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ness records in evidence, it would appear to be highly desirable to urge the West Virginia legislature to enact into law the Uniform Business Records as Evidence Act.

R. M.

COPYRIGHTS: A THUMBNAIL SKETCH

The Constitution of the United States provides that, "The Congress shall have power . . . To promote the Progress of Science and Useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . . ."[1] The two primary outgrowths of this provision—patents and copyrights—being so closely bound together in the Constitution, are often considered by the lawyer engaged in a general practice as being beyond the ken of human understanding, and to be avoided due to the complexity and special knowledge required. This is correct as to patents, and the procuring of these is best left to the specialist in that field. There is no reason, however, why the general practitioner of law cannot serve his clients as to copyright matters in the normal course of business.

There is no common law copyright. Although an author has a property right in his unpublished work, the copyright is purely a statutory creature[2] and has repeatedly been held so since 1834.[3] The first congressional action pursuant to the constitutional grant was the Copyright Act of 1790,[4] giving authors sole rights to publish their books for a term of fourteen years. It was not until 1909, however, that comprehensive legislation was enacted.[5] The present copyright law[6] is based on the Copyright Act of 1909, and, in general, follows it closely.

A copyright is defined as follows:

> "An intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions,

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[1] U.S. CONST. art. I, § 8, cl. 8.
[2] Mazer v. Stein, 347 U.S. 201 (1954).
[3] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).
[4] 1 STAT. 124 (1790).
[5] Copyright Law of 1909, 35 STAT. 1075 (1909).
[6] 61 STAT. 652 (1947), 17 U.S.C.A. (Supp. 1957). The copyright law was substantially reenacted in 61 STAT. 652. Hereafter, citation will be made only to 17 U.S.C.A., in the interests of uniformity, unless the Statutes at Large citation is other than 61 STAT. 652. U.S.C. and U.S.C.A. citations are identical as to title and section (§) numbers; again, in the interest of uniformity, citation will be made only to the annotated code, as most of the sections cited are correctly made thereto.

whereby he is invested, for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them."[7]

A copyright is similar to, but far from identical with, trademarks and design patents. It is not a patent, and has no similarity other than the fact that the original thought of a person is protected. The rights protected are different, and entirely different is the matter of gaining protection. As stated before, patents are best left to those who specialize in practice relating thereto; patents will not be dealt with herein.

The copyright is not available to all persons who may find themselves in possession of some article which is copyrightable. No one is entitled to obtain a copyright unless he, himself, is the author or is an assignee of the author.[8] Similarly, the period of copyright is not infinite, but is initially limited to a period of twenty-eight years, with a procedure for renewal for a like additional period, making a total of fifty-six years in which a copyright may be held on a particular item.[9] The holder of copyrighted material need not publish or sell copies, unless he so desires; he may content himself with excluding others from publication rights as to any or all media.[10] This is consistent with the proposition that reward to the owner is of secondary consideration.[11] Protection of the rights of the holder is, of course, the primary consideration. It should be noted that the copyright laws do not abrogate the common law right of recovery due to the aforementioned property in unpublished works.[12]

Not all original works, even excluding those qualifying for patent, are subject to copyright. Trademarks, for instance, may be registered, but not copyrighted, under laws separate and distinct from the copyright law.[13] The Copyright Act sets out a number of categories for copyright purposes,[14] as follow in a paraphrase of the law:

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[7] BLACK, LAW DICTIONARY 406 (4th ed. 1951).

[8] 17 U.S.C.A. § 1(a) (1952), April Products, Inc. v. G. Schirmer, Inc., 308 N.Y. 366, 126 N.E.2d 283 (1955).

[9] 17 U.S.C.A. § 24 (1952).

[10] Inge v. Twentieth Century-Fox Film Corp., 143 F. Supp. 294 (S.D.N.Y. 1956).

[11] 17 U.S.C.A. § 1 (1952), United States v. Paramount Pictures, 334 U.S. 131 (1947).

[12] 17 U.S.C.A. § 2 (1952).

[13] Trademarks are registered under the provisions of the Lanham Act, 60 STAT. 427 (1946), 15 U.S.C.A. §§ 1031-1127 (Supp. 1957).

[14] 17 U.S.C.A. § 5 (1952).

(a) Books, including composites and compilations.
(b) Periodicals, including newspapers.
(c) Lectures, addresses, etc., prepared for oral delivery.
(d) Dramatic or dramatico-musical compositions.
(e) Musical compositions.
(f) Maps.
(g) Works of art; models or designs for same.
(h) Reproductions of works of art.[15]
(i) Drawings of plastic works of a scientific or technical nature.[16]
(j) Photographs.
(k) Prints and pictorial illustrations including labels for merchandise.[17]
(l) Motion-picture photoplays.
(m) Motion-pictures other than photoplays.

