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STUDIES 22–25

25. Liability of Innocent Infringers of Copyrights

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FOREWORD

This committee print is the eighth of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

Provisions of the present copyright law are essentially the same as those of the statute enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are subject to copyright; new uses of these productions and new methods for their dissemination have grown up; and industries that produce or utilize such works have undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting a program of studies of the copyright law and practices. The subcommittee believes that these studies will be a valuable contribution to the literature on copyright law and practice, that they will be useful in considering problems involved in proposals to revise the copyright law, and that their publication and distribution will serve the public interest.

The present committee print contains four studies: No. 22, "The Damage Provisions of the Copyright Law" by William S. Strauss, Attorney-Adviser of the Copyright Office; No. 23, "The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study" by Prof. Ralph S. Brown, Jr., of the Yale Law School; No. 24, "Remedies Other Than Damages for Copyright Infringement" by William S. Strauss; and No. 25, "Liability of Innocent Infringers of Copyrights" by Alan Latman, formerly Special Adviser to the Copyright Office, and William S. Tager, both now engaged in the practice of law in New York City.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected by copyright laws, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate.

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the United States Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in directing their general subject-matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors and not of the Copyright Office.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

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STUDY NO. 25

LIABILITY OF INNOCENT INFRINGERS OF COPYRIGHTS

BY ALAN LATMAN AND WILLIAM S. TAGER

January 1958

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LIABILITY OF INNOCENT INFRINGERS OF COPYRIGHTS

I. Introduction

Copyright infringement consists of interference with any of a variety of rights and justifies resort to a number of remedies. Such interference may be intentional, negligent or accidental.

The law of torts, from which these terms are borrowed, considers intention relevant in several respects. For example, liability for conversion depends upon an intentional use of a chattel in such a way as to interfere with another's right to possession.[1] The defendant is liable even though he is under the reasonable but erroneous impression that the chattel is his and accordingly intends no such interference;[2] such good faith, however, may permit him to tender the chattel to the plaintiff and thus mitigate damages.[3]

Inasmuch as copyright infringement has been held to be an action "sounding in tort,"[4] the question is raised whether copyright law recognizes or should recognize similar distinctions based on the "innocence" of the infringer. Should one who copies, performs, or sells a copyrighted work unintentionally and in the exercise of due care be considered an infringer at all? Or should the remedies against him be limited? To what extent should a new Federal copyright statute modify existing law in this regard?

It is apparent that any answer to these questions is complicated by the great variety of copyright infringements. Innocent infringement occurs in various situations in which the opportunity to avoid infringement, and the impact of the infringement and of the imposition of certain remedies, differ. The innocent infringer might, for example, be shielded from liability for interfering with certain rights and not others. The copyright owner might be restricted in his choice of remedies against the innocent infringer or in the scope of any particular remedy. Many of the possible permutations have been attempted or proposed in this country or abroad. Of course, a balancing of policy considerations must dictate the relevance of intention or negligence in each situation. Moreover, the wide range of factual situations encompassed by the general concept of "innocent infringement" must be appreciated. The variety of factual or legal knowledge of which the "infringer" may be "innocent" may, where applicable, call for different answers to the broad questions posed above.

[1] Restatement, Torts, sec. 222 (1934).
[2] Id. at sec. 222, comment *d*.
[3] Id. at sec. 247.
[4] *Turton* v. *United States*, 212 F. 2d 354 (6th Cir. 1954); Howell, "The Copyright Law" 165 (1952).

II. History of the Treatment of Innocent Infringers in the United States

A. COLONIAL STATUTES, 1783–86

The 12 colonial copyright statutes,[5] enacted largely as a result of the recommendation of the Continental Congress,[6] took three different approaches to the problem of intention and its relation to civil liability for infringement.

1. No distinction between innocent and willful infringement

Four States [7] did not distinguish in their statutes between innocent and intentional infringement. Neither by limiting language in the specifications of infringement nor by proviso was state of mind made relevant. Thus, the innocent infringer was to be made liable to the same extent as one who purposely infringed. It should be noted, however, that the sole remedy afforded by three of these statutes [8] was recovery of a sum, limited by a stated minimum and maximum. In determining the amount of such sum which the defendant was to "forfeit and pay," it is conceivable that the courts were expected to take into consideration the degree of the defendant's culpability.

2. Liability of distributor conditioned on knowledge that consent had not been obtained to "publish, vend, utter and distribute" protected work

The statutes of five States [9] appear to distinguish between those who introduce a work into circulation, without the consent of the author, and those who aid in its distribution. Liability attached to anyone who, without such consent, printed or imported the work, but only to one who—

> shall *knowingly* publish, vend, and utter or distribute the same, without the consent of the proprietor thereof in writing * * *. [Emphasis added.]

The distributor, to be liable, must know that his sale was unauthorized; the initiator was liable, whether he knew of his lack of authorization or not.

3. Liability of distributor conditioned on knowledge that printing or importation was unauthorized

The statutes of Virginia, Maryland, and South Carolina may not have differed in basic approach from the five statutes discussed immediately above. The different language chosen is significant, however, for it served as a model for the first Federal copyright statute. The liability for undertaking to "sell, publish, or expose to sale" was limited to a person "knowing the same to be so printed, reprinted, or imported, without such consent first had and obtained." Thus, a seller who did not know that the *printing* of his copies was unauthorized was not liable.

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[5] All the Original Colonies except Delaware enacted copyright statutes.

[6] Resolution of Continental Congress, May 2, 1783. This resolution, in addition to the colonial statutes, are reproduced in "Copyright Laws of the United States of America, 1783-1956," a publication of the Copyright Office.

[7] Massachusetts, New Hampshire, Rhode Island and Pennsylvania.

[8] The Pennsylvania statute provided for recovery of "double the value" of the infringing copies, without apparent variation.

[9] Connecticut, Georgia, New Jersey, New York and North Carolina.

B. ACT OF 1790

Section 2 of the first Copyright Act passed by the Congress of the United States [10] provided in pertinent part:

> That if any other person or persons * * * shall print, reprint, publish, or import, or cause to be printed, reprinted, published, or imported from any foreign Kingdom or State, any copy or copies of such map, chart, book or books without the consent of the author or proprietor thereof, first had and obtained in writing * * *; or *knowing the same to be so printed, reprinted, or imported, shall publish, sell, or expose to sale or cause to be published, sold, or exposed to sale,* any copy of such map, chart, book or books, without such consent first had and obtained in writing as aforesaid, then such offender shall forfeit all and every copy * * *: And every such offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet * * *. [Emphasis added.]

Thus, persons who printed, published, or imported copies without consent were liable without regard to their innocence; but those who published or sold copies were liable only if they knew that the copies were printed or imported without consent. The statute was ambiguous in its reference to "publish" in both contexts.

C. ACT OF 1870

Sections 99 and 100 of the 1870 act [11] retained the distinction between persons who printed, published, or imported copies, and those who sold copies; but removed the ambiguity in the dual use of the term "publish" in earlier statutes by deleting that word from the description of acts which, if innocent, did not constitute infringement.

Subsequent amendments of the law relating to copyrights prior to the 1909 act continued the requirement of knowledge on the part of the vendor.

III. THE PRESENT LAW

A. THE STATUTE

The general features of the law of innocent infringement were shaped prior to 1909. Except for the innocent vendor, innocence or lack of intent to infringe was not generally a defense to an action for infringement.[12] There is considerable evidence that this situation was realized by those participating in the drafting and enactment of the 1909 act; [13] although the problem of the innocent infringer was considered at some length in the hearings, the 1909 statute contained no broad provisions excusing innocent infringers.[14] Moreover, the act eliminated the provision in earlier statutes expressly protecting the innocent seller.

However, several provisions limiting available remedies in certain instances of innocent infringement were inserted. These provisions were supplemented by amendments in 1912 [15] and 1952.[16]

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[10] Act of May 31, 1790, ch. 15, 1 Stat. 124.
[11] 16 Stat. 198.
[12] Drone, "Copyrights" 401-403 (1879); Spalding, "The Law of Copyright" 55 (1878); Morgan, "The Law of Literature" 240, 665, (1875).
[13] E.g., Hearings Before Committees on Patents on H.R. 19853, and S. 6330, 59th Cong., 1st sess. 17, 137 (June 1906).
[14] These developments were considered significant in *DeAcosta* v. *Brown*, 146 F. 2d 408, 411 (2d Cir. 1944).
[15] 37 Stat. 489.
[16] 66 Stat. 752.

1. Accidental omission of notice and the innocent infringer: Section 21

The only section in the present copyright act which uses the term "innocent infringer" deals with only a narrow area of the problem. Section 21 seeks generally to protect the copyright proprietor from the loss of copyright where notice has been omitted by accident or mistake from a limited number of copies. The section provides that such omission 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. [Emphasis added.]

This section appears only to bar the recovery of damages and, in some circumstances, the granting of injunctive relief against an innocent and misled infringer. The profits of an innocent infringer may apparently still be recovered even though he has been misled by the omission of the notice.[17]

2. Innocent infringement by means of motion pictures: Section 101(b)

The rapidity and frequency of the exhibition of a motion picture were considered to pose special problems as to innocent infringement. If a motion picture infringed a copyrighted work, the number of infringements in its repeated exhibitions could lead to the cumulative recovery of a potentially staggering amount of statutory damages. If such infringement were innocent, it was felt that this recovery would be unjustified.[18] Accordingly, in 1912, when Congress amended the 1909 act to enumerate motion pictures as a class of copyrightable works, it limited the amount of statutory damages recoverable for infringement by means of motion pictures.

(*a*) *Infringement of a nondramatic work*

Section 101(b) provides in part:

> * * * 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 [statutory] damages shall not exceed the sum of $100; * * *. [Emphasis added.]

