REVIEWS

PLAGIARISM AND ORIGINALITY. By Alexander Lindey. New York: Harper & Brothers, 1952. Pp. xv, 366. $5.00.

MR. LINDEY tells us that the purpose of his book is "not to convert laymen into amateur lawyers, but to make them—if they ever imagine themselves victims of piracy or if they're accused of the offense—knowledgeable and tractable clients."[1] In the opinion of this reviewer, the author has accomplished his purpose and indeed gone well beyond his mark. One might expect that a volume on plagiarism written by a lawyer would appeal only to a limited group—lawyers whose practice is largely concerned with protecting the rights of authors; and writers, publishers, and producers of such entertainment enterprises as plays, motion pictures, and radio and television programs. It was a pleasant surprise, however, to find here a book that will hold the interest of anyone, whether lawyer or layman. The author's literary style may be judged by his analysis of the subject of "fair use" of copyrighted works. Answering the oft-advanced contention that one may escape a charge of plagiarism by citing the source, the author remarks, "If you poach on private property, you can't purge yourself of trepass by tipping your hat to the property owner."[2]

The author's selection of quotations from legal opinions likewise shows an appreciation of style as well as content. There are copious quotations from the opinions of Judge Learned Hand, who has been "chiefly responsible for expounding and crystallizing the law pertaining to literary theft during the last few decades."[3] These quotations are invariably both good law and good reading for the student of literature. It is hoped that the readers will be tempted to refer to the full opinions in each case; for in any volume in which Judge Hand's opinions may be collected in the future, those on plagiarism are sure to command unusual attention as both legal and literary gems.

A study of plagiarism must necessarily begin with a discussion of originality. The approach must be practical rather than formally legalistic. As Judge Yankwich has pointed out, "[O]riginality is at the basis of the recognition of the rights of the author. It is the measure and boundary of protection. And the problem must be considered from the practical standpoint in any case involving literary property, whether we are determining the copyrightability of material or infringement."[4]

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1. P. xiii (Foreword).
2. P. 11.
3. P. 7.
4. Yankwich, *Originality in the Law of Intellectual Property (Its Meaning from a Legal and Literary Standpoint)*, 11 F.R.D. 457 (1952).

The concept of originality changes from time to time. Mr. Lindey observes: "Ours is an age of self-assertion. To quote Professor Babbitt, in the days of Pope a man made his bid for fame by polishing a commonplace; nowadays he does so by launching a paradox. Where yesterday a person of real originality stood in danger of being accounted freakish, today many a freak passes for original."[5]

The author delves into literary history to demonstrate the extent to which the masters of literature have relied on the writings of their predecessors for inspiration. This subject has been covered more completely in other works, such as Paull's *Literary Ethics* (1928); but Mr. Lindey's choice of examples shows a high degree of selection. When others have said things in a style that cannot easily be improved upon, Mr. Lindey does not hesitate to quote them. Concerning Milton's borrowings, he lets Mr. Hadden tell us:

> "The lilt of old songs was in his ears, the happy phrases of the old poets, the jewels five words long from old treasures. He had the opulent memory of the profound student, and these things crowded thickly into his thought with each new suggestion from without."[6]

His authority for Benjamin Franklin's use of materials in the common storehouse is Carl Van Doren:

> "Poor Richard was anything but poor when it came to literary pickings. Dryden, Pope, Prior, Gay, Swift, Bacon, de la Rochefoucauld, Rabelais—he combed them all. He claimed as his own a translation of *De Senectute* done by Logan. 'The rustic philosopher,' says Carl Van Doren, 'drew also on the stream of popular adages, whether already gathered into printed collections or still only current in ordinary speech. In this profusion and uncertainty of sources Poor Richard never hesitated to rework his texts to suit his purpose and his audience.' As an example of Franklin's method with his sources Van Doren cites how the *Pantagruelian Prognostication* in the Urquhart-Motteux version of Rabelais became *True Prognostication* in the 1739 Almanac—a neat bit of adaptation which bears witness to the sharpness of Franklin's eye for usable material, no less than to his adroitness in reshaping it."[7]

In his chapter on Literary Property and Copyright, Mr. Lindey reminds us that literary property is a relatively new concept in our law. He cites Blackstone to support the thesis that the earliest notions of property were limited to real estate, and that our first legislators "entertained a low opinion of all personal estate, which they regarded as transient property."[8] Naturally, the concept of property in the written word could not develop until the invention of printing. And a class of professional authors could not exist until their out-

5. P. 19.
6. Hadden, *Plagiarism and Coincidence*, 27 THE SCOTTISH REV. 336 (1895).
7. P. 92, referring to VAN DOREN, BENJAMIN FRANKLIN 112-3 (1938).
8. P. 96.

put was protected as being their property. This reviewer had occasion to discuss that subject in this JOURNAL.[9]

The author makes no attempt to establish an infallible yardstick of the permissible bounds of appropriation. He accepts Judge Hand's statements in the *Abie's Irish Rose case:*[10]

> "If *Twelfth Night* were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shapespeare's 'ideas' in the play, as little capable of monopoly as Einstein's 'Doctrine of Relativity' or Darwin's 'Theory of the Origin of Species.' It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."[11]

From another opinion of Judge Hand, Mr. Lindey reminds us that infringement suits are frequently brought "without shadow of merit," that "the finest gossamers of similarity" are resorted to in support of such a suit. Said the court, "The prizes are large: the security of the foundation often seems to be in inverse proportion."[12]

