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Copyright and Morals

Edward S. Rogers

COPYRIGHT AND MORALS

> "The statistics of crime are property to the same extent as any other statistics, even if collected by a criminal who furnishes some of the data." Mr. Justice Holmes in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 251.

THE basis for national copyright legislation in this country is Article I, Section 8 of the Constitution: "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."

To be entitled to copyright protection, therefore, there must be the writing of an author which will promote the progress of science and useful arts. What is a writing, and who is an author, have been, in the past, the cause of much dispute, but the limitation that the writing of an author must promote the progress of science and useful arts, opens up a field of ingenious inquiry and gives the courts an opportunity to indulge in refinements and speculations which probably would surprise the draftsmen of the Constitution.

Of course a work utterly useless and worthless would not promote the progress of science and useful arts, but outside of obvious limits it is dangerous for persons trained only in the law to pronounce upon such matters. Otherwise, at one extreme, some works of genius would be sure to miss appreciation, at the other end, copyright would be denied to works which appealed to a public less educated than the judge.[1] Manifestly an immoral work is not one which promotes the progress of science and useful arts. But it is when the courts attempt to determine what is or what is not immoral that some of the finest gems of judicial literature are to be found. There can be no quarrel with the generalization, but when an individual undertakes to determine whether or not a particular book, play, or picture is immoral, the result is seldom edifying and is often amusing.

For the purpose of this discussion, morality, in so far as it applies to literary or artistic works, can be divided generally. (a) Where the work offends public order, and (b) where it offends public decency.

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[1] Mr. Justice Holmes in *Bleistein* v. *Donaldson*, 188 U. S. 239.

(a) *Does the work offend public order?*

This includes an inquiry whether it is seditious, blasphemous, libelous or fraudulent. In earlier days when government controlled all printing, and when licensing acts were enacted and enforced, it is not surprising that judges sat not only as courts in determining controversies brought before them, but as censors of the books involved in those controversies. It sometimes happened that works which were sought to be protected as against piracy were sometimes condemned as against morals. To show the attitude of courts in the eighteenth century we have only to read Lord High Chancellor Parker's observations in *Burnett* v. *Chetwood*.[2] "This being a book which to his knowledge (having read it in his study) contained strange notions intended by the author to be concealed from the vulgar in the Latin tongue, in which language it could not do much hurt, the learned being better able to judge of it, he thought it proper to grant an injunction to the printing and publishing it in English; that he lookt upon it that this court had a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality." This is a return to the methods of the Star Chamber and High Commission, indeed, and is a highly dangerous view for any court to take.

What Milton said of the licensers of his time could appropriately be applied. "* * * how shall the licencers themselves be confided in, unless we can conferr upon them, or they assume to themselves above all others in the Land, the grace of infallibility, and uncorruptedness? And again if it be true, that a wise man like a good refiner can gather gold out of the drossiest volume, and that a fool will be a fool with the best book, yea or without book, there is no reason that we should deprive a wise man of any advantage to his wisdome, while we seek to restrain from a fool, that which being restrain'd will be no hindrance to his folly." * * * "It cannot be deny'd but that he who is made judge to sit upon the birth, or death of books whether they may be wafted into this world, or not, had need to be a man above the common measure, both studious, learned, and judicious; there may be else no mean mistakes in the censure of what is passable or not; which is also no mean injury."[3]

The cases which hold that a court of equity, as a preliminary to protection against infringement, should inspect and censor the work

[2] 2 Merivale 441, 35 Full Reprint 1008 (1720).

[3] AREOPAGITICA, (Arber's Edition), 48 and 54.

For an interesting account of the restraints imposed on printing see "LICENSERS OF THE PRESS," 3 DISRAELI'S CURIOSITIES OF LITERATURE, [9th ed.] Moxon 1834.

for which protection is sought,[4] and if it does not conform to the

[4] In *Southey* v. *Sherwood*, 2 Meriv. 435, 35 Full Reprint 1006. An injunction was sought to restrain the publication of Wat Tyler. Sir Samuel Romilly for the defendant, argued that the work, from its libelous tendency was of such a nature that there could be no copyright in it. Lord ELDON, "After the fullest consideration I remain of the same opinion as that which I entertained in deciding the case referred to. (*Walcot* v. *Walker*, 7 Ves. 1, 32 Full Reprint 1.) It is very true that, in some cases, it may operate so as to multiply copies of mischievous publications by the refusal of the court to interfere by restraining them, but to this my answer is that, sitting here as a judge upon a mere question of property, I have nothing to do with the nature of the property, nor with the conduct of the parties, except as it relates to their civil interests, and if the publication be mischievous, either on the part of the author or the bookseller, it is not my business to interfere with it." The plaintiff was directed to establish his right at law.

