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SOME 15,000 TO 20,000 years ago in a dimly lit recess of a large cave on Blackacre, *X*, a man of unparalleled imagination and genius, in response to an inexplicable inspiration, grasped a bit of prehistoric chalk and sketched upon a limestone wall the picture of a bison. Returning from the hunt, his friends were exultant. Something strange and new had been added to the history of civilization. They immediately realized that *X*'s talents should be protected, that his creativity should be encouraged, that proper steps should be taken to ensure that no second-rate imitator drew cheap copies of *X*'s masterpiece in every other cave in the world, thereby decreasing the value of Blackacre, which now possessed untold magical powers, not to speak of its practical values. *X* had become the world's first artist. He had also become the recipient of the first copyright.

Without a doubt, the history of art, and of copyright law, did not begin in this fashion, but it is true that the creators of works of the fine arts have been honored members of society from Magdalenian man to the present. "[W]e do know definitely that from the earliest times until today human beings the world over have given expression to human experience in concrete tangible forms which we call works of art." [1] Civiliza-

[1] GARDNER, ART THROUGH THE AGES 1 (1926).

tion has recognized value in artistic creation—economic, political, utilitarian, or aesthetic—and states have afforded it various forms of protection. Copyright statutes relating to the fine arts can be found in England as far back as 1735,[2] and in the United States dating from 1790.[3]

Of all the fields of creative endeavor afforded protection by our current copyright statutes,[4] none would seem to encompass such an extensive and variegated array of items as does the category "works of art." The Copyright Act provides that "any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: (a) To print, reprint, publish, copy and vend the copyrighted work," [5] and this protection is extended to "works of art; models or designs for works of art." [6]

The U.S. Copyright Office has supplied the following description of the category:

Works of Art (Class G).

(a) General. This class includes published or unpublished works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as works belonging to the fine arts, such as paintings, drawings, and sculpture.

(b) In order to be acceptable as a work of art, the work must embody some creative authorship in its delineation or form. . . .

(c) If the sole intrinsic function of an article is its utility, the fact that the article is unique and attractively shaped will not qualify it as a work of art. . . .[7]

The multiplicity of items which have qualified within this

[2] 8 Geo. 2, c. 13 (1735): "Whereas divers persons have by their own genius, industry, pains, and expense, invented and engraved, or worked in Mezzotinto or Chiaro Oscuro, sets of historical and other prints, in hopes to have reaped the sole benefit of their labours; and whereas print-sellers and other persons have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing or causing to be copied, engraved, and published, base copies of such works, designs, and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof. . . ."

[3] Act of May 31, 1790, ch. 15, 1 Stat. 124.

[4] 17 U.S.C. §§ 1–216 (1958).

[5] 17 U.S.C. § 1(a) (1958).

[6] 17 U.S.C. § 5(g) (1958).

[7] 37 C.F.R. § 202.10 (1960).

definition of "works of art" was noted by Justice Douglas in a concurring opinion in *Mazer v. Stein:*

> The Copyright Office has supplied us with a long list of such articles which have been copyrighted—statuettes, bookends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays.[8]

In view of the large range of objects encompassed by the phrase "works of art," the present writer has confined his consideration to what has been referred to above as "the fine arts." Except where otherwise noted, all cases discussed or noted have involved drawings, paintings, engravings, sculpture, or, in a few instances, photographs, the area of photography being increasingly the subject of artistic endeavor in recent years. Though works of art have always served functional purposes, at times for good and at times for bad, they have at the same time been cherished in and for themselves.[9] It is hoped that by limiting the scope of the present inquiry it will be possible to determine the attitude of the courts to art *qua* art, and that certain unanswered problems in this area may at least be identified.

WHY PROTECT THE ARTIST?

The early English justices would appear to have possessed a greater respect for an understanding of law than art,[10] and

[8] 347 U.S. 201, 220–21 (1954).

[9] PARKER, THE PRINCIPLES OF AESTHETICS 14 (1946): "No matter what further purpose artistic expressions may serve, they are produced and valued for themselves. . . . Any sort of practical purpose may be one motive in the creation of a work of art, but its significance is broader than the success or failure of that motive."

[10] In Gambart v. Ball, 32 L.J.C.P. 166, 143 Eng. Rep. 463, 468 (1863), Chief Justice Erle observes, "[W]e feel the same degree of pleasure in looking at the forms and attitudes of the beautiful animals there portrayed whether we see them in the size in which they are drawn in the original picture, or in the reduced size of the engraving, or in the still more diminished form in which they appear in the photograph." In Martin v. Wright, 6 Sim. 297, 58 Eng. Rep. 605, 606 (1833), Sir L. Shadwell notes, "Then with respect to the Defendant representing his copy as Martin's picture. It must be either better or worse; if it is better, Martin has the benefit of it; if worse, then the misrepresentation is only a sort of libel, and this court will not prevent the publication of a libel."

seldom does one find an inclination to speak in terms of a work of art as of value in itself.[11] This is not to say that the courts are not generous in the protection afforded, but the decisions are more often based on injury to the reputation of the artist [12] or to the commercial value of the work of art.[13]

The United States courts, while noting that there is no standard of artistic taste,[14] have nevertheless recognized that "the concept of beauty expressed in the materials of statuary or drawing, is the thing which is copyrighted." [15] And Justice Reed, speaking for the U.S. Supreme Court in 1954, said, "Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." [16]

The basic philosophy underlying the decisions was enunciated by District Judge Kickinson in *Pellegrini v. Allegrini:*

> The beautiful and the development of a love of the beautiful and of the artistic sense and taste is as much necessary to a well-rounded life as are the useful things. A like comment applies to our national life. It is well, therefore, to encourage the production of works of art. The policy is in line with, and in one sense an extension of, the policy avowed in our Constitution "to promote the progress of science and useful arts." Article 1, §8, cl. 8. These policies, if not the same, are very much alike.[17]

[11] *Cf.*, Dicks v. Brooks, 15 Ch. D. 22, 35 (1880). James, L. J., makes reference to "the print *qua* print," but goes on to refer to reputation and commercial value in the same sentence.

