

January 1974

## Copyright Law - Copyright of Fradulent Material - Belcher v. Tarbox, 486 F.2d 1087 (9th Cir. 1973)

Charles S. Kamine

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

---

### Recommended Citation

Charles S. Kamine, Copyright Law - Copyright of Fradulent Material - Belcher v. Tarbox, 486 F.2d 1087 (9th Cir. 1973), 51 Denv. L.J. 621 (1974).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

Copyright Law - Copyright of Fraudulent Material - Belcher v. Tarbox, 486 F.2d 1087  
(9th Cir. 1973)

## COMMENT

### COPYRIGHT LAW—Copyright of Fraudulent Material *Belcher v. Tarbox*, 486 F.2d 1087 (9th Cir. 1973)

*The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks fit. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.*<sup>1</sup>

#### INTRODUCTION

The Copyright Act of 1909, the predecessor of the present Title 17,<sup>2</sup> was passed with the intention of providing the greatest benefit for the public. Congress derived its authority from the Constitution which empowers Congress “[t]o 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.”<sup>3</sup> The sole object of the Constitution, and the primary purpose in conferring copyright protection, “lie in the general benefits derived by the public from the labors of authors.”<sup>4</sup> It is predicated on the concept that the public benefits from the creativity of authors, and that the copyright protection is necessary to encourage such creative activities.<sup>5</sup>

In the recent case *Belcher v. Tarbox*,<sup>6</sup> the Ninth Circuit allowed copyright protection to material which was considered against the public interest, and, therefore, contrary to the avowed purpose and intent of the Copyright Act. The case involved a written handicapping system designed for winning at the horse-races. The author had acquired copyright privileges by affixing the proper notice to his works and by applying for registration with the copyright office pursuant to the Copyright Act.<sup>7</sup> The defendant was the publisher of a magazine which reproduced

---

<sup>1</sup> H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909), accompanying the bill embodying the Copyright Act of 1909, Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

<sup>2</sup> 17 U.S.C. §§ 1 to 215 (1952).

<sup>3</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>4</sup> *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

<sup>5</sup> 1 M. NIMMER, NIMMER ON COPYRIGHT § 3.1 (1974) [hereinafter cited as NIMMER].

<sup>6</sup> 486 F.2d 1087 (9th Cir. 1973).

<sup>7</sup> The procedure for obtaining copyright protection is codified in 17 U.S.C. §§ 10, 11, 13, 19, 20, 21 (1970).

various systems for betting on horses. The defendant reprinted several of the author's systems, and the author instituted an action for copyright infringement. As a defense, the defendant argued that the plaintiff's works were not entitled to copyright protection since they, and the advertising associated with them, made fraudulent representations to the public. The trial court found, in fact, that one of the works was fraudulent and not entitled to protection from infringement. The issue which the appellate court resolved was whether "false and fraudulent material [is] entitled to copyright protection or does the clean hands doctrine preclude it?"<sup>8</sup> The Ninth Circuit, not following the weight of precedent law, asserted that fraudulent material was copyrightable and, in this case, had been infringed.

The purpose of this comment is to explore the implications of the *Belcher* decision by examining the historical precedents of copyright protection for fraudulent material; by drawing analogies to the copyrightability of immoral and illegal works and to the relation of fraud in trademark and patent law; and by analyzing the court's opinion in the present case. Finally, the implications of *Belcher* on the field of copyright law will be discussed to determine whether fraudulent works should be the subject of copyright protection.

## I. HISTORICAL PERSPECTIVE

### A. *Fraud in Copyright Cases*

#### 1. Copyright Law in England

Early copyright protection consisted of printers' licenses granted by the King about the time the printing press was developing.<sup>9</sup> The primary purpose of these licenses was to restrict circulation of anti-government and anti-Church literature. In 1662, Parliament passed the Licensing Act requiring licensing and registration of every published book with the Stationers' Company. This act prohibited the printing of "heretical, seditious, schismatical or offensive books or pamphlets,"<sup>10</sup> and required a licensing notice in each copy which was enforceable against pirates by criminal penalties. The Licensing Act expired in 1679, however, and new legislation was not enacted until 1709 with the passage

---

<sup>8</sup> 486 F.2d at 1088.

<sup>9</sup> W. COPINGER & E. JAMES, *COPINGER & SKONE JAMES ON COPYRIGHT* § 21 (11th ed. 1971) [hereinafter cited as *COPINGER*].

<sup>10</sup> 13 & 14 Car. 2, c. 33, § 2 (1662).

of the Copyright Act<sup>11</sup> wherein authors were granted a 14-year monopoly on their works published after 1710. The 1709 Copyright Act remained the law in England until revisions were made in the 19th century.<sup>12</sup>

The preamble to the 1842 Act to Amend the Law of Copyright expressed the object of copyright protection "to afford greater Encouragement to the Production of literary Works of lasting Benefit to the World."<sup>13</sup> This theme pervades early English copyright law and the court's concern with the public interest is demonstrated in *Wright v. Tallis*,<sup>14</sup> an early case on fraud in copyright. *Wright* involved an action for appropriating a work of devotional character which falsely professed to be a translation from an esteemed German author. The plaintiff intentionally deceived the purchasers in order to receive a higher value for his work than it was worth. In denying copyright protection, the court drew an analogy from the prior immorality cases stating:

The cases in which a copyright has been held not to subsist where the work is subversive of good order, morality, or religion, do not, indeed, bear directly on the case before us; but they have this analogy with the present inquiry — that they prove that the rule which denies the existence of copyright in those cases, is a rule established for the benefit and protection of the public. And we think that that the law can afford to the public against such a fraud as that laid open by this plea, is, to make the practice of it unprofitable to its author.<sup>15</sup>

The English courts again denied copyright protection in *Slingsby v. Bradford Patent Truck, Co.*<sup>16</sup> The plaintiff published an illustrated catalogue of trucks and trolleys which he allegedly manufactured. The catalogue suggested that he was the inventor, patentee, and sole maker of the vehicles, but in fact he held no English patents for them. The plaintiff was denied an injunction against the infringing defendant since his statements about being a true patentee were calculated to deceive the public and increase his trade.