In *Lawrence* v. *Smith*, Jac. 471, 37 Full Reprint 928, the plaintiff had published a work entitled "Lectures on Physiology, Zoology and the Natural History of Man." The lectures had been delivered by him at the College of Surgeons. The bill was to restrain the defendant from selling a pirated edition. The defendant asserted that the book which both he and the plaintiff were publishing was an immoral work and ought to have no protection. Lord Eldon characterized the defense as "singular" but declined to continue the injunction, directing the plaintiff to bring an action, after which, if it were decided favorably to him he might apply again. "Looking at the general tenour of the work," he said, "and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the scriptures, considering that the law does not give protection to those who contradict the scriptures, and entertaining a doubt, I think a rational doubt whether this book does not violate that law, I cannot continue the injunction."

In *Murray* v. *Benbow*, Jac. 474n, 37 Full Reprint 929, an injunction to restrain the piracy of Byron's "Cain" was denied. The Lord Chancellor on reading the work refused the relief because he thought it contradicted the scriptures. Byron's "Don Juan" was similarly treated by the Vice Chancellor in 1823. *Murray* v. *Dugdale*, 7 Ves. Jr. 2, 32 Full Reprint 2.

On the general subject that there is no property in matter which is libelous or indecent see *DuBost* v. *Beresford*, 2 Camp. 513, where the plaintiff, an artist of considerable reputation exhibited for money at a house in Pall Mall a painting entitled "La Belle et la Bete," or "Beauty and the Beast," which, says the reporter, "was a scandalous libel upon a gentleman of fashion and his lady." Great crowds of people went daily to see it. The lady portrayed was the sister of the defendant who one morning cut the picture to pieces. The plaintiff's counsel insisted on the one hand that he was entitled to the full value of the picture, together with compensation for the loss of the exhibition, while it was contended on the other that the exhibition was a public nuisance which everyone had a right to abate by destroying the picture. Lord ELLENBOROUGH: "If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. * * * The jury, therefore, in assessing the damages, must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts." There was a verdict for the plaintiff in five pounds damages. See generally on immorality as a defense, *Cowan* v. *Milbourn*, L. R. 2 Ex. 230, 16 L. T. 290, where the defendant contracted to let rooms to the plaintiff, afterwards discovering that they were to be used for the delivery of lectures maintaining that the character of Christ is defective and His teachings misleading, and that the Bible is no more inspired than any other book, he refused to allow the use of them. It was held that the publication of such doctrine was blasphemy, that therefore the purpose for which the plaintiff intended to use the rooms was illegal and there could be no recovery.

The printer of an immoral and libelous work cannot maintain an action for his bill against the publisher who employed him to print it. *Paplett* v. *Stockdale*, 2 C. & P. 198.

A printer declining to publish a book with a libelous dedication held entitled to recovery against the author for printing the work without the dedication. *Clay* v. *Gates*, 1 H. & N. 73.

An action will not lie for the sale of libelous, obscene or immoral prints. *Fores* v. *Johnes*, 4 Esp. 97.

Gale v. *Leckie*, 2 Starkie 106, 3 E. C. L. 337. The plaintiffs were booksellers and publishers, and the defendant had entered into a written contract with them, in which it was recited that the defendant had then ready for the press a work to be entitled, "An Historical Inquiry into the Balance of Power in Europe;" and it was agreed that this work should be published at the sole expense of the plaintiffs, and that the profits should be divided between the author and publishers; that the defendant should supply the plaintiffs with the manuscript, and that in case the plaintiffs should decline to publish a second edition the defendant should be at liberty to do so without the plaintiff's interference. It appeared that the work of printing went on to the extent of 336 pages, when the defendant declined to supply any further materials, signifying upon one occasion, that his incarceration would be the consequence of his completing the contract, and upon another, he assigned a ludicrous reason for refusing to proceed, saying that he was apprehensive of a prosecution by the pope.

Lord ELLENBOROUGH charging the jury (338): "He says that he withdrew himself that he might not subject himself to a prosecution, but without proof to the contrary, it is to be presumed that the composition was innocent; if, indeed, it had been of a different nature, he might have founded his defence upon that ground; he might have said, I now feel convinced that this work cannot be committed to the press with safety, that it is not a proper one for me to publish, or for you to print; here I will pause and will proceed no further in that which will place both of us in peril; but are you to assume all this without evidence when the work itself might have been submitted to you?"

Hime v. *Dale*, (1803), 2 Camp. 27n, was an action for pirating the words of a song called "Abraham Newland." It was urged that the song was libelous—but let counsel make his own argument. "It (the song) professed to be a panegyric upon money; but was in reality a gross and nefarious libel upon the solemn administration of British justice. The object of this composition was, not to satirize folly or to raise the smile of innocent mirth, but being sung in the streets of the capital, to excite the indignation of the people against the sacred ministers of the law, and the awful duties they were appointed to perform. The mischievous tendency of the production would sufficiently appear from the following stanza; after hearing which the court would say whether the non-suit ought to be disturbed.

