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Copyright - Infringement of Literary Works - An Elemental Analysis

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COPYRIGHT-INFRINGEMENT OF LITERARY WORKS—AN ELEMENTAL ANALYSIS*

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INTRODUCTION***

The necessity of extending to the creator of literary works a suitable reward for his labors has long been recognized and cannot seriously be questioned.[1] Without incentive there would be but little effort expended on the production of literature. Since the Statute of Queen Anne, the reward to the author has taken the form of a certain degree of protection in the exclusive use of his own work. This principle is recognized in the Constitution of the United States, which authorizes Congress 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."[2] The Copyright Act was enacted pursuant to this authorization.[3]

However, the need for a restriction on the protection afforded an author is as apparent as the need for the protection itself. Without some limitation on the time and scope of literary protection, the purpose of granting any protection at all would be defeated. If the protection were broad and absolute, it would be but a short time before the limited number of basic plots would all be used up, and there could be no more literary production without violating existing rights. Consequently, it is necessary that the protection given by copyright be limited to a relatively narrow area.

To establish a limitation on the length of time a literary work was to be protected was a comparatively simple task. Congress merely included in the Copyright Act an express limitation of twenty eight years as the period of protection, with the right to a renewal for a similar period.[4] To limit the scope of the protection the author was to have during this period, however, was far more difficult. Because of the relative inflexibility of legislation in its application to particular

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*** This article does not deal with problems arising out of the consensual use of copyrighted materials. Therefore, there is no discussion of the law pertaining to abridgements, digests, compilations, or anthologies.

[1] For a historical summary of literary protection, see 18 C.J.S., *Copyright and Literary Property* §17; Holmes v. Hurst, 174 U.S. 82 (1898).

[2] U.S. CONST. ART. I, §8.

[3] 17 U.S.C.A. (1947).

[4] *Copyrights,* 17 U.S.C.A. §24 (1947).

cases, it was necessary to leave it largely to the discretion of the courts to determine how far the protection of copyright should go.

Although the exact limitations on an author's protection necessarily remain to be determined by the particular facts of each case, nevertheless the courts have generally agreed on certain fundamental criteria. Since a dispute over the degree of protection to be afforded a copyrighted work seldom finds its way into court except as a suit by the author for infringement of his copyright, the protection to which an author is entitled is best measured by the elements which must be established to prove that his work has been infringed.

The following elements are those generally considered by the various American courts in a suit for infringement of copyright, either common law or statutory:

I. *Previous Work:* A previous work by the plaintiff.
II. *Literary Property:* Literary property of the plaintiff in that work.
III. *Similarity:* Similarity of the defendant's work to the protected work.
IV. *Access:* Access of the defendant to the plaintiff's work.
V. *Appropriation:* Appropriation of the protected work by the defendant.
VI. *Intent:* Intent on the part of the defendant to appropriate.
VII. *Damages:* Damage to the plaintiff as a result of the defendant's appropriation.
VIII. *Originality:* Originality of the plaintiff's work.

These elements are not necessarily of universal recognition. Some of them are often taken for granted without discussion or analysis; others have, on occasion, been expressly denied. For the most part however, they are all to be considered.

An attempt will be made in dealing with the various elements to evaluate how often and to what degree each of them influences the decision of the courts passing upon the question of infringement.

I. Previous Work

Of course, there can be no infringement unless there is a literary production which has been infringed. This production must meet certain requirements before it can be the basis of a successful suit for infringement.

First, it must have been in existence prior in time to the infringing work. This is necessary to enable the plaintiff to establish that the defendant had the opportunity to pirate from his work.

Secondly, the previous work of the plaintiff must be definite in its form. It is not enough that an author has formed the basic ideas of

his plot. He must also clothe those ideas in a form definite enough to make them his own. "Abstract ideas are not the subject of private property, and only the concrete expression of them will be protected."[5] However, this does not mean that there can be no infringement unless the author has completed his work to the last detail. The rough draft of a work, or even a detailed outline, could conceivably be the basis of a suit for infringement as long as there was a sufficient embodiment of the author's ideas to make them his property. Plagiarism is by no means confined solely to piracy of the words of another writer. "This [literary plagiarism] may take at least three forms: Plagiarism of language, of incident, or of plot."[6] The copyright in an unfinished production may be infringed even though the plot has not been reduced to its final, polished form.

The previous work must also have physical expression. That is, the author must have reduced his production to written form (or given it some other equally substantial expression). Without such physical expression, the author would be unable to prove exactly what it was that was protected by any copyright.[7] He would have the same difficulty in establishing that he had given his ideas such definite form as to make them his own property and entitled to any protection at all.