Although the copyright law in England is devoid of any statutory restriction on fraudulent material, the few early cases indicate the judicial concern for the public interest, the stated pur-

---

<sup>11</sup> 8 Anne, c. 19, § 1 (1709).

<sup>12</sup> COPINGER, *supra* note 9, §§ 21-30.

<sup>13</sup> 5 & 6 Vict., c. 45, § 1 (1842).

<sup>14</sup> 135 Eng. Rep. 794 (C.P. 1845).

<sup>15</sup> *Id.* at 800.

<sup>16</sup> [1905] W.N. 122; [1906] W.N. 51.

pose of the Copyright Acts, by denying copyright protection where the public was injured by the works of the copyright holder.

## 2. Copyright Law in the United States

The early development of copyright law in the United States followed the precedent set in England. The United States Constitution adopted existing common law at the time and granted Congress the authority to legislate copyright law.<sup>17</sup> The first American statute was entitled An Act for the Encouragement of Learning.<sup>18</sup> This act provided protection similar to that existing in England, and did not specifically deny or allow copyright protection on fraudulent material. American copyright law has undergone several statutory changes including expansions to extend protection to the arts of designing, engraving, and etching prints;<sup>19</sup> musical compositions;<sup>20</sup> dramatic compositions;<sup>21</sup> photographs;<sup>22</sup> and paintings, drawings, and statues.<sup>23</sup> The copyright law was finally revised in 1909 with the Copyright Act<sup>24</sup> which substantively became Title 17, enacted in 1947. Nowhere in this statutory law is there an express limitation on copyright protection on fraudulent matter.

Turning to early American case law, copyright protection was denied in *Davies v. Bowes*,<sup>25</sup> an infringement action where the defendant constructed and produced a play based on a fictional story which the plaintiff-reporter had written in his newspaper column. The court said that copyright does not exist in news, since facts are public property. The plaintiff presented the story to the public as if it were news, in order to attract attention and interest, and the court denied protection as a matter of morals saying that, "he who puts forth a thing as verity shall not be heard to allege for profit that it is fiction."<sup>26</sup>

The major precedent-setting case dealing with the copyright of fraudulent material is *Stone & McCarrick, Inc. v. Dugan Piano Co.*<sup>27</sup> *Stone* involved an instruction manual for the selling of pi-

---

<sup>17</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>18</sup> Act of May 31, 1790, ch. 15, 1 Stat. 124.

<sup>19</sup> Act of Apr. 29, 1802, ch. 36, 2 Stat. 171.

<sup>20</sup> Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

<sup>21</sup> Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.

<sup>22</sup> Act of Mar. 3, 1865, ch. 126, 13 Stat. 540.

<sup>23</sup> Act of July 8, 1870, ch. 230, 16 Stat. 198.

<sup>24</sup> Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

<sup>25</sup> 209 F. 53 (S.D.N.Y. 1913).

<sup>26</sup> *Id.* at 55.

<sup>27</sup> 220 F. 837 (5th Cir. 1915).

anos which contained advertisement forms for special sales to be held by the dealers. The forms contained sales statements which could not be true for all cases. In denying copyright protection to the manual the court stated that "the law should extend its protection to those advertisements only that speak the truth, and certainly not to that class of advertising matter the effect of which is to mislead and deceive the public."<sup>28</sup> This case, as are most in this area, was not decided on a principle of copyright law, but instead on a doctrine of equity. The court said, "It is a familiar maxim of equity that one who applies to a court of equity for relief should come in with clean hands . . . ."<sup>29</sup> The effect of this application is not really to deny the copyright, but only to refuse to enforce the copyright by not enjoining the one who has infringed it.

*Deutsch v. Felton*<sup>30</sup> took a different view. *Deutsch* involved the infringement of a graphology chart used to predict character traits through handwriting analysis. The court held that the copyright had been infringed and issued an injunction against the defendant despite the fact that neither the plaintiff nor the defendant claimed that the charts were based on scientific or other fact. The court declined to consider whether this was adverse to the public interest.

In *Advisers, Inc. v. Wiesen-Hart, Inc.*<sup>31</sup> a coupon book, which offered discounts on jewelry purchases, was produced and distributed by the plaintiff. The coupon book was advertised as being worth \$100, but the discounts which it offered were available to any customer. An action for infringement was brought against the defendant who published a similar book. The court found the material to be fraudulent,<sup>32</sup> but proceeded to conclude that it was

---

<sup>28</sup> *Id.* at 841. The court continues:

It is only necessary to glance at the matter of the advertisements . . . to satisfy the mind that their tendency, by the extravagant puffing of the wares of the dealer and misrepresentations of sales, is to mislead and deceive the public . . . Extravaganzas may be indulged by a writer for the purpose of illustration and to accomplish the end in view . . . . But advertisements by dealers of their wares, in order to insure the protection of the law, should reflect the truth and avoid representations which mislead and deceive the people. If their tendency be misleading and deceptive, they will find the doors of a court of equity barred against their admission.

*Id.* at 842-43.

<sup>29</sup> *Id.* at 841.

<sup>30</sup> 27 F. Supp. 895 (E.D.N.Y. 1939).

<sup>31</sup> 161 F. Supp. 831 (S.D. Ohio 1958).

<sup>32</sup> The court stated:

The Court finds as a fact that the plaintiff's "Cash \$100 Book" is fraudulent

the proper subject matter for copyright protection and issued an injunction against the defendant. The court stated, however, that the statutory damages of \$1 per copy provided for in the Copyright Act were not intended to be awarded to material which was fraudulent. The court did, nevertheless, grant general damages.

Two recent cases have also dealt with fraud in copyright; one applying the clean hands doctrine of equity to deny copyright protection,<sup>33</sup> and the other finding the conduct inconsequential to warrant application of the doctrine.<sup>34</sup> The above discussion demonstrates the fact that there is no clear authority in the United States dealing with copyright protection for fraudulent material. In fact, the authority is very limited since only two cases, *Stone* and *Advisers*, deal with actual fraudulent content, as distinguished from fraudulent representations made surrounding the work. Furthermore, even *Stone* and *Advisers* are split as to the effect of such fraudulent content in relation to the Copyright Act.