The fact that an article on which a copyright is desired may be called by one of the above names, or seemingly falls in such a category, does not necessarily mean that it qualifies for copyright. For example, the items falling in (g), above, are particularly demonstrative of this. The distinction between an object of art and a similar article not copyrightable, such as an article which is intended for practical use on a machine,[18] can be nebulous. This can best be illustrated by comparing two cases. In the first of these,[19] a statuette was copyrighted and then used as a lamp base. This did not remove copyright protection against infringement by imitators, and the copyright protection did extend to use in this utilitarian manner. In the second case,[20] a watch was designed which resembled a piece of costume jewelry and it was allegedly difficult to tell time by the watch, lending some credence to a purpose as an object of art. In this case, the court stated that the watch was not a proper subject for copyright protection, even though the utility of the object will not, in itself, remove the

[15] *E.g.*, lithographic reproductions of an oil painting.
[16] These "plastic works" should not be confused with the model sometimes required in patenting an invention. *E.g.*, medical teaching models as opposed to a working model of a patentable artificial heart machine.
[17] There is often confusion as to copyright and trademark in this area. See Derenberg, *Commercial Prints and Labels: A Hybrid in Copyright Law*, 49 YALE L.J. 1212 (1940).
[18] Brown Instrument Co. v. Warner, 161 F.2d 910 (D.C. Cir. 1947), *cert. denied*, 332 U.S. 801 (1947).
[19] Mazer v. Stein, 347 U.S. 201 (1954).
[20] Vacheron & Constantin--Le Coultre Watches, Inc. v. Benrus Watch Co., 155 F. Supp. 932 (S.D.N.Y. 1957).

copyright aspect. In the first case, it was stated that the hope and intent of the copyrightee to use the objects as dress for a utilitarian object did not affect its copyright status. The apparent rationale is that an object designed as a work of art, but used otherwise, is subject to copyright, but an object designed for utilitarian purposes and incidentally a work of art is not copyrightable.[21]

In any discussion of copyright, there is one basic precept which must constantly be kept in mind: Copyright does not apply to intangibles. The protection is afforded the *expression* of an idea, and not the idea itself.[22] The purpose is, further, to protect creation as against mere mechanical skill.[23] For exemplary purposes, consider a nonfiction book concerning an historical event, written and copyrighted by *A*, and a later novel written by *B*, also copyrighted, which involves the use of certain ideas and theories presented by *A* in the nonfiction work. Although the example is oversimplified, it is governed by the following principles: Historical facts are considered in the public domain and are not copyrightable as such;[24] *A*'s book is copyrightable;[25] however, a second author may adopt the first author's ideas and theories without violation of the Copyright Act,[26] since an *idea*, once expressed, is public property and there can be no compensable infringement of that idea.[27] A further illustration would be an instance in which *C*, a photographer, takes a picture, which is copyrightable,[28] and secures a copyright on it; later, *D*, also a photographer, takes a picture from the same point, under the same conditions as to light, weather, film and all other particulars, resulting in a photograph which is virtually—or actually—identical with that taken and copyrighted by *C*. There is no infringement if *D* causes his photograph to be published, because it is his own original work, and not a copy of *C*'s. If, on the other hand, *D* were to publish the photo taken by *C*, even though identical to the one he had taken him-

[21] See Rosenthal v. Stein, 205 F.2d 633 (9th Cir. 1953).
[22] Continental Casualty Co. v. Beardsley, 151 F. Supp. 28 (S.D.N.Y. 1957).
[23] Smith v. George E. Muehlebach Brewing Co., 140 F. Supp. 729 (W.D. Mo. 1956).
[24] Lake v. Columbia Broadcasting System, Inc., 140 F. Supp. 707 (S.D. Cal. 1956).
[25] 17 U.S.C.A. § 5(a)(1952).
[26] Greenbie v. Noble, 151 F. Supp. 45 (S.D.N.Y. 1957).
[27] Lewis v. Kroger Co., 109 F. Supp. 484 (S.D.W. Va. 1952).
[28] 17 U.S.C.A. § 5(j)(1952). See Burrow-Giles Lithographic Co. v. Sacony, 111 U.S. 53 (1884); National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294 (7th Cir. 1902); Home Art, Inc. v. Glensder Textile Corp., 81 F. Supp. 551 (S.D.N.Y. 1948); Alfred Bell & Co. v. Catalda Fine Arts, 74 F. Supp. 973 (S.D.N.Y. 1947).