These requirements are generally taken for granted by the courts in a suit for infringement of copyright. Obviously, the requirements of definite form and physical expression will not be involved in any case other than for infringement of common law copyright, since, as will be seen, every work protected by statutory copyright will necessarily meet those requirements.

II. Literary Property

Once the plaintiff has established the existence of a previous work, his next step is to prove that he has literary property in that work. The term "literary property" includes both common law copyright and rights under the Copyright Act.[8] There can be no infringement unless the work is protected by one of these. Generally speaking, common law copyright protects only unpublished works and such protection is lost upon publication.

> "Copyright law has been divided into common law copyright and statutory copyright. There is little similarity between the two, each providing for an entirely different stage of the publication of an intellectual work. Copyright at common law protected the author of a work from publication or plagiarism until he had published his writing, but once so published, this work was subject to copying by anyone so desiring. Statutory copy-

[5] 18 C.J.S., *Copyright and Literary Property* §10 e.
[6] Frankel v. Irwin, 34 F.2d 142, 143 (S.D.N.Y. 1918).
[7] Bien v .Warner Bros. Pictures, Inc., 35 U.S.P.Q. 78 (1937).
[8] 18 C.J.S., *Copyright and Literary Property* §3.

> right on the other hand protects the author after his article has been published from misuse of his rights acquired under that copyright."[9]

Since the Copyright Act protects a work only after it has been published, it can in no way be considered a substitute for the common law copyright, but is rather supplementary to it. Consequently, when the Copyright Act was passed, Congress was careful to avoid any unintentional abridgement of the common law rights and inserted the following provision:

> "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."[10]

Except for the stage of publication covered, the protection afforded by common law copyright is substantially the same as that under the Copyright Act. The remedy for infringement of either type of copyright is the same. The Copyright Act expressly reserves the right of the author of an unpublished work to "prevent the copying, publication, or use of such unpublished work" and also "to obtain damages therefor."[11] The Copyright Act also provides injunction [12] and damages[13] as the remedies for infringement of the statutory protection.

The requirement of literary property in the infringed work is generally not the subject of much discussion by the courts in suits for infringement. This is not because the requirement is overlooked, but because it so obviously essential that it is proved by the plaintiff as a matter of course.

III. Similarity

Once it has been established that the plaintiff has a work which is protected by copyright, similarity of the defendant's production to the protected work must be shown. The mere fact of similarity, of course, does not constitute proof of literary piracy. Works may be similar, or even identical, although each was produced independently of the other.[14] This is especially true when both authors drew their information from a common source. But just as it is obvious that similarity alone does not constitute infringement, it is equally obvious that there could not possibly be infringement without similarity.

In spite of the fact that it is often said by various courts that there can be similarity through mere coincidence or as a result of common

[9] Note, 15 Notre Dame Law. 331, 332 (1940).
[10] *Copyrights,* 17 U.S.C.A. §2 (1947).
[11] *Ibid.*
[12] *Ibid.,* §101 (a).
[13] *Ibid.,* §101 (b).
[14] Harold Lloyd Corp. v. Witwer, 65 F.2d 1 (9th Cir. 1933).

sources, in many cases the courts have used the fact that there were similarities as circumstantial evidence of other elements of infringement. Access and appropriation are frequently inferred from similarities. The attitude of the courts has been summarized in this statement:

> "The existence of substantial similarities . . . may be sufficient to justify an inference that defendant had access to and copied plaintiff's work."[15]

Undoubtedly, there may be such a degree of similarity between different works as to make it practically impossible to credit it entirely to coincidence.[16] However, there must be an exceptional degree of similarity before such other elements of infringement as access and appropriation may be inferred from it.[17]

IV. Access

However strong the similarities may be between the plaintiff's work and that of the defendant, the suit for infringement cannot succeed if the plaintiff fails to prove that the defendant had access to his work.[18] Any inference of access raised by similarities may always be rebutted by proof of non-access on the part of the defendant.

Actually, the term access means nothing more than the opportunity to copy. Proof of access may be made in various ways. When the work which is alleged to have been infringed is of general circulation so the defendant might easily have obtained a copy, there is no problem of proof at all. It is not necessary, in proving that the defendant had access to the infringed work, to show that he actually had a copy and that he actually read it. It is sufficient to prove that the defendant had sufficient opportunity to examine the plaintiff's work and copy from it.