### 3. The Status of Copyright Law for Fraudulent Material

The question of whether a copyright should be granted to material having fraudulent content which is, therefore, contrary to the purpose and intent of the Copyright Act in protecting the public interest, as discussed above, has rarely been confronted. The most common method for approaching this problem by the courts has been not to deny the granting of the copyright but rather to refuse enjoining the copyright based on the equitable doctrine of clean hands. This apparent granting of a *token* copyright with a judicial denial of statutory rights and remedies does not follow the principles of equity. One authority on equity, Kerr, has stated the rule of equity thusly:

---

in nature in that it is used for the sole and express purpose of enticing the gullible into those business establishments whose merchandise is advertised in the book under the guise that the book is worth \$100 in cash, where in fact the same discounts specified in the book are given to all members of the public in the ordinary course of business.

*Id.* at 834.

<sup>33</sup> *International Biotical Corp. v. Associated Mills, Inc.*, 239 F. Supp. 511, 514-15 (N.D. Ill. 1964). The plaintiff's design patent and copyrights were unenforceable because he had made prior misrepresentations to the court and the copyright office about prior publications, and to the public through fraudulent advertising.

<sup>34</sup> *Ideal Toy Corp. v. J-Cey Doll Co.*, 290 F.2d 710, 711 (2d Cir. 1961). The plaintiff was granted an injunction against the infringing defendant on a copyrighted doll with a distinctive head despite the claim that the doll's body had been previously published without copyright notice, and the plaintiff's copyright notice on the torso of the new doll, therefore, was an attempt to extend protection to the torso, rather than the whole doll, and constituted a fraud upon the public.



If a publication be of an immoral, indecent, seditious, libellous, or irreligious nature, there can be no copyright. The labor expended on a work of this nature is not labor in respect of which a right of property can exist. Upon an analogous principle no copyright exists in a book, though its contents be innocent, which purports falsely to have been written by an author of reputation, and seeks . . . [intentionally] to defraud the public and make a profit by a false representation.<sup>35</sup>

Kerr, therefore, states that copyright simply does not exist in such fraudulent works. The courts continue, however, to apply the clean hands doctrine of equity to deny enforcement, while recognizing the existence of copyright. This irony underscores the conflict which exists in the administration of copyright law. It is noteworthy that Kerr uses the *Wright* case based on fraud to support the other bars to copyright which he enumerated.

A more recent copyright commentator narrows the scope of the clean hands doctrine by stating that the transgression by the plaintiff must be of serious proportions and relate directly to the subject matter of the infringement action before the courts will apply the doctrine and deny protection.<sup>36</sup>

Despite this apparent fear by the courts to confront the fraud in copyrighted works, there is a pervasive theme throughout the case law that suggests that works which defeat the purpose of copyright law by defrauding, rather than benefiting, the public should not be protected from infringement. The courts have used the clean hands doctrine to accomplish this purpose. Not all courts have followed this theme, however, and, absent any clear authority which states that copyright does not exist in fraudulent material, the question remains unsolved. Analogies to other areas of copyright law and to the handling of fraud in trademark and patent cases, therefore, may offer insights and guidelines for solving this issue.

#### B. *Immorality and Illegality in Copyright Analogies*

No specific statutory authority exists for denying copyright protection to works which are immoral or illegal, but the case law abounds with instances where, in the interest of benefiting the public, courts have denied such protection. The rule of law generally used is:

The publication of an immoral, seditious, blasphemous, or libellous

---

<sup>35</sup> W. KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY, 452 (American ed. 1871) (footnotes omitted).

<sup>36</sup> 2 M. NIMMER, *supra*, note 5, at § 149.2.

work, is looked upon as unlawful; and for that reason it has been held that such a work cannot be the subject of statutory copyright. Hence, when the author has published a work of this kind, he is powerless to prevent any other person from republishing it, and he is not entitled to recover for damages sustained through loss of profits by such unauthorized publication.<sup>37</sup>

### 1. Obscenity and Immorality

The cases dealing with immorality can be divided into two groups: those which offend public decency with obscenity and those which are used for immoral purposes. In the first group copyright protection has been denied for the infringement of a book which the court found to be highly indecent and slanderous;<sup>38</sup> for the infringement of a dramatic composition which the court found to be "grossly indecent, and calculated to corrupt the morals of the people";<sup>39</sup> for the infringement of a song whose verse was held to be indelicate and vulgar;<sup>40</sup> for the infringement of a performance containing moving pictures of a woman making quick costume changes and exhibiting portions of her anatomy which the court found to be lascivious and immoral;<sup>41</sup> and for the infringement of movies which the court found to be indecent and disgusting.<sup>42</sup> In an English case, the court stated in dictum that indecent films would have been equally disentitled to protection of the court because of their offensive character.<sup>43</sup> As this discussion indicates, the courts have been quick to deny copyright pro-

---

<sup>37</sup> E. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 112 (1879) [hereinafter cited as DRONE]. See also COPINGER, *supra* note 9, at § 224, where he uses the words, "libellous, immoral, obscene, or irreligious" to describe works not protected as a matter of public policy.

<sup>38</sup> Stockdale v. Onwhyn, 108 Eng. Rep. 65 (K.B. 1826). Abbott, C.J. stated: "In order to establish such a claim, he must, in the first place, shew a right to sell; for if he has not that right, he cannot sustain any loss by an injury to the sale. Now I am certain no lawyer can say that the sale of each copy of this work is not an offense against the law." *Id.* at 176, 108 Eng. Rep. at 66.

<sup>39</sup> Martinetti v. Maguire, 16 F. Cas. 920, 922 (No. 9,173) (C.C. Cal. 1867). The court stated: "Now, it cannot be denied that this spectacle of the Black Crook only attracts attention as it panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person." *Id. Accord*, Shook v. Daly, 49 How. Pr. 366 (N.Y. Super. Ct. 1875).

<sup>40</sup> Broder v. Zeno Mauvais Music Co., 88 F. 74 (C.C.N.D. Cal. 1898). The vulgarity involved the word *hottest* as used in the song verse, "She's the hottest thing you ever seen." *Id.* at 79.