[12] Dicks v. Brooks, *supra* note 11; Gambart v. Ball, 32 L.J.C.P. 166, 143 Eng. Rep. 463, 467 (1863).

[13] Dicks v. Brooks, *supra* note 11; Gambart v. Ball, *supra* note 10, "Engravings are things having a commercial value, and the statute gives protection to the *money value of the creation* of the artist's mind." (Emphasis added.) Hansfstaengl v. W. H. Smith & Sons, [1905] 1 Ch. 519, 525, "[N]o alleged copy whether of a picture or of an engraving can properly be held to be a copy within the meaning of the statute and prohibited thereby unless commercial injury can be proved or reasonably presumed."

[14] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903); Pellegrini v. Allegrini, 2 F.2d 610, 611 (E.D. Pa. 1924).

[15] Jones Bros. Co. v. Underkoffler, 16 F. Supp. 729, 732 (M.D. Pa. 1936), *final decree rendered*, 24 F. Supp. 393 (M.D. Pa. 1938). See also, Home Art, Inc. v. Glensder Textile Corp., 81 F. Supp. 551 (S.D.N.Y. 1948).

[16] Mazer v. Stein, 347 U.S. 201, 219 (1954).

[17] 2 F.2d 610–11 (E.D. Pa. 1924).

THE SUBSTANTIAL COPY DOCTRINE

Both the English and American cases have applied the general rule of copyright law to works of art in declaring that to constitute infringement there must be a copying of a substantial part,[18] or a copy "more or less servile," [19] or similar language.[20] What constitutes a substantial copying is always a question of fact, but the decisions provide some guidance in making the determination.

It is uniformly held that "slight" [21] or "colorable" [22] or "trivial" [23] variations are inconsequential in the determination of infringement. The crucial question is whether there has been a usurpation of the substantial ideas;[24] and "it is no defense that close scrutiny may detect slight differences." [25] The

[18] Springer Lithographing Co. v. Falk, 59 Fed. 707, 712 (2d Cir. 1894), *appeal dismissed*, 17 S.Ct. 998 (1896); M. J. Golden & Co. v. Pittsburgh Brewing Co., 137 F. Supp. 455, 457 (W.D. Pa. 1956); Fleischer Studios v. Ralph A. Freudlich, Inc., 5 F. Supp. 808, 809 (S.D.N.Y.), *aff'd*, 73 F.2d 276 (1934), *cert. denied*, 294 U.S. 717 (1935) (infringement of animated cartoon character); Morrison v. Pettibone, 87 Fed. 330, 332 (N.D. Ill. 1897); Falk v. Donaldson, 57 Fed. 32, 35 (S.D.N.Y. 1893); Fishel v. Lueckel, 53 Fed. 499, 500 (S.D.N.Y. 1892); Falk v. Brett Lithographing Co., 48 Fed. 678, 679 (S.D.N.Y. 1891); Moore v. Clark, 9 M. & W. 692, 152 Eng. Rep. 293 (1842); Bradbury, Agnew & Co. v. Day, 32 T.L.R. 349 (1916).

[19] Alva Studios, Inc. v. Winniger, 177 F. Supp. 265, 267 (S.D.N.Y. 1959); Pellegrini v. Allegrini, 2 F.2d 610, 612 (E.D. Pa. 1924).

[20] Rosenthal v. Stein, 205 F.2d 633, 636 (9th Cir. 1953); Contemporary Arts v. F. W. Woolworth Co., 93 F. Supp. 739, 743 (S.D.N.Y. 1950), *aff'd*, 193 F.2d 162 (2d Cir. 1951), *aff'd*, 344 U.S. 228 (1952), "[I]t is not necessary that a copy be a 'Chinese copy' in order to find infringement."; Jones Bros. Co. v. Underkoffler, *supra* note 15, "The test of infringement is whether the defendants have made an original independent production or a copy of the plaintiff's work."; Hansfstaengl v. Empire Palace, [1894] 3 Ch. 109, 130 ("conveying tolerably correct ideas").

[21] Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F.2d 159, 161 (2d Cir. 1927).

[22] Munro v. Smith, 42 Fed. 266, 267 (S.D.N.Y. 1890) (differences more than colorable); West v. Francis, 5 B. & Ald. 737, 106 Eng. Rep. 1361, 1362 (1822).

[23] Gross v. Seligman, 212 Fed. 930, 931 (2d Cir. 1914).

[24] Springer Lithographing Co. v. Falk, *supra* note 18; Falk v. Donaldson, *supra* note 18 ("Is the sculptor compelled to see his life work in marble appropriated, and modeled in soap or sugar, because forsooth, the 'dimples are lacking' from the imitation . . .?"); Falk v. Brett Lithographic Co., *supra* note 18.

