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DETAILS

Level of Description:

Series

Type(s) of Archival Materials:

Textual Records

The creator compiled or maintained the series between:

1891 - 1992

This series documents the time period:

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Function and Use:

These records were created as a result of the appeals process available to parties involved in civil and criminal litigation in U.S. District Courts.

Arrangement:

Arranged numerically by case number.

Access Restriction(s):

Unrestricted

Use Restriction(s):

Unrestricted

Finding Aid Type:

Index

Subjects Represented in the Archival Material(s):

Decrees

No. 118.

PIERCE & BUSHNELL MANUFACTURING COMPANY,
Defendant, Appellant,

v.

EMIL WERCKMEISTER,
Complainant, Appellee.

[72 F.R. 54]

BLANK No. 6. APPEARANCE.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

NO. 118 OCTOBER TERM, 1894

Pierce v. Bushnell Manufacturing Co.,
Defendant, Appellant,

v.

Emil Werkmeister,
Complainant, Appellee.

The Clerk will enter my appearance as Counsel for the Appellant.

Alex. P. Browne.

MEMORANDUM. The signature of a member of the Bar of the United States Circuit Court of Appeals for the First Circuit is required.

118

No.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIRST CIRCUIT.

OCTOBER TERM, 189....

APPEARANCE

OF

Alex. P. Browne

FOR

Appellant

FILED 189....

BLANK No. 6. APPEARANCE.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

NO. 118. OCTOBER TERM, 1894.

Pierce & Bushnell Mfg. Co.

Defendant, Appellant.

v.

Emil Werckmeister

Complainant, Appellee.

The Clerk will enter my appearance as Counsel for the Defendant, Appellant,

MEMORANDUM. The signature of a member of the Bar of the United States Circuit Court of Appeals for the First Circuit is required.

118

No. 118

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1894.

APPEARANCE

OF

William A. Jenner

FOR

Appellant

FILED 189

BLANK No. 6. APPEARANCE.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

NO. 118 OCTOBER TERM, 1894

Pierce & Bushnell Manufacturing Company
Appellant

v.

Emil Werkmeister
Appellee

The Clerk will enter my appearance as Counsel for the Appellee

Louis C. Raegner.

MEMORANDUM. The signature of a member of the Bar of the United States Circuit Court of Appeals for the First Circuit is required.

118

No.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIRST CIRCUIT.

OCTOBER TERM, 189.....

APPEARANCE

OF

Louis C. Ragener

FOR

Appellee

FILED 189.....

United States Circuit Court of Appeals for the

First Circuit.

Pierce & Bushnell Manufacturing Company, Appellant

v.

Emil Werckmeister, Appellee.

Motion for leave to file additional brief for appellant.

Motion is hereby made to the Court that leave be granted to William A. Jenner, Esq., of counsel for appellant in the above entitled cause, to file a printed brief, a copy of which is hereto annexed, in addition to the brief heretofore filed by him, in order that the attention of the Court may be called to the provisions of a section of the Copyright Act not referred to at the hearing of the cause but believed to be material to its just determination.

William A. Jenner

by Alex. P. Browne

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

United States Circuit Court of Appeals

FIRST CIRCUIT.

PIERCE & BUSHNELL MANUFACTURING COMPANY,
Defendant-Appellant,

vs.

EMIL WERCKMEISTER,
Complainant-Respondent.

Additional Note.

The copyright act as amended March, 1891, provides respecting the notice:

"§ 4963. Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or other article, for which he has not obtained a copyright, shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty, and one-half to the use of the United States."

Unless the photograph was actually copyrighted, the notice on it was wrongful. The notice on it could be rightful only if copyright was "obtained" on *it*. Where an "article" is copyrighted, the copyright covers every copy, and every copy is to be regarded as an original, and should properly be impressed with the notice under § 4962. This dilemma is presented: If complainant's photograph is a "copy" of the copyrighted painting, it was itself copyrighted, and was rightfully impressed with the

notice, but in such case the proviso of § 4956 requiring manufacture here would apply to it, but the proviso of § 4956 would not apply to it only on the view that the photograph was not copyrighted, and in that case the notice was improperly impressed upon it under § 4963, but if the notice had been omitted there would then have been no notice at all to the public, none on the original painting and none on the photographs. To hold that the photograph is not a copy of the painting but is copyrightable separately avoids the dilemma. If the photograph had been copyrighted here the requirements of the proviso of § 4956 would have been satisfied, the notice required by § 4962 could have been given, and the penalty imposed by § 4963 avoided.

It is not an answer to this, that the present complainant will risk his liability for the penalty. It may be true that he cannot be held liable because he is in Berlin and committed the act of impressing the notice there, and the penalty is not attached to the importing or sale here of a falsely marked article, but the illegality in the act of impressing the notice is not to be affected by the residence of the wrong-doer. The act should apply in all its parts to foreigners as well as residents, otherwise a resident might copyright his painting, send a negative abroad, have photographs of it made and marked with the notice, import them and sell them here and thus evade the requirements of the proviso, and the penalty, and still enjoy the monopoly.

Respectfully submitted,

Wm. A. Jenner,

Of Counsel.

118

Pease & Burkhardt
Mfg Co.
v.
Wrickmeister

Motion for leave to
file additional
brief for appellant

[Allowed to be filed
by the Court Feb. 2, 1895
appellee to reply by the
8th instant.]

Leave with clerk
Jan 25, 1895
Spencer Seldon
clerk

United States of America, ss:

The President of the United States of America,

To the Honorable the Judges of the Circuit *Court*
of the United States for the District of Massachusetts

GREETING:

Whereas, *lately in the* Circuit *Court of the United States for the District of* Massachusetts, *before you, or some of you, in a cause between* Emil Wreckmeister, Complainant and The Pierce & Bushnell Manufacturing Company, Defendant the following decree was entered on the twelfth day of September, 1894:

DECREE.

SEPTEMBER 12, 1894.

This cause having come on to be heard upon the bill of complaint herein, the answer thereto of the defendant, the Pierce & Bushnell Manufacturing Company, the replication of the complainant to such answer, and the proof oral, documentary and written, taken and filed in said cause.

Now, therefore, on consideration thereof, after hearing Louis C. Raegener, Esq., of counsel for complainant, and Alexander P. Browne, Esq., of counsel for defendant, it is ordered, adjudged and decreed, and the Court doth hereby order, adjudge and decree, as follows: —

That Gustav Naujok, on or about Oct. 1, 1891, was a German subject and a resident of Germany, and the author and designer of a certain painting in oil called "Die Heilige Cäcilie", and that said painting is a work of art. That on March 5, 1892, the said Gustav Naujok assigned and transferred to the complainant, who does business under the firm name of "Photographische Gesellschaft", the right to obtain a copyright for said painting.

That on May 16, 1892, the complainant, under the name of the

&c, &c, as in the Transcript of Record pages 35 and 36.

And whereas the defendants appealed from said decree granting an injunction to this United States Circuit Court of Appeals for the First Circuit

as by the inspection of the transcript of the record in said cause of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the First Circuit, by virtue of the aforesaid appeal agreeably to the act of Congress, in such cases made and provided, fully and at large appears:

And whereas, in the ~~present~~ term of October, in the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel, and thence said cause was continued under advisement to the present term of October in the year of our Lord one thousand eight hundred and ninety five.

On consideration whereof, It is now, towit, January 24, 1896, here ordered adjudged and decreed as follows: The decree of the Circuit Court is reversed, and the cause remanded to that Court with directions to dismiss the bill with costs.

Costs in this United States Circuit Court of Appeals for which execution is to issue from the said Circuit Court in favor of the said Pierce & Bushnell Manufacturing Company, defendant, and against the said Emil Wecksweisler, complainant, are taxed at ninety six dollars ($96.

You, therefore, are hereby commanded that such execution and further *proceedings be had in said cause, in conformity with the aforesaid decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said* appeal *notwithstanding.*

Witness, *the Honorable* MELVILLE W. FULLER, *Chief Justice of the* ~~Supreme Court of the~~ *United States, the* fourth *day of* April, *in the year of our Lord one thousand eight hundred and ninety-*six

COSTS OF Appellant

Clerk	$ 36.95
Printing Record,	$ 39.95
Attorney	$ 20.00
	$ 96.00

John G. Stetson

Clerk of the United States Circuit Court of Appeals for the First Circuit.

U.S.CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No.1161. Pierce & Bushnell Mfg.Co. v. Werckmeister.
Clerk's fees.

Filing record & docketing case - - - -	$5.00
3 appearances 75; filing 75	1.50
Filing briefs,both parties	10.00
Filing receipts for records and briefs (6)	1.50
Assignment 20; hearing 20	.40
Decree 1.; filing 25; recording 20	1.45
Copy opinion to file 5.; filing 25	5.25
Calendars for Jan.Apr.& Oct.1895,and Jan.1896	4.00
Costs and copy 40; order for mandate 20	.60
Mandate 5.;copy mandate to file 2; filing 25	7.25
Total Clerk's fees,including mandate	$36.95
Printing record (additional in Court of Appeals)	39.05
Attorney fee	20.00
Total costs for appellant	$96.00

Attest: John G. Stetson.
Clerk.

No. 178

United States Circuit Court of Appeals
FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1895.

Pierce & Bushnell Mfg. Co.,
Appellants, Appellees,
v.
Emil Werckmeister,
Appellee, Appellant.

Copy.

MANDATE.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 374

Emil Werckmeister,

COMPLAINANT,

v.

Pierce & Bushnell Manufacturing Company,

DEFENDANT.

No 118.
Pierce & Bushnell Mfg Co
Def't, Appellant
Emil Werkmeister

TRANSCRIPT OF RECORD.

Filed & entered
Dec. 1, 1894
John G. Skelton
Clerk

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 374 3149.

Emil Werckmeister,

COMPLAINANT,

v.

Pierce & Bushnell Manufacturing Company,

DEFENDANT.

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Circuit Court of the United States

FOR THE DISTRICT OF MASSACHUSETTS.

In Equity.

Emil Werckmeister

vs.

Pierce & Bushnell Manufacturing Co.

Emil Werckmeister, a citizen of the Empire of Germany, brings this his bill of complaint against the Pierce & Bushnell Manufacturing Company, a corporation duly organized and established under the laws of the State of Massachusetts, and a citizen of said State; and thereupon your orator complains and says:

That your orator does business under the firm name of Photographische Gesellschaft, and for many years prior to the year 1890 did business under the said firm name of Photographische Gesellschaft.

And your orator further shows unto your Honors, that on or about October 1, 1891, one G. Naujok invented, designed and painted a certain painting called "Die Heilige Cäcilie." That said painting "Die Heilige Cäcilie" is of an allusive character, and by means of representing the patron saint of music, St. Cecilia, sitting before an organ, and cherubs dropping flowers, and by means of the artistic coloring of the picture and the expression in the face of St. Cecilia, expresses emblematically the power of sacred music.

And your orator further shows, that the said G. Naujok, on

or about the 5th day of March, 1892, assigned, transferred and sold to your orator all his right, title and interest in any copyright obtainable in the United States of America and in all other countries, and also the sole liberty and right of printing, reprinting, publishing, completing, copying, executing, finishing and vending said painting.