<sup>41</sup> Barnes v. Miner, 122 F. 480 (C.C.S.D.N.Y. 1903). The court stated: "Society may tolerate, and even patronize, such exhibitions, but Congress has no constitutional authority to enact a law that will copyright them, and the courts will not degrade themselves when they recognize them as entitled to the protection of the law." *Id.* at 492.

<sup>42</sup> Bullard v. Esper, 72 F. Supp. 548 (N.D. Tex. 1947).

<sup>43</sup> Glyn v. Western Feature Film Co., [1916] W.N. 5.

tection where the copyrighted work offends public decency. The major problem with this analogy is that changing social standards of morality result in fluctuating definitions of obscenity. The criteria used to assess morality in one year are obsolete in the next year.<sup>44</sup> The analogy is not lost, however, since the motivation of the courts in these obscenity cases was a protection of the public interest. Protection of the public interest was the same motivation used in copyright fraud cases, and is entirely in keeping with the intent of the Copyright Act to benefit the public.

The second group of immoral works deals with those things which are used for immoral purposes. The rule in this situation is best stated in *Richardson v. Miller*<sup>45</sup> where the court said that in order to deprive a work of its protection under law, "it must appear either that there is something immoral, pernicious, or indecent in the things per se, or that they are incapable of any use except in connection with some illegal and immoral act."<sup>46</sup> *Richardson* involved the infringement of a copyright on playing cards. Despite the assertion by the defendant that playing cards have only the immoral and illegal use for gambling, the court upheld the copyright since playing cards also have a legitimate use. A similar result was attained in two other cases wherein form charts of data about race horses and trotting horses were found to have a legitimate purpose besides the obvious immoral one.<sup>47</sup> In a later case,<sup>48</sup> however, the court refused to give copyright protection to a card which was allegedly infringed since it was used exclusively in theaters to conduct lotteries during intermission. Thus, it is apparent that immorality associated with the use of a thing may be the cause for the denial of copyright protection.

## 2. Libel, Sediton, and Blasphemy

Cases involving illegality as a cause for denial of copyright primarily deal with something in the content of the work which could create a disturbance of the public peace. Here again the courts are primarily concerned with the public interest, as intended by the Copyright Act, rather than the interests of the

---

<sup>44</sup> See Rogers, *Copyright and Morals*, 18 MICH. L. REV. 390, 398 (1920), and Comment, *Immorality, Obscenity and the Law of Copyright*, 6 S. DAK. L. REV. 109, 115 (1961).

<sup>45</sup> 20 F. Cas. 722 (No. 11,791) (C.C. Mass. 1877).

<sup>46</sup> *Id.* at 723.

<sup>47</sup> *Egbert v. Greenberg*, 100 F. 447 (C.C.N.D. Cal. 1900) involved form charts of past performances of race horses which in theory could be used by breeders and trainers; *American Trotting Register Ass'n v. Gocher*, 70 F. 237 (C.C.N.D. Ohio 1895) involved lists of trotters and pacers with a certain speed or better.

<sup>48</sup> *Kessler v. Schreiber*, 39 F. Supp. 655 (S.D.N.Y. 1941).

parties in litigation. These cases may be viewed in three groups: libel, sedition, and blasphemy.

An early English libel case<sup>49</sup> involved an action to restrain the defendant from publishing the plaintiff's works in violation of an agreement between them. Lord Eldon withheld an injunction until he was satisfied that the works were not libelous, stating a rule that equity should not offer relief until it is proved that an action at law will lie.<sup>50</sup> This opinion has been severely criticized as creating the doctrine that judges must screen all material for which injunctions are sought to determine if there is a right to an action at law.<sup>51</sup> The denial of legal protection for libelous works was demonstrated in a later English case, *Du Bost v. Beresford*.<sup>52</sup> Though not dealing with copyright, *Du Bost* involved the destruction of a painting in public exhibition which the defendant claimed was a libel. The court restricted damages to the value of the canvas and paint claiming that the picture had no legal value as a work of art.

The major concern in sedition cases, as with libel, has been the disturbance of the public peace by the publication of a work which may expose the government to peril or serious embarrassment. In such instances, the courts have been reluctant to grant copyright protection.<sup>53</sup> One early case<sup>54</sup> involved a song which satirized the system of justice in England by suggesting that the courts were corrupted by bribes. The song used the name of the chief cashier of the Bank of England, whose signature appeared on all bank notes, to infer that justice was not blind to money. In an action for piracy, the defendant argued that the song was a "nefarious libel upon the solemn administration of British justice,"<sup>55</sup> and the court stated that, "[i]f the composition appeared on the face of it to be a libel so gross as to affect the public morals, I should advise the jury to give no damages."<sup>56</sup> The court found, however, that this song was not so gross a libel. Another English case<sup>57</sup> involved a poem written, but not published by the author.

---

<sup>49</sup> *Walcot v. Walker*, 32 Eng. Rep. 1 (Ch. 1802).

<sup>50</sup> See Comment, *supra* note 44, at 110 and 111 n.6, for a discussion of *Dr. Priestley's Case* from which Lord Eldon extracted his rule.

<sup>51</sup> 10 LIVES OF THE CHANCELLORS 254 (5th English ed.), quoted in DRONE, *supra* note 37, at 183-85 n.1.

<sup>52</sup> 170 Eng. Rep. 1235 (N.P. 1810).

<sup>53</sup> DRONE, *supra* note 37, at 182.

<sup>54</sup> *Hime v. Dale*, 2 Camp. 27 n.(b), (M.T. 1803).

<sup>55</sup> *Id.* at 30 n.(b).

<sup>56</sup> *Id.* at 31 n.(b).

<sup>57</sup> *Southey v. Sherwood*, 35 Eng. Rep. 1006 (Ch. 1817).

It was later acquired and published by the defendant. When the author brought an action to restrain publication by the defendant, the court, in dictum, stated that no relief was forthcoming until the plaintiff proved that the publication was innocent since the defendant had asserted that the poem was seditious.