'The world is inclin'd
To think Justice blind;
Yet what of all that?
She will blink like a bat
At the sight of friend Abraham Newland!
Oh! Abraham Newland! Magical Abraham Newland!
Tho' Justice 'tis known
Can see thro' a mill-stone,
She can't see thro' Abrahm Newland" "

Lord ELLENBOROUGH: "If the composition appeared on the face of it to be a libel so gross as to affect the public morals, I should advise the jury to give no damages. I know the Court of Chancery on such occasions would grant no injunction. But I think the present case is not to be considered one of that kind."

LAWRENCE, J.: "The argument used by Mr Garrow on this fugitive piece as being a libel, would as forcibly apply to *The Beggar's Opera*, where the language and allusions are sufficiently derogatory to the administration of public justice."

Abraham Newland was chief cashier of the Bank of England, becoming such in 1782. His signature appeared on all the Bank's notes which were long known as "Abraham Newlands." This cant phrase for money makes the argument that the song was libelous, understandable.

judge's notions of propriety in religion, morality or otherwise, to deny relief against piracy, have been criticised,[5] and it would seem as if Milton's criticism is the most vigorous and soundest of all. It would be difficult to improve upon the Areopagitica in this respect. However, the rule ought to be that, outside of perfectly obvious limitations, a court should protect against piracy any work of which the defendant thinks well enough to steal. As has been frequently pointed out, the denial of relief in a case of this kind does not in any way benefit the public by keeping from them the things which the court may think they should not have, but has the exactly opposite effect—it multiplies copies and increases the circulation of something which the court thinks immoral. The denial of relief to the plaintiff under such circumstances only enhances the evil.[6]

Fiction masquerading as news was held by Judge Hough not to be protectable.[7] "Decision in this case" he said, "is put upon a single narrow ground—not because other grounds could not be found, but because the point to be stated depends upon a rule of morals. There

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[5] Judge STORY says: "The soundness of this general principle can hardly admit of a question. The chief embarrassment and difficulty lie in the application of it to particular cases. If a court of equity, under color of its general authority, is to enter upon all the moral, theological, metaphysical, and political inquiries, which, in past times, have given rise to so many controversies, and in future may well be supposed to provoke many heated discussions; and if it is to decide dogmatically upon the character and bearing of such discussions, and the rights of authors growing out of them; it is obvious, that an absolute power is conferred over the subject of literary property, which may sap the very foundations on which it rests, and retard, if not entirely suppress, the means of arriving at physical, as well as at metaphysical truths. Thus, for example, a judge, who should happen to believe that the immateriality of the soul, as well as its immortality, was a doctrine clearly revealed in the scriptures, (a point upon which very learned and pious minds have been greatly divided), would deem any work anti-christian which should profess to deny that point, and would refuse an injunction to protect it. So, a judge, who should be a Trinitarian, might most conscientiously decide against granting an injunction in favor of an author enforcing Unitarian views; when another judge, of opposite opinions, might not hesitate to grant it." EQUITY, Sec. 938.

[6] "So the injunction," says Lord CAMPBELL, speaking of Lord Eldon's refusal to enjoin Wat Tyler in *Southey* v. *Sherwood*, 2 Meriv. 435, 35 Full Reprint 1006, "was refused, and hundreds of thousands of copies of Wat Tyler, at the price of one penny, were circulated over the kingdom." 10 LIVES OF THE CHANCELLORS [5th English ed.], 257; DRONE ON COPYRIGHT, p. 113.

[7] *Davies* v. *Bowes*, 209 Fed. 54-55.

To an action for infringing the copyright in a work entitled, "Evening Devotions; or, the Worship of God in Spirit and in Truth, for every Day in the Year, from the German of Sturm:" a plea that Sturm was a well-known writer on religious subjects, and that the plaintiff procured H. to write the book in question, as a translation from a work in the German by Sturm, whereas no such work existed, and, with a view to defraud the public, and obtain a profit to himself, published a title page and preface to the work, falsely representing it to be the genuine production of Sturm:—Held, that the plea disclosed a transaction, on the part of the plaintiff, in the nature of *crimen falsi;* that he had no copyright in the work and that the plea afforded a good defence to the action. *Wright* v. *Tallis*, 1 C. B. 893; 14 L. J. C. P. 283; 9 Jur. 946.

never was any copyright in this alleged episode of trial, because it was printed as news; it was presented to the public as matter of fact and not of fiction; the readers of the Sun were invited to believe it, and Davies substantially admits that he wrote it in the form he did in order to induce belief. How much belief is to be accorded to newspaper stories is matter of opinion; but it is a matter of morals that he who put forth a thing as verity shall not be heard to allege for profit that it is fiction."

