

## NOTES

### MOTION PICTURE COPYRIGHT\*

In this age of commercial enterprise it seems strange that legal writers have largely ignored the application of copyright law to motion pictures which constitutes one of its most interesting and financially important phases. Despite the fact that the motion picture industry is the largest user of copyrighted materials in the world<sup>1</sup> and that its two billion dollar investment makes it the fourth largest business in the United States,<sup>2</sup> statutory provisions relating to motion pictures have been allowed to remain in inadequate status. The phenomenal growth of the motion picture industry suggests consideration of its position in respect to the law of copyright in the United States.

It is the purpose of the present article to review briefly the factors and authorities influencing this phase of the law. Consideration will be made of the basic problems encountered, with particular reference to the statutory and judicial bases for copyrighting motion pictures, the formalities required, the exclusive rights secured and infringement of such rights, the remedies afforded for infringement, and recent statutory reforms proposed for the copyright law.

#### I. COPYRIGHT STATUTES

Before considering the basic problems, it is desirable to review the present status of motion pictures under the existing Copyright Act<sup>3</sup> based upon Article I, section 8, of the Constitution which provides that Congress shall have the 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.

The Act of 1909 made no mention of motion pictures. This omission was made despite the fact that Edison had invented the motion picture machine twenty years previously,<sup>4</sup> that Eng-

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1. Shafter, *Musical Copyright* (2d ed. 1939) 349.

2. There's Always a Catch; Once it was Sound, now Color (Dec. 7, 1935) 6 News Week 36.

3. (1909) 35 Stat. 1075-1088, c. 320, 17 U. S. C. A. secs. 1-63, amended (1912) 37 Stat. 488-490, 17 U. S. C. A. secs. 5, 11, 25.

4. The "Kinetoscope" was invented on Oct. 6, 1889.

lish statutes had already recognized "cinematography,"<sup>5</sup> and that federal courts had passed upon the copyrighting of motion pictures. The first of the cases, involving an early form of newsreel, held that such a "motion picture" could be copyrighted as a photograph, under the Copyright Act of 1865.<sup>6</sup> The court said that to require individual copyrights for each picture "would, in effect, be to require copyright of many pictures to protect a single one."

This doctrine was further developed in subsequent cases.<sup>7</sup> In reviewing early controversies over the copyrighting of motion pictures, the judiciary soon departed from the doctrine that courts by interpretation should not extend existing statutes to subsequent inventions, but should leave such matters to the legislative body for determination. These cases are the first examples of extensions by judicial construction in the existing copyright law, since all the previous decisions had adhered strictly to the statutes.<sup>8</sup>

This trend toward judicial legislation was further developed in *Harper & Bros. v. Kalem Co.*,<sup>9</sup> wherein it was held that a film was a "writing" under section 4 of the Act of 1909. The word "writings" was extended to include moving pictures, because they tended to reproduce an artist's visual conception of an author's ideas described in words. The court's reason for this new extension of the word was that a motion picture film tends

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5. In England, at the time the Act of 1909 was passed, cinematographic films were entitled to copyright protection just as were all other photographs. *Barker Motion Photography, Ltd. v. Hulton & Co., Ltd.* (1912) 28 T. L. R. 496, 56 Sol. J. 633. The English Copyright Act of 1911 provided that, in the case of a literary or dramatic work, "copyright" should include the sole right to make "cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered." (1911) 1 and 2 Geo. V. c. 46, sec. 1 (2). "Cinematograph" was defined as including any work "produced by any process analogous to cinematography." *Id.* at sec. 35 (1).

6. *Edison v. Lubin* (C. C. A. 3, 1903) 122 Fed. 240, 241, 242. In discussing the question of whether, when the negative was photographically reproduced, the reproduction was a photograph, the court said: "The mere circumstance that such positive is pictured on a strip of celluloid, and not on a strip of paper, is immaterial. In either event, the reproduction is a light-written, and therefore a photographic plate or photograph." *Id.* at 242.

7. *American Mutoscope & Biograph Co. v. Edison Mfg. Co.* (C. C. D. N. J. 1905) 137 Fed. 262, 266, where the court said, "Though taken at different points, the pictures express the author's ideas and conceptions embodied in the one story." See also: *Harper & Bros. v. Kalem Co.* (C. C. A. 2, 1909) 169 Fed. 61.

8. See *Metro-Goldwyn-Mayer Dist. Corp. v. Bijou Theatre Co.* (D. C. D. Mass. 1931) 50 F. (2d) 908, 910.

9. (C. C. A. 2, 1909) 169 Fed. 61.

to promote the progress of science or the useful arts as set forth in Article I, section 8, of the Constitution of the United States.

Judicial legislation was again employed to sanction the copy-righting of motion pictures under section 1 (d). This section confers upon the copyright proprietor "the exclusive right to perform or represent the copyrighted work publicly if it be a drama." *Kalem Co. v. Harper Bros.*<sup>10</sup> held the unauthorized exhibition of a motion picture based upon the dramatization of a copyrighted novel was a dramatic production, and that consequently the copyright in the novel was infringed. But the question whether a film is itself to be deemed a drama did not arise until *Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co.*<sup>11</sup> The court therein found that the words "to make \* \* \* any transcription or record" in section 1 (d) included the production of a motion picture photoplay; and it was of the opinion that this section protects films based on dramas or other dramatic compositions which are already copyrighted under other appropriate sections of the Act. It concluded that a motion picture photoplay was a drama under the Act and that its unauthorized presentation or exhibition was therefore prohibited.

The development of sound pictures in the late 1920's introduced a new element into the field of motion picture copyright—the mechanical reproduction of music, dialogue, and other auditory impressions by recording on the edge of the film itself<sup>12</sup> or on a record which is synchronized with the projection of the film.<sup>13</sup> The latter method, although mechanically more simple, has caused greater controversy. The picture producers who use this process have claimed that, except as to use, their recordings are analogous to ordinary records.<sup>14</sup> Under this interpretation a talking picture recording would be considered a mechanical reproduction, copyrightable *per se*.<sup>15</sup> This problem, however, has never been taken to the courts for solution, but a tacit understanding has been reached recognizing a talking picture as being a single organism rather than a combination of separable parts.<sup>16</sup>

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10. (1911) 222 U. S. 55, Ann. Cas. 1913A 1285.