When the infringed work is one which has not been in public circulation, it may be more difficult to prove that the defendant had access. Of course, the plaintiff may have shown his work to the defendant or submitted it to him for approval or publication. This would be sufficient to establish access. The proof becomes most difficult when the plaintiff's work has not been circulated nor shown directly to the defendant or his agent. However, in such a case, the plaintiff may still rely on circumstantial evidence to establish access. As was said by the court in *Kovacs v. Mutual Broadcasting System:*

> "Access may, however, be proved indirectly. A charge of piracy does not fail merely because the infringer was not caught in the act of copying. Access may be inferred from the sur-

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[15] Note, 23 A.L.R. 2d 244, 369 (1952).
[16] *Supra,* note 6.
[17] Christie v. Harris, 47 F.Supp. 39 (S.D.N.Y. 1942); Allen v. Walt Disney Productions, Ltd., 41 F.Supp. 134 (S.D.N.Y. 1941).
[18] Twentieth Century-Fox Film Corp v. Dieckhaus, 153 F.2d 893 (8th Cir. 1946).

> rounding circumstances, or it may be found from similarities in the plan, arrangement and combination of materials, or from identity of phraseology, or from other evidentiary facts."[19]

Most important among the circumstantial factors considered by the courts is whether or not there is a possibility that the similarities could be merely coincidental.[20] The greater the similarities, the easier the proof of access. However, this does not mean that access is not necessary as an element of infringement if there is a substantial amount of similarity. Although it is rare, there have been occasions where almost identical works were produced by authors working completely independently of each other. Regardless of the substantiality of the similarities, if the defendant can show that his work is the result of his individual efforts, any inference of access is dispelled and there can be no finding of infringement.

V. Appropriation

Although many, perhaps even a majority, of courts do not use the term "appropriation" in discussing the necessary elements to be proven in a suit for infringement of copyright, the reason is not that it is not required; rather it is because the courts are inclined to use the term "copying" instead. Similarity, as has been seen, is not the same as copying. Works may be similar although each was produced independently of the other and without any copying.

But just as similarity does not necessarily mean copying, copying does not necessarily mean appropriation. The term copying, which is used by so many courts, is not a broad enough term to cover what is actually meant. In *Arnstein v. Porter,* the court pointed out this distinction:

> "Assuming that adequate proof is made of copying, that is not enough: for there can be 'permissible copying,' copying which is not illicit. Whether (if he copied) defendant unlawfully appropriated presents, too, an issue of fact. . . . The question, therefore, is whether defendant took from plaintiff's works so much that defendant wrongfully appropriated something which belongs to the plaintiff."[21]

Certainly there are many forms of copying which do not constitute literary piracy but are considered a fair use of the copied material.[22]

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[19] 99 Cal.App.2d 56, 221 P.2d 108, 113 (1950).

[20] *Supra,* note 14.

[21] 154 F.2d 464, 472 (2nd Cir. 1946). Although this case was concerned with plagiarism of a musical production, the same reasoning is applicable to cases involving literary works.

[22] The doctrine of fair use is not within the scope of this article. But for some illustrative cases on the doctrine of fair use, see: Thompson v. Gernsback, 94 F.Supp. 453 (S.D.N.Y. 1950); Karll v. Curtis Publishing Co., 39 F.Supp. 836 (E.D. Wis. 1941); New York Tribune, Inc. v. Otis & Co., 39 F.Supp. 67 (S.D.N.Y. 1941); see also, 18 C.J.S., *Copyright and Literary Property* §94 (4); Note, 23 A.L.R.2d 244, 339 (1952).

The test of when copying ceases to be a fair use and becomes appropriation is, of course, one which is necessarily left to the discretion of the courts. The rule by which the courts are to make this determination has been stated in various ways. In *Nichols v. Universal Pictures Corp.*,[23] the test was said by Learned Hand, J., to be "whether the part so taken is 'substantial,' and therefore not a 'fair use' of the copyrighted work." The test of substantiality has been widely applied by the courts,[24] but unfortunately it is rather vague as to exactly what is required. A slightly more definite expression of the same idea defines the necessary degree of appropriation as "that which comes so near the original as to give every person seeing it the idea created by the original."[25] The test of whether an "ordinary observer" who had read or seen both the plaintiff's and the defendant's work would get the impression that the defendant's was based on that of the plaintiff has also been widely applied.[26] It has also been stated that copying becomes appropriation when "so much is taken that the value of the original is sensibly diminished."[27] When the defendant's work is not of the same general type nor in competition with that of the plaintiff, the court is more reluctant to find infringement and gives the doctrine of fair use a much broader interpretation.[28]

Although stated in different terms by the various courts, the requirement of appropriation, as applied, is generally the same in all of them. The plaintiff, to prevail in his action for infringement of copyright, must establish that the defendant was guilty of "appropriation," "substantial copying," "piracy," or whatever other term the particular court may fancy.

