-06.



hold a translation infringing would be wrong on just the ground that it would make a copyright as broad as a patent.

The contrempts about patent was illustrative of the sporadic confusing injection into copyright analysis of oddments reminiscent of patent law: for example, the idea that an author could infringe by devising material which was in fact anticipated in another work though the author did not know of it;<sup>76</sup> or the idea that to attain copyright an author must necessarily exhibit more than the ability of a mere mechanic of the art, as an inventor must show more than ordinary workman's skill.<sup>77</sup> Some basic distinctions were not firmly taken until after the codification of 1909.

Justice Grier's opinion in the case of *Uncle Tom's Cabin* ended with the sweeping statement that by publication of the book all of Mrs. Stowe's "conceptions and inventions" not excepting her characters were made free to the world and could be "used and abused" by playwrights among others.<sup>78</sup> That proposition might be congenial to Mansfield, but was it any longer correct? Was it any longer clear that the story-line of a novel or the plot of a play apart from the specific envelope of narration or dialogue was incapable of protection? An argument the other way, besides drawing on the cases on informational works, could now build on a few decisions about music and graphic art, could appeal to patent doctrine, could

<sup>76</sup>See *Hein v. Harris*, 183 Fed. 107, 108-09 (2d Cir. 1910), where this proposition was related to the statutory language vesting in the copyright proprietor the "sole liberty" of printing and reprinting the work. See *infra*, Lecture II, pp. 41-43.

<sup>77</sup>See *Jolie v. Jaques*, 13 Fed. Cas. 910, 913 (No. 7437) (C.C.S.D.N.Y. 1850); but cf. *Henderson v. Tompkins*, 60 Fed. 758, 764 (C.C.D.Mass. 1894).

<sup>78</sup>23 Fed. Cas. at 208.

urge an analogy to Story's recognition of distinctive selection, arrangement, combination, and plan as copyrightable elements. The claim for plot could perhaps be made most effectively with regard to live drama. Shortly after Mrs. Stowe's disappointment, the act of 1856 added an exclusive public performance right as an incident of the copyright of a published dramatic composition,<sup>79</sup> and here a test arose. The case was *Daly v. Palmer*.<sup>80</sup>

The railroad episode at the end of the third scene of the fourth act of *Under the Gaslight*, by Augustin Daly, was popular with audiences, and the defendant sought to use a variant of it in the play *After Dark*, by Dion Boucicault, which was otherwise a quite different work. Both scenes hung on how, or whether, a character tied to the track was to escape an onrushing train; but the precise incidents diverged, as did the speeches. Much of the interest must have derived from the mechanical stage effects, in which copyright was evidently not claimed; for the rest, one would have thought the plaintiff would be hard put to show distinctiveness in the elements of the episode or their combination, and Boucicault had, after all, made changes. The defendant's attempt to show anticipation in prior works—again the hint of patent—was, however, rather feeble, and the court said the "originality and novelty"<sup>81</sup> of plaintiff's scene had not been disproved. Relying on the music case of *D'Almaine v. Boosey*,<sup>82</sup> and recalling Story's discussion in the case of arithmetics, the court

<sup>79</sup>Act of 18 August 1856, ch. 169, 11 Stat. 138.

<sup>80</sup>6 Fed. Cas. 1132 (No. 3552) (C.C.S.D.N.Y. 1868). See also *Daly v. Webster*, 56 Fed. 483 (2d Cir. 1892); *Brady v. Daly*, 175 U.S. 148 (1899).

<sup>81</sup>6 Fed. Cas. at 1138.

<sup>82</sup>See *supra* note 47 and accompanying text.

enjoined the defendant. We shall never know how far the court was yielding to the presumably irrelevant but poignant fact that the defendant was trying to work the lode of spectacular rescue that the plaintiff had proved to be rich in audience appeal, and was planning to open his show in direct competition with the plaintiff's in New York. Writing in the *American Law Review*, defendant's counsel Mr. T. W. Clarke lamented that this "is the first decision which has established a property in incident."<sup>83</sup> He said also that the decision "may be said to advance in literary law the doctrine of romantic<sup>84</sup> equivalents, analogous to the doctrine of mechanical equivalents of the patent or mechanical law." Here, I take it, Mr. Clarke was complaining that mere similarity of impression or effect was being accepted as sufficient to make out infringement.