11. (C. C. A. 1, 1932) 59 F. (2d) 70, setting aside (D. C. D. Mass. 1931) 50 F. (2d) 908.

12. Technically known as the "Movietone" method, the edge of the film called the "sound track."

13. The "Vitaphone" process.

14. This contention was made in a controversy over licensing fees in an effort to pay only the two-cent royalty on music. Shafter, *op. cit. supra* note 1, at 350.

15. See 17 U. S. C. A. sec. 1 (e).

16. Shafter, *op. cit. supra* note 1, at 350.

*Amendment of 1912*

The Act of 1912, amending the Act of 1909, specifically provided for the copyrighting of motion pictures by the addition of two new classes of copyright works,<sup>17</sup> namely, "(1) Motion-picture photoplays," and "(m) Motion-pictures other than photoplays." The amendment included<sup>18</sup> directions for the deposit of a certain number of prints from the scenes, acts, or sections of each motion picture to be copyrighted; and provided<sup>19</sup> for limited damages in the case of infringement of nondramatic work by means of motion pictures. The latter applies in case the infringer shows that he was not aware of infringement or that he could not reasonably have foreseen it.

The express authority to copyright "motion picture photoplays" having been established, they may be registered either as published or as unpublished works.<sup>20</sup> The Copyright Office, in classifying motion pictures, refers only to the general categories mentioned in the statute and makes no mention of newsreels, sports events, or similar cinematic works. In drawing up film contracts, the term "photoplay" is intended to include all kinds of films from "shorts" to feature pictures.<sup>21</sup> It is now established that pictures based on dramas or on dramatizations of literary and dramatic productions are "photoplays" and, being dramatic in nature, their protection is assured.<sup>22</sup>

The amendment of 1912 specifically authorized "motion pictures other than photoplays" to be copyrighted even when unpublished.<sup>23</sup> The reason for making a differentiation between motion picture photoplays and motion pictures other than photoplays has been explained on the basis that

\* \* \* the former is the result of an intellectual effort combined with technical skill; to produce the latter only the technical skill is needed. The former is therefore given by the Act a higher degree of protection as a dramatic work.<sup>24</sup>

While this provision for copyrighting motion pictures other than

17. 17 U. S. C. A. sec. 5.

18. 17 U. S. C. A. sec. 11.

19. 17 U. S. C. A. sec. 25.

20. *Universal Film Mfg. Co. v. Copperman* (C. C. A. 2, 1914) 218 Fed. 577, affirming (D. C. S. D. N. Y. 1914) 212 Fed. 301; *Photo-Drama Motion Picture Co. v. Social Uplift Film Corp.* (C. C. A. 2, 1915) 220 Fed. 448.

21. Shafter, *op. cit. supra* note 1, at 73-74.

22. *Tiffany Prod. v. Dewing* (D. C. D. Md. 1931) 50 F. (2d) 911; *Metro-Goldwyn-Mayer Dist. Co. v. Bijou Theatre Co.* (D. C. D. Mass. 1933) 3 F. Supp. 66.

23. 17 U. S. C. A. sec. 5.

24. Copinger, *Copyright* (5th ed. 1911) 251.

photoplays might seem to be broad enough to include animated cartoons, it was perhaps intended merely to distinguish between dramatic and non-dramatic films, in the same manner as the English copyright statute.<sup>25</sup> No decision has ever defined the types of film included in this class but in all probability travelogues, newsreels, documentary films, and disconnected shorts would belong here.<sup>26</sup>

## II. REQUIREMENTS OF THE COPYRIGHT ACT

There must be acts of publication in order to copyright a motion picture,<sup>27</sup> but these acts are largely analogous to those effecting publication in the more familiar case of stage productions. In the United States, only a general and authorized textual publication of a dramatic piece is understood to dedicate the literary property therein to the public;<sup>28</sup> merely giving a public exhibition is not considered as being such a dedication.<sup>29</sup> Publication of motion pictures takes place when there is a showing of the film to the trade and available copies are offered for sale.<sup>30</sup> Accordingly, reproduction of the picture in "positive" films made from original "negative" film and the sale and distribution of "negative" copies is a publication.<sup>31</sup> One case<sup>32</sup> held that the sale of a motion picture film, even without a "running-off," was a publication, but this decision was subsequently overruled by a

25. (1911) 1 and 2 Geo. V. c. 46, sec. 35 (1), where it is provided that the phrase "dramatic work" shall include "any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character."

26. Marchetti, *Law of Stage, Screen and Radio* (1936) 147. Generally, the courts have avoided the issue as to where to draw the line of demarcation in the case of motion pictures. *Tiffany Productions v. Dewing* (D. C. D. Md. 1931) 50 F. (2d) 911; *Metro-Goldwyn-Mayer Dist. Co. v. Bijou Theatre Co.* (D. C. D. Mass. 1933) 3 F. Supp. 66, (C. C. A. 1, 1932) 59 F. (2d) 70, rev'g (D. C. D. Mass. 1931) 50 F. (2d) 908; *Pathe Exch. v. International Alliance* (D. C. S. D. N. Y. 1932) 3 F. Supp. 63. One court has made the illogical statement that mere exhibition of a non-dramatic motion picture constitutes a dramatization of such non-dramatic work with no regard to the content of the work. *Metro-Goldwyn-Mayer Dist. Co. v. Bijou Theatre Co.* (D. C. D. Mass. 1933) 3 F. Supp. 66.

27. *Universal Film Mfg. Co. v. Copperman* (D. C. S. D. N. Y. 1914) 212 Fed. 301, 303, aff'd (C. C. A. 2, 1914) 218 Fed. 577, 134 C. C. A. 305.

28. *O'Neill v. General Film Co.* (1916) 171 App. Div. 854, 157 N. Y. S. 1028.

29. *Photo-Drama Motion Picture Co. v. Social Uplift Film Corp.* (C. C. A. 2, 1915) 220 Fed. 448; *Universal Film Mfg. Co. v. Copperman* (C. C. A. 2, 1914) 218 Fed. 577.

30. 2 Ladas, *International Protection of Literary and Artistic Property* (1938) 695, sec. 322.