(*b*) *Infringement of a dramatic work*

Congress took a slightly different approach with respect to infringement in a motion picture of a work in dramatic form. Innocent infringement of such a work was to be subject to the same scale of statutory damages as an ordinary infringement, but the entire process of making the motion picture and distributing it to exhibitors was to be considered a single infringement.

Thus, in another portion of section 101(b), it was provided:

> * * * 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 distribu-

[17] *Strauss* v. *Penn. Printing & Publishing Co.*, 220 F. 977 (E.D. Pa. 1915). Sec. 21 is discussed at length in Weil, "American Copyright Law" 351–354 (1917); see also Ball, "Law of Copyright and Literary Property" 327 (1944).

[18] H.R. Rept. No. 756, 62d Cong., 2d sess., 3 (1912).

tion 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 pictures shall not exceed the sum of $5,000 nor be less than $250 * * *. [Emphasis added.]

3. Innocent infringement of a nondramatic literary work by broadcasting: Section 1(c)

In 1952, section 1(c) was amended to extend public performance rights to nondramatic works.[19] Included in the amendment was the following provision:

* * * The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 when the infringing broadcaster shows that *he was not aware that he was infringing and that such infringement could not have been reasonably foreseen;* * * *. [Emphasis added.]

It should be noted this limitation is almost identical to the provision of section 101(b) limiting the remedy for infringement of a nondramatic work by motion pictures.

4. Discretion of the court in granting remedies: Sections 101(b), 101(c), 101(d), and 116

Section 101(c) provides for the impounding of infringing articles during the pendency of an action for infringement "upon such terms and conditions as the court may prescribe." Section 101(d) provides for delivery for destruction of all infringing copies or devices for making such copies "as the court may order." There is some indication in the legislative hearings that the discretion given to the court in these provisions may have been intended to give some measure of protection to the innocent infringer.[20] Similarily, section 101(b) provides, in lieu of actual damages and profits, for "such [statutory] damages as to the court shall appear to be just," within a specified range of minimum and maximum amounts;[21] and section 116 contains a provision by which "the court may award to the prevailing party a reasonable attorney's fee as part of the costs." In granting these various remedies, the courts may mitigate the remedies accorded against an innocent infringer.

5. Criminal provision and innocent intention: Section 104

Section 104 makes willful infringement for profit a misdemeanor. The requirement of willfulness thus expressly excludes the innocent infringer from the sweep of this criminal provision.

[19] 66 Stat. 752 (1952).

[20] See discussion in Hearings (December 1906) 178–179 and Hearings (June 1906) 177.

[21] The limitations on the amount of such statutory damages are made inapplicable 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." The willful infringement after notice at which this provision is directed might include certain types of infringements which would otherwise be considered "innocent." Thus, one who reasonably but erroneously relies upon the supposed invalidity of a claim to copyright after written notice of the claim might not be protected by his good faith.

B. THE TREATMENT OF THE INNOCENT INFRINGER IN THE COURTS

1. Innocence or lack of intentión as a defense

The rule is well established that lack of intention to infringe is generally no defense to an action for infringement.[22] This was the general rule prior to the present statute [23] subject, of course, to the statutory exceptions in favor of the innocent distributor; the provisions and legislative history of the 1909 act left little room for judicial modification. Thus, no less applicable under present law are the views expressed in the early case of *Lawrence* v. *Dana* [24] to the effect that—

> Mere honest intention on the part of the appropriator will not suffice * * * as the court can only look at the result, and not at the intention in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects * * *.[25]

This principle has been recognized by the Supreme Court which stated, by way of dictum, in *Buck* v. *Jewell-LaSalle Realty Co.:* [26] "Intention to infringe is not essential under the act."

Direct copying of copyrighted material will give rise to liability even if committed under the reasonable but erroneous assumption that the portion of the work being copied is in the public domain.[27] Neither is copying excused by reason of a notice in exceedingly small type,[28] or even by the omission of notice on the part of a licensee of the copyright owner.[29] And even where the user obtains the permission of the publisher of the magazine carrying an article copyrighted by the author, he cannot escape liability.[30]

There are still other situations in which the defendant has not consciously copied the plaintiff's work but the question of infringement is nevertheless raised. Here the defendant may be "innocent," to a varying extent, of different facts or legal results. These situations will be discussed separately in an attempt to describe the operation, in each of them, of the general rule that innocence of intention to infringe is no defense.

(*a*) *Indirect copying*

Copying from a publication which was itself copied from a copyrighted work constitutes infringement and is usually designated as "indirect" copying.[31]

Whatever doubts may exist as to the appropriate remedies to be applied, there is agreement among courts and writers that the copyist of an infringing copy is liable as an infringer, even if ignorant of the fact of copyright.[32] This rule was applied in *DeAcosta* v. *Brown* [33] to common law literary property. And while the Supreme Court has not specifically decided the point, it has considered a similar factual situation. In *Douglas* v. *Cunningham*,[34] the defendant pub-

[22] Howell, op. cit., note 4, supra, 122; Peck, "Copyright Infringement of Literary Works," 38 Marquette L. Rev. 180, 187 (1955).
[23] See note 12, supra.
[24] 15 Fed. Cas. 26, Case No. 8, 136 (C.C.D. Mass. 1869).
[25] Id. at 60.
[26] 283 U.S. 191, 198 (1930).
[27] *Toksvig* v. *Bruce Pub. Co.*, 181 F. 2d 664 (7th Cir. 1950).
[28] *Advertisers Exchange, Inc.* v. *Laufe*, 29 F. Supp. 1 (W.D. Pa. 1939).
[29] *American Press Ass'n* v. *Daily Story Publishing Co.*, 120 Fed. 766 (7th Cir. 1902).
[30] *Insurance Press* v. *Ford Motor Co.*, 255 Fed. 896 (2d Cir. 1918).
[31] Amdur, "Copyright Law and Practice" 688 (1936).
[32] *Altman* v. *New Haven Union Co.*, 254 Fed. 113 (D. Conn. 1918). See *American Press Ass'n* v. *Daily Story Publishing Co.*, 120 Fed. 766 (7th Cir. 1902); Weil, "American Copyright Law" 400 (1917); Shafter, "Musical Copyright" 238 (1939).
[33] 146 F. 2d 408 (2d Cir. 1944).
[34] 294 U.S. 207 (1935).

lished the plaintiff's copyrighted story in the belief that the material which had been orally related to defendant's employee by a third person represented an original recounting of actual happenings. The Court, in finding improper the interference by the court of appeals with the discretion of the trial court in fixing statutory damages, apparently accepted the liability of the defendant, notwithstanding his innocence.

(*b*) *Innocent printers*

During the hearings preceding the 1909 act, George W. Ogilvie, a Chicago publisher, stated:

> * * * There is no printer in the United States whom I cannot get in trouble—serious trouble—so serious that it might put him out of business. I take to him a set of plates about which he knows nothing as to the existence of copyright on them. He prints them for me * * * and then the owners of the copyright can get after him and collect damages * * *.[35]

Mr. Ogilvie thought the law should be changed to protect a printer who unwittingly prints infringing copies; but the law was not changed and the innocent printer has been held liable by the courts.[36] Insofar as the printer, innocent or not, is independent of the publisher and in no way a coadventurer, it has been held that he is not jointly liable for the publisher's profits, but is accountable only for his own.[37]

(*c*) *Innocent vendors*

Since the removal in 1909 of the protective provision of earlier statutes, innocent nonmanufacturing vendors have also been held to be infringers.[38] The good faith of the defendants in the recent *Woolworth* litigations [39] was acknowledged by both the majority [40] and dissent [41] in the Supreme Court, without apparently casting doubt on the vendor's status as an infringer. Thus, it is not surprising that in recent litigation,[42] the defendant dealers conceded that—

> the sale or vending of an unauthorized copy of a copyrighted article by anyone is an infringement of the copyright irrespective of the position of the vendor in the distributive process, his bona fides, his innocence, or the unknown peril to which he may have been subjected.[43]

And the court, relying in part on the *Woolworth* case, found that "this is undoubtedly the law."

(*d*) *Vicarious liability*

The normal agency rule that a master is liable for his servant's wrongful acts committed within the scope of employment has been considered applicable to copyright infringement.[44] A few courts have refused to apply this rule where its effect would have been, in the court's view, essentially penal. Thus, in *Taylor* v. *Gilman*,[45] the court regarded as a penalty the statutory amount required by a former provision to be divided equally between the plaintiff and the U.S. Government. Although the court refused to consider the em-

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35 Hearings (December 1906) at 49.
36 See *American Code Co.* v. *Bensinger*, 282 Fed. 829, 834 (2d Cir. 1922).
37 *Sammons* v. *Larkin*, 126 F. 2d 341 (1st Cir. 1942).
38 E.g., *McCulloch* v. *Zapun Ceramics, Inc.*, 97 U.S.P.Q. 12 (S.D.N.Y. 1953).
39 *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 193 F. 2d 162 (1st Cir. 1951), rev'd, 344 U.S. 228 (1952).
40 344 U.S. 229.
41 Id. at 234–235.
42 *Miller* v. *Goody*, 139 F. Supp. 176 (S.D.N.Y. 1956), rev'd sub nom *Shapiro, Bernstein* v. *Goody*, 248 F. 2d 260 (2d Cir. 1957). The court of appeals apparently extended this principle to the sale of unauthorized phonograph records.
43 139 F. Supp. 180.
44 See *M. Witmark & Sons* v. *Calloway*, 22 F. 2d 412, 414 (E.D. Tenn. 1927).
45 24 Fed. 632 (S.D.N.Y. 1885).

ployer liable for such amount, it was conceded that the defendant "might be civilly liable." And in an isolated instance under the present statute, though it provides in section 101(b) that statutory damages "shall not be regarded as a penalty," the court relied upon *Taylor*, the absence of actual damage, and what the court considered the "accidental" copying of the plaintiff's work, to deny recovery of statutory damages.[46] Despite these two cases, the rule seems well established that an employer may be held liable for infringing acts committed by his employees.[47]

An interesting application of the theory of vicarious liability to copyright law results in the liability of innocent proprietors of theaters and dance halls for infringements committed by hired musicians. Such liability apparently goes beyond the ordinary rules of *respondeat superior* and does not require a strict common law master-servant relationship. Thus, in *Dreamland Ballroom, Inc.*, v. *Shapiro, Bernstein & Co.*,[48] the court stated:

> The authorities are, we believe, unanimous in holding that the owner of a dance hall at whose place copyrighted musical compositions are played in violation of the rights of the copyright holder is liable, if the playing be for the profit of the dance hall. *And this is so, even though the orchestra be employed under a contract that would ordinarily make it an independent contractor.* [Emphasis added.]

