

Book Review: Fourth Copyright Law Symposium

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BOOK REVIEW

FOURTH COPYRIGHT LAW SYMPOSIUM, by The Nathan Burkan Memorial Competition. American Society of Composers, Authors and Publishers (1952).

This publication includes four of the prize winning papers selected from those submitted by law school students competing for the Nathan Burkan Memorial Competition. The four reproduced papers deal with copyright problems and the book was published by the American Society of Composers, Authors and Publishers.

The national award winner was Melville B. Nimmer of Harvard University Law School who wrote on the subject, *Inroads on Copyright Protection*. As stated by the author, "This discussion shall be confined to a consideration of the manner in which certain generally accepted principles of copyright law effectuate the statutory protection granted to literary works."

The author then proceeds to point out that in every copyright infringement case the court is confronted with three central questions which are:

1. Is the allegedly infringed material copyrightable?
2. Did the plaintiff satisfy the conditions precedent to copyright protection for the material?
3. Did the defendant copy this material?

In respect to the first question, Mr. Nimmer, after arguing pro and con, correctly concludes that "it cannot be denied that the courts in applying the substantial appropriation doctrine have, by and large, exhibited both consistency and at least a reasonable justification under both precedent and statute."

The normal solution of the second question in relation to a copyright infringement action is not ordinarily too complex but, as to the third question, Mr. Nimmer, after much discussion and theorizing as to a variety of possible tests, finally concludes that an experienced judge will decide this question on a "feeling" for copying. This, your reviewer submits, is what usually occurs in cases of this nature whether they be actions for infringement of patents, trade marks or copyrights. The "feel" of the trier of the case is most satisfactory if applied by an experienced judge.

An inaccurate comparison of copyrights and patents was noted in Mr. Nimmer's paper. He alleges that "letters patent give a monopoly to make, vend and use." This appears to be an erroneous interpretation of the patent statute which provides that a letters patent gives to the patentee, for a term of seventeen years, "the right to *exclude others*

from making, using or selling the invention throughout the United States . . .”

Mr. Nimmer's paper is replete with interesting authorities bearing on attempted solutions of the three main questions stated to be of the essence in respect to copyright infringement cases. In the final analysis, however, as conceded by the author, these matters get down to a more practical standpoint and the "feel" of the judge trying the particular case is all-important.

In the Nathan Burken Memorial Competition, two papers dealing with the compulsory manufacturing provision of the Copyright Act were selected as deserving of awards. The booklet under review only includes the paper entitled *The Compulsory Manufacturing Provision—An Anachronism in the Copyright Act* submitted by Clinton R. Ashford of the University of Michigan Law School. Another paper by Franklin Feldman of Columbia Law School covering the same subject has already been published in the Columbia Law Review for May, 1950. Mr. Ashford, in his paper, carries the torch for nonresident aliens in respect to United States copyrights, contending that certain aspects of the United States Copyright Law impose hardships on this class primarily because of the requirement that the printing and binding of the work to be copyrighted be done in the United States and, secondly, because the copyright application must be applied for in the United States within six months of the date of publication abroad.

The main discussion in the reproduced paper centers about the alleged adverse effect of the so-called manufacturing clause on non-resident alien authors and publishers and also the effect of the compulsory manufacturing clause on the American public.

In addition to these problems, Mr. Ashford briefly reviews past unsuccessful attempts to reform the Copyright Act and then presents as his conclusion that many reasons exist for repealing the anachronistic manufacturing provision of the United States Copyright Laws. According to the author, the requirement in question is an economic and possibly a political matter which has no place in the Copyright Act.

The third paper reproduced in the book being reviewed bears the title *The Doctrine of Moral Right and American Copyright Law: A Proposal* and was submitted by Arthur S. Katz of New York University Law School.

The author presents as his theses: (a) that the creator of a literary or artistic work has an intellectual property right therein which is absolutely, perpetually and uniquely his to enjoy, either as part of any copyright he may obtain, or independently thereof; (b) that this creator's right, described as a moral right, is actually a branch of the greater right of personality; and (c) that any breach of this right of

personality as it affects the creator of a literary or artistic work, can be suitably redressed under the existing laws.

Part I of the Katz paper examines the concepts of literary property and copyright. Part II examines the doctrine of moral right, traces its origins, and gives its present status in World Law. Part III examines the doctrine of moral right in respect to American Law and discusses its lack of reception in America and the author's reasons why this is so. Part IV examines foreign case law and statutes concerning the doctrine of moral right and includes suggestions presented by Mr. Katz whereby much in this body of foreign law might be incorporated into American law.

Mr. Katz argues his case with the zeal of a crusader, the ardor of which reaches its climax in the discussion of the 7th Circuit Court of Appeals case of *Vargas vs. Esquire*, 164 F. 2d 522. In the *Vargas case* the unique (in this country) theory of the author's so-called moral rights was urged but thoroughly rejected by the court speaking through Judge Major. Mr. Katz condemns the decision in the *Vargas case* in the following unjustifiably strong language: "This is judicial abdication most foul!"

Subsequently, the author concedes that the entire onus for the present attitude of American law toward the doctrine of moral right should not fall on the courts alone, the author recognizing that the legislative branch of the Federal Government is also at fault. Mr. Katz does not believe that the doctrine of moral right in copyright law is weak or basically repugnant to American law, but suggests that it has not received the serious intellectual examination by either bench, bar, legislature or law school, to which it is entitled.

Finally, Mr. Katz concludes his paper with a fervid plea that the author's right of personality be recognized and protected by the courts of the United States.

The final paper appearing in the booklet under consideration is entitled *Copyrights and the Income Tax Problem* and was submitted by Charles O. Whitley of Wake Forest School of Law.

Mr. Whitley's paper deals with perplexing practical problems in the tax field but is nevertheless very readable and is adequately supported by authoritative citations. This particular paper should be of interest to tax lawyers dealing with problems arising from copyright and patent monetary transactions.

As pointed out by the author there are two conflicting decisions of the Second and Fourth Circuits, not yet resolved. However, Mr. Whitley believed (at the time his paper was prepared) that the following conclusions can be drawn concerning the taxation of income derived from copyright sources:

1. Individual states may constitutionally tax income derived by their residents from copyrighted sources.
2. Income accruing to a copyright holder is ordinary income and not subject to the capital gains allowance unless (a) the copyright owner is not a professional author, artist, or composer or in the business of selling, licensing, or otherwise handling copyrights and (b) he sells the copyright itself as a whole, not assigning separate interests under it to various buyers.
3. The author or composer's income may be amortized over a three-year period if (a) he worked on the composition for three calendar years and (b) received 80% of the entire income accruing from the copyright during one taxable year and (c) the income is not a capital gain.
4. When a non-resident alien author transfers to an American buyer separate rights under the author's copyright, other rights being withheld and transferred to other buyers, the income accruing is a "royalty" whether payment is received periodically or in a lump sum; the transaction is a licensing arrangement, and the income is taxable by the United States.

The discussion ends with a suggestion that the confusion and conflict existing in the field of taxation of income from copyright sources could be eliminated by more plain and specific statutes or more logical and comprehensive opinions, if both Courts and Congress took a more realistic view of copyrights and the transfer of rights secured by them.

The four prize winning papers comprising the "Fourth Copyright Law Symposium" are all well written and documented and present interesting and, in some instances, unusual questions. The first three papers, especially, exhibit the normal urge of youth to disturb the tranquility of the status quo in respect to accepted and time tested copyright law principles.

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