CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL AND ARTISTIC WORKS. By Benjamin Kaplan * and Ralph S. Brown, Jr. ** Brooklyn: The Foundation Press, 1960. Pp. xxxvi, 750.

As a prominent lawyer for a literary group commented when I asked his opinion of this volume, "It is the handiest single volume for a busy lawyer who wants most of his authorities at his fingertips." For the law student, here is more than a collection of decisions for a particular course— it is living proof that the law is interesting, that judges are literate, and that the courts interpret the law in the light of scientific advances and changing methods of mass communication. One is tempted to suggest that the book would make a fitting companion piece to Ephraim London's fascinating volumes on "Law *in* Literature" and "Law *as* Literature."[1] This volume might be called "Law *of* Literature."

Conscious of the obligation to stimulate the student blessed with an inquiring mind, the authors have presented in the frontispiece a photograph of that most inquiring mind among legal scholars, Professor Zechariah Chafee. There is another portrait—of Judge Learned Hand,[2] beneath which appears George Wharton Pepper's observation that Judge Hand's opinion in the *Letty Lynton* case[3] "exhibits craftsmanship at its best and is entitled to be ranked as a model of judicial style." In this volume, more than a dozen of that great jurist's opinions are set out in full or in part. There is also a liberal sprinkling of Holmes, J., and references to such outstanding background sources as Holdsworth's *History* and Birrell's famous *Lectures on the Law and History of Copyright in Books.*

Perhaps the best way to review this volume is to examine some of the opinions.[4] Kaplan and Brown have selected their cases wisely. The opinions not only expound the law of literary property ably; they are excellent examples of legal style as well. All instructors who use this book in their courses should emphasize the importance of writing in a clear and interesting manner; but the subject of literary property presents a unique opportunity to view law as literature while gaining an insight into the development of law by the masters of the twentieth century.

Of necessity, the volume contains discussions which view literary rights as sometimes based on concepts of "property" and sometimes on concepts of "monopoly." And though these terms have been used interchangeably for many purposes, they may produce contrasting legal consequences depending upon

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1. LONDON, THE WORLD OF LAW (2 vols. 1960).

2. Opposite p. 252.

3. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

4. For a more detailed discussion of this work see Professor Walter J. Derenberg's excellent review in 14 J. LEGAL ED. 410 (1962). I shall try to avoid duplication of the ground he has already covered.

whether one term or the other is used as a starting point. As Birrell cautioned more than a half century ago:

> If your right to turn your neighbor off your premises—to keep your things to yourself—was *property*, and therefore *ex hypothesi* founded on natural justice, he who sought to interfere with your complete dominion was a thief or a trespasser, but if your rights were based upon some special concession made to you upon your own merits, you then found yourself dubbed a monopolist, and the brave man who sought to get the better of you was, at the worst, an *infringer* or smuggler. Monopoly is always an odious word. Property is still a sacred one.[5]

Analysis is also blurred when the ugly fact of *forfeiture* of rights (which occurs upon publication without a proper copyright notice) is disguised by calling it a "dedication" or "abandonment." In reversing a lower court because of the "confusion" resulting from this "misnomer," Judge Hand cautioned that " 'dedication,' like 'abandonment,' presupposes an intentional surrender, which is in no sense necessary to the 'forfeiture' of a copyright."[6]

The law has had to keep pace with modern revolutionary developments in the means of communicating the thoughts of an author, which even transcend Gutenberg's remarkable invention. In the span of a single lifetime there have been such startling advances as the phonograph, motion pictures (silent and sound), radio, and television. Even now we can only dream about the possibilities of Telstar. Yet it may compel the universal adoption of a single system of copyright protection.[7]

What is the legal effect of these successive inventions upon prior contracts involving literary properties which take on new values with each new scientific advance? In the words of Judge Hough, as between the parties to a contract granting certain rights in a copyrighted work, courts are called upon to decide who is entitled to the "accretion or unearned increment conferred . . . upon the copyright owners by the ingenuity of many inventors and mechanicians."[8] This brings to mind Mr. Justice Frankfurter's admonition to his Harvard students that the most important law reformer of the 18th and 19th centuries was not Blackstone or Mansfield or Jeremy Bentham, but rather Watt, the inventor of the steam engine.[9] So, the greatest contributors to the developing law of copyright in the present century were Thomas A. Edison of phonograph and motion picture fame, and Lee De Forest, Armstrong, and other inventors of our present radio and television systems.