2. Innocence or lack of intention and remedies for infringement

Innocence or lack of intention is of greater relevance to the fashioning of remedies for infringement than it is to the substantive question whether infringement has taken place. The copyright statute provides a battery of remedies for infringement; and the culpability of the defendant has played a significant role in judicial selection and adaptation of these remedies.

(*a*) *Damages*

It has been noted that one court considered the remedy of awarding statutory damages sufficiently penal to warrant denial of the remedy for an "accidental" use of plaintiff's work by defendant's agent where no actual damage to the plaintiff resulted.[49] More typically, a court is concerned with the amount of the statutory damages to be selected between the statutory maximum and minimum and may use the defendant's culpability as a guide to making such a selection.

In some of the cases discussed earlier, the innocence of the defendant, while insufficient to excuse his infringement, was a factor in the court's refusal to award more than the statutory minimum.[50] However, several Supreme Court decisions have made it clear that where the trial court has fixed a higher amount of statutory damages, the amount awarded may not be reduced by an appellate court, however innocent the infringer might have been.[51]

It has long been accepted that all who participate in an infringement are jointly and severally liable for all the damage sustained by the copyright owner.[52] There have been recent instances, however, where courts influenced by one defendant's innocence have ignored

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[46] *Norm Co.* v. *John A. Brown Co.*, 26 F. Supp. 707 (W.D. Okla. 1939).

[47] Warner, "Radio and Television Rights," 609 (1953).

[48] 36 F. 2d 354, 355 (7th Cir. 1929).

[49] See note 46, supra.

[50] See, e.g., *Altman* v. *New Haven Union Co.*, 254 Fed. 113 (D.C. Conn. 1918); *Sammons* v. *Larkin*, 38 F. Supp. 649 (D.C. Mass. 1940); judgment vacated and cause remanded sub nom *Sammons* v. *Colonial Press*, 126 F. 2d 341 (1st Cir. 1942).

[51] *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952); *Douglas* v. *Cunningham*, 294 U.S. 207 (1935).

[52] Ball, "Law of Copyright and Literary Property" 332 (1944); Warner, op. cit., note 47, supra, at 646.

or modified this rule. Thus, in *Northern Music Corp.* v. *King Record Distributing Co.*, [53] the corporate defendants made and distributed recordings of a song actually copied by other defendants from the plaintiff's copyrighted song. The corporate defendants had no knowledge or reason to know of the plaintiff's copyright and were held liable for only "that portion of the damage which is attributable to their individual infringements of plaintiff's copyright." And in *Gordon* v. *Weir*,[54] the court refused to hold innocent infringers, misled by a certificate of registration issued to the original willful infringer, liable for the damages inflicted by the original infringer.

These decisions go further than the earlier decision in *Detective Comics, Inc.* v. *Bruns Publications*,[55] which found joint liability but modified its enforcement in favor of innocent infringers. The distributors of the infringing articles were there to be held accountable for damages, profits, and counsel fees only if the principal infringer could not answer therefor. It remains to be seen whether the *Northern Music* and *Gordon* cases represent a trend against applying general principles of joint liability for tort to copyright infringement.[56]

It should be noted that in *DeAcosta* v. *Brown*, which involved the question of the liability of one who innocently published a story which infringed a common law right of literary property, the issue which divided the dissenting Judge Learned Hand from the majority was the liability of such innocent infringer for damages. Judge Learned Hand believed that while injunction and recovery of the innocent infringer's profits were appropriate, an award of damages was not.

(b) Profits

An innocent infringer may partially escape liability for profits if the copyright owner, though aware of the infringement, fails to notify the infringer within a reasonable time. In *Haas* v. *Leo Feist, Inc.*,[57] the court provided for reduction of the plaintiff's recovery in accordance with the length of time each plaintiff knew of the infringement and yet allowed the defendant to continue infringing. The court stated:

> If the defendant be a deliberate pirate, this consideration might be irrelevant * * *; but it is no answer to such inequitable conduct, if the defendant Feist is innocent, to say that its innocence alone will not protect it. It is not its innocence, but the plaintiff's availing himself of that innocence to build up a success at no risk of his own, which a court of equity should regard.

(c) Injunction

Innocence alone will not preclude a court's granting an injunction against a defendant. Nevertheless, in some situations innocence combines with other factors to lead a court to deny or modify injunctive relief.

A recent illustration of this approach is found in *Trifari, Krussman & Fishel, Inc.* v. *B. Steinberg-Koslo Co.*,[58] in which a preliminary

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[53] 105 F. Supp. 393 (D.C.N.Y. 1952).

[54] 111 F. Supp. 117 (E.D. Mich. 1953) aff'd, 216 F. 2d 508 (6th Cir. 1954).

[55] 111 F. 2d 432 (2d Cir. 1940).

[56] In *Shapiro, Bernstein & Co.* v. *Goody*, 248 F. 2d 260 (2d Cir. 1957), the court decided that the release of the manufacturer of unauthorized recordings did not release the sellers of the recordings, on the ground that "the liability of each infringer, whether he be manufacturer, distributor or seller is several." Id. at 267. It is not clear that this interpretation of sec. 101(e) would be extended to sec. 101(b).

[57] 234 Fed. 105, 108 (S.D.N.Y. 1916). It is generally accepted on the basis of principles of equity that coinfringers are not jointly liable for profits. *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.*, 86 F. Supp. 399 (S.D.N.Y. 1949), modified, 191 F. 2d 99 (2d Cir. 1951); *Washingtonian Publishing Co.* v. *Pearson*, 140 F. 2d 465 (D.C. Cir. 1944).

[58] 144 F. Supp. 577 (S.D.N.Y. 1956).

injunction was denied where the defendants had no notice of plaintiff's copyright and did not intend to infringe during the pendency of the action. There have also been instances of denial of an injunction against an innocent defendant where the plaintiff was guilty of laches,[59] or where it would have been difficult to distinguish between infringing and noninfringing parties of the work.[60] And the court in *Lawrence* v. *Dana* observed—

> * * * but cases frequently arise in which, though there is some injury, yet equity will not interpose by injunction to prevent the further uses, as where the amount copied is small and of little value, if there is no proof of bad motive.[61]

(d) Counsel fees and costs

A court may be influenced by a defendant's innocence in determining the amount to be awarded as attorney's fees or in refusing to give attorney's fees at all.[62] And in *Gross* v. *Van Dyk Gravure Co.*,[63] the court refused to award not only counsel fees against an innocent infringer, but other costs as well. An occasional decision has gone even further and refused to award costs against an innocent infringer who was the only party defendant, despite the apparently mandatory statutory language concerning the award of costs in general, as opposed to attorney's fees.[64]

The cases considered above indicate that innocence can be of some importance, in the selection of remedies in a particular case. It should be noted, however, that in most of the cases other factors—such as mere technical character of an infringement involving little or no loss to the plaintiff, laches on the part of the plaintiff, or the presence of willful infringers who could be taxed to compensate the plaintiff—combined with the defendant's innocence in influencing the court's decision.

3. Innocence or lack of intent and contributory infringement

It has been stated that with respect to—

> * * * parties who aid, induce, or contribute to the infringement * * *, guilty knowledge is the basis of liability for contributory infringements * * *[65]

In other words, one who unwittingly aids the commission of infringement is not liable.[66] This is one area where knowledge or intention is required for liability.[67] Such intention was found by the Supreme Court in *Kalem* v. *Harper Bros.*,[68] where the producer-distributor of a plagiarizing motion picture expected it to be exhibited in violation of copyright; the producer was held liable as a contributory infringer.

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[59] *West Pub. Co.* v. *Edward Thompson Co.* 176 Fed. 833, 838 (2d Cir. 1910).
[60] *Webb* v. *Powers*, 29 Fed. Cas. 511, Case No. 17,323 (C.C.D. Mass. 1847).
[61] 15 Fed. Cas. 26, 60, Case No. 8,136 (C.C.D. Mass. 1869).
[62] E.g., *Haas* v. *Leo Feist, Inc.*, 234 Fed. 105 (S.D.N.Y. 1916).
[63] 230 Fed. 412 (2d Cir. 1916).
[64] *Altman* v. *New Haven Union Co.*, 254 Fed. 113 (D.C. Conn. 1918).
[65] 45 Colum. L. Rev. 644, 645, n. 6 (1945).
[66] *Harper* v. *Shoppell*, 26 Fed. 519 (S.D. N.Y. 1886), motion for new trial denied, **28 Fed. 613.**
[67] See Amdur, op. cit., note 31, supra, at 968; 38 Marquette L. Rev. 180, 187.
[68] 222 U.S. 55 (1911).

4. Probative effect of intention or innocence

(a) Copying

In *Harold Lloyd Corporation* v. *Witwer*,[69] the court stated:

> In considering the weight of the circumstantial evidence of copying derived from an analysis of similarities between the play and the story, the question of intent to copy is an important factor, although, as has been stated, an intentional copying is not a necessary element in the problem * * *.

Thus, evidence of an intent or willingness to infringe may be a link in the chain of circumstantial evidence indicating copying.[70] Moreover, in *Meccano, Ltd.* v. *Wagner*,[71] the court took into consideration defendant's intentional acts of unfair competition in determining whether or not he had infringed plaintiff's copyright.