And your orator further shows unto your Honors, that having acquired the right to obtain the copyright for said painting and the sole right for printing, reprinting, publishing, completing, copying, executing, finishing and vending the same, and being a subject of the Empire of Germany, and desiring to secure the copyright thereof under the laws of the United States respecting copyrights, your orator, before the publication thereof in this or any foreign country, to wit, on the 16th day of May, 1892, delivered at the office of the Librarian of Congress, at Washington, District of Columbia, a copy of the title and description of said printing, which description was in the following words, to wit:

"St. Cecil is playing on an organ, whilst cherubs are strewing roses on the key-board,"

and also a photograph thereof; and that such title and description and photograph were duly deposited in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, on the 16th day of May, 1892, and that the Librarian of Congress duly received the same and recorded the title thereof on said 16th day of May, 1892, as will more fully and at large appear from a duly authenticated copy of said record, ready in Court to be produced, if required, a copy whereof is hereto annexed, marked "Exhibit Certificate A."

And your orators further shows unto your Honors, that he began the publication of said painting on or about the 15th day of September, 1892, and not before, either in this country or any foreign country.

And your orator further shows unto your Honors, that by reason of the premises and of the statutes in such cases made

and provided there was secured to your orator, his executors, administrators and assigns, or intended so to be, for the term of twenty-eight years from the said 16th day of May, 1892, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the said painting.

And your orator further shows unto your Honors, that being the lawful proprietor of said copyright as aforesaid and in possession of the same, and being able and desirous of supplying copies of the same to purchasers, your orator had made and prepared at his place of business, in the City of Berlin, in the Empire of Germany, certain negatives from which to print photographs of said painting "Die Heilige Cäcile," which negatives belonged to and were paid for by your orator and prepared under the direction of your orator's employees by persons paid to prepare the same for your orator, and that your orator had printed and continues to print therefrom copies of said painting; and that your orator, after the day of depositing the said title and description as aforesaid, and not before, commenced to publish copies of said painting and duly gave notice of your orator's copyright as is required by law, by inscribing upon a visible portion of every copy of said painting published by your orator, the word "Copyright," together with the year the copyright was entered and the name of the party by whom it was taken out, thus: "Copyright, 1892, by Photographische Gesellschaft."

And your orator further shows unto your Honors, that in the production of copies of said painting and since he secured the copyright for said painting as aforesaid, he has invested and expended large sums of money and been to great trouble and expense in making, selling and advertising copies of the same for sale, and for the purpose of carrying on the business of selling the same and making the same profitable to your orator and useful to the public; and that said painting has been and is of great benefit and advantage to your orator; and that there is a large sale and demand for copies of said painting; and that your orator at all times has had and now has on hand sufficient copies of said painting for sale to the public at a rea-

sonable price, and is prepared to supply the demand therefor and sell copies of such painting at a reasonable price; and that the public have generally acknowledged and acquiesced in the aforesaid rights of your orator, and your orator believes that he will realize and receive large gains and profits therefrom, if infringements by the said defendant and its confederates shall be prevented.

And your orator further shows unto your Honors, on information and belief, that said Pierce & Bushnell Manufacturing Company, the defendant, well knowing the premises and the rights secured to your orator as aforesaid, but contriving to injure your orator and to deprive him of the benefits and advantages which might and otherwise would accrue unto him from said painting and copyright, on or about the 1st day of March, 1893, and at other times after the recording of the title and description of said painting as aforesaid, and within the term limited (to wit, within the said twenty-eight years as aforesaid), and before the commencement of this suit, and without the consent of your orator first obtained in writing, signed in the presence of two or more witnesses, and against the will of your orator, and in violation of your orator's rights, and in infringement of said copyright, did, as your orator is informed and believes, at the City of New Bedford and the City of Boston, both in the State of Massachusetts, and at the City of Chicago, in the State of Illinois, and at other places within the United States, print, reprint, publish, complete, copy, execute and finish great numbers of copies of said painting, the property of your orator and for which your orator had obtained said copyright as aforesaid; and that said defendant, at said times and places aforesaid, and knowing that such copies of said painting were worked, printed, reprinted, published, completed, copied, executed and finished without the consent of your orator first obtained as required by law and as aforesaid, and against the will of your orator, did publish such copies thereof, and sell such copies thereof, and expose to sale such copies thereof, and that the defendant still continues so to do, and that it is threatening

to make copies of the aforesaid painting in large quantities, and to supply the market therewith and to sell the same.

And your orator further shows unto your Honors, upon information and belief, that said defendant has published, sold and exposed to sale large quantities of pirated copies of said painting at the times and places aforesaid and has large quantities on hand, which it is offering for sale, and has made and realized large profits and advantages therefrom, but to what extent and how much exactly your orator does not know, but believes that the same amount to about five thousand dollars.

And your orator further shows unto your Honors, upon information and belief, that at the time of publishing and of selling and of exposing to sale the said pirated copies of said painting by the defendant the defendant knew that the said copies by it published and by it sold and by it exposed to sale were published and were sold and were exposed to sale without the consent of your orator and in violation of your orator's rights and in infringement of your orator's said copyright.

And your orator further shows unto your Honors, that the publishing, the selling and the exposing to sale of such piratical copies of your orator's said painting by said defendant, and its preparation for and continuance thereof, and its other aforesaid unlawful acts, in disregard and defiance of the rights of your orator, have the effect to and do encourage and induce others to infringe said copyright, in disregard of your orator's rights.

All in defiance of the rights acquired by and secured to your orator as aforesaid, and to your orator's great and irreparable loss and injury, and by which your orator has been and still is being deprived of great gains and profits, which he might and otherwise would have obtained, but which have been received and enjoyed by the said defendant, by and through its aforesaid unlawful acts and doings.

And your orator further shows unto your Honors, that it fears and has reason to fear that unless the defendant is restrained by a writ of injunction issuing out of this Court it will

continue to print, reprint, publish, complete, copy, execute, finish, sell and expose to sale great numbers of piratical copies of said painting "Die Heilige Cäcilie," and thereby will cause irreparable injury to your orator's aforesaid exclusive rights.

And your orator prays that the said defendant, the Pierce & Bushnell Manufacturing Company, may be compelled by a decree of this Honorable Court to pay over unto your orator all such gains and profits as have accrued or arisen to or been earned or received by the said defendant, and all such gains and profits as your orator would have received but for the said wrongful acts and doings of the said defendant.

And your orator prays that the said defendant, the Pierce & Bushnell Manufacturing Company, its servants, agents, attorneys and workmen, and each and every of them, may be restrained and enjoined, provisionally, pending this suit, and forever afterwards, by the order and injunction of this Honorable Court, from directly or indirectly working, printing, reprinting, publishing, completing, copying, executing or finishing any copies of the aforesaid painting, so as aforesaid the property of your orator, or any part thereof; and from publishing, exposing to sale, selling or otherwise disposing of any piratical copies of said painting, or any like or similar to those which it has heretofore made, sold or exposed to sale, or any part or parts of such copies; and also from publishing, exposing to sale, selling or otherwise disposing of any of the plates upon which the same were copied, and from directly or indirectly copying, imitating or counterfeiting the aforesaid copyright painting, of which your orator is proprietor; and that the exclusive right and privilege of your orator in said painting, and the working, printing, reprinting, publishing, completing, copying, executing, finishing and vending thereof, may be established; and that the defendant may be decreed to pay the costs of this suit; and that your orator may have such further relief, or such other relief, as to this Honorable Court shall seem meet, and as shall be agreeable to equity.

May it please your Honors to grant unto your orator the

writs of injunction, as well provisional as perpetual, issuing out of and under the seal of this Honorable Court, commanding, enjoining and restraining the said defendant, the Pierce & Bushnell Manufacturing Company, its servants, agents, attorneys and workmen, and each and every of them, as is hereinbefore in that behalf prayed.

To the end, therefore, that the said defendant, the Pierce & Bushnell Manufacturing Company, may, if it can, show why your orator should not have the relief hereby prayed, and may, according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the several matters hereinbefore averred and set forth, except to such of said matters as may subject the defendant to a penalty or forfeiture, which matters the said defendant is not required to answer.

Your orator also waives answer under oath to this bill.

May it please your Honors to grant unto your orator a writ of subpœna *ad respondendum* issuing out of and under the seal of this Honorable Court, directed to the said defendant, the Pierce & Bushnell Manufacturing Company, commanding it by a certain day and under a certain penalty to be and appear in this Honorable Court, make answer to this bill of complaint, and to perform and abide by such order and decree herein as to this Court may seem required by the principles of equity and good conscience.

And your orator will ever pray, &c.

EMIL WERCKMEISTER.

GOEPEL & RAEGENER,
Complainant's Solicitors,
280 Broadway, New York.

LOUIS C. RAEGENER,
Of Counsel.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, ss.:

CHARLES E. WENDT, being duly sworn, deposes and says, that he is the attorney-in-fact in the United States of America of Emil Werckmeister, the complainant herein, and that he has heard read the foregoing bill of complaint and knows the contents thereof to be true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason this verification is not made by the complainant in person is because the said complainant resides in the City of Berlin, in the Empire of Germany.

CHARLES E. WENDT.

Subscribed and sworn to before me this 23d day of May, 1893.

BENJ. B. KENYON,
[SEAL.] Notary Public,
N. Y. Co.

("Exhibit Certificate A.")

Also marked "Complainants' Exhibit No. 1," May 5. 1894.

(L. S.)

No. 20698 X. LIBRARY OF CONGRESS,
Copyright Office, Washington.

To wit: BE IT REMEMBERED,

That on the 16th day of May, anno domino 1892, Photographische Gesellschaft, of Berlin, Ger., have deposited in this Office the title of a Painting, the title or description of which is in the following words, to wit:

DIE HEILIGE CÄCILIE,
G. NAUJOK.
Photo. & Descript. on file;

the right whereof they claim as proprietors in conformity with the laws of the United States respecting Copyrights.

A. R. SPOFFORD,
Librarian of Congress.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

No. 3149. *In Equity.*

EMIL WERCKMEISTER

v.

PIERCE & BUSHNELL MANUFACTURING COMPANY.

The answer of THE PIERCE & BUSHNELL MANUFACTURING COMPANY, *defendant, to the bill of complaint of* EMIL WERCKMEISTER, *complainant.*

This defendant, answering, says that it does not know and is not informed, save by the bill of complaint, whether the complainant does and has done business as therein averred, and leaves the complainant to make such proof thereof as he may be advised is material.

This defendant denies that at the time stated in the bill, or at any other time, one G. Naujok invented, designed or painted the painting called "Die Heilige Cäcilie."

This defendant denies that the said Naujok, at the time set forth in the bill of complaint, assigned, transferred, or sold to the complainant any right, title or interest in any copyright obtainable in the United States of America, or that he assigned the sole liberty and right of printing, reprinting, publishing, completing, copying, executing, finishing and vending said painting as therein alleged.

The defendant denies that the complainant, before the publication of said painting, delivered at the office of the Librarian of Congress a copy of the title and description of said painting, as averred in the bill, or that the same were duly deposited in the

mail within the United States, addressed to the Librarian of Congress, as averred in the bill, or otherwise, or that the said Librarian duly recorded the title thereof, as averred in the bill, or otherwise.

The defendant further denies that a photograph of said painting was delivered by the complainant at the office of the Librarian of Congress, as averred in the bill, or otherwise.

The defendant further denies that the complainant began the publication of said painting on or about the 15th day of September, 1892, as averred in said bill; but avers that the same was published by the complainant or the said Naujok long before the said 15th day of September, 1892, and also long before the 16th of May, 1892, being the date averred as the date of the alleged delivery and mailing of the copy of the title and description and of the photograph of said painting.

The defendant denies that there has been secured to the complainant, either for the term averred in the said bill or for any other term, any right or liberty or copyright with respect to said painting, either as averred in the bill of complaint or otherwise.