31. Amdur, *Copyright Law and Practice* (1936) 850.

32. *Universal Film Co. v. Copperman* (D. C. S. D. N. Y. 1914) 212 Fed. 301.

case which treated the sale as only a performing license which did not dedicate the common law rights in the drama as represented by the scenario.<sup>33</sup>

By an unusual interpretation of the law, a differentiation is made between leasing copies of a film and of a printed publication; leasing the former is held not to be a general "publication."<sup>34</sup> It has been suggested that since leasing of books to the public has always been regarded as a publication, leasing of copies of a film should also constitute publication.<sup>35</sup>

One of the most recent problems of publication has resulted from the constant use of songs and other music in talking pictures. It has been suggested that the use of a song in a sound picture should have virtually the same effect as that resulting from its performance in any other manner.<sup>36</sup> Such performance ordinarily does not constitute a publication.<sup>37</sup> But the production of a musical composition in a "talkie" has been distinguished from its projection upon the screen, and has been looked upon as a copying and publication of the work itself.<sup>38</sup> An additional question of musical publication arises when a non-copyrighted film including a song is published by the sale of the copy. The question presented is this:<sup>39</sup> "Would the abandonment include the song?" Inasmuch as the sale of copies is undoubtedly a publication, the song would thereafter be in the public domain.<sup>40</sup>

*Registration and Deposit.* Section 11 of the amendatory Act of 1912, relating to the copyrighting of unpublished works not reproduced for sale, provides for the deposit of copies of motion pictures. When copyright protection for a "motion-picture photoplay" is sought, a title and description, with one print taken from each scene or act of the picture, must be deposited with the claim of copyright;<sup>41</sup> if for a "motion picture other than a photoplay," a title and description, with not less than two

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33. *Universal Film Co. v. Copperman* (C. C. A. 2, 1914) 218 Fed. 577.

34. *De Mille Co. v. Casey* (1923) 121 Misc. 78, 201 N. Y. S. 20.

35. 2 *Ladas*, op. cit. supra note 30, at 695, sec. 322.

36. *Shafter*, op. cit. supra note 1, at 116.

37. *Patten v. Superior Talking Pictures* (D. C. S. D. N. Y. 1934) 8 F. Supp. 196.

38. *Metro-Goldwyn-Mayer Dist. Corp. v. Wyatt and Maryland Yacht Club* (D. C. Md., Eq. no. 1969, 1932).

39. *Shafter*, op. cit. supra note 1, at 116.

40. *Ibid.*

41. 17 U. S. C. A. sec. 11; Rules and Regulations for Registrations of Claims to Copyright, Copyright Office Bull. No. 15, rule 22. Publication before the copyright is registered invalidates the copyright. *Universal Film Mfg. Co. v. Copperman* (D. C. S. D. N. Y. 1914) 212 Fed. 301.

prints taken from different sections of the complete motion picture, must be so deposited.<sup>42</sup>

No corresponding amendment was made, however, to section 12 which requires the deposit of "two complete copies" of published works. The courts have completely disregarded the phraseology of this section by holding that the deposit requirement for registration of published motion pictures should be the same as that for unpublished motion pictures.<sup>43</sup>

*Copyright Notice.* The requirement of notice has undergone transformation since the early days of the motion picture industry when the fact of copyright registration had to appear in every scene.<sup>44</sup> At present sufficient notice of copyright is given if a plate inscribed with the statutory notice is attached to the film.<sup>45</sup> Customarily, the fact of registration is exhibited upon the screen at the beginning of the picture. This notice no longer need be repeated where a film is arbitrarily divided for convenience into reels, even though these reels are independent of each other and can be shown separately.<sup>46</sup>

Notice of the year of copyright registration is required only in the case of copies of printed literary, musical, or dramatic works;<sup>47</sup> and motion pictures are not included in these categories. It is advisable, however, to add the year of registration as a precautionary measure.

*Application for Copyright.* Under the copyright law of the United States, "the author or proprietor \* \* \*, or his executors, administrators, or assigns" are entitled to protection.<sup>48</sup> The owner of the negative at the time of the making of the film is the author of a motion picture film. In the case of a non-dramatic work, the author is the sole holder of copyright,<sup>49</sup> but in the

42. 17 U. S. C. A. sec. 11; Rules and Regulations for Registration of Claims to Copyright, Copyright Office Bull. No. 15, rule 22.

43. *Patterson v. Century Prod.* (D. C. S. D. N. Y. 1937) 19 F. Supp. 30.

44. See *St. Louis Post-Dispatch*, Sept. 29, 1939, p. 2F: 1, where Walter Winchell made the following statement, based on an illustration in *1 Ramsay, Million and One Nights* (1926) opposite 296: "Film piracies were numerous in the early silent days, and each company put its trademark on a prominent object in each scene to prevent theft by competitors. Sometimes the identifying symbol was on a door, a wall or a tree. In a newsreel of the Corbett-Fitzsimmons prizefight at Carson City, Nev., in 1897, the copyright was painted on the side of the ring platform."

45. *Edison v. Lubin* (C. C. A. 3, 1903) 122 Fed. 240, where the court held that one marking was enough, since the motion picture was essentially a single photograph.

46. *Patterson v. Century Prod.* (C. C. A. 2, 1937) 93 F. (2d) 489.

47. 17 U. S. C. A. secs. 9, 18.

48. 17 U. S. C. A. sec. 8.

49. 1 *Ladas*, op. cit. supra note 30, at 463, sec. 215.

case of a dramatic work other persons may possess authorship.<sup>50</sup> Here the courts have recognized ownership of copyright by the producer of the film in his capacity as employer of the scenario writer and of the stage director, or in his capacity as assignee of independent creators.<sup>51</sup> Thus, one deriving title from the author is known as the "proprietor" of the work. He can claim the right only where the author is entitled to the benefit of copyright.<sup>52</sup>

*Duration and Renewal.* Initial rights secured by copyright are limited to twenty-eight years from the date of the first publication,<sup>53</sup> but a renewal may be obtained for another twenty-eight year period, making the maximum duration of protection fifty-six years.<sup>54</sup>

### III. RIGHTS SECURED BY COPYRIGHT

Briefly, the exclusive rights secured by copyright consist of: (1) the right to print, publish, and vend; (2) the right to transform; (3) the right to perform publicly; and (4) the right to assign any of the aforementioned.