As the authors point out, Holmes in 1894 wrote Sir Frederick Pollock that he had "often thought of writing about a page on copyright," saying "The notion that such a right could exist at Common law or be worked out by it

5. P. 42.

6. National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 598 (2d Cir. 1951).

7. Radio-Television Daily, Nov. 16, 1962, p. 1, reports:
The advent of worldwide TV via Telstar, cable and other technical developments has prompted British and American video screen scribes to lay the foundation stone of a global Federation of Writer Guilds.

8. Harper Bros. v. Klaw, 232 Fed. 609, 613 (S.D.N.Y. 1916).

9. FELIX FRANKFURTER REMINISCES 233 (1960).

seems to me imbecility."[10] Holmes could not know then that he was to be the victim of a formalistic approach to copyright in later trying to protect his rights, as executor, in his late father's *Autocrat of the Breakfast Table*.[11]

Holmes had occasion to write opinions extending the scope of copyright protection (reversing the lower courts) in two landmark cases, the first holding that circus posters may be protected as works of art;[12] the second holding that a performance of a musical composition at a hotel was a "public performance for profit" even though no admission fee was charged.[13] His chance to write the "page on copyright" came in a concurring opinion in *White-Smith Music Publishing Co. v. Apollo Co.*[14] Here he explains why copyright, as we know it, could not develop at common law. Orthodox concepts of property, he pointed out, were related to physical things which could be possessed and from which others could be physically excluded. "But in copyright," he observed, "property has reached a more abstract expression."

> The right to exclude is not directed to an object in possession or owned, but is *in vacuo*, so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, it is one which hardly can be conceived except as a product of statute, as the authorities now agree.[15]

Kaplan and Brown are at home with their subject. They delight in reminding us, as did such scholars as Story[16] and Scrutton,[17] that the subject of copyright approaches "what may be called the metaphysics of the law."[18] Perhaps one reason for this is the difficulty of explaining that copyright is not inconsistent with, but actually fosters, what Judge Hand calls "the commonwealth of scholars who open their discoveries to the world that there may be

10. P. 51.

11. Holmes v. Hurst, 174 U.S. 82 (1899); p. 103.

12. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903); p. 162.

13. Herbert v. Shanley Co., 242 U.S. 591, 594 (1917); p. 424.

14. White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 18 (1908). Mr. Justice Holmes pointed out that "one is freer and more personal [when writing opinions for himself alone, as in dissents] than when one is speaking for others as well as for oneself." 1 HOLMES-LASKI LETTERS 68 (1953).

15. White-Smith Music Publishing Co. v. Apollo Co., *supra* note 14, at 19. Mr. Justice Holmes then gives this definition of a musical composition, which an eminent musicologist tells us "has no parallel in all of musical literature":

> A musical composition is a rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without continuous human intervention. On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or if the statute is too narrow ought to be made so by a further act, except so far as some extraneous consideration of policy may oppose.

Id. at 19-20.

16. Folsom v. March, 9 Fed. Cas. 342, No. 4901 (C.C.D. Mass. 1841).

17. SCRUTTON, LAWS OF COPYRIGHT 1 (1883).

18. P. xiii.

no monopoly of learning."[19] Unfortunately, a book review does not afford an opportunity to discuss this subject at length.