The circumstances under which the controversy arose are interesting. In June, 1908, Davies (the plaintiff) was in the employment of the Evening Sun. It was his especial duty to provide theatrical news and criticism; he also wrote short stories. At the time mentioned he wrote and the Sun published under the caption "News of the Theaters" something which began as follows: "A Massachusetts real life drama which eclipses the plot of 'The Thief'." "Two men who had missed their connection with a Boston train last Tuesday morning found themselves in a little interior Massachusetts town with four hours to be killed." Then it is told that during the four hours which they had on their hands they wandered into the village court house. While they were sitting there they saw a woman put on trial for theft. It appeared that she had actually stolen for the purpose of providing luxuries, and perhaps comforts, for the child to which she soon expected to give birth. She admitted the larceny, whereupon her husband asserted himself to be the thief, and she repudiated his assertion, dramatically exclaiming that the father of her child was lying to save her. Before the result of this court episode could be known the travelers were obliged to leave and catch their train. The incident, as reported by the plaintiff in the Sun, was related almost wholly in the third person, though the language of the woman in asserting her own guilt and her husband's innocence was put in the first person.

The edition of the Evening Sun containing this publication was copyrighted, and in course of time, by a train of circumstances unnecessary to recite, attracted the attention of one Kenyon, who said that he supposed it to be a journalistic statement of an actual occurrence. Davies' name appeared at the foot of the column headed "News of the Theaters" in the New York Sun, and Davies himself asserted that the tale was not true; that he regarded it as a short story which he had cast in the form of an actual occurrence because he thought it more striking. Kenyon testified that out of this tale in the Sun and much other and more important material, plus his

own imaginings, he consructed a play called "Kindling." Defendant was the producer of "Kindling," and Davies sued because, having received an assignment of the copyright privileges of the Evening Sun, he accused Kenyon of unlawful use of the product of his imagination just related. For the purpose of this decision Judge Hough assumed as a fact that "Kindling" contained a substantial part of the plot of Davies' story, if it be regarded as a story in the sense of fiction.

A manual of instruction in a system of salesmanship consisting of a collection of forms of advertisements to be used by dealers in connection with special sales of pianos and players, contained statements of facts about the sales and their success which could not possibly be true in all cases, and which in addition were so extravagantly exaggerated as to mislead the public, though held to be a book and formally copyrighted could not be protected on account of its fraudulent character. "Extravaganzas" said Judge Maxey, "may be indulged in by a writer for the purpose of illustration and to accomplish the end in view, as exemplified by Don Quixote and others of a similar nature, and as thus employed they carry conviction to the reader and lend charm and interest to the story. But advertisements by dealers of tneir wares, in order to insure the protection of the law, should reflect the truth and avoid misrepresentations which mislead and deceive the people. If their tendency be misleading and deceptive they will find the door of a court of equity barred against their admission."[8]

(b) *Does the work offend public decency?*

This inquiry places the courts in the rather delicate, or perhaps indelicate, position of deciding what is an indecent work. As far back in 1826, Chief Justice Abbott refused to protect from piracy a book entitled "Memoirs of Harriette Wilson," which professed to be the history of the amours of a courtesan, containing, according to the Chief Justice, "in some parts matter highly indecent, and in others, matter of a slanderous nature on persons named in the work."[9]

[8] *Stone & McGarrick* v. *Dugan Piano Co.*, 220 Fed. 837, affirming 210 Fed. 399.

[9] *Stockdale* v. *Onwhyn*, 7 D. & R. 625, 4 L. J. K. B. (O. S.) 122, 2 Carr. & P. 163, 5 B. & C. 174, 108 Full Reprint 65.

Brougham argued: "The doctrine that a publisher can have no property in such a work as that which the defendant is alleged to have pirated, rests entirely upon the dictum of EYRE, C. J., in a case tried before him at Warwick. In *Walcott* v. *Walker*, (7 Ves. Jun. 1), and *Southey* v. *Sherwood* (2 Mer. 435), Lord ELDON relied upon it, when he refused to grant an injunction to restrain the sale of copies of what he considered immoral works." * * * * * * "The objects with which the courts have been inclined to refuse their protection to such works, has been to put them down, but it seems

In 1867 Judge Deady held that "The Black Crook" was a composition, the production of which would not "promote the progress of science and useful arts" and hence, not entitled to copyright. "Now it cannot be denied," said the court, "that this spectacle of 'The Black Crook' only attracts attention as it panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person." The Court continued, "The Black Crook is a mere spectacle—in the language of the craft a spectacular piece. The dialogue is very scant and meaningless, and appears to be a mere accessory to the action of the piece—a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress, and in attractive attitudes or action. The closing scene is called Paradise, and as witness Hamilton expresses it, consists mainly 'of women lying about loose'—a sort of Mohammedan paradise, I suppose with imitation grottos and unmaidenly houris. To call such a spectacle a 'dramatic composition' is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts, or an exhibition of model artistes might as justly be called a dramatic composition. Like those, this is a spectacle, and although it may be an attractive or gorgeous one, it is nothing more. In my judgment, an exhibition of women 'lying about loose' or otherwise" (Note the word "otherwise." Here the moralist gives way to the lawyer. The