(1) *Publication.* The exclusive right of the copyright owner "to print, reprint, publish, copy, and vend the copyrighted work"<sup>55</sup> affords protection against copying after the first publication, a practice which existed under the common law.<sup>56</sup> "Printing" and "reprinting" refer to multiplication and issuance of copies of films.<sup>57</sup> "Publishing" is the communication to the public of the work, or any part thereof.<sup>58</sup> "Copying" includes substantial and exact reproductions.<sup>59</sup> "Vending" means the transfer of title in a film for a consideration; it includes distribution by means of sale, resale, lease, etc.<sup>60</sup> But by transferring title the vendor loses his power to restrict the use of the picture.<sup>61</sup>

50. *Ibid.*

51. 1 Ladas, *op. cit. supra* note 30, at 462, sec. 215.

52. *Foreign & Domestic Music Corp. v. Twentieth Century-Fox Film Corp.* (D. C. S. D. N. Y. 1937) 19 F. Supp. 769.

53. 17 U. S. C. A. sec. 23.

54. 17 U. S. C. A. sec. 24.

55. 17 U. S. C. A. sec. 1 (a). *Harms v. Cohen* (D. C. E. D. Pa. 1922) 279 Fed. 276.

56. *Atlas Mfg. Co. v. Street & Smith* (C. C. A. 8, 1913) 204 Fed. 398.

57. For brief explanation of producing films, see *Mutual Film Corp. v. Industrial Comm. of Ohio* (1915) 236 U. S. 230, 234; *Pathe Exch. v. Cobb* (N. Y. 1922) 202 App. Div. 450.

58. 2 Ladas, *op. cit. supra* note 30, at 778, sec. 360.

59. *Lawrence v. Dana* (C. C. D. Mass. 1869) 15 Fed. Cas. 26.

60. *Bauer & Cie. v. O'Donnell* (1913) 229 U. S. 1, 13.

61. *Universal Film Mfg. Co. v. Copperman* (D. C. S. D. N. Y. 1914) 212 Fed. 301, *aff'd* (C. C. A. 2, 1914) 218 Fed. 577.



(2) *Transformation*. The power of the copyright owner to transform<sup>62</sup> includes the right to convert copyrighted work into other forms of "writings" which, in turn, may be copyrighted. Thus the scenario and the photoplay made therefrom may be copyrighted separately. In addition to several stage dramatizations of a novel, each individually copyrightable, other dramatizations intended for use on the screen might be copyrighted.<sup>63</sup> A motion picture may be transformed into a novel or a drama.<sup>64</sup>

Recently complications arose when the law was required to take cognizance of talking picture rights. The courts have taken notice of the fact that "the talking motion picture combines the pictorial element of the old silent pictures with the new element which was formerly inseparable from dramatic rights, viz., the audible reproduction of words."<sup>65</sup> Hence they have extended copyright protection to include a transformation of a novel or a drama for purposes of talking picture production.

(3) *Performance*. The copyright owner has an exclusive right to make any transcription or record for performance or exhibition including the production of photoplays which may be infringed by an unauthorized exhibition.<sup>66</sup> Since there may be several dramatizations, the grant of performing rights in the dramatic version of a novel does not include the right to make a different dramatization of it.<sup>67</sup> The right to perform publicly would be infringed by performance of an unauthorized dramatic version of the novel.<sup>68</sup>

(4) *Assignment*. Through the exercise or assignment of his rights, the author can produce, or have produced, derivative works<sup>69</sup> which will in turn be capable of individual copyright.<sup>70</sup> To effectuate the provisions regarding constructive notice in the

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62. 17 U. S. C. A. secs. 1, 6.

63. Photo Drama Motion Picture Co. v. Social Uplift Film Corp. (D. C. S. D. N. Y. 1914) 213 Fed. 374; Universal Film Mfg. Co. v. Copperman (C. C. A. 2, 1914) 218 Fed. 577, 134 C. C. A. 305.

64. See Fitch v. Young (D. C. S. D. N. Y. 1911) 230 Fed. 743, where the exclusive right to novelize a drama was recognized. Although no decision has been found to substantiate the novelization of a motion picture, it is assumed that on analogy it would be sustained.

65. Cinema Corp. of America v. De Mille (N. Y. 1933) 149 Misc. 358, 359, 267 N. Y. S. 327.

66. Metro-Goldwyn-Mayer v. Bijou Theatre Co. (C. C. A. 1, 1932) 59 F. (2d) 70.

67. Harper & Bros. v. Kalem Co. (C. C. A. 2, 1909) 169 Fed. 61.

68. Ibid.

69. National Picture Theatres v. Foundation Film Corp. (C. C. A. 2, 1920) 266 Fed. 208.

70. Photo-Drama Motion Picture Co. v. Social Uplift Film Co. (C. C. A. 2, 1915) 220 Fed. 448.

recording section of the Act, the assignment of such rights must be recorded.<sup>71</sup>

The answer to the question "Does the grant of the rights of dramatization include that of making motion pictures?" is generally procured through judicial construction of the contract. In most cases whether the parties intended to contract in regard to the stage rights alone will not be a difficult question. It is a matter of common knowledge that screen rights to a literary work are frequently more valuable than stage rights. Unless the agreement clearly shows such an intent, the copyright owner will not be presumed to include screen rights with the grant of stage rights.

The Act of 1909 expressly provided for assignments,<sup>72</sup> and licenses are permitted by implication.<sup>73</sup> Intention of the contracting parties<sup>74</sup> determines whether a grant by a copyright owner or proprietor is an assignment or a license—*i. e.*, whether all or only a portion of the grantor's rights will be included. Some courts construe contracts transferring film production rights liberally.<sup>75</sup> But the majority of the courts by strict interpretation hold that particularization will exclude all unmentioned rights,<sup>76</sup> unless the grant is so phrased that the parties apparently had in mind more than the spoken drama.<sup>77</sup> Under this view a grant of stage production rights will not include film rights.<sup>78</sup>

With the development of sound pictures, a question also arose whether the phrase "exclusive motion picture rights" included "talking motion picture rights." This was answered in the affirmative in the federal courts by *L. C. Page & Co. v. Fox Film Corp.*<sup>79</sup> although "talkies" were unknown when the agreement was consummated. The court found that inventors had been ex-

71. *Ibid.*; *Macloon v. Vitagraph* (C. C. A. 2, 1929) 30 F. (2d) 634.

72. 17 U. S. C. A. sec. 41.