self, there would be an infringement, and this infringement would be compensable. Fortunately, such a situation is not likely, except in theoretical meanderings. As a more practical example, the following is presented: Although an actor's motions, voice, postures and other such "stage business" are not proper copyright material,[29] a motion picture of that same "business" *would* be a proper subject for copyright.[30]

As may be suspected from the preceding examples, the rights secured by copyright are not all-inclusive. It would certainly be an infringement of copyright protection if a work were imitated in entirety, or substantially. There may, however, be a derivation—direct or indirect—which is not an infringement, in addition to the situations posed by *a, b, c* and *d* above. One case[31] which points this out concerns a fact situation wherein *E* copyrighted a catalogue containing pictures of lamps which were neither copyrighted nor patented. *F* manufactured certain lamps copied from the picture and published a catalogue containing pictures of the copy. Neither the copying of the lamps from the picture nor the printing of the picture of the copy was an infringement, in view of the fact that *F*'s picture was not a copy of *E*'s picture. In other words, copyright of the picture did not afford copyright protection to the *subject* of the picture.

An interesting pair of cases, both from the legal viewpoint and the identity of those involved, has arisen; both deal with the television parody or burlesque of movies.[33] One of these, the *Benny* case,[34] holds such parody to be an infringement. The other, the *Caesar* case,[35] holds a parody not to be an infringement. There are factual differences, but these seem nebulous. In the *Benny* case, Jack Benny had received permission to parody the movie, "Gaslight", on a radio program. Some six years later, in 1952, he presented a parody of the same motion picture on a television pro-

[29] Universal Pictures Corp. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947).

[30] 17 U.S.C.A. § 5(m) (1952).

[31] Koskins v. Lightmakers, Inc., 155 F. Supp. 202 (S.D.N.Y. 1956).

[32] This fact situation should not be confused with the filing of a photograph in securing a copyright of a work of art, as outlined below; in the latter case, the subject of the photo is the object of copyright.

[33] This is not the only area in which such distinctions are narrow. It is one in litigation at present, however, and is mentioned for that reason as well as the reasons mentioned above.

[34] Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1957), *cert. granted,* 353 U.S. 946 (1957).

[35] Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. 1955).

gram. There was a great similarity to the original, and many of the lines of dialogue were taken either verbatim or with only slight changes from the original. Plot, story lines, situation, characters, and many other factors were virtually the same, but were acted in burlesque and in a light vein, as opposed to the rather heavy vein of the original. This was held as an infringement. The *Caesar* case was distinguishable factually, but involved almost identical considerations. There, Sid Caesar presented a parody of the moving picture, "From Here to Eternity", in a skit which was titled, "From Here to Obscurity". The story line, and all other considerations, were obviously derived from and parallel to the original, although there was a change as to some aspects: the principal character in the novel by James Jones and subsequent screenplay taken therefrom was named Maggio, for example, but the name of the parallel character in the Caesar skit was "Frankie". This might seem to remove some of the parallel character of the two until another fact is brought forth: an Academy Award was received by the actor portraying Maggio in the screen version. His name was Frank Sinatra. It may well be that there are distinctions in these two cases which have escaped mention or notice. The action of the Supreme Court in the *Benny* case should give food for thought, whether affirmed or reversed. In either event—as is true in many areas of copyright law—any distinctions presented must necessarily tread a narrow line.[36]

The actual procedure for securing a copyright is inexpensive and relatively simple.[37] The current normal fee is four dollars ($4.00), with a six dollar ($6.00) fee applicable when the article to be copyrighted is a print or label to be used for articles of merchandise. The first step in procuring a copyright is publication *with notice* of copyright.[38] Publication *without* notice, initially[39] or subsequent to the securing of a copyright,[40] will abrogate the protection of the copyright. The statutory form[41] of notice must be made the sub-

[36] Intertwined with the problem of compensable infringement is the allowable taking known as "fair use". For an excellent discussion of this, see Yankwich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203 (1954).

[37] The description herein is intendedly general in nature, and is only a guide for use; for that purpose, it should be adequate, but a number of procedural details have been left unmentioned, *e.g.*, there is a statement below that *a* form is required for application; in actuality, *the particular* form for the category in which the item falls is required.

[38] 17 U.S.C.A. § 10 (1952).

[39] See, *e.g.*, Grandma Moses Properties, Inc. v. This Week Magazine, 117 F. Supp. 348 (S.D.N.Y. 1953).

[40] *Cf.* Hershon v. United Artists Corp., 242 F.2d 640 (D.C. Cir. 1957).