The defendant admits that photographic negatives of the said painting were made and prepared by or for the complainant, as averred in said bill, and that photographs were printed therefrom. and that the photographs so printed were published and sold, but denies that any notice of the complainant's alleged copyright was given, as required by law, and avers that, even if the complainant did inscribe upon a visible portion of every photograph so published and sold by him, the words and figures, as averred in the bill, yet that this was not the notice required by law of the alleged copyright in the said painting, and also avers that the complainant failed to give notice of his alleged copyright upon the said painting by inscribing upon the face or front thereof the notice required by law, or any other notice of the same legal tenor and effect.

The defendant denies that the complainant has invested and expended large sums of money or been to trouble and expense in connection with the manufacture and sale of the

said painting or copies thereof, or that the same is of great benefit and advantage to the complainant, or that there is a large sale and demand for copies thereof, or that the complainant has any copies thereof on hand for sale to the public or otherwise, or that the public has acknowledged or acquiesced in any alleged rights of the complainant.

The defendant denies that at the time, or in the manner averred in the bill or otherwise, it has printed, reprinted, published, completed, copied, executed or finished any copies of said painting, either as averred in the said bill or otherwise, or that it threatens or intends to do so in the future.

The defendant denies that it has published, sold or exposed for sale any pirated copies of said painting, or has any such copies on hand, either as averred in the bill or otherwise.

The defendant submits to this Honorable Court that the complainant has no right to any further answer to the bill of complaint, or any part thereof, than is hereinbefore contained, and no right to any injunction, account or other relief, as prayed for in said bill, and the defendant prays to be hence dismissed, with its reasonable costs and charges.

THE PIERCE & BUSHNELL MANUFACTURING CO.,
By ARTHUR G. GRINNELL,
Treasurer.

CIRCUIT COURT OF THE UNITED STATES,

District of Massachusetts.

In Equity.

Emil Werckmeister

vs.

Pierce & Bushnell Manufacturing Company.

The replication of Emil Werckmeister, *complainant, to the answer of* Pierce & Bushnell Manufacturing Company, *defendant.*

The repliant, saving and reserving unto himself now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, says that he will aver, maintain and prove his said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by the repliant. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein or hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things the repliant is and will be ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by his said bill he has already prayed.

GOEPEL & RAEGENER,
Complainant's Solicitors,
280 Broadway,
New York.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, SS.:

THE CIRCUIT COURT OF THE UNITED STATES

WITHIN AND FOR THE MASSACHUSETTS DISTRICT.

To the Consular Officer of the United States at Berlin, Germany:

Know ye, That, reposing confidence in your wisdom, prudence and fidelity, we have appointed, and by these presents do authorize and empower you to take the answers to the interrogatories hereunto annexed of Emil Werckmeister and Franz Schroeder, witnesses to be examined on behalf of the complainant, and to be used in a certain cause now pending in said Court, wherein Emil Werckmeister is plaintiff, *versus* Pierce & Bushnell Manufacturing Company, defendant.

And to this end, at certain days to be by you appointed for that purpose, to cause said witnesses, as aforesaid, to be brought before you, and each witness, while present before you, to examine carefully on oath touching the premises. And when you shall have taken the examination as aforesaid, to reduce or cause the same to be reduced to writing, and to be subscribed by each of said witnesses in your presence. And the same, so taken and subscribed, to return, together with this commission and your doings herein, enclosed, sealed and directed to the Circuit Court aforesaid, holden at Boston, in said district, as soon as the same shall have been executed.

In testimony whereof, we have caused the seal of the said Circuit Court to be hereunto affixed.

Witness, the Honorable Melville W. Fuller, Chief Justice, at Boston, this 23d day of November, in the year of our Lord one thousand eight hundred and ninety-three.

ALEX. H. TROWBRIDGE,
Clerk.

examination, except the deponent and yourself, and such disinterested person (if any) as you may think fit to appoint as a clerk, to assist you in reducing the deposition to writing. And you shall put the several interrogatories and cross interrogatories to the deponent in their order, and take the answer of the deponent to each, fully and clearly. ☞ Depositions to be taken on paper of like size with this Commission.

CIRCUIT COURT OF THE UNITED STATES

For the District of Massachusetts.

In Equity.

Emil Werckmeister

vs.

Pierce & Bushnell Manufacturing Company.

Interrogatories to be administered to Emil Werckmeister, as a witness on behalf of complainant, under and pursuant to a commission issued by this Court:

1. What is your name, age, residence and occupation?

2. Of what country are you a citizen?

3. If you state in answer to the last question that you are a citizen of Germany, please state since what time you have been a citizen of Germany?

4. Under what firm name do you do business?

5. If, in answer to the last interrogatory, you give the name of a firm, please state for how long a period you have done business under such firm name?

6. Are you the only one that does business under the firm name that you have given in answer to the last interrogatory?

7. Do you know whether G. Naujok, the painter of the painting called "Die Hielige Cäcilie," transferred the right of

publishing said painting to the complainant, and the right to take a copyright thereon in the United States?

8. If you have answered the last question in the affirmative, please state what you know upon the subject referred to in the preceding interrogatory, and produce any documents or letters which you have received from the said G. Naujok upon the subject matter of the aforesaid interrogatory?

9. Do you know Franz Schroeder, and if so, in what relationship does he stand to you and your business?

10. What experience, if any, have you had qualifying you to give testimony as an expert in this case?

11. Are you familiar with the painting called "Die Heilige Cäcilie," painted by G. Naujok?

12. Are you able to state whether said painting is a valuable work of art?

13. Have you permitted, either directly or indirectly, the defendant, the Pierce & Bushnell Manufacturing Company, of New Bedford, Mass., to make and sell copies of the painting called "Die Heilige Cäcilie"?

CIRCUIT COURT OF THE UNITED STATES

For the District of Massachusetts.

In Equity.

Emil Werckmeister

vs.

Pierce & Bushnell Manufacturing Company.

Interrogatories to be administered to Franz Schroeder, as a witness on behalf of complainant, under and pursuant to a commission issued by this Court:

1. What is your name, age, residence and occupation?

2. In what relationship do you stand to the complainant in the above entitled suit?

3. Do you know of what country the complainant, Emil Werckmeister, is a citizen? If so, please state the same?

4. Do you know under what firm name the complainant does business? If so, state the same, and also for how long a period the said complainant has done business under such firm name?

5. When did the complainant begin the publication of copies of a certain painting painted by G. Naujok and called "Die Heilige Cäcilie"?

6. Please produce a copy of said painting, and have it marked by the Commissioner "Exhibit A."

7. Do you know whether G. Naujok, the painter of the painting called "Die Heilige Cäcilie," transferred the right of

publishing said painting to the complainant, and the right to take a copyright thereon in the United States?

8. If you have answered the last question in the affirmative, please state what you know upon the subject referred to in the preceding interrogatory, and produce any documents or letters which you have received from the said G. Naujok, upon the subject matter of the aforesaid interrogatory.

9. Did the complainant prepare any negatives from which photographs of said painting "Die Heilige Cäcilie" were prepared? If so, where?

10. Do you know to whom the negatives referred to in the preceding interrogatory belong? If so, state to whom they belong?

11. How many copies of said painting called "Die Heilige Cäcilie" did the complainant produce and sell?

12. Are you able to state whether the copies of the said painting "Die Heilige Cäcilie" had any copyright notice upon them, and if so, please state whether every one of the copies produced by the complainant bore such copyright notice, and also state the exact phraseology of such copyright notice, and in giving your testimony you may refer to "Exhibit A"?

13. Please state what experience, if any, you have had which qualifies you to give testimony as an expert in this matter?

14. Are you able to state whether the said picture "Die Heilige Cäcilie" is a valuable work of art?

15. If you know whether the public, excepting the defendant herein, have respected the rights of the complainant, please state so?

16. Has the complainant gone to any trouble and expense in advertising the said picture "Die Heilige Cäcilie," and in putting the same upon the market? If so, state to what trouble and what expense he has gone?

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

No. 3149. *In Equity.*

EMIL WERCKMEISTER

vs.

PIERCE & BUSHNELL MANUFACTURING COMPANY.

CROSS-INTERROGATORIES to be administered to Franz Schroeder as a witness on behalf of complainant, under and pursuant to a commission issued by this Court:

1. Was any copy of the painting by G. Naujok, called "Die Heilige Cäcilie," whether by photographing, etching, engraving, or otherwise, ever published by any one, to your knowledge, before the date given by you in answer to interrogatory 5, and if so, when, where and by whom, and in what form? Please answer fully?

2. If the copy produced by you in answer to interrogatory 6 is a photographic copy of the said painting, please state by what person the negative of said photograph was actually made, and at what time and under what circumstances.

3. Has the complainant or his firm ever published any copy of the said painting "Die Heilige Cäcilie" by any other process than by photography, or any photographic copy made from any other negative than the one hereinbefore referred to? If yes, when? and please produce samples of all such other copy or copies to be marked as exhibits in this case; and if said copies so produced are marked with any statement or notice of copyright

or registration, please state when said statement or notice was first imprinted upon said copy, and by whom?

4. If you know of any copy, photographic or otherwise, of the said painting "Die Heilige Cäcilie," whether produced by the complainant or otherwise, which has borne any copyright notice different from that given by you in answer to interrogatory 12, please state the facts fully?

Depositions of witnesses produced, sworn and examined the 15th day of December, in the year one thousand eight hundred and ninety-three, at the Consulate General of the United States of America at No. 49 Markgrafens Strasse, Berlin, German Empire, under and by virtue of a commission issued out of the Circuit Court of the United States within and for the Massachusetts District, to the Consular Officer of the United States at Berlin, Germany, directed, for the examination of witnesses in a cause therein depending between Emil Werckmeister, plaintiff, and Pierce & Bushnell Manufacturing Company is defendant, on the part and behalf of the plaintiff:

Emil Werckmeister, of Berlin, German Empire, by occupation a publisher, aged forty-nine years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

First.—To the first interrogatory he saith: My name is Emil Werckmeister, my age forty-nine years, my residence Berlin, German Empire, my occupaiion that of a publisher.

Second.—To the second interrogatory he saith:

I am a citizen or subject of the German Empire.

Third.—To the third interrogatory he saith:

I have been a citizen or subject of the German Empire since the day of my birth in 1844.

Fourth.—To the fourth interrogatory he saith:

My firm name is "Photographische Gesellschaft."

FIFTH.—To the fifth interrogatory he saith:

The firm name exists since 1862, and I have been sole proprietor of the firm since 1872.

SIXTH.—To the sixth interrogatory he saith:

So far as I know, I am the only person who does business under the firm name Photographische Gesellschaft.

SEVENTH.—To the seventh interrogatory he saith:

The painter, G. Naujok, transferred to my firm the right of publishing the painting called "Die Heilige Cäcilie." Being thus the assign of the author, my firm was entitled to secure the copyright of the painting under the laws of the United States.

EIGHTH.—To the eighth interrogatory he saith:

All letters and documents concerning the subject are filed with our records. The document of transfer runs literally as follows: "Ich übertrage der Photographischen Gesellschaft in "Berlin, für mein Werk 'Die Heilige Cäcilie,' das Verlagerecht "—worunter ich das unbeschrankte Nachbildungsrecht ver- "standen wissen will—gegen Zahlung von Rm. Fünfhundert "und neun Freiexemplars.

"Königsburg, i/Pr. den 5 März, 1892.

"(Signed) GUSTAV NAUJOK."

A copy authenticated by a notary public may be produced any time.

NINTH.—To the ninth interrogatory he saith:

I know Franz Schroeder; he is my attorney and the manager of my business since nearly 25 years.