73. See *Tully v. Triangle Film Corp.* (D. C. S. D. N. Y. 1916) 229 Fed. 297; *Klein v. Beach* (D. C. S. D. N. Y. 1916) 232 Fed. 240.

74. 2 *Ladas*, *op. cit.* supra note 30, at 780.

75. *Frohman v. Fitch* (1914) 164 App. Div. 231, 149 N. Y. S. 633; *Lipzin v. Gordin* (1915) 166 N. Y. S. 792; *Hart v. Fox* (1917) 166 N. Y. S. 793.

76. *Harms v. Stern* (C. C. A. 2, 1915) 229 Fed. 42; *Klein v. Beach* (D. C. S. D. N. Y. 1916) 232 Fed. 240; *Harper Bros. v. Klaw* (D. C. S. D. N. Y. 1916) 232 Fed. 609; *Manners v. Morosco* (1920) 252 U. S. 317. See *Comments* (1920) 20 Col. L. Rev. 705, 69 U. of Pa. L. Rev. 74.

77. 2 *Ladas*, *op. cit.* supra note 30, at 780.

78. *Manners v. Morosco* (1920) 252 U. S. 317; *O'Neill v. General Film Co.* (1916) 171 App. Div. 854, 157 N. Y. S. 1028; *Underhill v. Schenck* (1921) 114 Misc. 520, 187 N. Y. S. 589.

79. (C. C. A. 2, 1936) 83 F. (2d) 196.

perimenting with sound in motion pictures and, although the author had not contemplated sound when executing the contract, the words used were sufficient \* \* \* to embrace not only motion pictures of the sort then known but also such technical improvements in motion pictures as might be developed during the term of the license, \* \* \* "talkies" are but a species of the genus motion pictures, \* \* \*.<sup>80</sup>

It appears likely that similar results will be attached to such new developments in the motion picture industry as technicolor,<sup>81</sup> three-dimensional projection,<sup>82</sup> and television.<sup>83</sup>

### *Effect of Copyright Upon Common Law Rights*

Courts have long followed the rule that performance of a dramatic work on the stage does not extinguish the author's common law rights therein;<sup>84</sup> this rule has been extended to protect the author when a motion picture is exhibited.<sup>85</sup> Where, however, there is copyrighted a motion picture adapted from an unpublished drama, common law rights in the latter are abandoned in respect to all events and scenes drawn therefrom and shown in the picture, but not in respect to the unused portions.<sup>86</sup>

Even if motion picture films are sold, the common law rights in them are not transferred or abandoned;<sup>87</sup> the theory is that the sale is intended to convey only the right to exhibit, not the right to re-enact or re-film the original photoplay. Moreover, if films are leased, the lessor retains an exclusive right to give public exhibitions on the ground that the lease is not a dedication of this common law right.<sup>88</sup>

80. *Id.* at 199.

81. See Technicolor May Revolutionize the Screen (June 8, 1935) 119 *Literary Digest* 24-25; Becky Sharp in Color May Open Movies' Third Era (June 22, 1935) 5 *News Week* 22-23.

82. See Three Dimension Movies Arrive (Dec. 12, 1936) 122 *Literary Digest* 30.

83. See Daugherty, Movies Woo Television (Dec. 22, 1937) *Christian Science Monitor Magazine* 3; Hurd, Hollywood's Opportunity: What Will Television Do to the Movies? (July 1, 1938) *Christian Science Monitor Magazine* 8; Wittenberg, *Protection and Marketing of Literary Property* (1937) 5, says: "Even now, the purchasers of literary material for motion-pictures are seeking to acquire television rights, anticipating its commercial adaptability." See *Televising Old Films, A Legal Complication* (Nov. 18, 1939) 137 *Motion Picture Herald* 16.

84. *Ferris v. Frohman* (1912) 223 U. S. 424, 435.

85. *DeMille Co. v. Casey* (1923) 121 Misc. 78, 201 N. Y. S. 20.

86. *O'Neill v. General Film* (1916) 171 App. Div. 854, 157 N. Y. S. 1028.

87. *Universal Film Mfg. Co. v. Copperman* (C. C. A. 2, 1914) 218 Fed. 577.

88. *De Mille Co. v. Casey* (1923) 121 Misc. 78, 201 N. Y. S. 20.

## IV. INFRINGEMENT

Suits for infringement of copyright usually revolve about two major issues: first, the existence of copyright in the original work and, second, the infringement of this right by copying.<sup>89</sup> The problem is to discover a standard of judgment whereby the existence of plagiarism can accurately be determined. Some years ago a book called *The Science of Playwriting*<sup>90</sup> presented formulae designed to aid in the dissection and analysis of characters, emotions, and plots. This "method" obtained judicial attention but not recognition. In *Nichols v. Universal Pictures Corporation*,<sup>91</sup> the court refused to use the formulae, stating that: "the more the court is led into the intricacies of dramatic craftsmanship, the less likely is it to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal."<sup>92</sup>

Judges have usually rejected expert testimony, preferring to rely upon their own impressions and observations,<sup>93</sup> and the ability of an ordinary observer to detect copying in the allegedly infringing work.<sup>94</sup> However, the question of infringement is not left to the layman where certain technicalities of law are involved, such as the scope of copyright protection.<sup>95</sup>

*Infringement by Motion Pictures.* In deciding whether a copyrighted novel or drama has been infringed by the publication of a film version of the novel or drama, a number of cases have held that the production of a motion picture is not an infringement of the copyrighted novel or drama, because the physical film is not considered a copy of the protected works.<sup>96</sup> One court has looked upon the public showing of a film as being a photographic display, but not as an infringement of the rights of publication.<sup>97</sup>

89. *Hirsch v. Paramount Pictures* (D. C. S. D. Cal. 1937) 17 F. Supp. 816.

90. See Wittenberg, *Protection and Marketing of Literary Property* (1937) 69.

91. (D. C. S. D. N. Y. 1929) 34 F. (2d) 145, aff'd (C. C. A. 2, 1930) 45 F. (2d) 119.

92. Id. at 45 F. (2d) 119, 123.

93. Id. at 122.

94. *Barbadillo v. Goldwyn* (D. C. S. D. Cal. 1930) 42 F. (2d) 881; *Harold Lloyd Corp. v. Witwer* (C. C. A. 9, 1933) 65 F. (2d) 1; *Caruthers v. R. K. O. Radio Pictures* (D. C. S. D. N. Y. 1937) 20 F. Supp. 906. See *Hirsch v. Paramount Pictures* (D. C. S. D. Cal. 1937) 17 F. Supp. 816, where the court admitted that expert testimony is helpful.