(b) Fair use

The state of mind of the user of copyrighted material is of significance in determining whether his copying constituted infringement or "fair use." [72] For example, in *New York Tribune, Inc.* v. *Otis & Co.*,[73] defendant contended that its distribution of a photostatic copy of a copyrighted newspaper editorial was for noncommercial purposes. The court, in declining to rule on this issue on motion, recognized the relevance of the purpose of the claimed fair use and the defendant's intention.

IV. Legislative Proposals Since 1909 [74]

As indicated earlier,[75] a significant legislative development with respect to innocent infringers occurred in 1912. It was in that year that the Townsend Act [76] furnished the special limitation applicable to infringements by means of motion pictures presently in section 101(b) of the Copyright Act. Other attempts to cover the problems of innocent infringement were made in the series of general revision bills introduced from 1924 to 1940.

A. DALLINGER BILLS, 1924

The Dallinger bills,[77] maintained the provision, presently in section 101(b), which removes the statutory damage limitations in the case of infringements after actual written notice.[78] The second bill main-

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[69] 65 F. 2d 1, 17 (9th Cir. 1933).

[70] Peck, "Copyright Infringement of Literary Works," 38 Marquette L. Rev. 180, 188 (1955). Warner, op. cit., note 47, supra, 606. See also Howell, "The Copyright Law" 122 (1952).

[71] 234 Fed. 912 (S.D. Ohio 1916), modified on other grounds 246 Fed. 603 (6th Cir. 1918).

[72] Peck, op. cit., note 70, supra at 187. Warner op. cit., note 47, supra. The relevance of intent in this area was recognized prior to the present statute. See, e.g., *Lawrence* v. *Dana*, note 61, supra, at 60. "Innocent intention" in this context has been roughly equated by one writer with "good faith." Cohen, "Fair Use in the Law of Copyright," Copyright Law Symposium No. 6, 43, 60 (1955). In *Broadway Music Corp.*, v. *F-R Pub. Corp.*, 31 F. Supp. 817, 818 (S.D. N.Y. 1940), the court found the absence of an "intent to commit an infringement" to "go to fill out the whole picture" with respect to fair use.

[73] 39 F. Supp. 67 (S.D. N.Y. 1941).

[74] In addition to the general copyright revision bills to be discussed, a number of bills proposed granting to designs for useful articles protection based on copyright principles. These bills generally provided for more generous treatment of the innocent infringer than the copyright revision bills. For example, sec. 10(b) of H.R. 11852, 71st Cong., 2d sess. (1929), authorized the court to dispense with an accounting for damages and profits "in cases where the copying complained of was without knowledge or notice of copyright." In addition extensive protection was granted to distributors. This basic philosophy apparently continues to guide the drafting of design proposals. For example, see exceptions in the definition of infringement in sec. 9(b) of H.R. 8873, 85th Cong., 1st sess. (1957).

[75] See pp. 141-142, supra.

[76] See note 15, supra.

[77] H.R. 8177 and H.R. 9137, 68th Cong., 1st sess. (1924).

[78] See note 21, supra.

tained the Townsend limitations as well, as did most of the revision bills. In addition, section 26(a) of both Dallinger bills provided:

> In any action for infringement of copyright of any work, if the defendant proves that he was not aware that he was infringing and that he acted in good faith, or has been subjected to fraud, or substantial imposition by any third person or persons, the plaintiff shall not be entitled to any remedy other than an injunction in respect to future infringement: *Provided*, That this provision shall not apply in the event of registration of copyright or of any instrument affecting the same prior to defendants entering into or upon the undertaking which results in such infringement: *And provided further*, That the mere failure to register a work or to affix a notice shall not, per se, be deemed to create either a presumption of innocence in infringement or be deemed evidence of such innocence.

Thus, the innocent infringer of an unregistered work was to escape such remedies as liability for damages and for profits. This provision does not appear to have been specifically discussed in the hearings on the second Dallinger bill.

B. THE PERKINS BILLS, 1925

The Perkins bills [79] offered no innovations with respect to innocent infringement. The Townsend damage limitations in the case of innocent infringement by motion pictures were retained. Otherwise, the bills made no distinctions based upon the state of mind of the infringer. Thus, the Perkins bills represent an adherence to the 1909 postion, in contrast with the more sweeping exculpatory approach of the Dallinger bills.

C. THE VESTAL BILLS, 1926–31

The Vestal bills reverted generally to the Dallinger approach of limiting the remedies against innocent infringers. A refinement of the provision in the Dallinger bills set forth above, appeared in section 16(d) of H.R. 10434,[80] the first Vestal bill. This section, which seemed to be restricted to infringement of copyright in dramatic works, also limited the remedy against the innocent infringer to an injunction. But the section was made inapplicable not only where the plaintiff's work had been registered, but also where it had been published with notice, or performed in a "first class public production." Register of Copyrights Solberg expressed the view that the notice proviso imposed an undue burden on the copyright owner in a bill that provided for only optional notice; [81] but the section was favored by representatives of the motion picture industry.[82] The provision was modified in the amended Vestal bill which passed the House.[83] It then clearly applied to all copyrighted works but substituted for the injunctive remedy recovery of "an amount equivalent to the fair and reasonable value of a license, but not less than $50 nor more than $2,500."

The Vestal bills also included the protection of the innocent printers sought in the 1909 hearings. Section 16(e) of H.R. 10434 protected the printer who "was not aware that he was infringing and * * * was acting in good faith" as long as he did not participate in the publishing, distributing or selling activities. The remedies against such innocent printers included only injunction and forfeiture of the infringing copies.

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[79] H.R. 11258 and S. 4355, 68th Cong., 2d sess. (1925) and H.R. 5841, 69th Cong., 1st sess. (1925).
[80] 69th Cong., 1st sess. (1926).
[81] Hearings Before House Committee on Patents on H.R. 10434, 69th Cong., 1st sess. 237 (1926).
[82] Id. at 249–250.
[83] H.R. 12549, 71st Cong., 2d sess. (1931), sec. 15(d).

Notwithstanding the objections raised by Mr. Solberg to the proposed protection to different classes of infringers in derogation of the rights of the copyright owner,[84] the provisions in favor of innocent infringers were extended even further in the later Vestal bills, with respect to newspapers and periodicals. Thus, section 16(f) of H.R. 12549, included a special immunity as to advertising matter in newspapers and periodicals. The publisher who showed that he "was not aware that he was infringing and that such infringement could not reasonably have been foreseen" was to be subjected to an injunction only with respect to issues the manufacture of which had not been commenced. This immunity was inapplicable if the publisher was interested in the advertising phase of the enterprise. This provision had been proposed at earlier hearings by the periodical publishers on the ground that they, like the printers, are merely a medium for the advertiser.[85] Support was finally obtained from the Authors' League in 1930.[86]

D. THE DILL AND SIROVICH BILLS, 1932

The proposed revision bills in 1932 were not as sweeping as the Vestal bills with respect to the question of innocent infringers. The Dill bill [87] even retreated from the position taken in the amended 1909 act with respect to motion pictures; it included only the accidental omission of notice provision of section 21 of the 1909 act. The Sirovich bills [88] followed the Vestal bills in protecting innocent printers and periodical publishers of advertising matter.[89] In addition, the Sirovich bills, in effect, exempted the infringer who acted "without intent to infringe" or "in good faith" from liability for profits, but not for damages.[90]

The House committee considered the provisions of the 1909 act too harsh as against the innocent infringer. Thus, in its report on H.R. 10976,[91] one of the Sirovich bills, the committee stated:

> The present law further imposes upon an infringer, whether innocent or guilty, a tremendous penalty by awarding all the profits made by the infringer to the injured party contrary to the usual measures of compensation in force throughout the country. It is even possible that courts have hesitated with good reason before decreeing an infringement because of the very heavy penalties involved.[92]

The committee also explained:

> The present law, except in the case of certain infringements by motion-picture producers, takes no account of innocence in the matter of infringements. The new bill takes account of innocence—for instance, innocent printers who act merely to print a work, and who have no other interest in it are subject only to injunctions against future printing.
>
> Aside from these specific instances, all innocent infringers are treated alike under the provisions of the bill and are protected by provisions which limit the amount of recovery and the character of the remedy, according to the registration or non-registration of the work. Under the present copyright law all profits are taken from an infringer, whether innocent or otherwise. As pointed out, we believe that the success of infringement suits has been hampered by the drastic provisions of this kind in the law.[93]

[84] Hearings, note 81, supra, 235-237.
[85] Id. at 169.
[86] Hearings Before House Committee on Patents on H.R. 6990, 71st Cong., 2d sess. 139 (1930).
[87] S. 3985, 72d Cong., 1st sess. (1932); S. 342, 73d Cong., 1st sess. (1933).
[88] H.R. 10364, 72d Cong., 1st sess. (1932); H.R. 10740; H.R. 10976; H.R. 11948; H.R. 12094; H.R. 12425.
[89] E.g., sec. 10, H.R. 10364.
[90] E.g., sec. 10(b), H.R. 12094.
[91] H.R. Rep. No. 1008, 72d Cong., 1st sess. (1932).
[92] Id. at 2.
[93] Id. at 4.

E. DUFFY, DALY AND SIROVICH BILLS, 1935–36

The first Duffy bill [94] contained comprehensive provisions mitigating the effects of innocent infringement. Section 17 included: (1) General limitation of available remedies against an innocent infringer to recovery, "for all infringements by such defendant up to the date of judgment, [of] an amount equivalent to the fair and reasonable value of a license," unless the work had been registered or published with notice; (2) limitation of remedies against innocent printers to injunction and forfeiture of infringing copies and devices; (3) limitation of remedy to injunction with respect to advertising matter innocently broadcast or published in a newspaper, magazine or periodical, and (4) immunity from delivering up infringing copies and devices for the publisher of a newspaper, magazine, or periodical, a broadcaster, or a motion-picture producer or distributor, who has acted in good faith.