[25] Gerlach-Barklow Co. v. Morris & Bendien, Inc., *supra* note 21, at 161.

fact that the picture is reverse in the copy will not prevent infringement.[26]

It is not uncommon for an artist to infringe a copyright on a work of his own creation. The case of *Gross v. Seligman*,[27] which came before the Second Circuit Court of Appeals in 1947, involved two photographs made by the same professional photographer, the first sold to the plaintiffs with all rights thereto, the second to the defendants. Both photographs were of the same nude, though taken two years apart. The two poses were identical with the exception that in the second "the young woman now wears a smile and holds a cherry stem between her teeth," [28] and "some slight changes in the contours of her figure are discoverable." [29] The court had no difficulty in determining that the second picture was an infringement of the first. "The one thing, viz., the exercise of artistic talent, which made the first photographic picture a subject of copyright, has been used not to produce another picture, but to duplicate the original." [30] The same principle would be applicable to paintings.[31]

SIMILAR INDEPENDENT WORK

Some of the more difficult factual problems arise when the defendant readily admits that his work is substantially similar to that of the plaintiff but argues that it was independently produced—that the similarity is a result of pure coincidence. Or, an even more common situation, the two artists have used the same source of inspiration in conceiving their work—perhaps both have made replicas of artistic works in the public domain. How are these cases to be distinguished from those discussed above?

In the *Seligman* case,[32] the court made clear the point that

[26] Falk v. Brett Lithographic Co., *supra* note 18.
[27] 212 Fed. 930 (2d Cir. 1914). [28] *Ibid.* [29] *Id.* at 931.
[30] *Ibid.* [31] *Ibid.* [32] *Supra* note 27.

if there had in fact been an independent production, the similarity of the pictures would not have made the second an infringement.

> Of course when the first picture has been produced and copyrighted every other artist is entirely free to form his own conception of the Grace of Youth, or anything else, and to avail of the same young woman's services in making it permanent, whether he works with pigments or a camera. If, by chance, the pose, background, light, and shade, etc., of this new picture were strikingly similar, and if, by reason of the circumstance that the same young woman was the prominent feature in both compositions, it might be very difficult to distinguish the new picture from the old one, the new would still not be an infringement of the old because it is in no true sense a *copy* of the old.[33]

A more difficult problem confronted the Southern District of New York in *Alva Studios, Inc. v. Winninger*.[34] In this case, the plaintiff had created a minutely detailed reproduction of Rodin's "Hand of God." The reproduction did not constitute an exact replica in that the original work had been reduced in size, a fact which, the plaintiff contended, increased the difficulty of the work and required "an extremely skilled sculptor" for its execution. The plaintiff claimed that the defendant was marketing products which made use of the artistic work contained in his reproduction. The defendant argued that his work was an original interpretation.

The court observed that where both plaintiff and defendant have used an object in the public domain, or any common source, for their work, mere resemblance will not constitute an infringement.[35] In line with the reasoning in the *Seligman* case, the court said, "Publication of *identical works* cannot be

[33] *Id.* at 931. [34] 177 F. Supp. 265 (S.D.N.Y. 1959).

[35] *Id.* at 267. See also Allegrini v. De Angelis, 59 F. Supp. 248, 251 (E.D. Pa. 1945), *aff'd*, 149 F.2d 815 (3d Cir. 1945); Jones Bros. Co. v. Underkoffler, 16 F. Supp. 729, 731 (M.D. Pa. 1936); Pellegrini v. Allegrini, *supra* note 19; Munro v. Smith, *supra* note 22; 8 HALSBURY, LAWS OF ENGLAND 426 (3d ed. 1954).

enjoined if it is the result of independent research." [36] But, at the same time, "the availability to a defendant of other 'common sources' is not a defense to an action for copyright infringement if the defendant actually copied the plaintiff's work." [37] The court found that in this case the evidence supported the argument that the work had in fact been copied.

It would appear from these cases that whenever the defendant can successfully show that the allegedly infringing object was an independently created work, the defendant will not be guilty of piracy, no matter how nearly the works approximate each other.

At least one case has suggested that where the defendant has produced both the original and the allegedly infringing work the degree of similarity between the two necessary to constitute infringement may depend to some extent on the latitude of talent possessed by the defendant. In *Esquire, Inc. v. Varga Enterprises, Inc.*,[38] the plaintiff had hired the defendant to produce for it a number of "girl" paintings.[39] The plaintiff claimed that subsequent to the repudiation of the contract the defendant caused to be published elsewhere four paintings which were copied from paintings previously submitted to the plaintiff and which had been copyrighted by the plaintiff. The court in its opinion scrupulously compared each pair of paintings to show the distinctions between them and held that these were all independently created works. Typical of the comparisons were the following:

[36] Alva Studios, Inc. v. Winninger, *supra* note 34, at 267 (emphasis supplied). See ADMUR, COPYRIGHT LAW AND PRACTICE 70 (1936), "[I]t is possible to have a plurality of valid copyrights directed to closely identical or even identical works. Moreover, none of them, if independently arrived at will constitute an infringement of the copyright of the others."

[37] Alva Studios, Inc. v. Winninger, *supra* note 34, at 268.

[38] 81 F. Supp. 306 (N.D. Ill. 1948), *aff'd on this point*, 185 F.2d 14 (7th Cir. 1950).