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clear that the sale must be increased by allowing the publication of pirated editions. And, accordingly, we find conflicting opinions as to the propriety of granting injunctions to restrain piracy. 'The Beggar's Opera' has never been considered a very moral production; another opera, called "Polly," was composed by the same author, but the performance of it was prohibited; it must, therefore, be presumed to have been more immoral than the former, yet Lord Chancellor Talbot granted an injunction to restrain the sale of a pirated edition. Upon the whole, therefore, it appears that there is not any decision of a Court of Law against the present action, and that in equity there are conflicting opinions of different Chancellors as to the expediency of granting injunctions in such cases."

ABBOTT, C. J.: "The question then is, whether the first publisher can claim a compensation in damages for a loss sustained by an injury done to the sale of such a work. In order to establish such a claim he must, in the first place, shew a right to sell; for if he has not that right he cannot sustain any loss by an injury to the sale. Now I am certain no lawyer can say that the sale of each copy of this work is not an offence against the law. How then can we hold that by the first publication of such a work, a right of action can be given against any person who afterwards publishes it? It is said that there is no decision of a Court of Law against the plaintiff's claim But upon the plainest principles of the common law, founded as it is, where there are no authorities, upon common sense and justice, this action cannot be maintained. It would be a disgrace to the common law could a doubt be entertained upon the subject: but I think that no doubt can be entertained, and I want no authority for pronouncing such a judicial opinion."

court does not intend to permit any lying about of any description.) "is not a dramatic composition, and therefore not entitled to the protection of the copyright act. On this ground the application of Maguire *et al.* for an injunction is denied, with costs."[10]

This case probably is no more than a reflection of contemporary public opinion. The "Black Crook" with its plenitude of pink fleshings, scandalous as it may have seemed in the days of crinolines when legs—unless their very existence was genteelly denied—were vehicles, not spectacles, would probably bore a sophisticated modern audience, but would scarcely shock them. It would only make the tired business man tireder.

Times have changed. *Martinetti* v. *Maguire* was decided in 1867. In 1901 the Circuit Court of Appeals of the Second Circuit sustained a judgment for $2075 for 2075 sheets of a lithographed poster advertising the "Black Crook" alleged to be made in violation of copyright. Necessarily the court must have considered the copyright valid,[11] and on the authority of *Bleistein* v. *Donaldson Lith.*

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[10] *Martinetti* v. *Maguire*, (1867) Deady, 216, Fed. Cas. 9173.

In his sketch of William Wheatley, William Winter refers to his production of the "Black Crook." "His introduction of the Leg Drama of the "Black Crook" upon the American stage was mischievous. That piece represented a style of amusement that has intermittently prevailed in the English speaking theatre from the days of Sir William Davenant, and Wheatley cannot be charged with having invented it. The sensual spectacle, however, is a kind of theatrical display that has done injury, and it is deplorable that his name was ever associated with its evil influence."

The Wallet of Time.

Shook v. *Daly*, 49 How. Pr. 366. CURTISS, J., (p. 368): "The defendants further object that the play of 'Rose Michel' is an immoral production, and, consequently, that if the plaintiffs have any rights in regard to it, that they are not entitled to be protected in them by the interference of a court of equity. If this play, or any literary production, is of that character, it is no part of the office of this court to protect it by injunction or otherwise. The rights of the author are secondary to the right of the public, to be protected from what is subversive of good morals. But the examination of the original manuscripts fails to show that either version is amenable to this charge."

In *Egbert* v. *Greenberg*, 100 Fed. 447, a copyrighted "racing form" was alleged to have been pirated. It was unsuccessfully urged in defense that a racing form was a gambling device and immoral.

In *Richardson* v. *Miller*, 12 O. G. 3, 15 ALB. L. JOUR. 340, Fed. Cas. 11791, Judge Shepley held that the copyright for a design for playing cards was not invalid. "Courts of Justice will not lend their aid to protect the authors of immoral works. But where there is nothing immoral or improper in the prints themselves, the fact that they may be used by persons to violate the laws against gambling, does not of itself deprive them of the protection of the law. To do this it must appear either that there is something immoral, pernicious, or indecent in the things *per se*, or that they are incapable of any use except in connection with some illegal and immoral act. It is not contended that the playing cards of the complainant are subject to either of these imputations."

See also, *Novelty Co.* v. *Dworzek*, 80 Fed. 902; *National Device Co.* v. *Lloyd*, 40 Fed. 89.

[11] *Hegeman* v. *Springer*, 110 Fed. 374.