The atmosphere in which a plagiarism suit is tried is captured in the opinions selected by the authors. Often such a suit is more like that of a proceeding involving custody of a child than like a contest over property rights. A notable example is the *Kalua* case brought by Fred Fisher, composer of "Dardanella," against Jerome Kern, composer of "Kalua"—a case which Judge Learned Hand characterized as "a trivial pother" and "a mere point of honor, of scarcely more than irritation, involving no substantial interest," remarking that "Except that it raises an interesting point of law, it would be a waste of time for everyone concerned."[20] Although finding that Kern had unconsciously copied, but nevertheless infringed, the accompaniment to "Dardanella," the court refused to make any allowance for counsel fees, commenting, "Such victories I may properly enough make a luxury to the winner." Kern's biographer, without making any pretense of understanding the judicial process, ventures "that one of the reasons Kern lost the case was because of his uncontrolled temper and acidulous remarks as a witness, which prejudiced the court against him."[21]

It is small wonder that judges speak of the zeal with which plaintiffs present "actions without shadow of merit"[22] and comment that "[i]n copyright we have become accustomed" to such actions.[23] My own favorite is a *per curiam* opinion (L. Hand, Swan, and Clark JJ.) affirming the dismissal of a plagiarism suit, in which the court observed that unsuccessful playwrights seem to be "commonly obsessed, with the inalterable conviction that no situation, no character, no detail of construction in their own plays can find even a remote analogue except as the result of piracy. 'Trifles light as air are to the jealous confirmations strong as proof of holy writ.' "[24]

The opinions in the section on infringement are literary gems.[25] As examples, let us look at two delivered by Judge Learned Hand—one, where the charge of plagiarism was dismissed; the other, where it was sustained. The first was a suit by Anne Nichols charging that her play "Abie's Irish Rose" was infringed by Universal Pictures' "The Cohens and the Kellys."[26] Plaintiff was represented by Moses L. Malevinsky who had written a learned treatise asserting that there was an "Algebraic Formula" under which "two or more plays may be paralleled, squared and plumbed, with the certainty of

19. Hand, *Remarks at the Harvard Tercentenary Observance*, 39 HARV. ALUMNI BULL. 89 (1936).

20. Fred Fisher, Inc. v. Dillingham, 298 Fed. 145, 152 (S.D.N.Y. 1924).

21. EWEN, THE WORLD OF JEROME KERN (1960).

22. Rosen v. Loew's, Inc., 162 F.2d 785, 788 (2d Cir. 1947).

23. *Ibid.*

24. Christie v. Cohan, 154 F.2d 827, 828 (2d Cir. 1946). The quotation, of course, is from *Othello* III, 3. Obviously a chestnut of Judge Hand's, he had previously used it in part in Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 277 (2d Cir. 1936).

25. Pp. 245-331.

26. Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

an engineer's T, so that the understanding mind may be able to say with absolute assurance that two or more plays *are* or *are not* the same."[27] Judge Hand was not impressed. He criticized the extensive use of expert testimony as encumbering the record with argument, going so far as to suggest that "It ought not to be allowed at all . . ., for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal."[28]

The next decision in the volume involved a charge by Edward Sheldon, the famous blind playwright, and Margaret Ayer Barnes, Pulitzer Prize winner, that their play "Dishonored Lady" was infringed by the motion picture, "Letty Lynton." Both works were based on a famous murder trial—the Trial of Madeleine Smith, reported in the Notable British Trials series. Defendant had negotiated with plaintiffs for the motion picture rights in their play, which had starred Katherine Cornell, but the Will Hays office (which then served the motion picture industry as guardian of the morals of pictures) would not approve use of the original title. Defendant then bought the rights in the novel "Letty Lynton," which was also based on the Madeleine Smith trial, and made a motion picture called "Letty Lynton," starring Joan Crawford. Judge Woolsey's dismissal of the charge was reversed by a unanimous court.[29] Judge Learned Hand's opinion should be read from beginning to end, for it is not only, as Pepper states,[30] an example of legal writing at its best, it also shows an understanding of the playwright's craft which teaches lawyers and judges how to evaluate and try a charge of plagiarism. After reminding us that evidence of prior art is not material unless it is shown that plaintiff actually used it,[31] the opinion continues:

> The defendants appear not to recognize this, for they have filled the record with earlier instances of the same dramatic incidents and devices, as though, like a patent, a copyrighted work must be not only original, but new. That is not however the law as is obvious in the case of maps or compendia, where later works will necessarily be anticipated. At times, in discussing how much of the substance of a play the copyright protects, courts have indeed used language which seems to give countenance to the notion that, if a plot were old, it could not be copyrighted. [Citing cases.] But we understand by this no more than that in its broader outline a plot is never copyrightable, for it is plain beyond peradventure that anticipation as such cannot invalidate a copyright. Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an "author"; but if 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

27. MALEVINSKY, THE SCIENCE OF PLAYWRIGHTING 41 (1925).

28. Nichols v. Universal Pictures Corp., 45 F.2d 119, 123 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

29. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

30. See text accompanying note 3 *supra*.

31. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 53 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

> copy Keats's. [Citing cases.] But though a copyright is for this reason less vulnerable than a patent, the owner's protection is more limited, but just as he is no less an "author" because others have preceded him, so another who follows him, is not a tort-feasor unless he pirates his work. [Citing cases.] If the copyrighted work is therefore original, the public demesne is important only on the issue of infringement; that is, so far as it may break the force of the inference to be drawn from likenesses between the work and the putative piracy. If the defendant has had access to other material which would have served him as well, his disclaimer becomes more plausible.[32]

Mountains of words have been piled up as to whether a work may be infringed without taking an author's actual language. It remained for Judge Hand to cut away all irrelevant considerations. Pointing out that pantomime may constitute drama and may be infringed without taking any words, he adds:

> Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause, may tell the audience more than words could tell. To be sure, not all this is always copyrighted, though there is no reason why it may not be, for those decisions do not forbid which hold that mere scenic tricks will not be protected. [Citing cases.] The play is the sequence of the confluents of all these means, bound together in an inseparable unity; it may often be most effectively pirated by leaving out the speech, for which a substitute can be found, which keeps the whole dramatic meaning.[33]

The volume also discusses at some length the place of copyrighted music[34] in our national economy, setting forth, in the first section, the leading cases on the right of "public performance for profit," and in the second, the "Organization and Operation of ASCAP,"[35] including "The Rise of BMI," a creature of the combined broadcasting industry.[36]

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32. *Id.* at 53-54.

33. *Id.* at 55-56.

34. So many successful songwriters have spent so much money defending charges of plagiarism—usually with marked success in court, but with little satisfaction to their pocketbooks—that the National Music Council, on the recommendation of a committee headed by Sigmund Spaeth, the noted authority on plagiarism, set up machinery for a committee of musicologists to screen claims of plagiarism when requested by the contending parties. See 20 NAT. MUSIC COUNCIL BULL. No. 2, p. 7 (1960). To date, however, no request has been made to the Council to invoke this machinery. Publishers of musical works are so fearful of unfounded claims that they return manuscripts from unknown senders without opening the envelope. To open the envelope would deprive them of the main defense to such a charge, *i.e.*, lack of access to plaintiff's work. One would expect that the remedy of summary judgment would be invoked to curb these unfounded suits, but that was rejected by the Second Circuit Court of Appeals in a case where the plaintiff had no possibility of ultimate success. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946). This prompted Judge Clark, in a vigorous dissent to remark that "it is error to deny trial when there is a genuine dispute of facts; but it is just as much error—perhaps more in cases of hardship, or where impetus is given to strike suits—to deny or postpone judgment where the ultimate legal result is clearly indicated." *Id.* at 480.