[39] "This particular form of art portrays women in a state of semi-nudity and emphasizes, or rather over-emphasizes, many of the physical details peculiar to the female anatomy." 81 F. Supp. at 307.

Hair—Accused's hair is long and gathered at the base of the neck; Original's is combed upward to the top of the head in the well-known "upsweep" coiffure. . . . Shoulders—due to the different positions of the arms, there is a slightly different muscular effect in the vicinity of the shoulders and upper back.[40]

Significant to the decision reached by the court is this statement made by District Judge Campbell in defending this rigid examination of the paintings:

Any attempt to point out the distinguishing elements of the various paintings should be prefaced by the observation that the over one hundred paintings by defendant in evidence reveal that defendant's artistic talent is limited to the portrayal of the female figure in varying degrees of undress. . . . It is apparent from the testimony that this is all he has ever drawn and seems to be all he ever will draw. It follows, therefore, that all his future drawings will bear some similarity to his previous work, whether or not his past creations are before him at the time he is painting.[41]

This court, then, is not looking merely at the works of art involved in the litigation.[42] What if the purported copies had not been made by the creator of the original? If they had been made by a specialist in seascapes, for example, would the court have held differently? Would distinctions between the paintings such as those quoted above have been a substantial variance so as to constitute an independent work? Obviously, the *Esquire* opinion suggests that the decision might have been different, and, at the very least, the presumption of an independently created painting would be significantly weakened.

The present case has not been subsequently cited on this particular point. So far as this writer is able to determine, similar reasoning has been employed in no other decision relating to artistic copyrights. If it were to be followed in the future, it would represent a significant development in copyright law, for it has been a cardinal principle that the test of infringement is the apparence of a copying to the ordinary

[40] *Id.* at 308. [41] *Id.* at 307–08. [42] See *infra* note 50.

observer.[43] Here a court has suggested that the talents and abilities of the accused infringer may be a material factor in determining liability. Needless to say, such qualities are not readily apparent to the ordinary observer upon examination of the artistic works.

"THE ORDINARY OBSERVER"

A considerable amount of recent art criticism has suggested that many of the masters of fine art "borrowed" portions of their works from previously created works. One writer [44] persuasively demonstrates the similarity between a portion of Rembrandt's etching "Christ Driving Money Changers from the Temple," and a woodcut by Durer made a century before; between Gauguin's "We Shall not Go to Market Today" and an ancient Egyptian frieze; and even between Picasso's abstract human figures and drawings made 2,700 years ago on the walls of buildings in what is now Turkey. A similar comparison has been made between the abstract work of the contemporary artist Jackson Pollock, and the realistic paintings of Thomas Hart Benton, under whom the former studied.[45]

Though undoubtedly none of the examples cited above would give rise to a justiciable controversy, they do give rise to a new area of possible infringement. The courts have held as a general rule that the mode used in copying is of no consequence in determining infringement.[46] But what about variations in style? Would the holder of a copyright in a realistic portrait painting, for example, have a cause of action against one who had, using the first painting as his sole inspiration, created an abstract interpretation of the same subject?

Apparently no case has yet reached the appellate level based on facts such as these, but the statements made by the

[43] See following section.
[44] Watson, "Borrowing of the Masters," American Artist, Feb. 1960, p. 38.
[45] "Baffling U.S. Art: What It Is About," Life, Nov. 9, 1959, p. 10.
[46] See *infra* note 67 and accompanying text.

courts leave little doubt that the charge of infringement would not be sustained, barring visible evidence of a substantial similarity. Repeatedly, the courts are heard to say that the existence of a substantial copying is to be determined by the appearance to the "ordinary observer," [47] or the "ordinary reasonable person," [48] or other language connoting the same idea.[49] The proof of similarity must be found in the works of art themselves.[50] Consistent with this notion, there has been a tendency to be wary of the use of expert testimony to demonstrate similarities.[51]

Although the "ordinary observer" test, or "audience" test,

[47] Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) (infringement of ornamental cloth design copied from work of art); Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc., 73 F.2d 276, 278 (2d Cir. 1934), *cert. denied*, 294 U.S. 717 (1935) (infringement of animated cartoon character); Allegrini v. De Angelis, *supra* note 35.

[48] Contemporary Arts v. F. W. Woolworth Co., 93 F. Supp. 739, 744 (D. Mass. 1950); Allegrini v. De Angelis, *supra* note 35.

[49] West v. Francis, 5 F. & Ald. 737, 106 Eng. Rep. 1361, 1363, "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original."

[50] Weitzenkorn v. Lesser, 40 Cal. 2d 778, 256 P.2d 947 (1953); Golding v. R.K.O. Pictures, 35 Cal. 2d 690, 221 P.2d 95, 101 (1950), "[D]issection may be necessary to define the existence and extent of a plaintiff's property interest, and on the issue of similarity the test is always that of the average observer comparing such property interest with the alleged copy made by the defendant" [infringement of stage play by motion picture]. See also, Carman, *The Function of the Judge and Jury in the "Literary Property" Lawsuit*, 42 CALIF. L. REV. 52 (1954).