The sedition of libel required to deny copyright protection must be such as to justly threaten a breach of peace, or to interfere with the functions of government. In the United States, the first amendment protects satire, censure, and ridicule, and the court's interpretations of that amendment define the extent to which such works will be protected under law and, therefore, copyrightable without being seditious or libelous.<sup>58</sup> Libels on an individual are considered as an offense against society and treated in the same way.<sup>59</sup> It is noteworthy that the recurrent theme in the above discussed English cases is that copyright protection is based on the public interest and benefit.

The final group of cases involves blasphemy, an issue which was a crime against society in Great Britain. In 1822, three cases were decided in England and, in each case, the injunction to restrain publication of pirated works was denied or dissolved because the works were suspected of being contrary to the Scriptures.<sup>60</sup> The courts specifically stated that the law does not give protection to those who contradict the Scriptures. In the United States, however, where religious freedom is constitutionally guaranteed, such works would not cause a denial of copyright protection unless such works would interfere with the public order or undermine the public morals.<sup>61</sup>

### 3. The Analogy to Fraudulent Works

Early English case law supports the proposition that a

claim of copyright in a work of libellous, immoral, obscene or irreligious tendency will not be enforced . . . [and] the ground for refusal by the courts to intervene is that it is against public policy to protect rights of publication and sale of works, where publication and sale would be against the public interest . . .<sup>62</sup>

The same rationale should apply equally to fraudulent material since publication of such material is adverse to the public inter-

<sup>58</sup> 1 NIMMER, *supra* note 5, § 36 at 146.30.

<sup>59</sup> DRONE, *supra* note 37, at 185.

<sup>60</sup> *Lawrence v. Smith*, 37 Eng. Rep. 928 (Ch. 1822); *Murray v. Benbow*, 37 Eng. Rep. 929 (Ch. 1822); *Murray v. Dugdale*, 32 Eng. Rep. 2 (Ch. 1823).

<sup>61</sup> DRONE, *supra* note 37, at 195.

<sup>62</sup> COPINGER, *supra* note 9, § 224.

est. At least one authority, Howell, has included fraudulent with libelous, seditious, immoral, and indecent as the enumeration of works which are unprotected.<sup>63</sup> Such inclusion was based on reasoning that for a work to be entitled to copyright it must be "free from illegality or immorality."<sup>64</sup> Clearly, fraud is illegal. Ergo, although there is scant authority, by analogy to other forms of immoral and illegal works, it could be concluded that fraudulent works are not subject to copyright.

### C. *Fraud in Trademark and Patent Law*

Trademarks and patents are considered intellectual property along with copyrights. Patent law<sup>65</sup> derives its authority from the same source as copyright law.<sup>66</sup> Although trademark law<sup>67</sup> derives its authority from the commerce clause, there are sufficient similarities to make the analogy valid. The case law in both of these areas abounds with examples of the court's use of the clean hands doctrine to deny protection to one who has acted against the public interest. Here again the concern of the law is to benefit the public by granting limited monopolies to the authors and inventors whose creativity produced works of value to the public.

#### 1. Trademark Cases

As early as 1883, the Supreme Court denied protection in a trademark infringement case involving medicine which had fraudulent misrepresentations on its label.<sup>68</sup> A similar case involved a label which claimed the contents were "bottled at the spring" when in fact it was not. The court denied trademark protection for a misdescriptive label which was against the public interest.<sup>69</sup> A medicine with the trademark, "Syrup of Figs", was denied protection in an infringement action when the defendant proved that the plaintiff's constipation remedy actually contained no extract of figs.<sup>70</sup> The Supreme Court in that case refused

---

<sup>63</sup> A. LATMAN, *HOWELL'S COPYRIGHT LAW*, 45 (4th ed. 1962) [hereinafter cited as HOWELL].

<sup>64</sup> *Hoffman v. Le Traunik*, 209 F. 375, 379 (N.D.N.Y. 1913).

<sup>65</sup> Codified in 35 U.S.C. §§ 1 to 293 (1954).

<sup>66</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>67</sup> Act of July 5, 1946, ch. 540, 60 Stat. 427.

<sup>68</sup> *Manhattan Medicine Co. v. Wood*, 108 U.S. 218 (1883). The Court denied protection to a medicine which made a misrepresentation on its label as to the manufacturer and the place where it was manufactured declaring that the court of equity would not protect one who practices a fraud on the public.

<sup>69</sup> *Bear Lithia Springs Co. v. Great Bear Spring Co.*, 71 A. 383 (N.J. Ch. 1906).

<sup>70</sup> *Worden v. California Fig Syrup Co.*, 187 U.S. 516 (1903).

relief to the plaintiff because he was guilty of deceit and misrepresentations to the public. Two similar cases were cited therein. One involved a product label which advertised "fruit puddine", but no fruit was included in the ingredients.<sup>71</sup> The other involved a product claiming to be pure "pepper whiskey" but, in fact, was a mixture of several whiskies including inferior grades.<sup>72</sup> In both cases, the courts denied an injunction on the ground that the products were deceiving the public. In an 1897 case,<sup>73</sup> trademark protection was denied where the defendant produced a cigar with a similar label as that of a well-established cigar. The defendant argued that the label on the established cigar was deceiving since it claimed to be pure Havana tobacco, but, in fact, contained mostly tobaccos from other sources. The court, though finding the defendant guilty of unfair competition, refused to aid the plaintiff who was guilty of making materially false statements in connection with the property he sought to protect. Thus, the courts have been unwilling to protect one who has abused his trademark privilege by making fraudulent misrepresentations to the public. In an attempt to protect and benefit the public, courts have utilized the same clean hands doctrine to refuse to grant injunctions and damages as was used to deny copyright protection in the immorality and illegality cases, and as used in *Stone*, the case involving copyright fraud. More recently trademark law has drawn closer to the copyright decisions by precluding registration of trademarks consisting of "immoral, deceptive, or scandalous matter."<sup>74</sup> This statutory authority offers protection of the public interest where copyright and patent statutory authority is still lacking, but the case law analogy is strong evidence that the public interest to be preserved is the same.

