

Ben Hur Rides through Copyright History

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Movie buffs enjoy the 1959 film *Ben Hur* starring Charlton Heston and featuring an exciting chariot race between characters Ben Hur and Messala. But who knew that the origin of the movie is a novel at the center of an important copyright issue?

Civil War general Lew Wallace (1827–1905) who, at the Battle of Monocacy, saved Washington, D.C., from advancing southern troops and who sat on the military panel that tried the Lincoln assassination conspirators, penned a novel about fictional first-century hero Judah Ben Hur. Published in November 1880, the book was wildly popular. The numerous requests to dramatize the story were probably exceeded only by the quantity of unauthorized productions and readings. Wallace declined every plea to license his work until 1899, when he haggled at length over royalties.

The authorized stage version, which included a treadmill enabling live chariot races, was a huge hit. By 1920, the drama had grossed more than \$10 million, and, according to *Lew Wallace: Militant Romantic* by Robert and Katharine Morsberger, was “one of the most phenomenal hits in the history of the American theatre.”

Such success attracted the attention of movie-makers. A company called Kalem paid a writer to create unauthorized dramatic versions of scenes from *Ben Hur*, had these versions performed, and photographed the

result. It then produced (silent) film from the photographs, and advertised and sold copies as *Ben Hur*. These copies were publicly exhibited.

Wallace’s son, Henry, and publisher Harper Brothers sued Kalem for copyright infringement, and the case was appealed to the Supreme Court. Writing in 1911, Justice Oliver Wendell Holmes stated that a story could be told in actions, not only in speech or words, and that the photographs were “an unlawful dramatization of the novel.” Kalem claimed that it did not cause the films to be displayed, but Holmes pointed out that Kalem “not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story” (*Kalem v. Harper Brothers*). “If the defendant did not contribute to the infringement, it is impossible to do so except by taking part in the final act.”

With this decision, Holmes articulated the concept of contributory infringement, a form of secondary liability that occurs when a party knowingly “induces, causes, or materially contributes to the infringing conduct of another,” as stated in testimony by Register of Copyrights Marybeth Peters before the Senate Committee on the Judiciary when citing the case in July 2004. ©

Poster from 1901 stage version of Ben Hur



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