Co.[12] the judgment was affirmed by the Supreme Court.[13] If "Black Crook" posters run true to form, these undoubtedly contained representations of the scenes which so acutely shocked Judge Deady,[13a] and if the representation of a thing is the subject of copyright, it is difficult, unless there is some other objection to it, to understand why the thing itself may not be. If a life size colored picture of a woman in tights is not immodest, how, speaking of course legally and considering her as a work of art only, can the lady herself be fairly the subject of judicial reproach. Indeed the Supreme Court has said: "The ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that will excommunicate the paintings of Degas."

In discussing that immortal lyric "Dora Dean," Judge Morrow held that the word "hottest" in the line "She's the hottest thing you ever seen," as applied to a female colored person, had an indelicate and vulgar meaning and refused the song protection, although he intimated that if the objectionable word were omitted the complainant might establish a *locus penitentiae* and return to a court of equity.[14]

A performance containing among other things, moving pictures of a woman making quick changes of costumes and incidentally exhibiting considerable portions of her anatomy, was decided by Judge Ray to be "immoral and not tending to promote the progress of science and useful arts." The defendant performer was a man. The Court in comparing the two exhibitions observed: "The only close similarity is in changing clothes or costumes and the consequent exposure of the person—the one the exposure of the female person, conveying certain sensations and impressions; and the other the exposure of the male person, conveying entirely different sensations and impressions. Should these exposures alone actually be made, the first would bring a large and enthusiastic crowd (of men)—while the second would bring the police only—possibly a few courtesans. Society may tolerate and even patronize such exhibitions, but Congress has no constitutional authority to enact a law that will copyright them."[15]

One might almost fancy he was reading Prynne's "Histriomastix," Jeremy Collier's "Short View of the Profaneness and Im-

[12] 188 U. S. 239.

[13] 189 U. S. 505.

[13a] An inspection of the record in the Supreme Court discloses that this surmise is correct—they do.

[14] *Broder* v. *Zeno Mauvais Music Co.*, 88 Fed. 74.

[15] *Barnes* v. *Miner*, 122 Fed. 480.

morality of the English Stage,"[16] or Macaulay paying his respects to the dramatists of the Restoration.

A vaudeville monologue perpetrated by a person calling himself "The German Senator" contained such passages as "It gives me great pleasure and joy to stand and undress myself before this large aggravation. I stand before you with an open face and a free mind, a poor, honest, sterilized citizen. As soon as a child reaches the age of six we send him off to school and he granulates, goes to scollege for ten years, and when he gets through he gets a job as a school teacher at $60 per month and when the janitor of the same school is getting $90 a month. The Prohibitionists are progressing more and more every day. They are closing up every saloon in the country. You can't get in any saloon on Sunday. It is impossible; it's too crowded. You know it is drink that breaks up many a home. At last a woman comes out with a great idea,

[16] "Early in the days of William people began to discover how wicked their fathers were, and Jeremy Collier published a little book which is one of the curiosities of literature. It purported to be a 'short view of the stage'; it was actually a collection from Congreve, Wycherly, and Dryden of all the passages considered by Collier to be the most profane and obscene. Collier, in fact, adopted the method of all respectable pamphleteers and newspapers, which contrive to make the best of both worlds, offering the public wares he held to be unfit for sale, and disguising the exact nature of the undertaking with righteousness in the margin." THE CENSOR AND THE THEATRES, by John Palmer, (Unwin, 1912).

Collier's book was published in 1698.

Macaulay, in his review of Leigh Hunt's "Comic Dramatists," says that Collier was complete master of the rhetoric of honest indignation, and that the Short View is now much less read than it deserves. One is disposed to share the regret that Collier's book is not better known, perhaps not for the reason which Macaulay evidently had in mind.

"Their liberties," Collier says of the theatres, "in the following particulars are intolerable, viz: Their smuttiness of expression, Swearing, Profaneness and Lewd application of scripture; their abuse of the clergy; their making their Top Characters Libertines and giving them success in their debauchery. This charge, with some other irregularities I shall make good against the stage and shew both the Novelty and Scandal of the Practice, and first, I shall begin with the Rankness and Indecency of their language." No one escapes, "The Country Wife," "The Plaindealer," "The Old Bachelor," "The Relapse," even "Hamlet." "Had Shakespeare secured this point for his young Virgin Ophelia, the play had been better contrived. Since he was resolved to drown the Lady like a Kitten, he should have set her a swimming a little sooner. To keep her alive only to sully her Reputation, and discover the Rankness of her Breath, was very cruel."

And as to swearing—"They swear in solitude and cool blood, under Thought and Deliberation, for Business and for Exercise. This is a terrible circumstance."