[51] Contemporary Arts v. F. W. Woolworth Co., 93 F. Supp. 739, 743–44 (S.D.N.Y. 1950); Allegrini v. De Angelis, *supra* note 35, "The court must determine whether or not the fact of infringement is proven; and the opinion of experts, although helpful, may not be substituted for the court's judgement."; Falk v. Donaldson, *supra* note 18; Burtis v. Universal Pictures Co., 40 Cal. 2d 823, 256 P.2d 933, 940 (1953), "[T]he standard of the ordinary observer should be applied and comparison of the protectible portions should be made without dissection and without expert or elaborate analysis." [infringement of a common-law copyright in a manuscript by a motion picture]; Fox, *Evidence of Plagiarism in the Law of Copyright*, 6 U. TORONTO L.J. 414, 452 (1946), "[I]t may be said that the courts, while ready to hear the testimony of expert witnesses and to benefit by the assistance which they give in the way of carefully prepared and critical analyses and comparisons of the works involved in an action, are rather disposed . . . to consider themselves more properly the arbiters of originality and plagiarism and to base their conclusions on their own literary, dramatic, musical, or artistic perceptions."

as it is sometimes referred to, is a firmly accepted doctrine of copyright law, particularly in the area of the fine arts, it is not without its critics. This writer would tend to agree with the proposition that artistic works are not always created for, nor understood by, the "ordinary observer." By comparison, in the area of patent infringement it would be considered sheer folly to expect a jury to determine the similarities or differences between two intricate and complex machines on the basis of "ordinary observation." The copying involved in such a situation very possibly would not be readily apparent to the eye. Can it be denied that there is more to a work of art than that which meets the eye? Are there not more subtle ways of pirating the genius of another than by superficial similarities?

One writer [52] has observed,

> [T]here can be no dispute that the "spontaneous and immediate" reactions of the ordinary observer are relevant evidence in determining whether works were copied, but stealing and the immediate impression of stealing are not the same thing. . . . [I]t is unlikely that the basic purpose of the Act is merely to protect against the general public's "spontaneous and immediate" impression that these fruits have been stolen. . . . Ordinary observers may very easily find a literary product enjoyable and worth paying for without being able to recognize that it is the product of the plaintiff's creative effort, and that all the defendant has contributed is a shrewd disguise.[53]

It should be noted that in a few cases involving dramatic property [54] and musical property [55] the courts have been persuaded to rely more heavily upon expert testimony, and occa-

[52] Nimmer, *Inroads on Copyright Protection*, 64 HARV. L. REV. 1125, 1137 (1951) (Footnotes omitted.).

[53] The context of the article would not indicate that the phrase "a literary product" was used in the above quotation for the purpose of excluding works of the fine arts.

[54] Shipman v. R.K.O. Radio Pictures, Inc., 100 F.2d 533 (2d Cir. 1938).

[55] Heim v. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946); Wilkie v. Santly Bros., Inc., 91 F.2d 978 (2d Cir.), *cert. denied*, 302 U.S. 735 (1937); Montgomery v. United States, 290 Fed. 961 (7th Cir. 1923); Arnstein v. American Soc'y of Composers, Authors & Publishers, 29 F. Supp 388 (S.D.N.Y. 1939). See also Orth, *The Use of Expert Witnesses in Musical Infringement Cases*, 16 U. PITT. L. REV. 232 (1955).

sionally one will find judicial criticism of the general rule.[56] To date, however, no cases would appear to have reached the appellate level in which expert testimony has been seriously considered regarding works of the fine arts. It would seem that works of art and sculpture, at least as much as these other categories, are a field so specialized as to deserve examination and evaluation by experts, and that "on matters that appeal to a more intelligent, artistically aware audience, full resort to intelligence should be brought to bear on the determination of infringement." [57]

OTHER FACTORS IMMATERIAL IN DETERMINING INFRINGEMENT

Numerous other distinguishing features have been held by the courts as immaterial in determining copyright infringement. Thus it has been the attitude of the courts that the artistic merit of the defendant's work either by itself or as compared to that of the plaintiff is of no consequence.[58] It may even be the case that the defendant's copy is more meritable than the original,[59] but still the original creator is to be protected. Justice Holmes, in ruling that a circus poster was a work of art,[60] maintained that the courts were not prepared to consider artistic genius in reaching decisions. "It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time." [61] It also follows that whether the defendant's work is of marketable quality makes no difference.[62]

Differences which relate merely to size are unimportant.[63]

[56] Shipman v. R.K.O. Radio Pictures, Inc., *supra* note 54, at 536.

[57] Orth, *supra* note 55, at 260.

[58] Bleistein v. Donaldson Lithographic Co., *supra* note 14; Pellegrini v. Allegrini, *supra* note 14; Bracken v. Rosenthal, 151 Fed. 136, 137 (N.D. Ill. 1907); Allegrini v. De Angelis, *supra* note 35; Falk v. Donaldson, *supra* note 18.

[59] Pellegrini v. Allegrini, *supra* note 14.

[60] Bleistein v. Donaldson Lithographic Co., 188 U.S. 239 (1903).

[61] *Id.* at 251.

[62] Fishel v. Lueckel, *supra* note 18; Hansfstaengl v. Empire Palace, *supra* note 20.

[63] Falk v. T. P. Howell & Co., 37 Fed. 202 (S.D.N.Y. 1888); Gambart v. Ball, *supra* note 10.