TENTH.—To the tenth interrogatory he saith:

Doing business since a very long time on a very large scale, hardly surpassed by any other houses, and having branches in London, Paris and New York, I dare to say I am rather an expert in art publishing matters.

ELEVENTH.—To the eleventh interrogatory he saith:

I am familiar with the painting called "Die Heilige Cäcilie," painted by G. Naujok.

TWELFTH.—To the twelfth interrogatory he saith:

It is a very valuable work of art, exhibited in the Munich Salon of 1892, and sold at a high price.

THIRTEENTH.—To the thirteenth interrogatory he saith:

I did not permit the Pierce & Bushnell Manufacturing Company to make and sell copies of the painting called "Die Heilige Cäcilie," neither directly nor indirectly.

EMIL WERCKMEISTER.

Subscribed and sworn to before me on the day, at the place, and within the hours first aforesaid.

W. H. EDWARDS, Consul General,
[SEAL.] *Commissioner.*

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA, City of Berlin, German Empire, } ss.:

Pursuant to the foregoing commission, I caused the said Emil Werckmeister to come before me on the 15th day of December, A. D. 1893, and having sworn the said Emil Werckmeister to testify the truth, the whole truth, and nothing but the truth relating to the cause for which the deposition is taken, I examined the said Emil Werckmeister, and his testimony was reduced to writing by William Haupt, a disinterested person, in my presence.

The said plaintiff Emil Werckmeister was present by himself, and was not represented by an agent or attorney while giving his deposition, and I took said deposition separate and apart from all other persons, no person being present except myself and William Haupt, a disinterested person, and the witness Emil Werckmeister; and in taking the deposition I put the interrogatories and cross-interrogatories to the deponent as

directed in the foregoing commission, and in all respects fully and exactly complied with the directions in said commission in taking the same.

And after said deposition was taken I carefully read the same to the said Emil Werckmeister, and he subscribed it in my presence.

Witness my hand and official seal, the day and year above written.

W. H. EDWARDS, Consul General,
[SEAL.] *Commissioner.*

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MASSACHUSETTS.

In Equity.

EMIL WERCKMEISTER

vs.

PIERCE & BUSHNELL MANUFACTURING CO.

(St. Cäcilie.)

Translation of the Testimony of Franz Schröder.

1. To the first interrogatory he saith: My name is Franz Schröder; my age fifty years. My residence is Gross Lichtefelde, near Berlin. My occupation is that of a painter and power of attorney for the Photographische Gesellschaft.

2. To the second interrogatory he saith: I am in no way related to the complainant

3. To the third interrogatory he saith: Emil Werckmeister is a citizen of the German Empire.

4. To the fourth interrogatory he saith: The complainant, Emil Werckmeister, does business under the firm name "Photo-

graphische Gesellschaft," art publisher. Since 1872 the complainant is the sole proprietor of this business. Since 1867 the complainant, however, has been with the said business.

5. To the fifth interrogatory he saith: The first copy of the painting called "Die Heilige Cäcilie" was published in Germany on the 19th of September, 1892. The first copies were sent by the Protographische Gesellschaft to America on the 24th day of August, 1892.

6. To the sixth interrogatory he saith: Hereby I add to my deposition a copy of the aforesaid picture called "Die Heilige Cäcilie," and designate the same as Exhibit A.

7. To the seventh interrogatory he saith: Yes. I know this, as I keep the records for the same. G. Naujok, the painter of the picture "Die Heilige Cäcilie," transferred the right of publication for the aforesaid painting to the complainant, with the right for the copyright in the United States of America.

8. To the eighth interrogatory he saith: I personally attended to the assignment of the right of publication, and I personally obtained from the painter Naujok, in Königsberg, the exclusive right of publication of the picture "Die Heilige Cäcilie" for the Photographische Gesellschaft of Berlin, by an instrument transferring the right of publication, dated March 5, 1892. A copy of this instrument, in writing, I annex to my testimony and designate the same Exhibit B. Application for the copyright for "Cäcilie" was made in Washington on May 16, 1892.

9. To the ninth interrogatory he saith: Yes; the complainant has made a great many negatives in his art establishmen- from the picture "Die Heilige Cäcilie"; that is to say he had them made.

10. To the tenth interrogatory he saith: The negatives belong to the complainant.

11. To the eleventh interrogatory he saith: The complainant published, from the day of the publication up to now, about ten

thousand copies of the so-called painting "Die Heilige Cäcilie." Just as many were sold.

12. To the twelfth interrogatory he saith: All copies bore the inscription "Copyright 1892, by Photographische Gesellschaft." It is not conceivable that other copies, which did not bear this inscription, left the establishment of the Photographische Gesellschaft, because the cartones for this purpose were not printed until the application for the copyright had been made in Washington and we had received notice that the copyright had been there entered.

13. To the thirteenth interrogatory he saith: I am a painter. I have studied in the academy of art at Dresden and at Berlin. Besides this I am familiar with all technical matters in reference to the art productions, and have been with the Photographische Gesellschaft over twenty-four years as art salesman and expert.

14. To the fourteenth interrogatory he saith: I consider the picture "Die Heilige Cäcilie" a very valuable work of art.

15. To the fifteenth interrogatory he saith: Yes, indeed, I know that very well, that the picture "Die Heilige Cäcilie" has not been infringed by anybody except the defendant.

16. To the sixteenth interrogatory he saith: The Photographische Gesellschaft undertakes either through Mr. Werckmeister or through me journeys to all the larger art centres for the purpose of visiting the designers of paintings, and for the purpose of acquiring the right of reproduction from them. Besides this the "Gesellschaft," through its travelers, causes the art dealers in Europe to be visited and samples shown to them. Besides this the Photographische Gesellschaft founded a branch in New York, and from New York all the larger cities in America are visited. Besides that the Photographische Gesellschaft has branches in London and Paris for the same purpose.

CROSS INTERROGATORIES.

1. To the first cross-interrogatory he saith: The painting "Die Heilige Cäcilie," by G. Naujok, to the best of my knowledge, has been reproduced by nobody, either through photography, etching and engraving, or in any other way, before or after the date to which I have testified, with the exception of the rightful publication by the Photographische Gesellschaft.

2. To the second cross-interrogatory he saith: The negatives from all paintings, including those from the painting by Naujok, are not made in our establishment by one, but by different of our employees, and therefore I cannot designate a particular person. At all events, the negatives were immediately made as soon as we had received the aforesaid painting from Naujok.

3. To the third cross-interrogatory he saith: "Die Heilige Cäcilie" has been published in photographic folio size, imperial size and normal size, which latter is the largest size. Besides this it has been published in photogravure in imperial size. All of these negatives of the various sizes are all copies of the original by Naujok and therefore only differ in their size, and I refer in this respect to the Exhibit A as a sample. The same may be said with regard to the photogravure of this picture. The negatives were made after receipt of the painting from Naujok. All these copies bore the inscription "Copyright 1892, by Photographische Gesellschaft." This inscription was printed on the cartones for the copies by us as soon as we were assured that the painting by Naujok called "Die Heilige Cäcilie" had been entered in Washington.

4. To the fourth cross-interrogatory he saith: About this I know nothing. I have never seen a copy of the so-called painting upon which there was any other notice than the one put on by us, and no one excepting the defendant has reproduced the picture called "Die Heilige Cäcilie."

Exhibit B (Copy).

I transfer hereby to the Photographische Gesellschaft in Berlin for my work "Die Heilige Cäcilie" the right of publication – by which I wish to have understood the exclusive right of reproduction—against a payment of 500 mark, and nine gratuitous copies thereof.

KÖNIGSBERG, in Prussia, March 5, 1892.

(Signed) GUSTAV NAUJOK.

The undersigned hereby consent that the aforesaid answers of the witness Franz Schröder translated into English as aforesaid, may be accepted and printed in lieu of the answers of said witness in German, and that Exhibit B, above, is a correct translation and may be accepted and printed in lieu of the original.

March , 1894.

GOEPEL & RAEGENER,
Complainant's Solicitors.

ALEX P. BROWNE,
Defendant's Solicitor.

U. S. CONSULAR AGENCY,
KÖNIGSBERG, PR., January 12th, 1894.

CONRAD H. GÄDEKE, United States Consular Agent at Königsberg, P. Germany, having been appointed by the Circuit Court of the United States within and for the Massachusetts District to have the answers to the interrogatories and cross-interrogatories, annexed at this appointment, of G. Naujok, as witness in a certain cause wherein Emil Werkmeister is Plaintiff *versus* Pierce and Bushnell Manufacturing Co. Defendant. I have called the said witness G. Naujok this 12th day of January, 1894, at half-past nine o'clock before me at my office, who having carefully been examined on oath, answered the interrogatories and cross-interrogatories as follows:

INTERROGATORIES.

1. What is your name, age, residence and occupation.

Answer. Gustav Naujok, 32 years, Königsberg, Pr., Painter.

2. Do you know the Photographische Gesellschaft of Berlin?

Answer. Yes.

3. Do you know who invented and designed a certain painting called "Die Heilige Cäcilie," a copy of which is herewith presented to you marked "Exhibit B2"?

Answer. Yes, I have invented and designed it myself.

4. Did you transfer and assign the right of publishing the said painting "Die Heilige Cäcilie" and the right to take a copyright thereon in the United States to any one? If so, when and to whom?

Answer. Yes, I have transferred and assigned the right of publishing the said painting "Die Heilige Cäcilie" and the right to take a copyright thereon in the whole world and therefore also in the United States to the Photographische Gesellschaft at Berlin on March 5, 1892.

5. How did you transfer the right of publication and the right of taking copyright in the United States?

Answer. By handwriting, not especially for the United States but as aforesaid for the whole world.

CROSS-INTERROGATORIES.

1. If you answer interrogatory 3 to the effect that you invented and designed the painting called "Die Heilige Cäcilie" state when the picture was begun by you and when it was finished?

Answer. The picture was begun by me in February, 1891, and finished in October, 1891.

2. Did you ever paint a replica of said painting "Heilige Cäcilie" and if yes, when was such replica begun and finished by you?

Answer. No, I never have painted a replica of said picture "Die Heilige Cäcilie."

3. State whether or not there has ever been put upon said painting " Die Heilige Cäcilie " or replica, or upon the canvas or frame thereof, at any time, any statement or notice that the same has been copyrighted or registered or otherwise protected by law, and if yes, state at what time or times and in what way any such statement or notice was put on and by whom, and give the words and figures of all said statements or notices in full.

Answer. No, only my name, " G. Naujok " is put on the picture by myself.

4. State whether or not any picture or replica " Die Heilige Cäcilie," invented and painted by yourself, was ever publicly exhibited, and if so, at what time or times and places and under what circumstances. Please answer fully.

Answer. This picture is publicly exhibited by myself at Berlin in the " Kunsthandlung von Schulte " from January, 1892, until March, 1892, and at Munich, in the " Grosse Internationale Kunstausstellung im Glaspalast" in summer 1892.

5. State whether or not any reproduction of the said painting " Die Heilige Cäcilie " or of any replica thereof, whether by photographing, etching, engraving, or otherwise copying has ever been made by yourself or by others (except the complainant herein) with your knowledge or consent, and if yes, state the nature and character of every such reproduction, by whom made, if not by yourself, and by whom, where and when published. This interrogatory is intended to include reproductions in exhibition catalogues, illustrated journals, etc., and is to be answered accordingly.

Answer. No, to my knowledge not.