In addition, an injunction and a reasonable license fee not in excess of $1,000 were the only remedies available against *any* infringer if the work was not registered or published with notice. The provision described in (1) above was omitted in the second Duffy bill.[95]

In contrast to the Duffy bill, the Daly bill,[96] contained no provision modifying the 1909 act with respect to innocent infringers. The 1936 Sirovich bill,[97] as did earlier Sirovich bills, contained provisions absolving the innocent periodical publisher of advertising matter, and the innocent printer, from liability for profits.

Although the Duffy bill, which passed the Senate, was strongly opposed as "an infringer's bill," [98] the radio broadcasters felt that it did not go far enough in protecting the innocent infringer, and that there should be no liability whatsoever for certain types of infringement, by radio.[99]

F. THOMAS (SHOTWELL) BILL, 1940

Despite the great variety of treatment of the problem under consideration in revision attempts from 1924 to 1936, the Shotwell committee apparently adopted the approach of relying upon the discretion of the trial judge in awarding damages to protect the innocent infringer. In any event, section 12(b) of the Thomas bill [100] excused "the incidental and not reasonably avoidable infringement of a copyrighted work in the depiction or representation of current news events." This exemption was made inapplicable to any use for advertising purposes. In addition, section 19(e) reduced the possible recovery for infringement by motion pictures and radio by considering multiple infringements in certain situations as a single infringement.

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[94] S. 2465, 74th Cong., 1st sess. (1935).
[95] S. 3047, 74th Cong., 1st sess. (1935).
[96] H.R. 10632, 74th Cong., 2d sess. (1936).
[97] H.R. 11420, 74th Cong., 2d sess. (1936). The relevant provisions are found in secs. 24 and 25.
[98] See Hearings Before House Committee on Patents on Revision of Copyright Laws, 74th Cong., 2d sess. 1087 (1936); 47 Yale L. J. 433, 436 (1938).
[99] Hearings, note 98, supra at 478. Thus, it was argued that the liability for network programs should be restricted to the originating broadcaster. Limited relief was also sought with respect to broadcasts by remote control.
[100] S. 3043, 76th Cong., 3d sess. (1940).

V. Laws of Foreign Countries [101]

The interrelation of civil and criminal remedies for copyright infringement found in the laws of many foreign countries complicates consideration of foreign treatment of the problem of innocent infringement.

For example, in the Greek law,[102] the sole pecuniary remedy of the copyright owner is through disposal of infringing copies after conviction of the infringer. Such conviction must be based on "willful or fraudulent" infringement. Confiscation may often be effected in the course of a criminal action. This is the rule in France where the proceeds of such confiscation may be used to indemnify the copyright owner, with no statutory mention of intent or innocence. In Belgium, confiscation is the core of civil remedies with respect to which nothing is said about intent; the Belgian criminal provision [103] is made applicable to "any willful or fraudulent violation of copyright."

In view of the interrelation of remedies noted above, the laws of many foreign countries apparently do not distinguish between innocent and willful infringers for the purposes of civil liability. These include France, Italy, Switzerland, Argentina, Brazil, Peru, Portugal, Monaco and Mexico. At the other extreme, the German law [104] appears to require intent or negligence for every case of infringement. Between the extremes are varied approaches and different limitations of the remedies available against the innocent infringer.

Innocence is quite relevant to liability under the Spanish law. Article 45 makes the author of an infringing work "responsible in the first instance" for copyright infringement. It is further provided that if such approach is not successful, liability is fastened on "the publisher and printer, successively, *unless they are able to prove their respective innocence.*" The law of Chile similarly protects those deemed less directly responsible for infringement. Article 19 excuses "utilization for profit" of infringing copies if "good faith can be proved in the acquisition and use of the copies."

One approach to the problem of remedies is to absolve the innocent infringer from liability for damages. For example, section 18 of the Hungarian law grants immunity from any pecuniary remedy except profits to the infringer who is not guilty of either "willfulness or negligence." The Polish law [105] imposes liability for damages only "in the case of willful infringement." And article 21(4) of the Guatemalan law specifically limits the remedy of damages to willful and negligent violations. Article 21 of the Norwegian law of 1930 permits damages only where infringement has been committed "willfully or by gross negligence." Profits are expressly made available "in any case" even where good faith is shown.

Denmark modifies the remedy of delivery and destruction of infringing copies where the infringement was committed "in good faith." In such a case, the infringer is permitted by section 16 to place copies in public custody until the expiration of the copyright term.

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[101] The statutes of foreign countries are translated in "Copyright Laws and Treaties of the World" (1956). which collection, including its 1957 supplement, is the basis for the discussion of all foreign laws except the recent statutes of France (Law No. 57-298), India (Law No. 14 of 1957), and the United Kingdom, 1956 (4 and 5 Eliz. 2, ch. 74).

[102] Art. 16.

[103] Art. 22.

[104] Secs. 36 and

[105] Art. 56.

The laws of the British Commonwealth nations are most elaborate in this area and afford considerable protection to the innocent infringer in certain situations. The United Kingdom Act of 1956 has not significantly altered the approach, and may serve as an example: (1) Under various provisions of section 5, one who does not know of the infringing nature of an article is not guilty of infringement at all by reason of his unauthorized importation, sale, or exhibition; nor is one an infringer who permits the use of his premises for an infringing public performance if he had no reason to suspect the performance would be infringing or if he received no profit from granting such permission; (2) one "who was not aware and had no reasonable grounds for suspecting that copyright subsisted" is absolved by section 17(2) from liability for damages arising out of the infringement, but is liable for profits; (3) section 18 precludes any pecuniary remedy for conversion or detention of infringing copies not only where the defendant did not and could not reasonably know of the existence of copyright protection, but also if he reasonably believed that the copies were not infringing copies.

Apparently, the British courts had interpreted the clause "was not aware, and had no reasonable ground for suspecting, that copyright subsisted in the work" quite narrowly under the 1911 act.[106] It, therefore, did not furnish as much assistance to the innocent infringer as the language might suggest. In addition, the Canadian statute imposes another limitation on the immunity of the innocent infringer. Section 22 provides that where a work has been duly registered under the act, "the defendant shall be deemed to have reasonable ground for suspecting that copyright subsisted in the work." [107]

The Indian copyright law of 1957 accepts generally the philosophy of the United Kingdom Act. At least one significant modification has been introduced, however. While one who innocently permits, though for profit, the use of his premises for an unauthorized performance of a copyrighted work is excused from liability for infringement, the innocent seller, importer, and exhibitor are apparently considered infringers.[108] As in the United Kingdom Act, injunction and an award of profits are the only remedies available against anyone who "was not aware and had no reasonable grounds for believing that copyright subsisted in the work."[109]

Provisions concerning the state of mind of the defendant are found more frequently in criminal sanctions where such provisions are separated from civil remedies. Thus, the Swiss law [110] specifically provides that the penal law applies only if the infringement is "inten-

[106] See Copinger, "The Law of Copyright" 170-171 (1948) wherein the author states:

"Judging from its marginal note, the section is intended to afford protection to innocent infringers, but is framed in such language that it is difficult to imagine a case in which it can be invoked in aid. The section must be specifically pleaded, and the burden is upon the defendant to prove that 'at the date of the infringement he was not aware, and had no reasonable ground for suspecting, that copyright subsisted in the work' * * * Nor is it, under section 8, sufficient to prove mere innocence and absence of carelessness; the innocence that must be proved is ignorance that 'copyright subsisted in the work', i.e., the work which has, in fact been pirated. * * *

"In what cases, then can the section apply? What 'reasonable ground' can a direct copyist have for not suspecting the work he copies to be the subject of copyright? It is submitted that the proper attitude of mind of a copyist toward a work that he copies is that copyright in the latter subsists unless he has evidence to the contrary. The only grounds for not suspecting copyright appears to be either (*a*) that the period of protection has run out; (*b*) that he thinks that the work is of such a character that it ought not to be a subject of copyright; or (*c*) that the work is a foreign work."

[107] For a discussion of the Canadian provisions, see Fox, "Evidence of Plagiarism in the Law of Copyright," 6 U. of Toronto L.J., 414, 446 (1946).

[108] Sec. 51(a)(ii).

[109] Sec. 55.

[110] Art. 46.

tionally committed." And the Monaco law requires "bad faith" for the imposition of criminal penalties.[111] Section 17 of the Danish law limits criminal penalties to a willful or grossly negligent violation.

Such express provisions are not universal even in those countries making every infringement a criminal offense. For example, the laws of France, Portugal, and Argentina do not specify intent or willfulness as an element of the offense of infringement. The Italian law[112] clearly indicates that negligence is sufficient to invoke the criminal provisions, but reduces the fine in such a situation.

VI. Review of Underlying Problems

As indicated by the foregoing, innocent infringement is not a unitary concept. As broadly understood, the term encompasses a number of factual stituations in which infringement is not intended, for example: (1) use of material on which notice has been omitted; (2) belief that certain material in a copyrighted publication is in the public domain; and (3) a variety of secondary infringements where infringing material has been received for reproduction or distribution with the reasonable assumption of its originality.

Statutory provisions dealing generally with the problem of the culpability of the defendant also vary greatly in their approach. Thus, to enjoy the limitations on recovery for infringement by motion pictures imposed by section 101(b) of the present law, an infringer must establish freedom from negligence as well as lack of intent. Negligence would not seem to be sufficient for liability under a strict reading of section 5 of the British Act. On the other hand, in some of the revision bills, even good faith and freedom from negligence would not have shielded the infringer from the full battery of remedies, if the work in question had been registered or published with notice.[113]

A possible general definition of the innocent infringer is one who invades the rights of the copyright owner without intending to do so and without having reason to suspect that he is doing so. The basis for the innocent infringer's ignorance will vary according to the factual situation. The consequences attached to his innocence will similarly vary.