## 2. Patent Cases

In the patent area the clean hands doctrine is freely used to protect the public interest. Although the cases do not deal necessarily with fraud, the rationale has been to deny protection where abuse of the patent privilege has been detrimental to the public interest. Two cases involve an attempt by the manufacturer of a patented device to license the use of such device only to those consumers who agree to buy an unpatented product from that

---

<sup>71</sup> *Clotworthy v. Schepp*, 42 F. 62 (C.C.S.D.N.Y. 1890).

<sup>72</sup> *Krauss v. Jos. R. Peebles' Sons Co.*, 58 F. 585 (C.C.S.D. Ohio 1893).

<sup>73</sup> *Hilson Co. v. Foster*, 80 F. 896 (C.C.S.D.N.Y. 1897).

<sup>74</sup> 15 U.S.C. § 1052(a) (1970).

company.<sup>75</sup> The result is the use of a patent privilege to create a monopoly in an unpatented product. This abuse of the patent privilege was considered unclean hands by the Supreme Court which denied protection in the infringement action saying:

The grant to the inventor of the special privilege of a patent monopoly carries out a public policy adopted by the Constitution and laws of the United States, "to promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right . . ." to their "new and useful" inventions . . . . It equally forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant.

It is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest.<sup>76</sup>

The clean hands doctrine is not only used where the given privilege is abused, but also to protect the public interest from patents which do not benefit the public. Two cases, for example, involved infringement of patented devices which the court found to be used exclusively for gambling.<sup>77</sup> The courts refused patent protection because the devices were not "useful" as per the Constitution and were against the public policy since their only use was an immoral one. The courts did state that the patents would be upheld if a legitimate use was found for the devices.<sup>78</sup> This is similar to the copyright cases discussed above.

The clean hands doctrine has also been employed, in the public interest, where the conduct of the patentee has been deceitful or fraudulent. In *Keystone Driller Co. v. General Excavator Co.*<sup>79</sup> the plaintiff held a patent on a device used in ditch-

---

<sup>75</sup> *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942). The manufacturer of a patented salt dispensing machine required the licensees of the dispenser to use its salt tablets which were unpatented. The Court stated:

A patent operates to create and grant to the patentee an exclusive right to make, use and vend the particular device described and claimed in the patent. But a patent affords no immunity for a monopoly not within the grant . . . . and the use of it to suppress competition in the sale of an unpatented article may deprive the patentee of the aid of a court of equity to restrain an alleged infringement by one who is a competitor.

*Id.* at 491; *B.B. Chemical Co. v. Ellis*, 314 U.S. 495 (1942).

<sup>76</sup> *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 492 (1942).

<sup>77</sup> *Reliance Novelty Co. v. Dworzek*, 80 F. 902 (C.C.N.D. Cal. 1897); *National Automatic Device Co. v. Lloyd*, 40 F. 89 (C.C.N.D. Ill. 1889).

<sup>78</sup> The patent definition of immorality has undergone a transition similar to that in obscenity.

<sup>79</sup> 290 U.S. 240 (1933).



cutting machinery. The plaintiff discovered that the device had been previously used and experimented with by another. The plaintiff then went to this other person and colluded with him to assign his rights to the plaintiff so the plaintiff could prosecute an infringement action. The plaintiff suppressed the evidence of the prior use and, instead, claimed they were abandoned experiments. The court, after uncovering the misrepresentations of fact, denied relief stating that the plaintiff must have a good faith claim and come into equity with clean hands. A similar case was *International Biotical Corp. v. Associated Mills, Inc.*<sup>80</sup> wherein the plaintiff held a patent and a copyright, but made misrepresentations to the court and the copyright office, and to the public through his copyrighted material. Relief was denied on the grounds of the plaintiff's unclean hands and inequitable conduct.

Another principle case in this area was *Precision Instrument Manufacturing Co. v. Automotive M.M. Co.*<sup>81</sup> In that case the plaintiff attempted to enforce a patent which the plaintiff knew to be tainted by fraud and perjury. The plaintiff had entered into agreements to assign the patent rights to itself and to settle an interference proceeding to prevent revealing to the Patent Office the true nature of the patent claim. The Supreme Court refused to enforce this patent claim, stating:

These facts all add up to the inescapable conclusion that [the plaintiff] has not displayed that standard of conduct requisite to the maintenance of this suit in equity. That the actions of [the defendants] may have been more reprehensible is immaterial. The public policy against the assertion and enforcement of patent claims infected with fraud and perjury is too great to be overridden by such a consideration.<sup>82</sup>

The Court, in applying the clean hands doctrine to deny patent protection in this case, emphasized the public interest involved in such an application of the doctrine:

Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. . . .

---

<sup>80</sup> 239 F. Supp. 511 (N.D. Ill. 1964).

<sup>81</sup> 324 U.S. 806 (1945).

<sup>82</sup> *Id.* at 819.

. . . A patent by its very nature is affected with a public interest . . . . The farreaching social and economic consequences of a patent, therefore, give a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. The facts of this case must accordingly be measured by both public and private standards of equity. . . .<sup>83</sup>

### 3. The Analogy to Fraud in Copyright

Both trademark and patent law are concerned with the public interest, and where an individual threatens that public interest through fraudulent representations or fraudulent conduct, the courts have been quick to deny him any relief. The nature of either trademark or patent law is very akin to copyright law in this respect. Hence, the treatment of fraudulent material in each of these areas of the law should be analogous. The Supreme Court recognized such an analogy in *Morton Salt Co. v. G.S. Suppiger Co.*<sup>84</sup> stating:

It is the adverse effect upon the public interest of a successful infringement suit, in conjunction with the patentee's course of conduct, which disqualifies him to maintain the suit, regardless of whether the particular defendant has suffered from the misuse of the patent. Similarly equity will deny relief for infringement of a trademark where the plaintiff is misrepresenting to the public the nature of his product either by the trademark itself or by his label. [case citations omitted]; see also, for application of the like doctrine in the case of copyright, *Edward Thompson Co. v. American Law Book Co.*, 122 F. 922, 926; *Stone & M'Carrick v. Dugan Piano Co.*, 220 F. 837, 841-43. The patentee, like these other holders of an exclusive privilege granted in the furtherance of a public policy, may not claim protection of his grant by the courts where it is being used to subvert that policy.<sup>85</sup>

Despite the precedent set by previous copyright fraud cases, and the overwhelming parallels from immoral and illegal copyright cases, and even the strong analogies to fraudulent trademark and patent cases, the court produced a curious turnabout in *Belcher* by granting copyright protection to a work which was allegedly fraudulent. An analysis of the rationale of the court in *Belcher* is necessary to shed some light on this issue.