6. If in answer to interrogatories 4 and 5, you state that you transferred the right of publishing the painting " Die Heilige Cäcilie " and the right to take copyright thereon in the United States to Emil Werkmerster or the Photographische Gesellschaft by an instrument in writing, please produce the same to be made an exhibit and attached to this deposition.

Answer. I cannot produce any instrument in writing, as I

have transferred all rights to the Photographische Gesellschaft at Berlin only by handwriting, and as I have not retained any copy of the same.

7. Have you transferred the right of publication or any right of copyright in the said picture "Die Heilige Cäcilie" for any country other than the United States to any person, and if so, when and to whom, and if by an instrument in writing, please produce the same to be annexed to your deposition and made an exhibit in this case.

Answer. I have transferred the right of publication and the right of copyright in the said picture "Die Heilige Cäcilie" for the whole world to the Photographische Gesellschaft at Berlin by handwriting, whereof copy is not retained by me.

8. By whom is the painting by you entitled "Die Heilige Cäcilie," or any replica thereof, now owned and at what place? If you state that it is owned by any one other than yourself please state when it left your possession and give in full its history so far as you are able.

Answer. I do not know by whom the painting entitled by me "Die Heilige Cäcilie" is now owned and at what place; it left my possession in summer 1892, as I sent it to Munich to the Grosse Internationale Kunstausstellung, where it is sold by the "Ausstellungs commission."

GUSTAV NAUJOK.

Subscribed and sworn to this 12th day of January, 1894.

CONRAD H. GÄDEKE,
[L. S.] U. S. Consular Agent.

CIRCUIT COURT OF THE UNITED STATES

For the District of Massachusetts.

In Equity.

Emil Werckmeister

vs.

Pierce & Bushnell Manufacturing Co.

New York, May 5, 1894.

Testimony on behalf of complainant taken *de bene esse* before Thomas M. Rowlette, a Notary Public for New York County, pursuant to notice.

Present: Alexander P. Browne, Esq., of Counsel for Deft.
Louis C. Raegener, Esq., of Counsel for Complt.

Complainant's counsel offers in evidence certificate from the Librarian of Congress, dated May 16, 1892, and the same is marked "Complainant's Exhibit No. 1, May 5, 1894."

It is conceded and admitted by defendant's counsel that "Die Heilige Cäcilie" referred to in Exhibit 1, and in the instrument signed by Gustav Naujok, is the same picture, a photographic copy of which is attached to the commissions of complainant, Emil Werckmeister, Franz Schroeder and Gustav Naujok, and that the description thereof filed with the Librarian of Congress was set forth in the bill of complaint.

Complainant's counsel also offers in evidence a photograph, and defendant's counsel admits that the same was made, published and sold by the defendant at some time during the year

1893, and prior to the commencement of this suit. The same is marked "Complainant's Exhibit No. 2, May 5, 1894."

Adjourned, subject to notice.

Attest,

THOMAS M. ROWLETTE,
Notary Public,
New York Co.

UNITED STATES OF AMERICA,

District of Massachusetts.

At a Circuit Court of the United States for the First Circuit begun and holden at Boston within and for the District of Massachusetts, on Tuesday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Before

The Honorable WILLIAM L. PUTNAM,
Circuit Judge.

No. 374, Equity.

EMIL WERCKMEISTER,
Complainant,

v.

PIERCE & BUSHNELL MANUFACTURING COMPANY,
Defendant.

The Bill of Complaint in this cause was filed in the Clerk's Office on the twenty-fourth day of May, A.D. 1893, and was duly entered at the May Term of this Court, A.D. 1893, and is in the words and figures following:

BILL OF COMPLAINT.
(Filed May 24,1893.)

(MEMORANDUM. The Bill of Complaint as printed in this Transcript of Record, beginning on page 1, is here inserted. ALEX. H. TROWBRIDGE, Clerk.)

At the same term the following Answer was filed:

ANSWER.
(Filed Sept. 1,1893.)

(MEMORANDUM. The Answer as printed in this Transcript of Record, beginning on page 9, is here inserted. ALEX. H. TROWBRIDGE, Clerk.)

Also at the same term the following Replication was filed:

REPLICATION.
(Filed Sept. 2,1893.)

(MEMORANDUM. The Replication as printed in this Transcript of Record on page 12, is here inserted. ALEX. H. TROWBRIDGE, Clerk.)

This cause was thence continued from term to term to the present May Term, A.D. 1894, when, publication of the testimony having passed in the Clerk's office, the same is set down for hearing and fully heard by the Court, the Hon. William L. Putnam, Circuit Judge, sitting.

On the seventh day of August, A.D. 1894, the opinion of the Court is announced.

On the twelfth day of September, 1894, the following ~~Final~~ Decree is entered.

~~FINAL~~ DECREE.

(~~Entered~~ Sept. 12, 1894.)

This cause having come on to be heard upon the bill of complaint herein, the answer thereto of the defendant the Pierce & Bushnell Manufacturing Company, the replication of the complainant to such answer and the proof oral, documentary and written, taken and filed in said cause,

Now, therefore, on consideration thereof after hearing Louis C. Raegener, Esq., of counsel for complainant, and Alexander P. Browne, Esq., of counsel for defendant, it is ordered, adjudged and decreed, and the court doth hereby order, adjudge and decree as follows:

That Gustav Naujok on or about October 1st, 1891, was a German subject and a resident of Germany, and the author and designer of a certain painting in oil, called "Die Heilige Cäcilie", and that said painting is a work of art. That on March 5th, 1892, the said Gustav Naujok assigned and transferred to the complainant who does business under the firm name of "Photographische Gesellschaft", the right to obtain a copyright for said painting.

That on May 16th, 1892, the complainant under the name of the "Photographische Gesellschaft" delivered to the office of the Librarian of Congress a description of the said painting together with a photograph of said painting.

That, on May 16th, 1892, the complainant became duly vested with a copyright for said painting and has the sole right of printing, reprinting, publishing, completing, executing, finishing and varying the said painting.

That, on or about September 15th, 1892, the complainant made and published in Germany a photograph of the said painting and subsequently imported or caused to be imported the same photograph, and has sold it or caused it to be sold in the United States.

That, the complainant inscribed upon a visible portion of every photograph of said painting published by him, the words "Copyright 1892, by Photographische Gesellschaft."

That, the defendant, the Pierce & Bushnell Manufacturing Co., has made and sold in the United States at some time during the year 1893, prior to May 1st, 1893, a photograph which is a copy of said painting, and that defendant has infringed upon the exclusive rights of the complainant under the aforesaid copyright.

And it is further ordered, adjudged and decreed that the complainant do recover of the defendant the profits, gains and advantages which the said defendant has received or made, or which have arisen or accrued to it from the sale of photographs and copies of the said copyrighted painting "Die Heilige Cäcilie".

And it is further ordered, adjudged and decreed that it be referred to - - - - - - - a special master of this court, residing in the city of - - - - , to ascertain and take and state and report to the court an account of the number within the United States of photographs and copies of the said copyrighted painting made, and also the number within the United States sold by the said defendant, and also the gains,

profits and advantages which the said defendant has received or which have arisen or accrued to it since the first day of January,1893,from infringing within the United States,the said exclusive rights of the said complainant by the making and selling of photographs and copies of said copyrighted painting.

And it is further ordered,adjudged and decreed that the complainant on such accounting,have the right to cause an examination of said defendants and its officers ore tenus or otherwise; and also the production of the books, vouchers and documents of said defendant,and that the officers of said defendant attend for such purpose before said master from time to time as such master shall direct.

It is also further ordered,adjudged and decreed,that a perpetual injunction be issued in this suit against the said defendant,the Pierce & Bushnell Manufacturing Co.,restraining it,its officers,agents,clerks,servants,and all claiming or holding under or through the said defendant from directly or indirectly within the United States,working,printing,reprinting,publishing, completing,copying,executing or finishing any photographs or copies of the said painting "Die Heilige Cäcilie" not made by the complainant,and from,within the United States,publishing,exposing for sale,selling or otherwise disposing of any photographs or copies of said painting not made by complainant,or any like or similar to those which it has heretofore made,sold or exposed to sale,or any part or parts of such copies,and also from,within the

United States, publishing, exposing for sale, selling or otherwise disposing of any of the plates or negatives from which the defendants photographs of the said painting were produced.

By the Court;

ALEX. H. TROWBRIDGE,
Clerk.

From this decree the defendant claims an appeal to the United States Circuit Court of Appeals for the First Circuit, and gives good and sufficient security that it will prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, and said appeal is allowed.

A true record:
Attest: ALEX. H. TROWBRIDGE,
Clerk.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
District of Massachusetts, ss.

I, ALEXANDER H. TROWBRIDGE, Clerk of the Circuit Court of the United States for the First Circuit and District of Massachusetts, certify that the foregoing is a true copy of the record in the cause, in equity, entitled,

No. 374,

EMIL WERCKMEISTER,
Complainant,

v.

PIERCE & BUSHNELL MANUFACTURING COMPANY, Defendant,

in said Circuit Court determined, and that annexed hereto are true copies of the Opinion of the Court, the Claim of Appeal and Assignment of Errors and Bond to Party on Appeal, and also annexed hereto is the original Citation on Appeal with Acknowledgment of Service thereon, all constituting a true copy of the record and all proceedings in said cause.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this twenty-sixth day of November, in the year of our Lord one thousand eight hundred and ninety-four and of the Independence of the United States the one hundred and nineteenth.

Seal

Clerk.

CLAIM OF APPEAL AND ASSIGNMENT OF ERRORS.
(Filed Oct.11,1894.)

And now comes the respondent and claims an appeal in this suit and assigns therefor the following errors, viz.:

First. That the Court having found that the complainant failed to inscribe the notice required by law upon some visible portion of the painting alleged to be copyrighted or of the substance on which the same was mounted, erred in finding that he was not thereby debarred from maintaining this action for the infringement of his copyright.

Second. That the Court erred in finding and holding that the painting alleged to be copyrighted had not been published within the sense of the copyright law prior to the deposit of the description and photograph thereof in the office of the Librarian of Congress.

Third. That the Court having found that the complainant had published copyrightable but uncopyrighted photographs of his alleged copyrighted painting and that the defendant had copied solely the uncopyrighted photograph and not the copyrighted painting itself, erred in finding that such copying was an infringement of the copyright upon the said painting.

Fourth. That the Court having found that the complainant had placed upon the uncopyrighted photographs a notice of copyright and had failed to place the same upon the copyrighted painting, erred in not finding that the plaintiff by virtue of such false and incorrect marking of his uncopyrighted photograph had debarred himself from equitable relief.

Fifth. That the Court erred in finding that the complainant's uncopyrighted photograph could not have been copyrighted under section three of the Act of 1891.

Sixth. That the Court having found that the complainant had published copyrightable but uncopyrighted photographs of the said alleged copyrighted painting, erred in finding that he had not thereby dedicated the right of copying said photographs to the public, including the defendant herein, and therefore also erred in enjoining the defendant herein from copying said copyrightable but uncopyrighted photograph.

Seventh. That the Court erred in finding that the complainant was the proprietor or assign of the said copyrighted picture or of the right to copyright the same at the time of his alleged copyrighting thereof, and also erred in finding that the said copyright was rightfully and effectually registered by the complainant in his own name.

ALEX. P. BROWNE,
Solicitor and of Counsel
for defendant, respondent.

Nov. 13, 1894.

This appeal and also the appeal bond and citation were first presented to me this day. I allow the appeal without passing on the question of seasonableness, as no supersedeas is asked.

W. L. PUTNAM,
Circuit Judge.

A true copy:
Attest: Alex. P. Browne
Clerk.