[41] 68 STAT. 1032 (1957).

ject of close adherence. At present, the correct form is "Copyright", the abbreviation "Copr.", or the symbol "©" accompanied by the name of the copyright proprietor, and—if printed literary, musical or dramatic works—the year in which the copyright is secured by publication must also be present. In certain cases[42] the notice requirement will be met if the copyright symbol is accompanied by the initials, monogram, mark or symbol of the copyright proprietor in an obvious place, *provided,* however, that the name must appear in another place on the article. The apparent purpose is to avoid marring the article in production with an extensive notice on the decorative surfaces of the article.

The materials necessary in procuring a copyright are, of course, centrally filed by the United States government. Two copies[43] of the work are filed,[44] except that only one need be filed in the event the article is not to be reproduced for sale.[45] Filing of the copy for works of art and similar articles may be by photograph. Where printed matter is the subject, all type must be set in the United States[46] and an affidavit to that effect must accompany the material.[47] In addition, an application form is required;[48] these forms are available from the Register of Copyrights.

It should be noted that a special procedure must be followed for works published outside the United States. This may be done in compliance with international agreements to which the United States is a party,[49] or by the statutory procedure[50] whereby protection on an ad interim basis is secured for five years from the date of first publication abroad, provided deposit of the work, fee, application and other material required—quite similar to those listed above for domestic copyright—is made within six months.

There has been presented herein most of the basic information which is necessary to an understanding of copyright, and for procuring the protection afforded when the article is a fit subject

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[42] Those articles encompassed in 17 U.S.C.A. §§ 5(f)-5(k) (1952).
[43] 17 U.S.C.A. § 13 (1952).
[44] Such filing—as well as any other communication concerning copyrights—should be addressed to the Register of Copyrights, Library of Congress, Washington 25, D. C.
[45] 17 U.S.C.A. § 12 (1952).
[46] 17 U.S.C.A. § 16 (1952).
[47] 17 U.S.C.A. § 17 (1952).
[48] See note 37, *supra.*
[49] See, *e.g.,* Dubin, *Universal Copyright Convention,* 42 CALIF. L. REV. 89 (1954).
[50] 68 STAT. 103 (1954), 17 U.S.C.A. § 22 (Supp. 1957).

for such protection. As has been seen, the actual procuring is relatively simple and far less expensive than would be thought by those totally unfamiliar with the enabling laws. The information is not comprehensive in scope, however, and should not be considered as such. It is intended only as a starting point for those practitioners who may have occasion to serve their clients in such matters, and research on particular matters would, of course, be wise before any attempt is made to secure a copyright. This is not so foreboding as it might seem on first inspection, however, and is comparable to the work involved in a real estate title search, insofar as time is concerned; that is, it is usually a fairly routine matter, but may involve unanticipated difficulties. It should not, on this event, be forsaken, however, as the steps involved are not so complicated or technical as to require a technically specialized knowledge.

One word of caution is felt necessary. As is generally the case in such matters, most of the difficulty is not in the initial procurement of the copyright. Technical crags appear in the path when there is a suspected or alleged infringement, and it is here that a specialized knowledge is most helpful; it is not a necessity, however, and the lack thereof can be overcome with the same attention necessarily paid when an unfamiliar aspect of the law is presented. In such areas as remedies,[51] taxation,[52] jurisdiction,[53] venue,[54] assignments and bequests,[55] and the declaratory judgment proceeding,[56] there may or may not be special rules applicable, depending upon the facts in each particular case. None is so formidable, however, that a good working knowledge cannot be garnered from the usual source materials available, with the addition of a basic text on the subject.[57]

C. R. S.

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[51] *Cf.* Rushton v. Vitale, 218 F.2d 434, 104 U.S.P.Q. 158 (2d Cir. 1955) (temporary injunction); Gilmore v. Anderson, 38 Fed. 846 (S.D.N.Y. 1889) (permanent injunction).

[52] See Strom, *Depreciation and Income Aspects of Copyright Under the Internal Revenue Code of 1954*, 20 Mo. L. Rev. 187 (1955).

[53] See Cohen, *State Regulation of Musical Copyright*, 18 Ore. L. Rev. 175 (1939). This is a vast field, but any authoritative federal practice text should contain the necessary information as to federal jurisdiction.

[54] See Robbins Music Corp. v. Alamo Music, 119 F. Supp. 29 (S.D.N.Y. 1954). The same remarks apply here as in note 53, above.

[55] 17 U.S.C.A. §§ 27-32 (Supp. 1957).

[56] See Wells v. Universal Pictures Co., 166 F.2d 690 (2d Cir. 1948).

[57] There are many. Either of the following would be entirely adequate: Howell, The Copyright Law (1952); Rothenberg, Copyright Law (1956).