This element is frequently one of those most strongly contested by the defendant and is consequently analyzed very thoroughly in many court decisions. However, the exact amount of copying or appropriation which must be proven is still very indefinite. To maintain flexibility in defining the extent of copyright protection, it is necessary that the courts have a great deal of discretion in determining whether there has been an appropriation in any particular case.

It is very seldom that there is any direct proof of appropriation. The defendant will seldom be caught in the act of copying from the plaintiff's work. However, when there are unexplained similiarities between the two works, and there has been adequate proof of access, this is generally all that is required to prove that there was an appro-

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[23] 45 F.2d 119, 121 (2nd Cir. 1930).
[24] Note, 23 A.L.R.2d 244, 339 (1952) and cases there cited.
[25] *Supra*, note 14.
[26] *Ibid.* See also, Note, 23 A.L.R.2d 244, 342 (1952) and cases there cited.
[27] 18 C.J.S., *Copyright and Literary Property* §105.
[28] Karll v. Curtis Publishing Co., *supra*, note 22.

priation. This was demonstrated in *Shipman v. R.K.O. Radio Pictures, Inc.*, where the court said:

> "When there is access, there is a high degree of probability that similarity results from copying and not from independent thought and imagination. Indeed, it might well be said that where access is proved or admitted, there is a presumption that the similarity is not accidental."[29]

However, even though substantial similarity and access have been proven, if the defendant can present "strong proof" that his production was the result of his own independent effort, there can be no finding of appropriation.[30]

VI. Intent

There is no question that there can be an infringement of copyright without any intention on the part of the infringer to appropriate the plaintiff's work.[31] Infringement has often been found when the defendant has read the plaintiff's work and, due to an unconscious memory of the plot, modeled his own production to closely resemble it.[32] However, this does not mean that the *animus furandi* has no bearing on the question of infringement.

> "While it is quite true that a copying of a work constitutes infringement whether the copier intended to infringe or not, those cases which go so far as to generalize by saying that innocence, ignorance, or intent constitute no element to be considered on the issue of infringement are to be scrutinized with care and read only in the light of the qualifications expressed above. Evidence of intent, it is obvious, may in certain cases solve decisively the question of whether what the defendant has done constitutes infringement or not."[33]

The question of infringement may be decided by evidence of intent on the part of the defendant to appropriate the plaintiff's work in cases where the defendant has alleged that he only made a fair use of the plaintiff's work. Obviously, if the defendant is guilty of an *animus furandi,* he cannot claim fair use.[34] Intent is also necessary to liability for contributory infringement[35] or to sustain a conviction under the penal provisions of the Copyright Act.[36]

However, proof of intent is not to be limited to those few classes of

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[29] 100 F.2d 533 (2nd Cir. 1938).
[30] O'Rourke v. R.K.O. Radio Pictures, Inc., 44 F.Supp. 480 (Mass. 1942).
[31] Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931).
[32] Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F.2d 893 (8th Cir. 1946); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2nd Cir. 1936); Harold Lloyd Corp. v. Witwer, 65 F.2d 1 (9th Cir. 1933).
[33] Fox, *Evidence of Plagiarism in the Law of Copyright,* 6 U. of Toronto L. J. 414, 448 (1946).
[34] 18 C.J.S., *Copyright and Literary Property* §95.
[35] Harper & Bros. v. Kalem Co., 169 Fed. 61 (2nd Cir. 1909).
[36] *Copyrights,* 17 U.S.C.A. §104 (1947) makes "wilful infringement" a misdemeanor.

cases. In every suit for infringement of copyright where the plaintiff seeks to recover damages, intent on the part of the defendant is an important element. The Copyright Act provides that "where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen," the damages may not exceed a certain, almost nominal, amount.[37]

Proof of *animus furandi* may also be considered by the court as an important element in establishing appropriation without any direct evidence. It was stated in *Harold Lloyd Corp. v. Witwer:*

> "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 if there has been a subconscious but actual copying."[38]

Although, as has been seen, intent to appropriate is not absolutely necessary to every suit for infringement, nevertheless it is an important factor in many cases and is not to be disregarded.