In 1870 the statute was amended to allow authors to reserve the right not only to translate their works (*pace* Justice Grier) but also to dramatize them.<sup>85</sup> The latter enlargement of the monopoly to cover the conversion of a work from one to another artistic medium, taken together with the *Daly* decision, put the question whether any line could really be held, even as to imaginative works, between "idea," long supposed to be outside copyright protection, and "form," assumed to be the only thing within it. Was a copyrighted work now to be protected according to its "principle," as McLean thought it should be? The question will recur.

At this point I have to mention a kind of counter theme<sup>86</sup> *Am. L. Rev.* 453 (1869). A handwritten annotation by J. C. Gray in his copy of the *Review* (now in the Harvard Law Library) attributes the comment to Clarke.

<sup>83</sup> *Am. L. Rev.* 453 (1869). A handwritten annotation by J. C. Gray in his copy of the *Review* (now in the Harvard Law Library) attributes the comment to Clarke.

<sup>84</sup> The word appears with a lower-case *r*.

<sup>85</sup> Act of 8 July 1870, ch. 230, § 86, 16 Stat. 198.

sounded by the famous case of *Baker v. Selden*.<sup>86</sup> One Selden, in a number of copyrighted books, had described a peculiar system of bookkeeping and had set out blanks and forms intrinsic to it. He had in effect licensed others to use his forms and thus his system; whereupon the defendant Baker began to sell similar forms, working the same system, to bookkeepers and auditors. You will have guessed that Selden failed in the lawsuit; but then the thought will occur to you that the plan of presentation of a grammar or arithmetic, the plot of a play, is a kind of system; and, beyond that, what of the forms themselves as combinations of words and signs? Justice Bradley for the Supreme Court distinguished between Selden's books and the system which they described. Another book about bookkeeping tracking Selden's books would infringe them; but anyone was free to use the system disclosed, in the absence of a patent, and that immunity carried with it the forms, even in the case of one who sold them for use by others.

"Explanation" was thus set apart from use at least where the copyrighted work taught a practical art. Denial of copyright to commonplace advertisements<sup>87</sup> and to such ephemeral fact collections as market quotations<sup>88</sup>—settled doctrine before 1909—was justified on grounds of their being works merely of utility; it was also suggested that they did not meet the constitutional standard of promoting science or arts. So also the substance of news reports was conceived to be free of copyright, though special literary style or embellishment

<sup>86</sup> 101 U.S. 99 (1879).

<sup>87</sup> *J. L. Mott Iron Works v. Clow*, 82 Fed. 316 (7th Cir. 1897).

<sup>88</sup> *Clayton v. Stone*, 5 Fed. Cas. 999 (No. 2872) (C.C.S.D.N.Y. 1829).

might perhaps claim protection.<sup>89</sup> But what of the protection of compilations, directories, and the like which assembled facts? Discussing news carried by ticker tape, Judge Grosscup, in a case anticipating the great quarrel between Associated Press and International News Service,<sup>90</sup> offered a distinction between "originality" and "opportunity," between works of authorship and mere annals;<sup>91</sup> but one may wonder whether it was really fair to say that compilations were works of the creative mind while news reports sprang just from occasion.

The 350 years of this lecture, from the stationers' charter of 1557 to the threshold of our act of 1909, end, fittingly enough, with some attempts at generalization by Justice Holmes. *Bleistein v. Donaldson Lithographing Co.*<sup>92</sup> upheld the copyrightability of three humble chromolithographs picturing certain circus acts as advertisements of Wallace's circus. On principle, Holmes thought, any work qualified for copyright so far as it was a "personal reaction . . . upon nature."

"Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act." The pictures were not barred on account of their "limited pretensions": "the least pretentious picture has more originality in it than directories and the like." Nor did it matter that the pictures advertised goods or services.

<sup>89</sup>See *Tribune Co. of Chicago v. Associated Press*, 116 Fed. 126 (C.C.N.D. Ill. 1900); BOWKER, *COPYRIGHT: ITS HISTORY AND ITS LAW* 89 (1912).