BOND TO PARTY ON APPEAL."
(Filed Nov. 5, 1894.)

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BOND TO PARTY ON APPEAL.

Know all Men by these Presents, That we, The Pierce & Bushnell Manufacturing Company, of New Bedford, Massachusetts, The Pierce & Bushnell Mfg. Co., as principal, and Arthur G. Grinnell and William D. Howland, both of New Bedford, County of Bristol, Massachusetts, as sureties, are held and firmly bound unto Emil Werckmeister, doing business as The Berlin Photographische Gesellschaft of New York, N.Y., in the full and just sum of Three hundred dollars ($300) to be paid to the said Emil Werckmeister his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this eleventh day of October, in the year of our Lord one thousand eight hundred and ninety-four.

WHEREAS, lately at a Circuit Court of the United States for the District of Massachusetts in a suit in Equity depending in said Court, between said Emil Werckmeister, complainant, and said Pierce & Bushnell Manufacturing Company, defendant,

a decree was entered against the said defendant

and the said defendant

having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said Emil Werckmeister, complainant,

citing and admonishing him to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the City of Boston, Massachusetts, on the

Now, the condition of the above obligation is such, That, if the said Pierce and Bushnell Manufacturing Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

Eliot D. Stetson to all these signatures.

THE PIERCE & BUSHNELL MFG. CO., SEAL
ARTHUR G. GRINNELL, SEAL
WM. D. HOWLAND, SEAL

Approved: Assented to.
GOEPEL & RAEGENER,
Attorneys for E. Werckmeister, Plaintiff.

Approved Nov. 13, 1894.
W. L. PUTNAM, Circuit Judge.

A true copy:
Attest: Albert Crowdrige, Clerk.

Allison

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~~UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.~~

CITATION ON APPEAL.

UNITED STATES OF AMERICA, SS.:

The President of the United States,

To Emil Werckmeister, a citizen of the Empire of Germany, doing business as the Berlin Photographische Gesellschaft of New York, N.Y.

GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the first day of December next, pursuant to an Appeal duly obtained from a decree of the† Circuit Court of the United States for the District of Massachusetts wherein the Pierce v Bushnell Manufacturing Company, a corporation duly organized and established under the laws of Massachusetts, and a citizen of said State,

Entered Sep. 12, 1894

is appellant

and you are appellee , to show cause, if any there be, why the said decree, entered against the said appellant , should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable William L. Putnam, Judge of the Circuit Court of the United States for the District of Massachusetts, this thirteenth day of November, in the year of our Lord one thousand eight hundred and ninety four.

William Putnam

U.S. Circuit Judge.

~~*Not exceeding 30 days from the day of signing.~~

~~†Name of Court in which the Decree is entered.~~

Due service of the above citation acknowledged this 21st day of November, 1894

George P. Macquer.
Louis C. Macquer

~~Alexander Brown~~

Sol'r for Counsel for Plff

~~United~~

The following is the opinion of the Court in accordance with which the decree was entered Sept. 12, 1894.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 374

EMIL WERCKMEISTER

v.

PIERCE & BUSHNELL MANUFACTURING COMPANY.

OPINION OF THE COURT.

August 7, 1894.

Putnam, J. On or about October 1, 1891, G. Naujok, a German subject and a resident of Germany, painted in oils a picture called by him, and in this case, "Die Heilige Cäcilie", an undoubtedly meritorious work of art. On the fifth of the succeeding March he executed, in behalf of the complainant in this case, who describes himself in his bill as a citizen of the Empire of Germany, and who transacts his business under the name of the Photographische Gesellschaft, an instrument of which the following is a copy:

"I transfer hereby to the Photographische Gesellschaft, in Berlin, for my work, 'Die Heilige Cäcilie' the right of publication — by which I wish to have understood the exclusive right of reproduction — against a payment of 500 marks, and nine gratuitous copies thereof.

Königsburg, in Prussia, March 5, 1892.

Gustav Naujok."

The artist never painted a replica. In the summer of 1892 he sent the picture to Munich, to the Grosse Internationale Kunstausstellung, where it was sold to some person

unknown to the artist, and not shown in this case; and neither the artist nor either of the parties to this case know where the picture is, or where it has been since the sale. From January, 1892, until March, 1892, the picture was publicly exhibited at Berlin in the Kunsthandlung von Schulte, a public art gallery, the rules of which as to suffering copies to be taken are not shown. No other publications are proven, except the photographs of the parties to this case.

On the sixteenth of May, 1892, complainant delivered at the office of the Librarian of Congress a copy of the title of the painting and a description of it, and obtained the following certificate:

"LIBRARY OF CONGRESS,
COPYRIGHT OFFICE, WASHINGTON.

TO WIT: BE IT REMEMBERED,

That on the 16th day of May, anno domini 1892, Photographische Gesellschaft, of Berlin, Ger., have deposited in this Office the title of a Painting, the title or description of which is in the following words, to wit:

DIE HEILIGE CÄCILIE,
G. NAUJOK.
Photo. & Descrip. on file;

the right whereof they claim as proprietors in conformity with the laws of the United States respecting Copyrights.

A. R. SPOFFORD,
Librarian of Congress."

Afterwards, on or about the fifteenth of September, 1892, complainant put on the market in Germany a photograph of the painting, and subsequently imported, or caused to be imported, the same photograph, and has sold it, or caused it to be sold, in the United States. Subsequently the defendant sold in the United States a photograph which is an undoubted infringement, if under the law there can be an infringement, and the bill is brought to restrain the defendant touching its photograph, and for other relief.

The photograph of the complainant bears the inscription, "Copyright, 1892, by Photographische Gesellschaft", and reproduces from the picture the signature of the artist; but it contains no notice, unless implied in the foregoing words, that the painting itself was ever copyrighted, nor has there been inscribed on the painting, or its mounting, the notice pointed out by section 4962 of the Revised Statutes.

By the proclamation of the President of April 15, 1892, 27 Stat. 1021, the benefit of the International Copyright Act of March 3, 1891, c. 565, 26 Stat. 1106, was extended to German subjects.

The Act of 1891, sec. 3, provides that the two copies of a copyrighted photograph required to be delivered at the office of the Librarian of Congress, shall be printed from negatives made within the limits of the United States, or from transfers made therefrom, and that during the existence of the copyright the importation into the United States of the photographs copyrighted, or any edition or editions thereof, or any negatives, shall be prohibited. Consequently, the complainant's imported photographs cannot be directly protected by statute. As they are not copyrighted, and are therefore, perhaps, not prohibited from importation, it is claimed that if his positions in this case are sound, the policy of the provisions of the third section to which we have referred, may be partially defeated These provisions, however, are apparently precise, in that they are limited to the cases of "book, chromo, lithograph or photograph"; *Littleton* v. *Oliver Ditson Company*, decided by this court August 1, 1894. They do not assume to reach any reproduction which does not involve depositing with the Librarian of Congress two copies; and the case at bar does not fall within the latter class, but within the class requiring one photograph of the subject matter of copyright. Therefore we are apparently not met by any broad policy, such as would trouble us in reaching a result not fairly excluded by the letter of the

statute. But as the right of the complainant to enjoin the defendant does not depend on the right of the former to import photographs, we need not particularly investigate the effect of these statute provisions.

At the common law the artist, or the owner of the painting, can prohibit reproductions of it until he in some way publishes it; but, after publishing it, either by photographs or otherwise, it becomes subject to the same rules as other published matter, and the public becomes entitled to it. This principle is so fundamental that it need not be elaborated, or fortified by any citation of authorities; and we will only refer on this point to *Parton* v. *Prang*, 3 Cliff. 537, 548, 549. Moreover, a mere exhibition of a picture in a public gallery, like that at Berlin, does not at common law forfeit the control of it by the artist, or the owner, unless the rules of the gallery provide for copying, of which there is no evidence in this case. But if, by proper authority, which it does not lie in the mouth of the complainant in this case to deny, photographs of this painting have been put on the market in the United States, under such circumstances that they are not protected by the copyright statutes, the public is free to copy it, and to sell copies of it in the legitimate course of trade, and the bill cannot be maintained.

The propositions of the complainant necessary to maintain his case are, that by virtue of the agreement given him by the artist, which we have already set out, he was entitled to copyright the painting itself, and that he has lawfully done so; and that the painting being copyrighted, all reproductions of it in every form are infringements. While he admits that he is neither the author nor the proprietor of the painting, yet he claims, by virtue of the instrument given him by Naujok, to come in under the words "assigns of any such person", found in section 4952 of the Revised Statutes. In response to the complainant's claim, the defendant, among other things, refers

to section 4962 of the Revised Statutes, and asserts that even if the complainant's position was correct in other respects, he could maintain no action for any infringement of his copyright, because the words specified in the section last referred to have not been inscribed on any visible portion of the original painting, or on the substance on which the painting is, or may have been, mounted.

Neither party has cited to the court any decided cases, nor referred us to any other authorities, bearing directly on the principal questions involved. *Yuengling* v. *Schile*, 12 Fed. Rep. 97, has been brought to our attention, as leading up to the proposition that the proprietor of a painting, merely as such, has no right to a copyright thereon. We do not understand that such is a proper inference from that case, or that the statute law is to that effect. We have no occasion to make any issue touching any questions which were actually decided in that case. Our attention is also called to *Schumacher* v. *Schwencke*, 30 Fed. Rep. 690; but this case, so far as it applies to the case at bar, is only in harmony with *Gambart* v. *Ball*, 14 C. B. (N. S.) 306, *Rossiter* v. *Hall*, 5 Blatch. 362, and *Ex Parte* Beal, Law Rep., 3 Q. B. 387, 394, to the effect that the person holding the copyright of an original painting is protected against any reproduction of it, whether by a photograph of it, by a reproduction of an authorized photograph, or in any other manner. The decisions of the English courts are of but little assistance, because their statute touching copyrights of original paintings, 25 & 26 Vict. c. 68, makes special provisions with reference to the right to a copyright impliedly passing with the picture itself, and also the general copyright act now in force, 5 & 6 Vict. c. 45, contains, in section 2, a definition of the word assigns, and, in section 25, provisions about the nature of the estate in copyrights, not found in the statutes which govern us. Some English cases will, however, be referred to, which relate incidentally to the determination of this case.

Returning to the principal propositions at issue, they divide themselves into three: First, whether the complainant had a lawful right to copyright the original picture; second, whether, if the copyright is valid, it carries with it protection against all reproductions of it, including the photographs of the defendant; and third, whether the omission to inscribe on the original painting, or its mounting, either of the expressions required by the copyright statutes, and already referred to, bars this action. If either of these propositions are determined against the complainant, we, of course, need go no farther.

We have no doubt that the law is correctly laid down in the cases to which we have referred, that the author or proprietor of a painting who properly copyrights it, is protected against all reproductions of it in any form. This proposition is so fundamentally essential to the policy of the copyright statutes, that it needs no elaboration; and it follows logically that, if the complainant in this case, who received from the artist the exclusive right of reproducing the painting, became thereby entitled to a copyright, his copyright protects him as fully as the artist would have been protected, if he had reserved his right of reproduction and taken the copyright himself. Therefore on the second proposition at issue we are clearly with the complainant.

It is to be observed that the instrument given by Naujok to the complainant contained no expression of any authority to copyright, in the name either of Naujok or the complainant; but this is of no consequence if the complainant's contention is correct, that he is covered by the words "assigns of any such person", already cited. In accordance with that contention the complainant registered the copyright in his own name, and on his own right, and not in the name of Naujok, nor on the assumption of any agency coming from Naujok, either revocable or otherwise. It is also to be noticed that the case runs clear of the difficulties which would arise from the word sole

in section 4952 of the Revised Statutes, if the right vested in the complainant by Naujok had not been exclusive, even as against Naujok himself.