But what if the alleged copy of the plaintiff's work is of only part of that work? Again it would appear that infringement will turn on whether there has been a substantial copying. In *Fishel v. Lueckel* [64] the court said, "The appropriation of part of a work is no less an infringement than the appropriation of the whole, provided 'the alleged infringing part contains any substantial repetitions of any material parts which are original and distinctive.' " [65]

The fact that the plaintiff's work was incomplete at the time of the alleged copying provides no defense. In *Beifeld v. Dodge Publishing Co.*,[66] the defendant contended that there was no infringement of the plaintiff's painting, because the copying was of a preliminary sketch which the plaintiff had made prior to the completion of the painting. The court held that even if the preliminary drawing had been completed before the painting was begun, the copyright on the painting would protect the sketch as well, and a copying of the sketch would constitute an infringement. The court reasoned that if the plaintiff had himself attempted to sell the preliminary sketch after selling the painting, such a sale would infringe the copyright on the painting. Thus, it concluded, in legal contemplation, the two works are the same.

THE MODE OF COPYING

The methods used in duplicating the works of art involved in infringement cases have been varied, and often ingenious. Generally, the cases have held that the mode employed in copying is immaterial.[67]

[64] 53 Fed. 499 (S.D.N.Y. 1892).

[65] *Id.* at 500. See also Morrison v. Pettibone, *supra* note 18; The London Stereoscopic and Photographic Co. v. Kelly, [1888] 5 T.L.R. 169.

[66] 198 Fed. 658 (S.D.N.Y. 1911). See also, Fishel v. Lueckel, 53 Fed. 499 (S.D.N.Y. 1892).

[67] Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951); M. J. Golden & Co. v. Pittsburgh Brewing Co., 137 F. Supp. 455 (W.D. Pa. 1956); Jones Bros. Co. v. Underkoffler, 16 F. Supp. 729 (M.D. Pa. 1936); Bracken v. Rosenthal, 151 Fed. 136 (N.D. Ill. 1907); Werckmeister v. Pierce &

One of the earliest problems to confront the English courts was the *tableau vivant*, or "living picture." This innovation involved the arrangement of human beings and scenery in such a manner as to duplicate the image produced by the plaintiff's picture. In an early case,[68] the Chancery court ruled that such a representation did not constitute an infringement of the plaintiff's copyright. But following the passage of the Copyright Act of 1911,[69] the problem was again brought before the court,[70] and the living picture was held to be an infringement.[71] Much earlier, in 1859, an Irish court had held that where the defendant had arranged a "living picture" and photographed it, the photograph constituted an infringement of the plaintiff's copyright.[72]

Other more conventional forms of copying have generally afforded no difficulty. A water color painting may be infringed by an oil, or a crayon, or a lithographic facsimile.[73] A litho-

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Bushnell Mfg. Co., 63 Fed. 445 (D. Mass. 1894), *rev'd on other grounds*, 72 Fed. 54 (1st Cir. 1896); Falk v. Donaldson, 57 Fed. 32 (S.D.N.Y. 1893); Falk v. Brett Lithographic Co., 48 Fed. 678 (S.D.N.Y. 1891); Falk v. T. P. Howell & Co., 37 Fed. 202 (S.D.N.Y. 1888); Schumacher v. Schwencke, 30 Fed. 690 (S.D.N.Y. 1887); Rossiter v. Hall, 20 Fed. Cas. 1253 (No. 12082) (E.D.N.Y. 1886); Turner v. Robinson, 10 Ir. Ch. Rep. 121; Frost & Reed v. Olive Series Publishing Co., [1859] 24 T.L.R. 649 (1908); Bradbury, Agnew & Co. v. Day, *supra* note 18; *Ex parte* Beal, L.R. 3 Q.B. 387 (1868). In Gambart v. Ball, 32 L.J.C.P. 166, 143 Eng. Rep. 463 (1863), the defendant contended that a photograph could not infringe an engraving since the art of photography was not known at the time the copyright act was passed. In holding for the plaintiff, Chief Justice Erle said, "I see no reason why these very wide and general words should not be construed according to their plain and ordinary meaning, and be held to apply to any mode of copying known at that time and to such other modes of multiplying copies as the ingenuity of man may from time to time discover."

[68] Hanfstaengl v. Empire Palace, Ltd., [1894] 3 Ch. 109.

[69] 1 & 2 Geo. 5, c. 46 (1911).

[70] Bradbury, Agnew & Co. v. Day, *supra* note 18.

[71] *Ibid.* Justice Coleridge, speaking for the courts, said, "Before 1911 the law protected the design, which meant the particular form in which the idea was embodied, and since 1911 the law has protected that embodiment, whatever be the medium in which it was expressed. [I]f the embodiment of the idea or any substantial part of it was copied, copyright was infringed."

[72] Turner v. Robinson, *supra* note 67.

[73] Schumacher v. Schwencke, *supra* note 67, at 691 (dictum).

graph may infringe a copyrighted photograph.[74] A photograph may be an infringement of a piece of statuary [75] or an engraving.[76] And a photograph which combines the plaintiff's photograph and an independently made drawing may infringe the original photograph.[77] Finally, in *Falk v. T. P. Howell & Co.*,[78] the Southern District of New York held that the plaintiff's photograph would be infringed when the defendant stamped a raised figure, like the picture, on the leather out of which he made the bottoms and backs of chairs. And the same court, sixty years later, held a scarf design to infringe the copyright on an oil painting reproduction.[79]

COPY OF A COPY

To this point consideration has only been given to those situations in which the defendant was accused of copying the original work of art. Additional problems arise in those cases in which there is a dispute as to whether the alleged infringing copy was based upon the original or upon a reproduction.