The author analyzes the inferences to be drawn from similarity in works from Homer to Milton and from Ben Johnson to the present. He correlates this historical approach with chapters on similarity and originality. The ethical and psychological aspects of plagiarism are also presented. But, in the main, Mr. Lindey's book is a review of cases of plagiarism in separate chapters devoted to books and magazines (c. 9); plays (cc. 10 and 11); motion pictures (c. 12); art (c. 13); music (c. 14); and other fields of creative endeavor. Through these cases, the author develops the various patterns of thought on the subject of plagiarism: (1) A certain amount of similarity between artistic works is inevitable. (2) Literary borrowing of themes rather than the particular form in which a theme is treated is not to be condemned. (3) Parallels between works should be warily regarded in infringement suits inasmuch as they are so readily susceptible to manipulation. (4) Creators who have achieved success are bound to be targets for nuisance suits. (5) Plagiarism actions are all too frequently unfounded. (6) Courts should not be reluctant to dispense summary relief in disposing of plagiarism suits which are patently unfounded.

The subject of expert testimony in plagiarism cases is a fascinating one. Experts are always used to establish or deny plagiarism. The author is content to cite Judge Hand's hope that such witnesses might be entirely excluded,[13]

9. Finkelstein, Review, 48 YALE L.J. 712, 713 (1939).
10. Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).
11. *Id.* at 121.
12. Rosen v. Loew's, Inc., 162 F.2d 785, 788-9 (2d Cir. 1947).
13. P. 261.

but we are not helped with a discussion of the pros and cons. This subject should prove most interesting—especially to lawyers, professors of literature (often used as experts), and others who may play a part in plagiarism litigation.

Mr. Lindey's suggestions for revisions of the Copyright Act[14] are noteworthy. One suggestion was before Congress when the book was written, and has since been enacted. Copyright owners of non-dramatic literary works were not accorded, under the 1909 Act, the exclusive right to record or to perform their works publicly for profit. This was remedied by the Bryson bill which became law on July 17, 1952, and which will take effect on January 1, 1953.[15] The author also makes certain suggestions regarding the requirement of domestic manufacture of books. A bill seeking the repeal of this provision as applied to foreign works failed of passage at the last session of Congress.[16] The subject will come up again in considering the Universal Copyright Convention adopted at Geneva on September 6, 1952.

In a review of a book which, as we have said, is directed primarily to the layman, it may perhaps be inappropriate to dispute the author's use of certain legal phrases. However, the author falls into the error of calling a copyright a "legalized monopoly" and thereafter argues that it should be carefully circumscribed because, says he, "monopoly and liberty are essentially incompatible."[17] This ignores the fact that a copyright does not give the author any right to prevent others from using his *ideas*. Only the means of expressing those ideas is protected. And then the protection is merely against *copying*. Any member of the public who without copying formulates the same method of expressing ideas as that embodied in the copyrighted work is entitled to a separate copyright on his creation. As Judge Hand said in a famous motion picture plagiarism suit, "[I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's."[18]

Patents, unlike copyrights, are indeed monopolies because the patentee may bar anyone else from using his invention even though the newcomer arrived at his "discovery" wholly independently. As we have seen, this is not true of copyrights. This distinction should never be overlooked.[19]

In keeping with the author's endeavor to appeal to the lay reader, the text is not interrupted by footnotes, although there are references to notes which

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14. Pp. 274-6.

15. Pub. L. No. 575, 82d Cong., 2d Sess. (July 17, 1952), amending 17 U.S.C. § 1 (Supp. 1952).

16. H.R. 4059, 82d Cong., 1st Sess. (1951), introduced by Congressman Celler, May 10, 1951.

17. P. 276.

18. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936).

19. This reviewer has discussed this subject at greater length in 7 CCH, COPYRIGHT PROBLEMS ANALYZED 70 (1952).

may be found at the end of the volume. In locating the appropriate notes, however, the reader is handicapped because the notes are arranged by chapter number only, without referring to the various chapter headings which appear on each page. As a result, when the reader wishes to find the source of a quotation he must turn the pages back to find the number of the chapter he is reading before turning to the notes at the end of the book. This requires two excursions, where even a single one is often discouraging. After a few such experiences the reader dispenses with the valuable source material which the book contains. This fault, it seems, could be easily remedied in a subsequent edition, which the work certainly merits.

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PLEADING AND JOINDER, CASES AND STATUTES. By William Wirt Blume and John W. Reed. New York: Prentice-Hall, Inc., 1952. Pp. xviii, 684. $8.00.

THIS book is designed for use in an introductory procedure course. I should find it hard to review such a book without trying to think through and state my notions of what the objectives of a beginning course in procedure should be. This ought to help the reader appraise the review and the reviewer as well as the book, and this is as it should be.

To my mind such a course should include a broad and fairly philosophical analysis and evaluation of the objectives of legal procedure itself—its relationship to the meting out of justice according to the rules of substantive law; the concept of procedural justice or fairness; the kinds of problems that have been injected into the quest for procedural and substantive justice by the shortness of life and practical limitations upon available resources; the kinds of solutions that have been found for these problems; the recurring patterns of reasoning about them; something of the history and the trends of these solutions; and an appraisal of them in terms of objectives. The teaching of the detailed procedural system of any one jurisdiction (even the federal system) as a crystallized set of rules, I should think unimportant. Yet I should give close attention to the details of the cases, statutes, and rules chosen by the authors for treatment, in order to equip students with the vocabulary; to train them in the use of close reasoning and attention to detail; and to teach them the argumentative techniques which every lawyer needs, whether his role be that of practitioner, judge, or reformer. This examination should include a study of the tactical considerations facing the parties in the various situations taken up in the course. Only thus, I think, can analysis and appraisal of the broader problems be made concrete and meaningful.

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