The problem basic to all the variations discussed above is the conflict between the full enjoyment of rights by the copyright owner on the one hand, and the interests of users who, even though scrupulously attempting to respect such rights, commit infringement. Thus, Mr. Solberg argued that the provisions of the Vestal bill—

> are virtually inroads upon the author's right to the protection of his exclusive privileges, and they have the regrettable effect of cutting down the powers of the courts to properly adjudicate the trespass committed.[114]

On the other hand Representative Townsend viewed his ultimately successful proposal to limit damages for infringement by motion picture as a bill which "merely seeks to make the damage reasonable," rather than one which "excuses" infringers.[115]

Some judges and commentators have expressed disapproval of certain applications of the rule that innocence is no defense. In

[111] Art. 21.
[112] Art. 172.
[113] E.g., Vestal bill, H.R. 10434, 69th Cong., 1st sess. (1926), see pp. 150–151, supra.
[114] Hearings, note 81, supra, at 237 (1926).
[115] Hearings Before Committee on Patents on H.R. 15263 and H.R. 20596 at 5 (1912).

DeAcosta v. *Brown*,[116] Judge Learned Hand, accepting the majority's analogy of conversion, likened the innocent indirect infringer to one who carries off a watch in his bag without any knowledge that it is there. This is to be contrasted with the innocent direct infringer who, by analogy, intentionally takes the watch believing that it was not the property of the plaintiff. Judge Hand felt that only an injunction and accounting for profits should be imposed against an innocent indirect copyist. Similar views were expressed in a dictum by the court in *Barry* v. *Hughes*.[117] Others have pointed out that the blanket imposition of liability in the indirect infringement situation fails to take into account the problems faced by the radio, television, and motion picture industries, and the complex problems of publication where the author is no longer identified with the publisher or the artist with the lithographer.[118]

Mr. Solberg's remarks suggest an argument against any extensive legislation in this area. The flexible powers of a court in granting remedies, rather than a legislative attempt to provide for an infinite variety of factual situations, may arguably represent the more appropriate technique for solving the problems raised by innocent infringement. The court may consider all the factors involved and fashion a tailormade remedy within such areas of discretion as the statute provides. For example, the power of the court to withhold an award of counsel fees in the absence of willfulness was considered by the representative of the book publishers, in the hearings on the amendment of section 1(c), to represent an effective tool with which to adjust problems raised by innocent infringement.[119]

The problems common to a particular group, such as vendors, printers, periodical publishers or broadcasters, may call for special treatment. Mr. Ogilvie pointed out at the hearings leading to the 1909 act that "it is utterly impossible" for the printer to "read everything that goes into his place" and that he is not in a position to guard against copyright infringement.[120] Vendors are also "secondary infringers" who must rely on their publishers. This relationship may have motivated the court's action in *Detective Comics, Inc.* v. *Bruns Publications, Inc.*,[121] whereby the liability of the distributor of the infringing work was made secondary to that of the publisher. This general approach has been codified by the Spanish law where a hierarchy of liability is established subject to a showing of innocence by the publisher or printer.[122] This approach recognizes the importance of permitting the plaintiff to have recourse against several defendants, in order to facilitate enforceability of a judgment. It may be argued that to immunize printers and vendors from liability might remove the only financially responsible parties from the plaintiff's reach.[123]

Similar considerations apply in the case of newspaper or periodical publishers with respect to advertising matter. Their ability to guard against secondary infringement through the publication of such matter would seem slight.

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[116] 146 F. 2d 408, 413 (2d Cir. 1944) (dissenting opinion).
[117] 103 F. 2d 427 (2d Cir.), cert. denied, 308 U.S. 604 (1939).
[118] See 45 Colum. L. Rev. 644, 648 (1945).
[119] Hearings Before Subcommittee of Committee on the Judiciary on H.R. 3589, 82d Cong., 1st sess. 34 (1951).
[120] See note 35, supra.
[121] 28 F. Supp. 399 (S.D.N.Y. 1939). See p. 147, supra.
[122] See p. 153, supra.
[123] Cf. *Miller* v. *Goody*, 139 F. Supp. 176, 182 (S.D.N.Y. 1956) rev'd sub nom, *Shapiro, Bernstein & Co.* v. *Goody*, 248 F. 2d 260 (2d Cir. 1957) (effects of insolvency of disk pirates).

The broadcasters pose a slightly different problem. They are primary, rather than secondary users, of copyrighted material. Nevertheless, the relative speed with which a great mass of material is used is said to create special problems.[124] The broadcasters themselves have gone so far as to say that "a deliberate, willful infringement by a broadcasting station is a very rare thing, and in practically every infringement case, an intent to infringe is completely absent.' [125] On the other hand, broadcasters are a principal user of copyrighted material and the representatives of authors and publishers have resisted any special treatment for them.[126]

Even as to special groups such as printers or vendors, the remedial problems may be more significant than the general question of liability. In other words, state of mind might be considered irrelevant to the question of infringement but might be made determinative of the remedies available against the infringer. This is basically the approach of the Lanham Act[127] with respect to trademark infringement. Under that act, an innocent printer or an innocent periodical publisher who publishes infringing advertising matter is subject only to injunction.[128] The statutory provision uses the description "innocent infringers" rather than any more detailed standard.

Perhaps the problem might be analyzed in terms of which of two innocent parties can more appropriately protect against the infringement. This analysis would suggest, for example, expansion of section 21 so as to shield the innocent infringer from liability where the notice was omitted by a licensee of the copyright owner. Such a result would be based on the fact that the copyright owner is better equipped than the infringer to prevent the infringement; at least he might secure indemnification from his licensee for any loss. On the other hand, the infringer would be made to bear the loss imposed on the copyright owner where such infringer receives infringing material from a third person with assurances that the material is original.

Even under this approach, the loss need not be completely imposed on one party. The remedy of injunction could, as in the Vestal bills, be available in any event; but the compromise in available remedies or selection of damage limitations might be weighted against the person whose contractual or other dealings would permit protection against unintended infringements.

The problem of innocent infringement is obviously part of the larger question of liability and remedies for infringement in general. Perhaps less obvious is its potential relationship with the question of formalities. The history of previous attempts at revision of the statute illustrate how close this relationship could be. For exemple, in some proposals, formalities replace provisions concerning good faith. Thus, the second Duffy bill[129] limited the remedies against infringement of a work which had not been registered, published with notice or publicly performed, regardless of the good or bad faith of the infringer. This development is to be contrasted with earlier pro-

[124] See e.g., Hearings Before Committee on Patents, 74th Cong., 2d sess. 478–480 (1936).
[125] Hearings, note 119, supra, at p. 19.
[126] Id. at 5, 32.
[127] 60 Stat. 427 (1946), as amended 15 U.S.C. 1051-1127 (1952), as amended 68 Stat. 509 (1954).
[128] Sec. 1114(2). In addition sec. 1114(1) provides—
"Any person who shall, in commerce, * * * (b) reproduce, counterfeit, copy or colorably imitate any such [registered] mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of such goods or services, shall be liable * * * [for damages and profits only if] the acts have been committed with knowledge that such mark is intended to be used to cause confusion or mistake or to deceive purchasers."
[129] S. 3047, 74th Cong., 1st sess. (1935).

posals, such as in the Dallinger bills,[130] whereby registration merely precluded the immunity which good faith might otherwise have warranted. In other words, the Dallinger bills focused on good faith but made registration a factor which could negate good faith. The question of good faith or innocence was irrelevant in the approach of the second Duffy bill. More objective criteria there determined results which were primarily dependent in the Dallinger bills on the question of good faith.[131]

VII. Summary of Major Issues in Revision of Law

Examination of present statutory and case law, previous proposals for revision of the law, and provisions in foreign laws reveals several major issues for policy decision. These issues are posed most sharply in particular areas which will be suggested below. Although the issues may be isolated for discussion purposes, it is apparent that the problem of the innocent infringer might be solved by an infinite combination of different provisions. The major issues may be posed as follows:

A. Should all innocent infringers (i.e., all those who act in good faith without knowing or having reason to suspect that they are infringing) either be absolved from liability, or be subjected only to limited remedies?

B. If not, should immunity be given, or the remedies be limited for innocent infringements in the case of—

1. Printers?
2. Vendors?
3. Periodical publishers with respect to advertisements?
4. Motion picture producers?
5. Broadcasters?
6. Any others?

C. Should innocent infringement be related to formalities so that—

1. A copyright notice, or registration, will preclude the defense of innocence?
2. Reliance in good faith upon the absence of a copyright notice, or of registration, will constitute innocence?

D. Under A or B or C–2, above, what remedies should be available against the innocent infringer:

1. Actual damages?
2. Profits?
3. Statutory damages in the usual amounts or in reduced amounts?
4. Reasonable license fees, with or without a stated minimum and maximum?
5. Injunction?
6. Impounding and destruction of infringing copies?
7. Costs?

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[130] H.R. 8177, H.R. 9137, 68th Cong., 1st sess. (1924).

[131] The Lanham Act, note 127, supra, also attempts to deal with this problem. Damages are recoverable only if the defendant had notice, actual or through a mark on the goods, that the goods are protected by a mark registered under the act.

COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON LIABILITY OF INNOCENT INFRINGERS OF COPYRIGHTS

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COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON LIABILITY OF INNOCENT INFRINGERS OF COPYRIGHTS

By John Schulman

JANUARY 13, 1958.

The study of "Innocent Infringers" prepared by Latman and Tager gives a good review of the problem's legal history.

I think that Mr. Solberg's analysis, although made many years ago, is still valid, and that there is little substantial danger to the person who acts with ordinary caution.

On the other hand, it is sometimes necessary to make compromises to dispel fears. That is, if you remember, what we did in the amendment to section 1(c) (see study, p. 143).