95. *Sheldon v. Metro-Goldwyn Pictures Corp.* (D. C. S. D. N. Y. 1934) 7 F. Supp. 837.

96. *Harper & Bros. v. Kalem Co.* (C. C. A. 2, 1909) 169 Fed. 61; *Kalem Co. v. Harper Bros* (1911) 222 U. S. 55, Ann. Cas. 1913A, 1285.

97. *Kalem Co. v. Harper Bros.* (1911) 222 U. S. 55, 62, Ann. Cas. 1913A,

The exhibition of a motion picture, however, is construed as a dramatic version of the novel and as an infringement of the copyright owner's exclusive rights to dramatize and to perform publicly.<sup>98</sup>

With the advent of sound motion pictures, music became not only a featured attraction, but also incidental background for dialogue and action. The industry has found itself confronted by an efficient organization protecting the performing rights of copyrighted music. Dramatists and novelists, who negotiate individually, have been unable to cope with the organized film producers. But music composers and publishers, through affiliation with the American Society of Composers, Authors, and Publishers,<sup>99</sup> have competently defended their interests. As guardian of the performing rights of its members, this Society has successfully attacked the unlicensed use of its compositions in "talkies" on the ground that such use is a performance of music for profit in violation of the copyright law.

*Infringement of Motion Pictures.* Infringement of a copyrighted novel by a motion picture production should be distinguished from the infringement of a copyrighted motion picture, since a ruling upon the first question is not decisive of the second.<sup>100</sup>

Just as in other copyright, motion picture films may be infringed through the multiplication or sale of copies.<sup>101</sup> Beyond this, the extent to which there may be infringement of moving picture films is difficult to define. This situation is largely due to the fact that the statute confers the exclusive right to perform, represent, or exhibit for dramatic and musical works only, but fails to confer any such specific rights for motion pictures.<sup>102</sup>

However, since a moving picture photoplay may be deemed dramatic work,<sup>103</sup> the holder of copyright in a motion picture

1285, where the Court drew a distinction between a mere photograph and moving pictures.

98. *Harper Bros. v. Kalem Co.* (C. C. A. 2, 1909) 169 Fed. 81; *Kalem Co. v. Harper Bros.* (1911) 222 U. S. 55, Ann. Cas. 1913A, 1285.

99. This cooperative endeavor has given ASCAP control of over 3,000,000 compositions. *Shafter, op. cit. supra* note 1, at 311.

100. *Metro-Goldwyn-Mayer Dist. Co. v. Bijou Theatre Co.* (D. C. D. Mass. 1931) 50 F. (2d) 908, set aside on other grounds (C. C. A. 1, 1932) 59 F. (2d) 70.

101. 17 U. S. C. A. sec. 1. *Patterson v. Century Productions* (C. C. A. 2, 1937) 93 F. (2d) 489.

102. 17 U. S. C. A. sec. 1. *Metro-Goldwyn-Mayer v. Bijou Theatre Co.* (C. C. A. 1, 1932) 59 F. (2d) 70.

103. *Tiffany Productions v. Dewing* (D. C. D. Md. 1931) 50 F. (2d) 911; *Metro-Goldwyn-Mayer Dist. Corp. v. Bijou Theatre Co.* (C. C. A. 1, 1932) 59 F. (2d) 70, rev'g (D. C. D. Mass. 1931) 50 F. (2d) 908. See Comment (1931) 45 Harv. L. Rev. 380.

photoplay possesses an exclusive right of public performance. The public exhibition of a competing film production infringes this exclusive right.<sup>104</sup> An unauthorized exhibition of a copyrighted motion picture would constitute a dramatization, infringing the right of performance,<sup>105</sup> under the view that motion picture photoplays come within section 1 (d) of the Act of 1909, relating to the making and performing of transcriptions or records of dramatic works.<sup>106</sup>

*Titles.* The courts have frequently protected the title of a copyrighted literary or artistic work, but have done so only in connection with the work and never independently of it.<sup>107</sup> The title will be protected when it has acquired a "secondary meaning" in relation to the work or when its use in connection with another work would confuse the public.<sup>108</sup> In the latter case the composition must have attained such publicity or notoriety that the public has established a definite association between the title and the work in question.<sup>109</sup>

#### V. REMEDIES

Varying remedies are provided for violations of the rights conferred upon the copyright owner by the statute. Violation of the exclusive right to copy may be remedied by damages,<sup>110</sup> issuance of an injunction,<sup>111</sup> or by an accounting for profits.<sup>112</sup>

The injunction is not used more than is absolutely necessary<sup>113</sup> and its value for the purpose of restraining the infringement of motion picture films may be doubtful. This is due to the fact that before a temporary injunction is made final the actual value of the picture may drop to nothing due to shifting popularity of

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104. *Ibid.* It is not necessary that the unauthorized exhibition be for profit to constitute infringement. *Pathe Exch. v. International Alliance* (D. C. S. D. N. Y. 1932) 3 F. Supp. 63.

105. *Tiffany Productions v. Dewing* (D. C. D. Md. 1931) 50 F. (2d) 911; *Metro-Goldwyn-Mayer Dist. Corp. v. Bijou Theatre Co.* (D. C. D. Mass. 1933) 3 F. Supp. 66.

106. 17 U. S. C. A. sec. 1 (d).

107. *Warner Bros. v. Majestic Pictures* (C. C. A. 2, 1934) 70 F. (2d) 310. See *Wittenberg*, op. cit. supra note 90, at 110.

108. *Manners v. Triangle Film Corp.* (D. C. S. D. N. Y. 1917) 244 Fed. 293.

109. *Patten v. Superior Talking Pictures* (D. C. S. D. N. Y. 1934) 8 F. Supp. 196.

110. 17 U. S. C. A. sec. 25 (b).

111. 17 U. S. C. A. sec. 25 (a).