## II. ANALYSIS OF *Belcher v. Tarbox*

The issue in *Belcher* was the same issue which plagued earlier courts, that is, whether false and fraudulent material was the

---

<sup>83</sup> *Id.* at 815-16.

<sup>84</sup> 314 U.S. 488 (1942).

<sup>85</sup> *Id.* at 494.

subject of copyright protection or whether the equitable clean hands doctrine should be applied to deny such protection. The majority based its decision to grant copyright protection on three rationales. First, the majority stated, "There is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work."<sup>86</sup> As was indicated in the discussion above, no specific statutory authority exists to grant courts the power to review the content of any given work and then deny it copyright on the basis of such content. The constitutional authority granted to Congress requires that the protected works "promote the progress of science and the useful arts," but a literal application of this rule might destroy protection in many works now copyrighted.<sup>87</sup> In this respect, the majority is accurate in declining to deny protection on the basis of content. The dissent, however, points out that, despite a dearth of authority, the courts have frequently supported the spirit of the copyright law, the avowed purpose to benefit the public, and have denied protection to immoral or illegal works by using equity principles without, in fact, denying the copyright. By analogy, then, the court should protect the public interest by prohibiting protection of fraudulent works, absent statutory authority to do so.

Secondly, the majority states:

The gravity and immensity of the problems, theological, philosophical, economic and scientific, that would confront a court if this view [the use of the clean hands doctrine to deny protection] were adopted are staggering to contemplate. It is surely not a task lightly to be assumed, and we decline the invitation to assume it.<sup>88</sup>

This presents two issues. First the court is fearful of opening the floodgates of litigation. The majority assumes that adoption of a policy of censuring works to determine if they benefit the public will invite parties to bring actions to test the validity of a copyright. The dissent counters with the argument that such a fear is unfounded since only two cases have actually challenged the fraudulent content of a work in this century, *i.e.*, *Stone* and *Advisers*. Furthermore, it can be asserted that it is a weak court and weak argument that rejects the opportunity to seek justice in the face of an onerous task in terms of work volume. It is interesting to note, however, that the Attorney General recog-

---

<sup>86</sup> 486 F.2d at 1088.

<sup>87</sup> HOWELL, *supra* note 63, at 12. See also 1 NIMMER, *supra* note 5, § 3.2 at 6.7.

<sup>88</sup> 486 F.2d at 1088.

nized the inability of the Register of Copyrights to screen every application his agency receives because of the sheer volume of it.<sup>89</sup> If this administrative agency would encounter such problems, it is a fair argument that the courts would have the same problems. The second issue is that the courts would have to be prepared to listen to a great variety of cases. This would require: (1) that judges be knowledgeable enough in many areas to recognize fraud; and (2) that courts create a uniform and practical criterion for judging what is, and is not, fraudulent. This would indeed be a great burden on the courts, but not an insurmountable one. As the dissent points out, courts hear cases of fraud every day. Why should it be difficult or different to hear cases of fraud in copyright? On the other hand, such criteria are not so easily fixed. If the development of obscenity law in this country offers any indication, then changing social values result in changing criteria for assessing the social morality. This has been demonstrated in court decisions from the 19th century, where courts refused protection to indecent plays and books, to the present, where courts apply criteria like "utterly without social redeeming value" and "appealing to prurient interests."<sup>90</sup> Perhaps the analogy is overdrawn since fraud is a legal concept that is enduring while obscenity is a moral concept which changes with society. Or is fraud so enduring?

The third rationale of the majority is based on the intent of the Copyright Act. The majority expressed its concern for the public interest by seeking the best manner possible to protect that interest. The court states:

Copyright protection restricts permissible publication. We fail to see what public policy would be served by eliminating this restriction in the case of fraudulent matter and permitting it to be reprinted and circulated freely.<sup>91</sup>

This argument seems sound, but the dissent offers an equally sound counterpoint:

---

<sup>89</sup> 41 OP. ATT'Y GEN. 396 (1958). The opinion states:

The Register has advised me that facilities of the office make intensive screening of works presented practically impossible. It has a staff of some thirty-five examiners which receives more than 1,000 applications daily. Therefore, examinations of any more than the question whether the works involved meet the specific statutory requirements of the act may be regarded as not feasible administratively.

*Id.* at 401-02.

<sup>90</sup> See 1 NIMMER, *supra* note 5, § 3.2 at 6.7-6.8, and § 36 at 146.29; Comment, *supra* note 44, at 124-26. See also 41 OP. ATT'Y GEN. 396, 401 (1958).

<sup>91</sup> 486 F.2d at 1088 n.3

A copyright is in the nature of a privilege . . . Such a privilege should not be abused by granting copyright protection to material which is used to defraud the public . . .

. . . The public interest is to protect members of the public from being defrauded. While granting copyright protection of fraudulent material will assure that only one person will defraud members of the public with a single fraudulent scheme . . . it will not insure that any fewer members of the public will be defrauded by this single scheme. By allowing copyright protection to such material, the law is not only condoning fraud but is placing its power, endorsement and support behind fraudulent works.<sup>92</sup>

The majority suggests that the best way to serve the public interest is to grant the copyright protection against the infringer, while the dissent suggests that the public is benefited most by denying copyright protection to the deceiving author. This dichotomy between the majority and the dissent is based on differing views of the nature of copyrights. The majority views copyright in the nature of a restriction on publication and, therefore, seeks to promote the public interest by restricting publication of fraudulent material. The dissent, meanwhile, views copyright in the nature of a privilege to the author and, therefore, seeks to promote the public interest by denying the privilege to one who would abuse it by defrauding the public.