At the common law, the right to control the publication of a painting follows the title of the painting. It vests in the artist so long as he retains the painting; but, when it is sold by him, if sold without any qualification, limitation or restriction, all the incidents of the painting, including that of controlling its publication, vest in the purchaser. This is in strict harmony with the law touching the incidents of property, and flows necessarily out of it. We hardly need to cite authorities to sustain this proposition, but refer again in this connection to *Parton* v. *Prang*, 3 Cliff. 537, 550, 551. The English copyright statute, 25 & 26 Vict. c. 68, which created the law authorizing copyrighting of paintings, *Fishburn* v. *Hollingshead*, (1891) 2 Ch. 371, 379, and which is still in force, contains regulations touching this matter, enabling the artist, when disposing of his painting, to retain or dispose of the right to reproduce it. But nothing of this nature is found in our statutes, and the question arises, therefore, how far their general terms are intended to vary from the practice of the common law referred to. Is there, or is there not, enough in them to overcome the presumption that the statutes do not change the common law, except so far as the intention to do so is apparent? In the absence of something showing an intention to vary the common law rule, it must be presumed to stand. We do not mean by this that, at common law, the owner of a painting might not empower some other person than himself to elect as to publication, or that he might not dispose of the painting, reserving to himself the right of such election; but we mean to say that, inasmuch as at the common law this right is presumably in the proprietor of the painting, it requires something more than general expressions in a statute to satisfy the court of an intention to vest the privilege of secur-

ing a copyright in any other person than the one in whom it presumably exists. Moreover, the word assigns, on which the complainant relies, is ordinarily construed as only indicating the nature of the estate, and its ordinary effect is only to the extent of declaring that whatever is obtained is of an assignable character. Strictly, an authority to assign, or an assignment, relates to what already exists, and has no pertinency to the creation of a right out of another right, as by the instrument given by Naujok to the complainant. Such instruments are ordinarily spoken of as licenses and not assignments, and the holders of them as licensees and not assigns. This is the common rule under the statutes touching patents, although they contain a system so much more elaborated than those touching copyrights, that it is not safe to reason too liberally from one to the other. Instruments of this class relating to patents are ordinarily regarded as strictly in gross. *Oliver* v. *Rumford Chemical Works*, 109 U. S. 75, 82.

But the instrument in this case is so strongly expressed that it must be construed as vesting in the complainant all the right of publication which Naujok had, or ever could have, and therefore as vesting a full estate, which would pass by succession, and also be assignable. The instrument having been executed in Germany, where the technical rules of the common law touching the particular phraseology required to create more than a life estate or a personal interest, do not exist, is especially free from doubt on this score. It cannot be questioned that all the right which Naujok had to publish or reproduce passed out of him, and as it was in him assignable and descendible, it follows necessarily that the same qualities attach to it as vested in the complainant. It is for this, with other reasons, that, as we have already stated, no embarrassment arises in this case from the word sole in section 4952 of the Revised Statutes.

Following out the same line touching the distinction be-

tween transferring interests already existing and creating new ones, and between assignments and licenses, it is stated in Copinger on the Law of Copyright, 3rd ed., page 449, that it has been decided that a document conveying the sole right to reproduce a picture in chromos, or in any other form of color painting, for the term of two years, was not an assignment, and therefore did not need to be registered; but the learned author questions this decision. In *Lucas* v. *Cooke*, 13 Ch. D. 872, Mr. Justice Fry, of especially large experience and ability in cases of this character, used, with reference to an instrument of this nature, the words assignment and license interchangeably; and, on the whole, it involves no violent presumption to maintain that section 4952 of the Revised Statutes, in its use of the word assigns, had no reference to its narrow, technical meaning to which we have referred.

The English statute, 25 & 26 Vict. c. 68, already referred to, in designating the persons who may copyright an original painting, uses only the word author and the words "and his assigns". The word proprietor occurs at various points in the English copyright acts, but not in this connection; and the same may be said as to the copyright statutes of the United States prior to the act of July 18, 1870, c. 230, sec. 86, 16 Stat. 212. The provisions of the statute last named were re-enacted by section 4952 of the Revised Statutes, and further re-enacted, so far as this point is concerned, by the first section of the International Copyright Act of March 3, 1891, c. 565, 26 Stat. 1107. As there found, it provides in terms that the "author" * "or proprietor of any" * "painting" * "and the assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending". The phraseology of the statute, 25 & 26 Vict. c. 68, might not require going beyond the ordinary implications of the common law, or ~~beyond~~ holding that the word assigns

contemplated anyone except the purchaser of the painting itself. But section 4952 of the Revised Statutes, as re-enacted in the International Copyright Act, in addition to the word author, uses the word proprietor; and this latter word extends to paintings as well as to the other matters designated in the section. By the word author and the word proprietor our statute exhausts everything which the English statute necessarily covers by the word author and the words "or his assigns"; and if nothing more was contemplated than is provided by the English statute, the word proprietor, or the word assigns in our statute — one or the other of them — would be necesarily surplusage and of no effect. The language of our statute is not only explicit in including author, proprietor and assigns, but is rendered even more so by the use in the same connection of the words "upon complying with the provisions of this chapter". These demonstrate that the assigns, equally with the author or proprietor, may register and complete the copyright.

Applying the ordinary rules of construction, the court must ascertain, if it can, why, after using the word proprietor, our statute also uses the word assigns. Certainly this requirement cannot be met if the word assigns is limited to its ordinary technical meaning, already referred to, or to the holder of the original painting; because all this is covered by the word proprietor. We therefore cannot escape the conclusion that the statute requires us to broaden out the class of persons authorized to take out a copyright, so as to include others than mere proprietors of the paintings themselves, having regard always, of course, to the word sole, which the section contains, and to which we have already referred. We are unable to perceive the force of all these words, unless the statute covers cases of the precise character of this at bar.

What the complainant claims has been accomplished in this case, could clearly have been accomplished by first registering

a copyright, or copyrights with various nationalities, by Naujok, or in his name, and by his then assigning them absolutely and without reservation to the complainant. The result under those circumstances would have been precisely the same as the result which the complainant now maintains; and certainly a construction of a statute which avoids this circumlocution, cannot be unjust or against good sense. On the whole, we think the complainant rightfully and effectually registered the copyright, as maintained by him.

So far the history of the legislation in the United States has not been of much assistance to the court; but on the remaining proposition it proves to be of great value.

The defendant claims that section 4962 of the Revised Statutes is to be read literally, and that being thus read, it requires the notice to be inscribed on the painting itself, or at least on the mounting of it. If the defendant is right in this literal reading, it follows that the statute is satisfied by inscribing the notice on the original painting, or its mounting, and that all reproductions thereof, whether in engravings, photographs or other forms, go free from the notice. The Supreme Court has said, what must be patent to everyone, that the object of the statute in this particular is to give notice of the copyright to the public. *Burrow-Giles Lithographic Company* v. *Sarony*, 111 U. S. 53, 55. The purpose of the statute, therefore, would wholly fail of accomplishment by inscribing notice on the painting only, which presumably passes into some private collection, entirely out of the view of the general public. This is so patent that it need not be enlarged upon, and would be enough of itself to persuade the courts very urgently to look, if necessary, beyond the mere letter of the statute. Moreover, the same clause of section 4962 on which the defendant relies, groups paintings with engravings, photographs, chromos and various other articles which need not be specified; and if the defendant's construction properly applies to paintings, it would

seem to follow that it applies to all the other articles named in the same clause, and that the notice, therefore, should be inscribed on some original, or quasi original, engraving, photograph or chromo, and not on the copies thereof which go out to the public. But the practice as to such articles is distinctly the other way; and its correctness was expressly recognized in the decision of the Supreme Court last cited, in which the court said that the notice is to be given by placing it "upon each copy". Thus in a single sentence the Supreme Court has torn down the structure of apparent literalness on which the defendant relies.

An examination of the history of the legislation out of which section 4962 developed, makes the result entirely clear. The first statute requiring the inscription of a notice was that of April 29, 1802, c. 36, 2 Stat. 171. At that time the province of the copyright laws was narrow, and was divided in that statute into two fields. Section 1 provided that the copy of the record of registration required by law to be published in one or more newspapers, should be inserted on the title page, or the page immediately following it, of every book, but that in the case of a map or chart certain abbreviated phraseology, pointed out by the statute, should be impressed "on the face thereof". Section 2 extended the copyright privilege to historical and other prints, and required that the same entry impressed on the face of maps and charts, should be engraved on the plate, with the name of the proprietor, and printed on every print. Under this statute it was clear that the notice prescribed should go out to the public on every copy protected by the statute, and evidently the engraving of it on the engraver's plate was only to make sure that the main purpose of the statute was accomplished.

The next statute is the act which so long stood as the copyright code of the United States, that of February 3, 1831, c. 16, 4 Stat. 436. The provisions of that act touching the question now under examination we reproduce here at length:

"SEC. 5. And be it further enacted, That no person shall be entitled to the benefit of this act, unless he shall give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured on the title-page, or the page immediately following, if it be a book. or, if a map, chart, musical composition, print, cut, or engraving, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, or engravings, upon the title or frontispiece thereof, the following words, viz: 'Entered according to act of Congress, in the year , by A. B., in the clerk's office of the District Court of ', (as the case may be)."

This statute somewhat extended the scope of the copyright privilege, but left the provision on this point entirely clear. A distinction was made by section 5 between a book, on one hand, and a "map, chart, musical composition, print, cut or engraving", on the other, but it was only as to the precise place on which the notice should be inscribed,—in the one case on the title-page, or the page immediately following it, and in the other on the face, with a provision that in cases of volumes of maps, charts, music or engravings, it should be on the title or frontispiece. Except as to the mere place of impressing the notice, the statute applied without discrimination to all articles within the scope of the copyright privilege, and looked for the inscription of the notice on every copy which went out to the public, and nowhere else. The words "the several copies of each and every edition" ran through and governed every part of the section. This is so clear that it needs nothing to be added to the statement of the fact.

The next act was that of August 18, 1856, c. 169, 11 Stat. 138, which contained nothing to be noticed in this connection. Next came the act of March 3, 1865, c. 126, 13 Stat. 540. This is important, because it first extended the copyright privilege to photographs, and provided that this extension should enure to the benefit of the authors of photographs

"upon the same conditions as to the authors of prints and engravings". In other words, when photographs first came into the copyright statutes, they came in under the clear provisions of the fifth section of the act of 1831, requiring the inscription of the notice to be on every copy going out to the public, and nowhere else. That was the law when the revised code of July 8, 1870, c. 230, 16 Stat. 198, was adopted. The provision we are looking for is found in section 97 of that act. This statute first extended the copyright privilege to paintings, statues, statuary, models and designs, and section 97 was a consequent attempt to cover the additional articles by condensation of phraseology. It was afterwards incorporated into section 4962 of the Revised Statutes, on which the defendant rests.

To this time there had been no indication of any policy except that which the Supreme Court, in the citation we have made, had said was necessary to give the public notice of the copyright privilege claimed,—a policy which we have already seen, expressly included photographs, maps and charts as well as books. In this attempted condensation, maps, charts and photographs were dislocated from the express provision touching books, and associated with paintings, statues, statuary, models and designs. As no reason can be suggested for any change touching maps, charts and photographs, the presumption is that Congress intended, notwithstanding the awkward phraseology used, that the law should continue the same as to them; and, if this presumption stands, it carries with it the same law for paintings as for maps, charts and photographs. *Logan* v. *United States*, 144 U. S. 263, 302. The whole section was as follows:

"Sec. 97. And be it further enacted, That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, draw-

ing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words, viz: 'Entered according to act of Congress, in the year ———, by A. B., in the office of the librarian of Congress, at Washington'."