Although this kind of limitation may be acceptable in very specific areas, it should not be adopted as a general philosophy or policy. In order to determine the areas wherein the exception would lie, each category should be considered separately.

JOHN SCHULMAN.

By J. A. Gerardi

JANUARY 31, 1958.

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In one on your studies the subject of "Innocent Infringement" was discussed. It is my feeling that the law on this subject should be clarified or amended in some degree. For instance, a court should not be bound to grant the minimum statutory damage for copyright violation in a case of innocent infringement of the following type: Supposing that the Government in one of its many circulars or bulletins republished an article from a magazine without permission and without the knowledge of the magazine publisher, should a person who uses the material, in whole or in part, in connection with another article be subjected to liability for infringement? I do not think the present law gives the court any discretion in the matter.

J. A. GERARDI.

By George E. Frost

MARCH 1, 1958.

Re: "Liability of Innocent Infringers."

The essay by Messrs. Latman and Trager on the above subject is an excellent piece which I have read with interest and profit.

My general feeling is that the law should leave a maximum range for judicial discretion in varying the award in accordance with the culpability of the defendant. With this basic thought in mind, I would answer the questions on page 158 along the following lines:

A. I would not absolve innocent infringers or limit the remedies available against them. I would, however, arrange the statutes so that a trial judge could reduce the monetary award when confronted with a really innocent infringer.

B. In my judgment the cases listed justify special statutory treatment only if this is necessary to get a bill passed, and I would resist strongly any exemption of printers.

C. Lack of a copyright notice probably should be listed in a statute as an element to go into the exercise of discretion as to the award.

D. My feeling is that actual damages, profits, statutory damages, impounding and destruction of copies, and costs should be discretionary in cases of innocent infringement. I would doubt that injunction should be other than mandatory

in all cases, but if this is not so handled it would seem that this is the only case where reasonable license fees should enter into the picture. They should then be the alternative to injunction.

Needless to say, the above is based only upon my own experience. I would certainly listen to those having other ideas and experience to back them up.

GEORGE E. FROST.

By Ralph S. Brown

MARCH 19, 1958.

The attempts at statutory formulation of categories and immunities for innocent infringers persuade me that this approach is unsatisfactory. Certainly an attempt to classify and distinguish the situations of printers, vendors, broadcasters, etc., seems doomed to obsolescence, in view of the changing patterns and media of distribution that are bound to arise. I would suggest that, except in the cases arising from absence of copyright notice (referred to in my comments on the notice study), it is unnecessary to make any statutory provision for the innocent infringer, except for the possible confinement of remedies to injunction, actual damages, and profits.

Does this leave the innocent infringer defenseless? I suggest that it does not, because in most cases he has a right of indemnity—a right which, if there is any uncertainty about its existence by implication, can usually be assured as a matter of contract. This matter is given some attention in my study on the operation of the damage provisions, but it deserves more extensive investigation. Of course, a right of indemnity is of no value if the indemnitor is judgmentproof, but this possibility points up the underlying principle which seems to me decisive in these cases. It is well stated by Messrs. Latman and Tager in their study at page 157, where it is pointed out that "the problem might be analyzed in terms of which of two innocent parties can more appropriately protect against the infringement." If the primary infringer is in fact judgmentproof, who should bear the loss? The copyright owner or the party who dealt with the primary infringer? Recent court decisions seem clearly to be moving toward a recognition of the secondary nature of the liability of an innocent infringer. (See cases discussed in the study at p. 147.) If the innocent infringer can be relieved of the sometimes capricious burden of statutory damages, it seems to me not unreasonable that he should take some of the risk for the wrongdoing of those with whom he deals.

RALPH S. BROWN.

By Joseph S. Dubin

APRIL 1, 1958.

Re: "Liability of Innocent Infringers."

In connection with the study covering the above matter, while it is true that intention to infringe is not essential under the Copyright Act, innocence should be a defense for infringement of both a common law as well as a statutory right, particularly where only a distributor is involved, since by analogy in defamation cases the distributor is only held liable where there is negligence or knowledge on his part of the defamatory nature of the material.

JOSEPH S. DUBIN.

By Harry G. Henn

APRIL 7, 1958.

I am submitting my comments and views on the issues presented in the study on the "Liability of Innocent Infringers of Copyrights" prepared by Alan Latman and William S. Tager.

A. All innocent infringers should neither be absolved from liability nor be subjected only to limited remedies.

B. Neither should immunity be given nor the remedies be limited for innocent infringements in the case of printers, vendors, periodical publishers with respect to advertisements, motion picture producers, broadcasters, or others, except to the extent presently provided in the copyright statute. Since profits would remain on an individual basis, and liability for damages, whether actual or statutory, would remain joint and several, the aggrieved party would remain well protected, and any innocent secondary infringer could seek indemnity from the

noninnocent primary infringer. (In this respect, the study might have explored more fully the principles of indemnification applicable to such situations.)

C. If the present copyright notice requirements be retained and the copyright notice is accidentally omitted from some copies, or if the copyright notice be made permissive, incentives offered for the voluntary use of such notice by limiting the remedies available against one who uses the work in reliance on the absence of notice, remedies against such innocent infringer should be limited as outlined in my letter to you of March 24, 1958, stating my comments and views on the notice of copyright study.

D. Where the copyright notice is omitted, and the innocent infringer relies in good faith upon such omission, such innocent infringer should be subject to an injunction only upon reimbursement of his reasonable outlay innocently incurred, but not be subject to any other remedies. In the other cases of innocent infringement when the aggrieved party has done all that he can to secure and maintain statutory copyright protection, the innocent infringer should bear the risk, protecting himself by contract and general indemnification principles, having his liability for damages limited by the statutory maximum amounts in prescribed situations, and enjoying the benefits of whatever discretion the courts might properly exercise in his favor.

HARRY G. HENN.

By Elisha Hanson

APRIL 9, 1958.

Mr. Elisha Hanson has asked me to forward to you the comments set forth below relative to the study entitled "Liability of Innocent Infringers of Copyrights."

While the granting of blanket immunity from liability to all innocent infringers would not be desirable, there are certain areas in which the restriction of remedies are warranted by special considerations.

Statutory revisions of the copyright law respecting the liability of the innocent infringer should balance the rights of the proprietor against the equities in favor of the innocent infringer, as measured by the infringer's good faith and the availability of a practical means of avoiding the invasion of the proprietor's interest. An innocent infringer may or may not have this practical means of avoiding injury, depending upon the conditions under which the infringement occurs. The manner in which general advertising matter is utilized by newspapers, magazines, and other publications serves to illustrate the point.

Substantially all of what is commonly referred to as "national" or "general" advertising is supplied to the newspaper or magazine by an advertising agency or by the individual advertiser. Advertising material is processed in tremendous volume. Copy is furnished to publications, quite frequently prepared for insertion without change by the publisher. However furnished, it is prepared by or for the advertiser and not by the publisher. It is not possible, without prohibitive expense for publications, to conduct a complete copyright search of advertising so submitted. In fact, they should not be called upon to do so. Although publishers do investigate generally the persons or agencies supplying advertising and do screen the copy for general compliance with ethical business practices, they must insofar as copyright is concerned rely upon the good faith of those submitting advertising for publication.

Another factor of crucial importance is time. Advertising copy is submitted to newspapers daily and to magazines on a deadline schedule. Thus, while the advertising agency and the advertiser have both the time and the opportunity to ascertain the copyright status of any material used in their advertising before it is submitted, the newspaper or magazine does not have such before publication.

In the field of national or general advertising, liability of the newspaper or magazine, if any at all, should be nominal and, in a case of innocent infringement, no injunction should be granted where it would delay the regularly scheduled times of publication and distribution. However, it is possible that a provision for nominal damages would, in fairness to the proprietor, leave an area for the operation of a sound judicial discretion, depending upon the facts presented in each individual case, and would tend to discourage nuisance suits.

Since the problem inherent in innocent infringement in advertising copy is essentially similar to that inherent in innocent infringement of photographs, any revision of the present law properly might provide that in the case of the repro-

duction of a copyrighted photograph or copyrighted material in general advertising by a newspaper, magazine, or other publication, such damages should not exceed the sum of $200 nor be less than the sum of $50. The present liability of an innocent infringer under existing law could still be applied in regard to advertising prepared by the publisher and not furnished to him in completed form.

The innocent infringer's status should be related generally to the formalities of copyright. However, in the case of newspapers and other publications, the controlling inquiry in regard to photographs or general advertising copy submitted for publication in a completed state should be whether or not a copyright notice appears on the face of the work. If a notice appears, it is a red flag of warning; if no notice appears, there is in the ordinary case no warning or suggestion that the work may be registered in the Copyright Office. Yet, despite the absence of notice there might be in a rare case some additional reason to believe that the work of a proprietor was being infringed. In such circumstances, a provision related to reasonable foreseeability of a possible infringement would offer the proprietor a sufficiently broad protection.

EMMETT E. TUCKER, Jr.
(For Elisha Hanson).

By Walter J. Derenberg

APRIL 16, 1958.

It is difficult to comment on the question of "Liability of Innocent Infringers of Copyrights" because so many answers to this problem would depend upon or overlap with the answers to problems in certain related fields. For instance, the problem of inadvertent use by motion picture producers of copyrighted background material and similar questions would seem more properly to fall within the study on "fair use" and have been treated there.

In my opinion, the question of innocent infringers cannot be separated from the basic problem dealing with the requirement of copyright notice. Many of us, in commenting upon the copyright notice study, are already on record as favoring a new copyright act which would eliminate the requirement of notice as a formality upon which the existence and validity of copyright depend. But much could be said for a provision which would make the presence of the type of notice contemplated in the Universal Copyright Convention not a condition precedent to copyright protection, but a prerequisite for the awarding of damages or profits against "innocent" infringers, i.e., an infringer without *actual* notice.