<sup>90</sup>See *infra*, Lecture III, pp. 86-87.

<sup>91</sup>*National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 298 (7th Cir. 1902).

<sup>92</sup>188 U.S. 239 (1903).

The opinion upset brusquely the received wisdom about advertising matter. But more arresting was Holmes's insistence on individuality or personality which seems to me to have an echo in it of the Romantic gospel.<sup>93</sup>

Assume a copyright in some manifestation of individuality—just what restraint did it work on others? The Court held in *White-Smith Music Pub. Co. v. Apollo Co.*<sup>94</sup> that the copyright of a song was not infringed by the manufacture and sale of music rolls which, when used on player pianos, rendered the music in sound. Although agreeing that the matter was concluded by precedent, Holmes objected on principle. The ground of copyright was that the author had "invented some new collocation of visible or audible points." Protection should not extend beyond "the specific form, . . . the collocation devised"; on the other hand the protection should go to the "essence" of the collocation; it ought to 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." Holmes's language here leaves some doubt as to what he meant by "invention." Also, is protection of "the specific form" of the invention, the same thing as protecting its "result"? The latter might be read as taking in a good deal more than the former. Thus we come to *Kalem Co. v. Harper Bros.*<sup>95</sup> where the defendant had made a silent

<sup>93</sup>Cf. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 205 (1890), relating the right of the sender of a letter to prevent its publication, and indeed all rights to prevent publication of "thoughts, sentiments, and emotions, expressed through the medium of writings or of the arts" to "the more general right of the individual to be let alone."

<sup>94</sup>209 U.S. 1 (1908) (Justice Holmes "concurring specially" at 18).

<sup>95</sup>222 U.S. 55 (1911).

motion picture following the story of the copyrighted novel *Ben Hur*. Had not the "form" of the novel been changed, and even the "result"? Here was an opportunity to decant on plagiarism but Holmes dealt with the problem briefly. Although the statute said nothing about movies until 1912, it had already prohibited "dramatization," and a movie was not less a drama than a faithful pantomime would be, and hence should count as a dramatization of the novel. To the claim that expansion of the copyright of the novel to prohibit the movie would create a monopoly of "ideas" in violation of the copyright clause of the Constitution, Holmes answered that the law had not that effect but "confines itself to a particular, cognate and well known form of reproduction"; and he ended characteristically, "If to that extent a grant of monopoly is thought a proper way to secure the right to the writings this court cannot say that Congress was wrong." We get no view of how far Holmes would have been willing to suppress the individuality of a movie producer who did not so much follow *Ben Hur* as ring variations on it, just as the movie varied from the protectible part of the play in *Sheldon v. Metro-Goldwyn Pictures Corp.*—the case with which we began, and to which we must return in the next lecture.

I have rendered a summary of the evolution of Anglo-American doctrine about copyright, of the gradual broadening of that conception; and instead of summarizing the summary I shall recall the main protagonists of the tale: John Doe, unknown draftsman of the Stationers' Company charter; Archbishop Whitgift, probable author of the Star Chamber decree of 1586; Richard Roe, draftsman of the Statute of Anne; Lord Mansfield, associated with the classic narrow

view of the horizontal extent of copyright; Edward Young, arbitrarily chosen as the voice of Romanticism; Lord Eldon, transitional figure; Justice Story, American expositor; and, finally, Justice Holmes.

sort), as where the area served by the system does not receive all networks.<sup>116</sup>

4. The Committee would split the difference between the present two-cent compulsory music license and the three cents first proposed in the Revision Bill: it would adopt two and one-half cents as the base rate.<sup>116</sup>

Abandoning the effort to abolish completely the present jukebox exemption, the amended Bill would establish a compulsory license for the jukebox performance right at a base rate of three cents per work for each three-month period it was made available on the particular machine.<sup>117</sup>

<sup>116</sup>Reported Bill § 111(a)(3), (b), (c), (d).

<sup>116</sup>Reported Bill § 115(c)(2).

<sup>117</sup>Reported Bill § 116(c)(2).

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