35. Pp. 428-41.

36. Pp. 439-41.

A section of the book is devoted to the music and entertainment industries, which are divided into four parts: (1) "Songwriters and Music Publishers," analyzing the standard form of agreement between songwriters and their publishers;[37] (2) "The Phonograph Record Industry: Compulsory Licensing" (Sections 1(e) and 101(e) of the Copyright Act),[38] including a discussion of "The Juke-Box Exemption" which is an anomaly in the Copyright Act;[39] (3) "The Decline of Motion Pictures and the Ascendancy of Television,"[40] including legal problems arising out of the showing of old films on television;[41] (4) "Writers' and Performers' Collective Agreements,"[42] including "residual rights," "re-use payments for musicians," and the litigation involving the Dramatists Guild Minimum Basic Agreement.[43]

No discussion of literary property would be complete without a close examination of the results of combinations of labor and capital in this area, just as no modern treatise on trade regulation could fail to discuss combinations in relation to copyrights and patents. Chafee notes that "Publishers have organized, producers have organized, broadcasters have organized; and at last after many centuries authors have organized, only to be denounced as monopolists by state legislators."[44] The authors of this volume dispose of this subject by a simple assertion that "There were efforts by state legislatures in the 1930's to regulate or restrict the activities of ASCAP, but they have had no lasting results." The fact is that although such statutes have been repealed in most states, a Washington statute[45] prevents normal copyright relations in licensing musical works in that state with the result that a number of actions for infringement of copyrighted works are pending against several Washington broadcasters. In addition, similar bills have been introduced with monotonous

37. Pp. 442-45.

38. Pp. 445-51.

39. Pp. 450-51. Oscar Hammerstein II thus summarized the resentment of composers against the juke-box exemption with his usual eloquence:

> Jukeboxes are no good without records. Records are no good without the sound [*sic*] that are impressed on them. Those sounds are the song, the words and the music. A song that many people love is an important thing.
>
> It is not made in a factory. It isn't the result of a shrewd business transaction. It's an expression of life. It is not merely the product of talent and industry and technical skill—though it contains all those things. It is something that comes out of a man's heart.
>
> . . . . For those people who like to sing it and to listen to it, it is important, and it cannot be considered fair that the mechanical device for reproducing a song should earn money while the man who created it goes unrewarded.

Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary, 86th Cong., 1st Sess., ser. 6, at 31 (1959).

40. Pp. 452-58.

41. See United States v. Loew's, Inc., 371 U.S. 38 (1962).

42. Pp. 458-70.

43. Ring v. Spina, 148 F.2d 647 (2d Cir. 1945). *But see* Ring v. Authors' League of America, Inc., 186 F.2d 637 (2d Cir. 1951).

44. Chafee, Book Review, 52 HARV. L. REV. 1378 (1939).

45. WASH. CODE ANN. §§ 19.24.010—19.24.900 (1959).

regularity in other legislatures, only to be defeated after passing one house or the other.[46] Such bills are often sponsored by associations of broadcasters or other users. The members of the Mississippi legislature were assailed by the Mississippi Broadcasters' Association for failing, at the last session, to enact such a bill, the President of the Association making this report to its members:

> If this were a Bill which affected newspapers, how do you think these legislators would have voted? If more of the stations editorialized, it would be a stronger factor in your community.[47]

These bills would require a duplication of filing in each state of the data filed in the Office of the Register of Copyrights in the Nation's Capital. If the Federal Act is paramount and if the national policy favors copyright protection with a minimum of formality, the validity of such statutes or their economic justification would seem to merit consideration in a course on copyright.