"However, now we know the Reason of the Profaneness and Obscenity of the stage, of their Hellish Cursing and Swearing, and in short of their great Industry to make God and Goodness contemptible. 'Tis all to satisfie the company, and make people laugh. * * * Innocence is no such easy matter. There is no succeeding in this matter without Sweat and Drudgery. Clean wit, inoffensive Humor and handsome Contrivance require Time and Thought, and who would be at this expence, when the Purchase is so cheap another way?"

a wives' union, think of it, a union for wives. A young couple gets married and just as soon as they get settled down a walking delegate comes out and orders a strike. Just imagine hundreds and thousands of wives walking the streets and scabs taking their places." The similarities in the defendant's monologue of which the plaintiff complained consisted of such things as describing eggs as "in their second childhood," referring to the "house of misrepresentatives," and the like, which were claimed to be original with the plaintiff, highly meritorious, and appropriated by the defendant. Judge Ray thought that the merit and morality of plaintiff's monologue was so doubtful as to require the denial of a preliminary injunction.[17]

Mrs. Glyn sought to restrain, as an infringement of her novel "Three Weeks" the exhibition of burlesque moving picture films under the title of "Pimple's Three Weeks (without the Option)." It was naturally contended by the defendant that the plaintiff's book was an immoral work. Mr. Justice Younger delivered a written judgment in which, among other things, he said:[18] "More important from a public point of view was the further fact that in his lordship's opinion the plaintiff's work was of a highly immoral tendency, and on this ground even if there had been an infringement, was disentitled to the protection of the Court. Moreover, the films themselves in his opinion contained incidents and movements of an indecently offensive character, which would equally have disentitled them in their present form to the protection of the Court in an action for infringement; and since in a copyright action the plaintiff was in the position of a person adopting and claiming the benefit derived from the infringing work, this ground too was fatal to the plaintiff's case. Under the circumstances the action must be dismissed without costs on either side."

The question seems not to have been raised in a case where the subject matter was a photograph of a nude model called the "Grace of Youth."[19]

Upon principles of unfair trading, not of copyright, protection was given to the Old Sleuth series of youthful memory, including

[17] *Hoffman* v. *Le Traunik*, 209 Fed. 375.

[18] *Glyn* v. *Western Feature Film Company*, (Jan. 1, 1916) Weekly Notes 1916, 5. The same conclusion was reached and the same disposition of the case as to costs was made by Mr. Justice Kekewich, in *Baschet* v. *London Illustrated Standard Company*, [1900], 1 Ch. 73, 79, where two of seven pictures were held indecent and disentitled to protection. The defendant had pirated all seven. "But" said the court, "the defendants are *in pari delicto* in that respect." The defendants were ordered to pay five-sevenths of the costs.

[19] *Gross* v. *Seligman*, 212 Fed. 930, 230 Fed. 412.

one entitled "Old Sleuth's Own," "Dudie Dunne or The Exquisite Detective, by Old Sleuth," which, with its yellow cover was imitated in defendant's publication "Old Sleuth Series," "That Dangerous Humpback; Conclusion of Desperate Larry, by Old Sleuth."[20]

Cases where spectacular pieces were refused copyright protection on account of their supposed immodesty are reminiscent of some of the incidents related by Mrs. Trollope. Her experience at the "Antique Statue Gallery" at Philadelphia, where it was thought to be indecent for mixed company to look at the statues. "Now, ma'am, now," said the attendant, "this is just the time for you—nobody can see you—make haste."—When picnics were discouraged because it was considered very indelicate for ladies and gentlemen to sit down together on the grass, and a young foreigner greatly offended "one of the principal families" by having pronounced the word "corset" before the ladies of it. Mrs. Trollope tells of a garden at Cincinnati where people went to eat ices and look at the roses. At the end of one of the walks there was a sign representing a Swiss peasant girl requesting that the roses might not be gathered: "Unhappily for the artist, or for the proprietor, or for both, the petticoat of this figure was so short as to show her ancles. The ladies saw, and shuddered; and it was formally intimated to the proprietor, that if he wished for the patronage of the ladies of Cincinnati, he must have the petticoat of this figure lengthened. The affrighted purveyor of ices sent off an express for the artist and his paint pot. He came, but unluckily not provided with any colour that would match the petticoat; the necessity, however, was too urgent for delay, and a flounce of blue was added to the petticoat of red, giving bright and shining evidence before all men of the immaculate delicacy of the Cincinnati ladies."

Then there was the incident at the Cincinnati theatre where Mrs. Trollope says the men sat in boxes in their shirt sleeves, and that their bearing and attitudes were "perfectly indescribable;"—"the heels thrown higher than the head, the entire rear of the person presented to the audience, the whole length supported on the benches, are among the varieties that these exquisite posture-masters exhibit. The noises, too, were perpetual, and of the most unpleasant kind; the applause is expressed by cries and thumping with the feet, instead of clapping; and when a patriotic fit seized them and 'Yankee Doodle' was called for, every man seemed to think his reputation as a citizen depended on the noise he made."