It is germane to this discussion to note here a feature which distinguishes artistic works from other forms of creative endeavor. The copyright of such works, with the exception of photographs, attaches to their physical embodiment.[80] That is to say, the copyright of a painting provides protection for certain bits of pigment applied with certain brush strokes on a particular canvas. The copyright of a statuary is related to a given piece of granite, etc. By contrast, when a literary work is copyrighted, a percise copy may be made of the protected words—by typing, by writing in longhand, by any method

[74] Falk v. Donaldson, *supra* note 67; Falk v. Brett Lithographic Co., *supra* note 67.

[75] Bracken v. Rosenthal, *supra* note 67; M. J. Golden & Co. v. Pittsburgh Brewing Co., *supra* note 67.

[76] Rossiter v. Hall, *supra* note 67; M. J. Golden & Co. v. Pittsburgh Brewing Co., *supra* note 67; Gambart v. Ball, *supra* note 67.

[77] Lumiere v. Pathé Exch., Inc., 275 Fed. 428 (2d Cir. 1921).

[78] 37 Fed. 202 (S.D.N.Y. 1888).

[79] Home Art, Inc. v. Glensder Textile Corp., *supra* note 15.

[80] *Cf.* 47 L.Q. Rev. 332 (1931).

whatever, and, for that matter, in any language. The fact that the infringing work does not physically look like the original is immaterial. In the same fashion, what is protected by a musical copyright is not the sheets of paper inscribed with symbols; it is the melody represented by those symbols. Any accurate copying will produce the same combination of sounds when played by an accomplished musician.

Such is not the case with works of art. It would not be inaccurate to say that it is actually impossible to make a true copy of a copyrighted painting or work of sculpture. Only approximations of the original can be made, a fact which has been dramatically brought home to any person of normal perception who has had the opportunity of comparing only a few paintings with their reproductions.

Because of this it has long been recognized that the making of reproductions of art is an art in itself.[81] In *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*,[82] District Judge Smith said:

> Of course, the ideas for the subject are entirely those of the first artist, the painter. What is original with the engraver is the handling of the painting in another medium to bring out the engraver's conception of the total effect of the old master. The engraver is not trying to alter or improve on the old master. He is trying to express in another medium what the original artist expressed in oils on canvas.

In implementing the protection provided for reproductions by the Copyright Act,[83] the Copyright Office has described the category as follows:

> Reproductions of works of art (Class H).
> This class includes published reproductions of existing works of art in the same or a different medium, such as lithograph, photoengraving, etching or drawing of a painting, sculpture or other work of art.[84]

Thus in the area of artistic copyright there arises the unique situation in which the same work of art may be the subject of two or even more copyrights.

[81] Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 104–05 (2d Cir. 1951); Alva Studios, Inc. v. Winninger, 177 F. Supp. 265, 267 (S.D.N.Y. 1959).
[82] 74 F. Supp. 973, 976 (S.D.N.Y. 1947), *modified*, 191 F.2d 99 (2d Cir. 1951).
[83] 17 U.S.C. § 5(h) (1958). [84] 37 C.F.R. § 202.11 (1960).

In an 1887 case, *Schumacher v. Schwencke,*[85] the plaintiff held a copyright on an original painting. The plaintiff made lithographic copies of the painting, which were not in themselves copyrighted. The defendant made copies of the plaintiff's work, *from the lithographic copies.* The defendant contended, and apparently it was not challenged by the plaintiff, that he had in fact never even seen the original work of art. The court ruled in favor of the plaintiff, saying:

> It by no means follows from the fact that the law recognizes a distinction between a painting and a print that a copyright for the former will not protect its owner in the sale of copies thereof, even though they may appropriately be called prints. It is clear that the defendants are wrong-doers. They have invaded the complainants' territory. They have copied the painting. It is immaterial how this was accomplished, whether directly or indirectly. They have copied a lithograph which was protected by the complainants' copyright, and have thus attempted unlawfully, and without due recompense, to reap the fruits of the complainants' genius and enterprise.[86]

Sixteen years later, in *Champney v. Haag,*[87] the plaintiff's copyrighted painting had been reproduced by a copyrighted photograph. This action was brought for an infringement of the copyright in the painting. Upon the trial of the case, the evidence showed that the defendant's copies were made from the photograph and not from the painting. The court held that there was an infringement of the copyright on the photograph but not on the painting. It said that the plaintiff would have to show that the illustrations in question were not copied from the photograph, a requirement which he failed to meet.

It is possible to reconcile these two decisions on the basis that in the *Schumacher* case there was but a single copyright—that on the original work; in the *Champney* case, both the original and the reproduction had been copyrighted. But considering the vociferous language used in the *Schumacher* opinion, in guaranteeing the original work an absolute protection from infringement, it would appear more likely that that

[85] 30 Fed. 690 (S.D.N.Y. 1887). [86] *Id.* at 691–92.
[87] 121 Fed. 944 (E.D. Pa. 1903).

court would not have agreed with the *Champney* decision and would have held the defendant to have infringed the protection afforded for both the original painting and the photograph.

The Southern District of New York followed the reasoning of the *Champney* case (though not referring to it) in a recent case[88] in which the opposite situation was presented. The plaintiff was the owner of a copyrighted reproduction, and the defendant contended that his copy constituted no infringement, because he had copied the original oil painting. Though the ruling was for the plaintiff, the court indicated that the defendant would not have been liable if the evidence had supported his contention.