These divergent views leave a basic issue unresolved. If the purpose of copyright law is to encourage works which will benefit the public, and the purpose of the courts is to protect the public interest within copyright law, then how do the courts best serve that purpose? Should the court grant an injunction preventing the defendant from reproducing the plaintiff's work, and thereby encourage the plaintiff to defraud the public by granting him the court's endorsement, or should the court deny protection, and thereby encourage the defendant to freely reproduce the fraudulent work? Clearly the courts do not want to endorse a fraudulent scheme, but following the denial of an injunction in *Southey v. Sherwood*,<sup>93</sup> Lord Campbell commented, "So the injunction was refused; and hundreds of thousands of copies of Wat Tyler, at the price of one penny, were circulated over the kingdom."<sup>94</sup> This illustrates that a denial of copyright protection does not protect the public from dissemination of the material, but may in fact foster it. So, the dilemma remains. The purpose is to serve and

---

<sup>92</sup> *Id.* at 1090.

<sup>93</sup> 35 Eng. Rep. 1006 (Ch. 1817).

<sup>94</sup> 10 LIVES OF THE CHANCELLORS 257, (5th English ed.), quoted in DRONE, *supra* note 37, at 113 n.1.

protect the public interest, but there is no clear path. It might be said, therefore, that it is impossible to discern whether the court in *Belcher* adhered to the spirit of the Copyright Act and the Constitution by permitting copyright protection.

### III. IMPLICATIONS OF *Belcher*

*Belcher* does not represent a radical shift in the development of copyright law. Its result is not unlike that of *Advisers*. The importance of *Belcher*, however, stems from its value as a reminder that serious problems exist in copyright law to which no definite solutions have been made. Three related issues lurk behind this case and all similar cases. The first issue deals with the problem of using equity principles to solve copyright law questions. As was pointed out above, the courts have been reluctant to deny copyright in any work which was immoral or illegal. Instead, the courts have utilized the equitable clean hands doctrine to merely deny copyright protection to such works by refusing to grant an injunction or damages against the pirate of the work. This is done under the pretext of protecting the public interest. The clean hands doctrine, however, must be asserted as an affirmative defense before the court will act upon it. This is the irony. It is the defendant, guilty himself of pirating a work which he believed had sufficient value to earn him a profit, who asserts the affirmative defense of the plaintiff's unclean hands. Then the court punishes the plaintiff for having labored to create such an immoral or illegal work by denying the injunction, while the defendant continues to perpetrate the obscenity or fraud for profit. The court, of course, has acted in the public interest, but the defendant has not. One solution to this illogical inequity is that if equity is the game, it should be played both ways. The court, therefore, should also apply equitable principles to the conduct of the defendant who is guilty of piracy. If this were done, the defendant would then be estopped from asserting the affirmative defense of unclean hands against the plaintiff.<sup>95</sup> This solution, though equitable, is not satisfactory since the purpose of copyright law is to protect the public interest.

Another solution might be to stop using equity principles and simply deny the copyright to any such work, but this may be unsatisfactory because of the burden imposed by the need to screen every potential copyright work.

---

<sup>95</sup> Comment, *supra* note 44, at 111 n.8.

This leads to the second problematic issue. In any copyright case should judges sit as censors to determine what is immoral or fraudulent? This issue has raised much debate. Justice Story brought up the problem that every judge passing judgment on a work would be tempted to stifle the free exchange of new ideas if he found such views opposed to his own views.<sup>96</sup> Justice Holmes elaborated in *Bleistein v. Donaldson Lithographing Co.*<sup>97</sup> by explaining that judges censoring works might deny copyright to a work which might appeal to a public less educated than the judge, but which still had sufficient value to the public. Failure to grant such copyright would not serve the public interest and, therefore, be contrary to the intent of the Copyright Act.<sup>98</sup> If equity in copyright cases is inequitable, then who but the judges could determine the copyrightability of each published work? Yet

---

<sup>96</sup> 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 938 (5th ed. 1849).

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

*Id.* at 268.

<sup>97</sup> 188 U.S. 239 (1903).

<sup>98</sup> *Id.* at 251-52. The Court stated:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which the author spoke. 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. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.

*Id.* at 251.

under such a system, is there not the great peril that our coveted freedom of speech, the backbone of democracy, might be compromised by the natural biases of individual judges?

If equity fails and judicial censorship fails, then is there fault in the system? Yes. The problem lies in the fact that in all the cases wherein copyright is in issue, the action is brought by the plaintiff-author or publisher of the questioned work against the defendant-pirate who infringed such work. Yet, the court which purportedly sits as the mediator between these two litigants, in fact, sits as the representative of the public who joins in the action as a third party protecting its own interests. Rather than seeking justice as between the parties at bar, the court seeks only to protect the public interest, that trust which was granted in the Copyright Act. The result is that when the guilty defendant confesses his guilt but pleads that the work in question has a suspicious nature, the court, in its role as public protector, punishes the plaintiff for his sins against society. Then the defendant, guilty as he is, is rewarded for uncovering the plaintiff's crime. It is, therefore, the system which is at fault, and the *Belcher* case, with its majority and dissenting opinions, is nothing more than a representation of the struggles of the system attempting to deliver justice and protect the public simultaneously.

#### CONCLUSION

The purpose and intent of copyright law is to benefit the public, yet there is no statutory authority granting the courts the power to restrict or permit the copyright of fraudulent material. The case law offers no concrete precedent in this area, though by analogy to copyright of immoral or illegal works and analogy to fraud in trademark and patent law, the indication is that courts are reluctant to protect any work which tends to adversely affect the public interest. The problem with these precedents, however, is that the application of equity principles to copyright law unjustly permits one guilty party to continue his inequitable conduct while failing to provide the greatest public benefit. This problem results from the structure of copyright litigation which places the court in the dual role of mediator between the litigants and representative of the public interest. It is the system, therefore, which creates injustice. The conclusion is simple. The system must be altered in some way to allow the public, as its own representative, to bring to bar any author or publisher who seeks to perpetrate immorality, illegality, or fraud upon it. But where



the court is called upon to sit as arbitrator between an author and the pirate who is profiting from the author's labors, the court must seek only justice as between those individuals.

*Charles S. Kamine\**

---

\* It is intended that this paper will be submitted in the 1975 Nathan Burkan Memorial Competition.