In other words, I would favor a provision in the proposed Copyright Act which would substantially incorporate section 29 of the Trademark Act of 1946. Under that section, to which the Latman-Tager study also refers at page 157, the use of the registration notice, either the full notice or the R in a circle, is optional to the extent that its absence will deprive the registrant of his right to damages and profits unless he can prove that the particular defendant had *actual* notice of the registration. You will note that section 29 does not deprive the trademark owner of his right to injunctive relief against an innocent defendant and I believe the same should be true in case of technical infringement of copyright. Furthermore, I believe that the specific exemptions for the protection of innocent printers and publishers which are included in section 32(2) of the Lanham Act of 1946 might also serve as a basis for similar exceptions in a new copyright statute, particularly since here, too, innocence is no defense with regard to the issuance of an injunction against future printing.

Generally speaking, I agree with Mr. Solberg's approach as referred to at page 156 of the study, that extensive legislation in this area with regard to specific factual situations should be avoided and that we need not go beyond the enactment of some basic general rule, such as that contemplated in section 29 of the Trademark Act.

WALTER J. DERENBERG.

By Edward A. Sargoy

APRIL 30, 1958.

Re: Copyright Office panel study, "Liability of Innocent Infringers."

I have read the above study by Alan Latman and William S. Tager and feel that they have done a very perspicacious job in breaking down into more manageable connotations what we may be thinking or talking about when we otherwise use the broad term innocent infringer.

I liked particularly the distinction brought out between the liability ordinarily imposed by courts for infringement regardless of innocence or intent to infringe, as distinguished from the consideration given to these factors by the statute and by the courts in according varying degrees of remedies. We generally do not think of the problem in such terms until an analysis of this type focuses it upon our attention. The historical approach to the problem, with regard to enacted as well as proposed legislation, was also of special interest.

Their review of the underlying problems puts into perspective some of the difficult questions which have to be considered.

In the final analysis, however, it always seems to come down to the fact that the policy decisions cannot be divorced from what future copyright law we generally propose to have, and particularly so in respect of formalities. The summary of major issues in the study is evidently appreciative of this fact, in indicating that it is apparent that the problem of the innocent infringer may be solved by an infinitive combination of different provisions.

Of necessity, in attempting to isolate questions of "innocence" for policy discussion purposes, the summary had to be rather broad and general. The questions being of that nature, they call for like answers. I am assuming "innocence" as being used in the sense of the study (p. 155), i.e. involving one who invaded the rights of the copyright owner without intending to do so, and without having reason to suspect that he was doing so.

In answer to A, I do not think any infringer should be absolved from total liability. If a man uses or exercises a right with respect to intellectual property which he did not himself create, and it appears that the property or right belonged to another from or under whom proper permission was not obtained, the user should assume the responsibility of liability for the appropriation. If he relied upon the wrong party for alleged permission, it would seem that it is a responsibility that he should assume rather than the owner of the right. So much generally as to total liability.

As to the extent of the remedies which may be available, other considerations may be appropriate, as they have been in the past under the statute and by judicial consideration, depending upon having acted in good faith without knowing or having reason to suspect that the acts were infringing, or where the owner should bear some responsibility for having made the situation possible. I do not necessarily mean that we reincorporate old law, statutory or judge-made, in this regard.

I would find it very difficult to make any general answer as to the categories of innocent infringers referred to in the items of B.

As to C, I think that innocent infringement could be generally related to formalities. I am strongly for the elimination of formalities as a mandatory condition upon the recognition or continued enjoyment of the copyright. At the same time, I am very strongly for a system which would make it extremely attractive to register and deposit a copy of the work, published as well as unpublished, and for a strong system of recordation of grants of rights under the copyright. I think limitations on certain kinds of remedies may be a very effective way of so doing, so long as the limitations do not put us into any situation where we would be acting contrary to the basic conceptions of the Universal Copyright Convention, or interpose provisions which might make it more difficult for us to come closer to the systems of the other major countries of the world, if we were to desire later expansion of the UCC or adjustment to the Berne Union. We should, therefore, not do anything which would condition the initial recognition of the copyright, or curtail its future enjoyment so as in effect to deny it any further validity at all. Curtailing certain of the remedies, while leaving others available, assuming we do so on a nondiscriminatory basis as between our own citizens and the nationals of any country with whom we have multilateral or bilateral copyright relationships, would not seem to be flying into the face of such international arrangements.

More specifically, I would be generally inclined to relate limitation of remedies to formalities such as registration and deposit, so that the infringer would have to

show that he had relied upon the absence thereof to constitute innoncence. I prefer subdivision 2 to subdivision 1 of paragraph C, in that even in the absence of registration and deposit, the alleged innocent should show reliance in good faith. I do not feel as strongly about the desirability of future utilization of notice. If a good case were made that some form of notice should be retained (but not as a mandatory formality), reliance in good faith upon its absence might also be shown to constitute some aspect of innoncence.

Treating paragraph D in connection with paragraph C-2, it is very difficult to answer in general terms, and here the answer may well depend on the different classifications of works and the nature of the infringement; also whether the infringers are primary or secondary infringers and the available opportunities in the particular field for a prior exploration of the copyright status by the potentia infringer.

I would think generally that injunctive relief should be obtainable against continued infringement, since the true situation is now fully available to the infringer. Whether there should be compensation of some kind to the infringer in such case for the expense previously incurred in innocence, now that the work can no longer be utilized, would be a factual matter which the court in its discretion would probably have to determine, and there might possibly be provision to give courts such discretion. Depending upon the factual situation as to innocence, there might likewise be similar discretion in the court, in respect of impounding and destruction of infringing copies, as to whether some reimbursement might be made by having the copies turned over to the owner or an authorized distributor at some reasonable price based on the going wholesale rate for copies, or the amount invested in making them or some other basis, if the owner or distributor wanted them, or whether the infringer might be permitted to dispose of the copies previously made in innocence if the owner did not elect to take them over. As to infringing plates or matrices similar considerations might be possible.

I would be inclined to think that the innocent infringer should not be permitted to make a profit out of the infringement and that the owner should have a right to an account of profits, but not to actual damage, statutory damage in the usual or in reduced amounts, nor to reasonable license fees where he has failed to register and deposit prior to the infringement, or if similar treatment is to be given with respect to encouraging notice, has failed to have notice affixed prior to infringement to all copies publicly distributed by or under his authority. As I said before, I am still somewhat skeptical of whether the use of notice of copyright should assume such importance, compared to encouraging registration, deposit, and recordation.

There is an additional field which I have pointed out in comments on other studies, where I think there should be a limitation in respect of possible astronomical liability for statutory damages. This is in the case of the primary liability of an infringer for contributing to a great mass of secondary infringements. I refer in this connection to the liability of the producer of a copyrighted motion picture and of its national or regional distributor, if the producer is not itself the distributor, for turning over prints of a copyrighted motion picture (containing in whole, or in some lessor or even minor part, some material infringing on another copyrighted literary, dramatical, musical or motion picture work) to some 10,000 or so theaters in the United States within a short period of time for exhibition purposes, and thereby contributing to the infringing exhibition committed in the theater by each of its thousands of exhibition licenses. This is the problem to which the Townsend amendment of 1912 was directed, but which was never itself an adequately drawn provision in my opinion to accomplish what it intended. A similar situation is the primary liability of a broadcasting company and the sponsors of the program, for a broadcast which is either simultaneously projected over a large network of radio or television stations, or later rebroadcast from an electrical transcription or kinescope within a short period. There should be some way of limiting the fantastic theoretic liability of the originating source for these thousands of secondary infringements. Perhaps this is not a question of innocent infringement and does not appropriately belong in this study, but as I said before, it is difficult to break down each study into its individual category, when in the final analysis we have to think of the revision as a whole.

I should like to express this caveat concerning my very general observations. I have been trying to pass along rough impressions by way of response to the inquiries, but I would like to reserve my judgment, of course, to when I can see these bits and pieces fitted into the context of a proposed general revision statute as a whole.

EDWARD A. SARGOY.

Melville B. Nimmer

JUNE 16, 1958.

The following are my views with respect to "Liability of Innocent Infringers of Copyrights," by Alan Latman and William S. Tager.

It is my view that basic to the problem of innocent infringement must be the underlying premise that as between two innocent parties (i.e., the copyright owner and the infringer), it is the innocent infringer who must suffer, since he, unlike the copyright owner, either has an opportunity to guard against the infringement (by diligent inquiry), or at least the ability to guard against the infringement (by an indemnity agreement from his supplier and/or by insurance). Moreover, it is generally true that the volume purveyors of copyrighted materials (e.g., motion picture companies, television networks, music publishers, etc.) are, in fact, innocent of any knowledge of infringement. Even where there is an absence of such innocence, it is usually on the basis of negligence (of a type difficult to establish), rather than knowledge. Therefore, to render a complete or partial exemption for the innocent infringer would seriously impair the protection afforded to a copyright owner.

Relating innocent infringement to formalities does not seem to me to be a helpful approach. Obviously, this would have no application to the secondary infringer (i.e., one who himself copies from an infringer), since the primary infringer would in no event register the work or carry a copyright notice in the name of the true copyright owner. Yet, as discussed above, to exempt the innocent secondary infringer would be to seriously curtail the scope of copyright protection. Tying formalities to the innocent primary infringer is more meaningful, but even here is undesirable. One who knowingly copies the work of another should be put on diligent inquiry, even in the absence of a copyright registration or notice.

For the reasons discussed above, I would answer the summary of major issues listed by Messrs. Latman and Tager at page 158, as follows:

A. Innocent infringers should not be absolved from liability or be subjected only to limited remedies merely by reason of innocence.

B. Immunity should not be given and remedies should not be limited as to any type of user.

C. Innocent infringement should not be related to formalities.

D. All existing remedies should be available as against innocent infringers.

MELVILLE B. NIMMER.