112. See infra notes 119 et seq.

113. See *Brady v. Reliance Motion Picture Corp.* (C. C. A. 2, 1916) 229 Fed. 137; *Metro-Goldwyn-Mayer Dist. Corp. v. Fisher* (D. C. D. Md. 1935) 10 F. Supp. 745; *L. C. Page & Co. v. Fox Film Corp.* (C. C. A. 2, 1936) 83 F. (2d) 196.

the "stars." An injunction will seldom be made permanent<sup>114</sup> because the defendant is generally given sufficient time to eliminate the infringing portions of his film production, and so only a "moral" victory is obtained. Therefore, parties injured by an infringement usually attempt to obtain more tangible compensation.

The issue of damages for infringement is complicated by the poor draftsmanship of section 25 of the Act, which sets out available remedies. This section provides that damages are to be limited to a maximum of \$100 in case the infringer shows that he was not aware that the motion pictures constituted infringement of an undramatized or non-dramatic work, and that such infringement could not reasonably have been foreseen.<sup>115</sup> It further stipulates that damages of a minimum of \$250 to a maximum of \$5,000 may be awarded where the motion picture infringes a dramatic or dramatico-musical work. Actual damages and profits are usually combined and sought in one action; and the plaintiff may recover either or both.<sup>116</sup> The measure of actual damages is the probable amount of sales lost due to the competition of the infringing work.<sup>117</sup> But due to uncertainty and difficulty in estimating this amount, suits at law are usually designed to recover maximum damages under the statute.<sup>118</sup>

The bill in an accounting for profits is governed by the general principles of equity and is not allowed as a matter of right.<sup>119</sup> Until recently the rule was that all profits from an infringing work were subject to the person whose work had been infringed.<sup>120</sup> But a precedent-breaking departure was recently made in *Sheldon v. Metro-Goldwyn Pictures Corp.*,<sup>121</sup> where it

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114. See *International Film Service Co. v. Affiliated Dist.* (D. C. S. D. N. Y. 1922) 283 Fed. 229.

115. In order to apply the maximum limitation of damages, the infringer must show that he was not aware of his act of infringement. *Patterson v. Century Productions* (D. C. S. D. N. Y. 1937) 19 F. Supp. 30.

116. Shafter, *op. cit. supra* note 1, at 257. See Note (1939) 24 WASHINGTON U. LAW QUARTERLY 400.

117. *Paramore v. Mack Sennett* (D. C. S. D. Cal. 1925) 9 F. (2d) 66.

118. See *Tiffany Productions v. Dewing* (D. C. D. Md. 1931) 50 F. (2d) 911.

119. *McCaleb v. Fox Film Corp.* (C. C. A. 5, 1924) 299 Fed. 48.

120. *E. g.*, *Sheldon v. Metro-Goldwyn Pictures Corp.* (D. C. S. D. N. Y. 1934) 7 F. Supp. 837.

121. *Sheldon v. Metro-Goldwyn Pictures Corp.* (D. C. S. D. N. Y. 1938) 26 F. Supp. 134, *aff'g* (C. C. A. 2, 1936) 81 F. (2d) 49, *rev'g* (D. C. S. D. N. Y. 1934) 7 F. Supp. 837. See Comment (1939) 52 Harv. L. Rev. 688; *Notorious Lady* (Aug. 5, 1939) 136 Motion Picture Herald 8; 20% of Profits for Plagiarism; Exhibitor Customers May be Sued, *Ibid.*; Court Denies Application for 'Lynton' Rehearing (Sept. 9, 1939) 136 Motion Picture Herald 60; Court Cuts Award in 'Lynton' Suit (Sept. 23, 1939) 136

was held that profits from an infringing film are to be apportioned according to the value actually contributed by the plagiarized story. This decision has been appealed to the Supreme Court,<sup>122</sup> its final dispensation is expected to clarify this phase of the law.

The Act specifies certain other remedies, such as the delivering up<sup>123</sup> and the destruction of<sup>124</sup> infringing copies, and provides for costs and attorney's fees to the prevailing party.<sup>125</sup> Where the allowance of full costs is in question this provision is considered mandatory,<sup>126</sup> but, where the plaintiff is only partially successful, the court may exercise its discretion by apportioning costs between the parties.<sup>127</sup> The court also has considerable discretion in the allowance of attorney's fees.<sup>128</sup> If the ward appears reasonable and proportionate to the work required, the novelty of the question, and the amount of money involved, it will be upheld upon appeal.<sup>129</sup>

#### VI. THE "SHOTWELL BILL"

In 1909 and 1912 it was impossible for Congress to anticipate the incredible technical and financial growth of the motion picture industry. The task of applying the copyright law with due consideration for these changes has consequently devolved upon the courts. Difficulties experienced in practice are not due to deficiencies of the judiciary but to the incomprehensiveness of the copyright statutes.<sup>130</sup> The Act of 1909 and the amendatory Act of 1912 have become antiquated methods of dealing with the great demand of motion picture producers for copyrighted literary and musical works.

Motion Picture Herald 56. The value which the licensee of the copyright put on his rights is immaterial. *L. C. Page & Co. v. Fox Film Corp.* (C. C. A. 2, 1936) 83 F. (2d) 196.

122. *MGM Copyright Case Before Supreme Court* (Nov. 11, 1939) 137 Motion Picture Herald 52. [Since this article was written the Supreme Court has refused to review the decision of the Circuit Court of Appeals for the Second Circuit. (1940) 60 S. Ct. 263.—EDITOR.]

123. 17 U. S. C. A. sec. 25 (c). See *Patterson v. Century Prod.* (D. C. S. D. N. Y. 1937) 19 F. Supp. 30.

124. 17 U. S. C. A. sec. 25 (d). See *Patterson v. Century Prod.* (D. C. S. D. N. Y. 1937) 19 F. Supp. 30.

125. 17 U. S. C. A. sec. 40.

126. *Pastime Amusement Co. v. Witmark & Sons* (C. C. A. 4, 1924) 2 F. (2) 1020.

127. See *Sheldon v. Metro-Goldwyn Pictures Corp.* (D. C. S. D. N. Y. 1938) 26 F. Supp. 134.

128. *Nichols v. Universal Pictures Co.* (C. C. A. 2, 1930) 45 F. (2d) 119; *Eisman v. Samuel Goldwyn* (D. C. S. D. N. Y. 1938) 23 F. Supp. 519.