"Two very indifferent figurantes, probably from the Ambigu Comique, or la Gaieté, made their appearance at Cincinnati while

[20] *J. S. Ogilvie Pub. Co.* v. *Royal Pub. Co.*, 241 Penn. 5.

we were there; and had Mercury stepped down and danced a *pas seul* upon earth, his godship could not have produced a more violent sensation. But wonder and admiration were by no means the only feelings excited; horror and dismay were produced in at least an equal degree. No one, I believe, doubted their being admirable dancers, but every one agreed that the morals of the Western world would never recover the shock. When I was asked if I had ever seen anything so dreadful before I was embarrassed how to answer; for the young women had been exceedingly careful, both in their dress and in their dancing, to meet the taste of the people; but had it been Virginie in her most transparent attire, or Taglioni in her most remarkable pirouette, they could not have been more reprobated. The ladies altogether forsook the theatre; the gentlemen muttered under their breath, and turned their heads aside when the subject was mentioned; the clergy denounced them from the pulpit; and if they were named at the meetings of the saints, it was to show how deep the horror such a theme could produce. I could not but ask myself if virtue were a plant, thriving under one form in one country, and flourishing under a different one in another? If these Western Americans are right then how dreadfully wrong are we? It is really a very puzzling subject."[21]

This point of view may represent an American survival of that Puritanism which Macaulay describes. "Nymphs and Graces, the work of Ionian chisels, were delivered over to Puritan stone-masons to be made decent. Against the lighter vices the ruling faction waged war with a zeal little tempered by humanity or by common sense. Sharp laws were passed against betting." * * * "Public amusements, from the masques which were exhibited at the mansions of the great, down to the wrestling matches and grinning matches on village greens, were vigorously attacked. One ordinance directed that all the Maypoles in England should forthwith be hewn down. Another proscribed all theatrical diversions. The playhouses were to be dismantled, the spectators fined, the actors

[21] DOMESTIC MANNERS OF THE AMERICANS (1832).

The advantage of morality in the show business is well illustrated by A. Ward's celebrated letters to the Cleveland Plain Dealer. "My show," he wrote in one of them, "at present consists of three Moral Bares, a Kangaroo (a amoozin little Raskal—t'would make you larf yerself to deth to see the little cuss jump up and squeal), wax figgers of G. Washington Gen. Taylor John Bunyan Capt. Kidd and Dr. Webster in the act of killin Dr. Parkman, besides several miscelanyus moral wax statoots of celebrated piruts & murderers, &c. ekalled by few & exceld by none. Now, Mr. Editor, scratch off a few lines sayin how is the show bizniss down to your place. I shall have my hanbills dun at your offis. Depend upon it, I want you should git my hanbills up in flamin stile. Also git up a tremenjus excitement in yr. paper 'bout my onparaleld show. We must fetch the public sumhow. We must work on their feelins. Cum the moral on em strong."

whipped at the cart's tail. Rope dancing, puppet shows, bowls, horse-racing, were regarded with no friendly eye. But bearbaiting, then a favorite diversion of high and low, was the abomination which most strongly stirred the wrath of the austere sectaries. It is to be remarked that their antipathy to this sport had nothing in common with the feeling which has, in our own time, induced the legislature to interfere for the purpose of protecting beasts against the wanton cruelty of men. The Puritan hated bearbaiting, not because it gave pain to the bear, but because it gave pleasure to the spectators."[22]

There is a very vital distinction between a published and an unpublished work respecting the defense of immorality. In the case of a published work in the United States the constitutional limitation, that the work must tend to promote the progress of science and useful arts, must be given effect, and if the work is immoral (giving the author the benefit of every doubt) it does not tend to promote the progress of science and useful arts. Neither Congress, nor the courts, therefore, have jurisdiction to protect it. Where, however, it is sought to prevent the unauthorized publication of an unpublished work, neither the constitutional limitation nor the copyright statute has any application, and the morality of the work itself ought not to be in question. The plaintiff in such a case is not seeking, by the publication and sale of his work, to debauch the public, because he has not published. He is simply seeking to enjoin some one else from publishing an unpublished work without his consent. If he (the plaintiff) subsequently publishes a work which is immoral and tries to profit by it, or seeks to make some one else account for the gains of such an unlawful publication, it is time enough for the court then to discuss the morality or immorality of the subject matter, but no reason is apparent why John Wilkes, provided he had not himself published, could not have restrained a bookseller who had surreptitiously obtained a copy of it, from publishing even the Essay on Woman, and relief in such a case might be placed on a principle which is frequently invoked—that a man has a right to determine not only when and how his work shall be published, but whether it shall be published at all.[23]

EDWARD S. ROGERS.

Chicago, Ill.

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[22] HISTORY, Chap. II.

[23] COPINGER ON COPYRIGHT, [4th ed.] 5. Lord Eldon seems not to have had this distinction in mind deciding *Southey* v. *Sherwood*, 2 Meriv. 435, 35 Full Reprint 1006. See DRONE ON COPYRIGHT, pp. 111-113; SHORTT COPYRIGHT & LIBEL, [2nd ed.] p. 6.