VII. Damages

A few courts have included "damage resulting from the copying" among the elements which must be established to recover for infringement.[39] In the case of infringement of a statutory copyright, actual damages need not have resulted from the defendant's appropriation. The Copyright Act provides that the plaintiff may recover any damages he sustained or any profits made by the defendant but "in lieu of actual damages and profits, such damages as to the court shall appear to be just," within specified limitation.[40]

Even in the case of common law copyright, proof of damages is not essential to a successful suit for plagiarism. Of course, damages or profits for infringement cannot be recovered unless they are proven. The Copyright Act reserves the right which existed at common law to obtain an injunction "to prevent the copying, publication or use" of the unpublished work,[41] and the courts have often invoked such power of injunction.[42]

VIII. Originality

The requirement that the plaintiff's work be original is probably the most frequently contested element in an action for infringement.

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[37] *Copyrights,* 17 U.S.C.A. §101 (b) (1947).
[38] *Supra,* note 14 at p.17.
[39] Golding v. R.K.O. Radio Pictures, Inc., 35 Cal.2d 690, 221 P.2d 95 (1950). The opinion in this case, however, refers only to infringement of common law copyright.
[40] *Copyrights,* 17 U.S.C.A. §101 (b) (1947).
[41] *Ibid.,* §2.
[42] DeAcosta v. Brown, 146 F.2d 408 (2nd Cir. 1944).

The originality of the plaintiff's work is usually put in issue when suit is brought against the defendant for infringement of a statutory or common law copyright, and the defense is raised that the copyright is invalid, or that the common law right does not exist, because the infringed work was not original.

The courts have traced the element of originality back to the Constitution, as is illustrated in *Chamberlain v. Uris Sales Corp.:*

> "Our starting point must be the Constitution. For, as the constitutional power to enact the Copyright Act . . . derives from Article I, §8, that Act would be void if it went beyond granting monopolies (or exclusive franchises) to authors whose works 'promote the progress of science and the useful arts.' Obviously the Constitution does not authorize such a monopoly grant to one whose product lacks all creative originality. And we must, if possible, so construe the statute as to avoid holding it unconstitutional."[43]

Therefore, the courts imply in the Copyright Act a provision that only original works will be protected. But exactly what is included in the term "original"?

The Copyright Act, itself, does not aid to any large extent in helping to determine the question. Section 8 of the Act states that "no copyright shall subsist in the original text of any work which is in the public domain . . ."[44] This raises a problem as to the meaning of the phrase "public domain." Driscoll, in an article appearing in the Fordham Law Review, contended:

> "Public domain as used in this statute includes:
> 1. All literary works that have been published without copyright protection; and
> 2. All literary works upon which the term of copyright protection has expired.
> Public domain so used means simply *unprotected literary works.*"[45]

Learned Hand, J., agreed in *Fred Fisher, Inc. v. Dillingham:*

> "It [Section 8 of the Copyright Act] has no application whatever to a work which is of original composition, because such a work is not the 'original' text of any work in the public domain, but a second and equally 'original' text of a work never published before its copyright."[46]

It becomes apparent, therefore, that a strict interpretation of the statute means that no copyright may be obtained on the same work on which a copyright has expired or which was previously published without a copyright.

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[43] 150 F.2d 512 (2nd Cir. 1945).
[44] *Copyrights,* 17 U.S.C.A. §8 (1947).
[45] Comment, 11 FORDHAM L. REV. 63, 68 (1942).
[46] 298 Fed. 145, 149 (2nd Cir. 1924).

The court's definition of public domain has not stopped with its interpretation of Section 8 of the Copyright Act. Driscoll sums it up in this way:

> "As the term 'public domain' is used in many decisions, it means anything that belongs to the public at large—historical events, current news, ideas, thoughts, situations, even basic plots and such like. . . ."[47]

The mere fact that a certificate of copyright has been secured from the Library of Congress is not conclusive evidence of the originality of the literary work. A copyright certificate is frequently granted on a production which is not original. It would not only be impractical but impossible as well to have a determination of originality made upon every application for a copyright certificate. The problem has been summarized thus:

> ". . . the Library of Congress does not ordinarily pass upon the originality or scope of a copyrighted work, but merely determines whether or not certain formal requirements of the Copyright Act have been met.
> ". . . the Library of Congress is neither equipped nor authorized to pass upon questions of originality. The result is that a copyright certificate represents nothing more than a recording of the author's claim to copyright coupled with an implied statement by the Library of Congress that certain formalities have been met."[48]