The copyright section concludes on this "quizzical theme" relating to serious music:

> The movies are supported by paid admissions (and popcorn sales). Radio and television are supported by advertising. The theatre and other costly places of entertainment, such as night-clubs, are supported by tax-deductible expense accounts. Though classical recordings account for perhaps one-fourth of phonograph record sales, serious music is largely supported by philanthropy.[48]

The student should have been invited at this point to compare the copyright laws of the United States with those of most foreign countries with respect to rights accorded to composers of serious works. Such music is written primarily for performance by symphony orchestras and other public-spirited groups operating at a deficit. In most foreign countries, the composer is entitled to payment for all public performances of his works—a broad right which is accorded to authors of dramatic works in the United States but is denied to composers of serious works unless such performances are both public *and* "for profit." The serious composer thus has a far greater market for his works abroad than he has in the United States.[49] The Register of Copyrights has proposed a revision of our Copyright Act but has not recommended any improvement in treatment of the serious composer; yet if he is not to be "largely supported by philanthropy," the law should be brought down to modern times. If the public pays the deficits of symphony orchestras in order to attract and compensate the conductor and to assure the union scale for members of the orchestra, such funds should also be used to pay the composer the fair value of his work. After all, who would attend a symphony concert if the composers had never written the works which the orchestra performs or interprets?

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46. *E.g.*, Massachusetts, S. 500 (1953), H. 700 (1956), H. 142 (1957), H. 148 (1961).

47. Miss. Broadcasters' Ass'n Monthly Bull., May 1962, p. 6.

48. P. 470.

49. See Finkelstein, *The Copyright Law—A Reappraisal*, 104 U. PA. L. REV. 1025, 1056-59 (1956).

In view of the international nature of successful copyrighted works—they exist everywhere at once and they may be communicated across national borders by invisible waves carrying radio or television messages, or by wireless or cable—it is disappointing that the authors devote less than 30 of their 695 pages of text to that subject. There is no discussion of the Berne Convention, which is still the most important method of protecting American works abroad because: (a) the rights assured under that Convention are greater than those under the Universal Copyright Convention; (b) the minimum term of protection (absent specific statutory retaliation) is longer; (c) not all Berne countries have adhered to the U.C.C.

It is impossible to view the challenging international aspects of copyright without wondering if, how, and when there may be a merger of the Berne Convention and the Universal Copyright Convention. Such a merger is inevitable. What a grand opportunity to broaden the horizons of law students by exposing them to this lively subject! The outlook of the lawyer or law student can no longer be parochial. He must view law on an international plane. The growing importance of the Common Market leaves no choice.

If this volume is to assist instructors in discussing the law of copyright with their classes—whether the courses be limited to Copyright or treat the subject as part of a course on Trade Regulation, Business Organization, Contracts, Jurisprudence, Legal Writing or Torts—or if it is expected to be useful to the practitioner, it should certainly have an index. To take some examples: when a lawyer must draw a distinction between patents and copyrights—and that is frequently necessary—he will find the material scattered throughout the book.[50] The subject of "publication" is one that cuts across many fields of the law of copyright. The index to Copinger lists over 25 subtitles under this heading.[51] Kaplan and Brown's Summary of Contents lists five "publication" items—the greatest number for any single topic. The "Detailed Table of Contents" adds the titles of several cases but does not add any detail to identify the phase of the problem which is taken up at a given point.

Of more concern to this reviewer, however, is the failure to assist the busy lawyer who may know the name of a defendant in a particular case (but not the plaintiff), or who may know the title of the work or works involved. The table of cases should certainly have a defendant-plaintiff listing (as well as plaintiff-defendant) and should have another listing of cases by the title of the work involved, as the authors themselves list such cases at page 262. These are minor criticisms which are offered as suggestions for improvement in a subsequent edition for which there is bound to be a demand. Most of the imaginative literature on copyright today is found in law periodicals. This volume is a distinct contribution. It is hoped that it will inspire courses in copyright in many law schools throughout the land.

HERMAN FINKELSTEIN†

50. See pp. 28, 131, 170, 195, 200, 207, 208, 209, 258, 279, 530.

51. COPINGER & SKONE JAMES, LAW OF COPYRIGHT 902 (9th ed. 1958).

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