129. *Caruthers v. R. K. O. Radio Pictures* (D. C. S. D. N. Y. 1937) 20 F. Supp. 906; *Sheldon v. Metro-Goldwyn Pictures Corp.* (D. C. S. D. N. Y. 1938) 26 F. Supp. 134.

130. *Shafter*, op. cit. supra note 1, at 87.



Perhaps the outstanding needs to be filled by revision of the copyright law are the inclusion of a wider range of protected works and a more stringent guardianship of all copyrighted objects. The "Shotwell Bill"<sup>131</sup> has been drafted to strengthen both qualitatively and quantitatively the protection bestowed by the law on literary, musical, and other artistic products. Incorporation in the copyright statute of the changes suggested by this proposal would serve as stimuli to the production of all types of copyrightable compositions.

Some of the more significant aspects of the proposed enactment will be noted. The second section of the bill would establish an "automatic copyright" by declaring that "authors shall have copyright in all of their writings, whether published or unpublished from and after the creation thereof, without compliance with any conditions or formalities." This section is in reality a statutory version of the so-called common law copyright, which has been altered to prevent the loss of common law rights upon publication. Also, the bill would abolish the ambiguities in the vital question of publication. If this section should be enacted, any original work produced thereafter would immediately be protected.

The protection afforded the author of a copyrighted musical composition would be greatly extended by other provisions in this bill. Section 4 (e) provides that a copyright of a motion picture "shall not include the right of public performance for profit of any musical composition which is a part of a motion picture when the right of public performance for profit shall be owned by others." In addition, section 4 (h) provides that "a copyright in a motion picture shall not include the right to grant the use of its accompanying sound track apart from a visual exhibition of the motion picture."

Section 6 of the "Shotwell Bill" would extend the period of copyright protection from the present maximum of fifty-six years to a term covering the author's lifetime plus an interval of fifty years thereafter or, where the author or first owner is other than a natural person, to fifty years following the creation of the work. Such a provision would guarantee to writers of dramatic and musical works a more substantial and secure financial status.

Section 8 provides that "the Author of a work shall be the first owner of copyright therein." This provision, of course,

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131. This bill is being sponsored by a committee under the chairmanship of Dr. Shotwell.

expresses the attitude of the authors.<sup>132</sup> The motion picture industry has voiced its most vehement objections to this section of the bill. Motion picture producers are of the opinion that the employer should be regarded legally as the author of any works produced by its employees. Diametrically opposed to this view, the Authors' League of America has strongly protested that "where copyright initiates upon the creation of the work, the transfer of the right to motion picture producer can be handled by contract," and that the legal fiction of looking upon the employer as the author is quite unnecessary. The League argues that no such fiction exists under the analogous patent laws. It points out that the inventor is the only one who is granted the privilege of patenting his invention. His employer, however, can specify in the contract of employment with the inventor that any patents procured by the latter shall be assigned to the employer.

Another section of the proposed act provides for a considerable broadening of copyrightable subjects. Heretofore, "motion pictures" have been protected by implication as "dramatizations" rather than by specific provision. The "Shotwell Bill" entitles such pictures to a place quite as important as "dramatic" and "dramatic-musical" compositions.<sup>133</sup> It further provides for the desirable classifications of "scenarios and continuities for motion pictures"<sup>134</sup> and for "sound" pictures.<sup>135</sup>

Section 49 of the bill authorizes the President "to take all steps and to perform all acts necessary to make the United States an adhering party" in the International Copyright Union. Membership in this organization is most desirable in view of the importance of our country as a producer of motion pictures for the world entertainment market. Entrance into the Union would entitle all Americans protected under United States copyright law to automatic protection in more than forty important foreign countries.<sup>136</sup>

#### CONCLUSION

This paper has pointed out the more important phases of motion picture copyright. It has been shown that troublesome problems have arisen because of the inadequacy of the present

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132. The writer is indebted to Mr. John G. Paine, General Manager of ASCAP for the discussion of the views expressed here. Letter to this writer, Nov. 14, 1939.

133. Sec. 15 (d).

134. Sec. 15 (j).

135. Sec. 15 (k).

136. For a list of the 44 members of the Union, see Shafter, *op. cit. supra* note 1, at pp. 478-479.

law. Although most of these questions have now become settled, new and more involved ones are coming forth with the introduction of color, the third dimension, and television in this field. It is therefore apparent that the "Shotwell Bill" should be given serious consideration in order that the benefits of past experimentation may be enjoyed and the "period of fumbling" in copyright litigation may be ended. The clarification of the many confused issues which yet await logical settlement would permit and even induce a continuation of the rapid growth of the motion picture industry. There would undoubtedly be a consequent increase in the value of all literary and musical works possessing any substantial potentialities as material for use in future productions. Thus, all parties concerned—authors, composers, publishers, producers, distributors, exhibitors, and also consumers—would be directly or indirectly benefited by the adoption of the "Shotwell Bill."

MILTON H. ARONSON.

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### THE JOINT TORT-FEASOR IN MISSOURI

The gradual change in the concept of tort liability made of the tort-feasor a new man. At early common law, the liability of the tort-feasor was to a large extent imposed as a penalty for his wrongdoing.<sup>1</sup> If two or more were liable for the tort, any or all might be held to pay. And, according to *Merryweather v. Nixan*,<sup>2</sup> those upon whom a levy was made could not enforce contribution by the others. Today, tort liability is no longer imposed as a penalty. Its purpose is to shift the burden of loss caused by tortious conduct to those who may be properly required to bear it. With this change in concept there came a feeling that the rule denying contribution between joint tort-feasors operated too harshly in many situations. Nevertheless, the majority of jurisdictions which have not modified the rule by statute still deny any right to contribution between joint tort-feasors.<sup>3</sup> Some

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1. Bohlen, Contribution and Indemnity between Tortfeasors (1936) 21 *Corn. L. Q.* 552, 554. Pollock, *The Law of Torts* (13th ed. 1929) 4: "In the medieval period the procedure whereby redress was obtained for many of the injuries now classified as torts bore plain traces of a criminal or quasi-criminal character, the defendant against whom judgment passed being liable not only to compensate the plaintiff, but to pay a fine to the king."

2. (K. B. 1799) 8 T. R. 186, 101 Eng. Rep. 1337.

3. Bohlen, *supra* note 1, at 552; Leflar, Contribution and Indemnity between Tortfeasors (1932) 81 U. of Pa. L. Rev. 130, 141.