The term "original," when used as a requirement for copyright, differs greatly from the "novelty" required for a patent. Before a patent can be issued, the Patent Office must be convinced that the article is novel and useful: there must be invention on the part of the applicant. This is not what is meant by originality of a literary work. The court, in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, made this analysis of originality:

> " 'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary. . . .
> "All that is needed to satisfy both the constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' Originality in this context 'means little more than the prohibition of actual copying.' No matter how poor artistically the author's addition, it is enough if it be his own."[49]

Because of this liberal attitude of the courts in defining originality, the plaintiff in an action for infringement need have little concern that

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[47] *Supra*, note 45.
[48] Spencer and Stone, *Creating and Preserving a Copyright*, 14 NOTRE DAME LAW. 362, 369 f. (1939).
[49] 191 F.2d 99, 102 (2nd Cir. 1951).

his suit will fail for want of originality in his own work unless he was, himself,guilty of plagiarism. If this were not the case, literary production would soon be stifled because the limited number of basic plots and ideas would prevent an author from turning out works which were original in the sense of being new or novel.

As it is, however, an author has considerable freedom in borrowing from the vast storehouse of older literary productions. He may add his own embellishments to an old plot. This was illustrated in *Stodart v. Mutual Film Corp.*

> "A man may take an old story and work it over, and if another copies, not only what is old, but what the author has added to it when he worked it up, the copyright is infringed. It cannot be a good copyright in the broader sense that all features of the plot or the bare outlines of the plot can be protected; but it is a good copyright in so far as the embellishments and additions to the plot are new and have been contributed by the copyright."[50]

Or the author may treat the old plot in a new manner by varying the time, locale, and characters of the story. The court dealt with such a treatment in *Stephens v. Howells Sales Co.*

> "It is true that an old plot could not be copyrighted, and this plot is old, but a new treatment of an old plot may be protected by copyright. [Citation omitted.] Probably almost every conceivable plot has been the subject of many books. However, people will continue to write books, and the public continue to read them, because of the new characters and settings with which the authors surround an old plot, and such of them as are the independent productions of the authors may be copyrighted."[51]

The writer may also combine a series of old incidents or ideas into his own arrangement. The court in *Stanley v. Columbia Broadcasting System* commented on this.

> "An author who takes existing materials from sources common to all writers, arranges and combines them in a new form, giving them an application unknown before, is entitled to a copyright, notwithstanding the fact that he may have borrowed much of his materials and ideas from others, provided they are assembled in a different manner and combined for a different purpose, and his plan and arrangement are a real improvement upon existing modes; for the labor of making these selections, arrangements and combinations has entailed the exercise of skill, discretion and creative efforts."[52]

However, when some or all of the ideas used by an author are taken from the public domain, in the sense that they are available for the free

[50] 249 Fed. 507, 510 (S.D.N.Y. 1917).
[51] 16 F.2d 805, 808 (S.D.N.Y. 1926).
[52] 35 Cal.2d 653, 221 P.2d 73, 79 (1950).

use of anyone, these ideas do not become his property merely because he has added his own embellishments, given them a new treatment, or combined them in a different manner. "The copyright of a story only covers what is new and novel in it."[53] Only what the author has added to the old ideas is protected. And of course, the author's particular style of expression is also protected. Other writers are free to use the same old ideas as long as they do not use any of the author's contributions. "Others are free to copy the original. They are not free to copy the copy."[54]

CONCLUSION

While few courts have ever expressly detailed exactly what elements are necessary to constitute infringement of copyright, they have almost universally required a previous work in which the plaintiff has literary property, substantial similarity of the defendant's work to the protected one, access to and copying of the protected work by the defendant and originality of the plaintiff's work. Intent to infringe and damage resulting from infringement, as has been seen, although generally not essential, are nevertheless important elements in many cases. Although it depends entirely on the facts of each case which elements are most important to the success of the suit, originality and appropriation are probably the elements most frequently in contest. These two elements are also those in which the court usually exercises the widest degree of discretion.

By application of these various requirements for copyright infringement, the courts have attempted to afford ample protection to the author of literary works while still limiting that protection sufficiently to prevent unreasonable restriction on the area left open to subsequent authors. It is a difficult line to draw. "Nobody has ever been able to fix that boundary and nobody ever can."[55]

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[53] *Supra*, note 14 at p.23.
[54] Bleistein v. Donaldson, 188 U.S. 239, 249 (1903).
[55] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2nd Cir. 1930).