The rule is clearly sound in this latter decision. It could hardly be denied that when a third party makes a reproduction of an original work he has not infringed the copyright on another reproduction. He has not utilized the talents of the first reproducer. But in the original situation, where the third party copies the reproduction, it would likewise appear clear that the injury done extends beyond the reproduction to the original work. The concept of beauty expressed in the materials of statuary or drawing, is the thing which is copyrighted.[89] The aesthetic value to be found in the reproduction is for the very large part contingent upon the artistic genius of the creator of the work.

The *Schumacher* and *Champney* cases were both decided prior to the passage of the Copyright Act of 1909. This act required, *inter alia*, that a copyrighted work of art or reproduction carry notice of copyright,[90] a requirement which had been present in the previous act,[91] but contained a new provision that where the copyright proprietor had omitted the notice by accident or mistake the act would "prevent the recovery of damages against an innocent infringer who has been

[88] Home Art, Inc. v. Glensder Textile Corp., *supra* note 15.
[89] See cases cited note 15 *supra*. [90] 17 U.S.C. § 19 (1958).
[91] Act of June 18, 1874, ch. 301, § 1, 18 Stat. 79.

misled by the omission of the notice." [92] If notice were intentionally omitted, the copyright would be forfeited.[93] The problem of notice did not confront the court in the previously discussed cases. With this enactment, it became a determination precedent to the question of copying.

In *Leigh v. Barnhart*,[94] a photograph of the plaintiff's oil painting appeared in a magazine, but the magazine inadvertently failed to identify it as copyrighted. The plaintiff did not hold a copyright on the reproduction.[95] The defendants had made copies of the reproduction in the magazine. The court denied relief to the plaintiff as there was no notice given to the defendants of the copyright. This is the only case decided since the passage of the Copyright Act of 1909 that the present writer has been able to uncover in which the holder of the copyright on an original work of art has brought an action for infringement against one who has copied from a reproduction in which the plaintiff did not hold the copyright. The court strongly implies here that if there had been a compliance with the statutory requirement of notice, the plaintiff would have been entitled to relief, as well as would the holder of the copyright on the reproduction.

CONCLUSION

The number of cases involving infringement of works of the fine arts to come before the appellate courts has been relatively small, a fact which has no doubt impeded the development of the law in this area to some extent. The lack of controversies may be attributed to a number of reasons. Works of art are normally not channeled through publishing outlets in the same

[92] Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

[93] 17 U.S.C. § 21 (1958).

[94] 96 F. Supp. 194 (D.N.J. 1951).

[95] Plaintiff contended that the magazine had assigned the copyright in the reproduction to him, but the court found that it had only unsuccessfully attempted to reconvey the copyright in the original, which in fact the plaintiff had never given up.

manner as are literary and musical compositions. As a result, many artists receive little guidance in the marketing of their material and thus are virtually unaware of their legal rights so far as their creations are concerned. Furthermore, piracy is not so common in this area as in others because of the manifest difficulties entailed in copying—in many instances, it would take another artist to substantially copy a work of art. Finally, the factual requirements for proving an infringement would appear at times quite difficult to fulfill, especially in cases of like reproductions of works in the public domain.

At present, the great weight of authority would confine the determination of infringement to a comparison of the works of art involved in the controversy. In suggesting that the court should go beyond the paintings themselves and that the defendant's artistic talent should be taken into account, the *Esquire* decision is quite obviously not in line with the prevailing attitude. Due to the particular facts there involved, the defendant's abilities would appear quite relevant to a fair disposal of the case. But to extend the principle beyond this narrowly defined fact situation would be exceedingly dangerous. Virtually every proficient artist's works are stylistically similar to some extent, at least enough that his works can be recognized as his. Should the courts examine all of an artist's work in order to find out if there is a substantial similarity between two of these works? Or is the fact that "girl" paintings are aesthetically inferior, or easily produced, or not of lasting value, important? Any of these approaches would go against the grain of recognized copyright law and plunge the courts into the area of artistic value determinations, an area which they have systematically avoided in infringement cases in the past.

The more difficult problems confronted in all infringement cases are factual,[96] and it would at least appear questionable

[96] Yankwich, *Legal Protection of Ideas—A Judge's Approach*, 43 VA. L. REV. 375, 379 (1957).

that the standards applied by the courts are completely satisfactory. The adoption of the familiar "reasonable man" legal standard in the guise of the "ordinary observer" would not seem in all cases equal to the task of determining piracy. One United States district judge has said that the best the judges can do in cases of this nature is to "seek to approximate the median impression." [97] The present writer would suggest that though the impression of the "ordinary observer" is an important consideration, to limit the proof of infringement this narrowly would be in effect to sanction many real but subtle methods of piracy. It is to be hoped that in the area of the fine arts we shall see an increasing reliance upon expert witnesses in the future; in this respect, the artistic works decisions would not appear to have kept pace with those in other types of copyright infringement.

If, as Justice Reed has said, "Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered," [98] it would certainly seem that any piracy should be prevented, whether visible to the "ordinary observer" or not. Concomitantly, where the defendant has substantially copied a reproduction of the plaintiff's work, the artistic ability which the plaintiff has embodied in the work has been wrongfully used, and the plaintiff should be allowed redress, regardless of whether he holds a copyright on the reproduction.

[97] *Ibid.* [98] Mazer v. Stein, 347 U.S. 201, 219 (1954).