The words "several copies of every edition published" may well be held to permeate and govern that portion of the section commencing with the words "if a map, chart", etc., as effectively as it does the words "if it be a book", and the section may well be construed precisely the same as if the words "if it be a book" preceded the words "on the title-page". The word "thereof", in the latter part of the section, may well be held to refer back to the words "the several copies" in its early part. For clearness, we give the section as thus re-arranged:

"That no person shall maintain an action for the infringement of his copyright, unless he shall give notice thereof by inserting in the several copies of every edition published, if it be a book, on the title-page or the page immediately following, or if a map, chart, * painting, * by inscribing upon some portion of the face or front thereof * ."

Under the circumstances, the breaking up and dislocation of the section into sentences, or phrases, should be held to have been merely for the purpose of indicating the place where the notice is to be inscribed, according to the subject matter of the publication, that is to say, on the title page, or on the page immediately following, if it be a book, but, if it be other matter, on the face, or front; and it should be further held that in all other particulars the directions of the statute are identical with reference to each article to which the subject matter relates. A re-arrangement of clauses, or parts of sentences, is justifiable under the most common circumstances, and is especially justifiable in order that the statute may not be read contrary to its plain purpose and the general public policy.

A careful comparison of this section of the act of 1870 with the corresponding section of the act of 1831, shows that there are no other differences, except those of detail required by the extension of the copyright code, nor any which can affect the proposition we are considering.

This provision of law, as we have already said, was re-enacted without substantial change in section 4962 of the Revised Statutes. It was again re-enacted in the act of June 18, 1874, c. 301, 18 Stat., 78. The only differences are the option of the shorter form of notice contained in the latter statute, and a broadening out of the provision touching the portions of the published article on which the notice may be inscribed. No other purpose in the last enactment was suggested in *Higgins* v. *Keuffel*, 140 U. S. 428, in which it is somewhat referred to.

The only remaining act to be considered is that of August 1, 1882, c. 366, 22 Stat. 181. The main purpose of this statute was to make sure of the accomplishment of one general purpose of the act of 1874. The latter required that the notice be inscribed on some visible portion of the published articles, while the act of 1882 expressly permitted it, under some circumstances, to go on the back or bottom of such articles, although in some senses the back or bottom might not always be visible portions thereof. The reading of the act of August 1, 1882, contains, however, a legislative construction of the prior statutes on the point which we are considering. The prior statutes included designs in the same class with maps, charts, photographs and paintings. Therefore if, with reference to paintings, the inscription is to go on the painting itself, it would follow as a matter of course, that, with reference to models and designs, under section 4962 of the Revised Statutes, it should appear on the original models and designs, and not on the articles put on the market constructed according to them. But the act of 1882 says in terms, that the manufacturers of designs of molded decorative articles may put the mark prescribed by stat-

ute, not on the designs, but "upon the back or bottom of such articles". As the clear purpose of this statute related entirely to the place where, on any particular article, notice might be inscribed, and it clearly was not in any way intended to change the law as to what the inscription shall be impressed on, the effect of this phraseology cannot be mistaken.

On the whole, while we must admit that the phraseology of the statute is unfortunate, and might have been more clearly and positively expressed, we are convinced that, as we have already said, the differences in the various phrases relate entirely to the place on which the notice is to be inscribed, according to the subject matter of the article published, and that, with that exception, the phrases apply alike to all classes of articles, and relate entirely to the notices to be inscribed on what goes to the public in various forms and editions, and that there is no requirement that any shall be inscribed on the painting itself, more than there is that there shall be an original, or quasi original, map, chart, musical composition, print, cut, engraving, photograph, drawing, chromo, or model or design, to be inscribed with the notice, as the defendant claims the painting in this case should have been inscribed.

The defendant also claims that the words inscribed on the photograph, namely, "Copyright, 1892, by Photographische Gesellschaft", give no notice that the painting has been copyrighted, and imply only that the photograph has been. If this is so, the fault is that of the statute and not of the complainant, as he has used exactly the phraseology imposed by law. Undoubtedly the statute, if it had not been so condensed, might have given a form of notice more in harmony with the facts of cases of this character; but we can see that in this notice there is enough to give any one who is looking for the truth, and who desires to avoid infringement, the thread which will lead him easily to the actual condition of the copyright. There is something in the form of this notice which tends to sustain the con-

tention of the defendant that it should have been inscribed on the painting itself, but not enough to overcome the force of the rules of construction which have led us to the result we have explained.

We perceive nothing further in the case which requires any observations from the court.

Decree for the complainant; complainant to file draft decree on or before the twenty-fifth instant, and the defendant corrections thereof on or before the first day of September next.

A true copy:
Attest: Alex. T. Brookbridge
Clerk.

United States Circuit Court of Appeals

FOR THE FIRST CIRCUIT—OCTOBER TERM, 1894.

IN EQUITY.

No. 118.

Pierce & Bushnell Manufacturing Company,

Defendant, Appellant,

against

Emil Werckmeister,

Complainant, Appellee.

BRIEF ON BEHALF OF APPELLEE.

LOUIS C. RAEGENER,
Of Counsel for Appellee,
280 Broadway, New York.

Filed January 7, 1895.
John G. Hetherington, Clerk
F. a. B.

NEW YORK:
THE EVENING POST JOB PRINTING HOUSE, 156 FULTON STREET.
(EVENING POST BUILDING.)

1895.

United States Circuit Court of Appeals

FOR THE FIRST CIRCUIT—OCTOBER TERM.

1894.

PIERCE AND BUSHNELL MANUFACTURING COMPANY, Defendant, Appellant,

AGAINST

EMIL WERCKMEISTER, Complainant, Appellee.

No. 118.

BRIEF ON BEHALF OF APPELLEE.

This is an appeal from an interlocutory decree in a suit brought to restrain the infringement of a copyrighted painting called "Die Heilige Cacilie." The opinion of Judge Putnam (p. 41, Rec.) fully states the facts. The assignment of errors is found on page 37 of the Record.

I.

The law did not require any copyright notice to be inscribed upon the original painting or the substance on which the same was mounted.

The point under consideration presents two questions: (A) Was it necessary to inscribe the notice under all circumstances; and (B) was it necessary in this particular case?

The statute says (in Section 4962): "*No person shall maintain an action for the infringement of any copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or* if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof or of the substance on which the same shall be mounted, the following words: 'Entered according to Act of Congress, in the year , by A. B., in the office of the Librarian of Congress at Washington,' or, at his option, the word 'Copyright,' together with the year the copyright was entered and the name of the party by whom it was taken out, thus: 'Copyright 18 by A. B.'"

A.

Appellant's counsel seems to construe this sentence as though it read, "No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof, if a painting, by inscribing upon some visible portion thereof or of the substance on which the same shall be mounted, the following words:" * * *

If this be the proper construction, then the law would be complied with by putting the notice upon the original painting, print, cut, engraving, &c., and it *would be unnecessary to put the notice upon any copies* of a painting, print, cut, engraving, &c.

In our opinion, the object of the statute is to cause the published copies to be marked and not the original, and that this construction is the proper one is also evident from the recent decision rendered by the Circuit Court of Appeals, speaking through Judge Shipman, in the case of Falk *v.* Gast Litho. and Engraving Co., in 54 Fed. Rep., 890: "The proprietor of a copyrighted photograph may, without losing his copyright, use

a card containing one hundred miniature samples of different copyrighted photographs which has not the word 'copyright' impressed thereon, for the sole purpose of enabling dealers to give orders. Such a use is not a publication within the meaning of the copyright law. * * * *This card is not one of the published editions of the photographs which it contained.* * * * The statute refers to a *published edition, which is an edition offered to the public for sale or circulation.*"

In Burrow-Giles Litho. Co. *v.* Sarony, 111 U. S., 53, the Supreme Court said: "The object of the statute is to give notice of the copyright to the public by placing *upon each copy* in some visible shape the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained."

The court below carefully revised "the history of the legislation out of which Section 4962 developed" (pp. 52, 53, 54, 55 and 56, Rec.), and we shall not reiterate these arguments. It surely was not the intention to require a copyright notice to be upon the unpublished original manuscript in the case of a book, or the original plate or stone in the case of an engraving or lithograph.

Judge Putnam correctly says: "The purpose of this statute, therefore, would wholly fail of accomplishment by inscribing notice on the painting only, which presumably passes into some private collection entirely out of the view of the general public. This is so patent that it need not be enlarged upon and would be enough of itself to persuade the Court very urgently to look, if necessary, beyond the mere letter of the statute."

This section of the law, therefore, must be interpreted as though it read: No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, if a photograph, painting, &c., by inscribing upon some visible

portion of the copies or the substance on which the same shall be mounted the following words, &c.:

B.

We doubt very much whether in this particular case it would have been necessary to put the words "Copyright," &c., on said painting, for the reason that the copyright was obtained in May, 1892. At that time the painting had not been published. After the copyright had been obtained, sometime late in the summer of 1892, the painter Naujok caused his painting to be sold. It stands to reason that it was then no longer in his power, assuming that the copyright had been properly obtained by the complainant, to do anything whatsoever to ruin or injure defendant's copyright. The sale of the painting was not with complainant's consent, nor was it his publication, if indeed a sale of a publication is *eo ipso* a publication. As well might the complainant's rights be affected by some infringer's unauthorized publication without copyright notice.

In conclusion we beg to call the Court's attention to the fact that this paragraph of the law is in the nature of a penal statute and must be construed in such a way as to give the complainant the benefit of the doubt, if there should be any.

Mr. Browne, on page 4 of his brief, says that a book is an impression made from type. We disagree entirely with him. A book is not necessarily printed. Before the art of printing was invented we had books. Decisions of our courts in connection with copyright cases have included within the term "book" a leaflet, and have held that the term "book" does not necessarily mean a bound volume, nor is any particular form, size or style requisite.

Mr. Browne's definition of a book, therefore, being incorrect, his reasoning, based upon such definition, necessarily falls to the ground. Mr. Browne's argument, however, is substantially to the same effect as Mr. Jenner's on page 18 of his brief, that a

photograph is not a copy of a painting. Of course, if a photograph is not a copy of a painting, then it was not necessary to put the copyright notice thereon, but it was also a wrong to do so.

II.

There was no publication of the painting prior to the deposit of the description and photograph of the same in the office of the Librarian of Congress.

The painting was first published in Germany September 19, 1892, and the first copies were sent to America on August 24, 1892 (page 23, Schroeder's testimony).

The copyright was taken on May 16, 1892. According to the testimony of the painter Naujok (p. 28 of the Record, A. 4), "This picture is publicly exhibited by myself at Berlin in the 'Kunsthandlung von Schulte' from January, 1892, until March, 1892, and at Munich in the Grosse Internationale Kunstausstellung im Glaspalast in summer 1892." This exhibition between January and March was not a publication.

"The exhibition of a painting or a work of sculpture is not strictly a publication within the meaning of the statutes of the United States, *because the right secured is that of copying and not that of exhibiting.* This objection may not exist in England, where, as is shown further on, the right of exhibiting as well as that of publishing is secured by statute."

Drone on Copyrights, p. 287.
Parton *v.* Prang, 3 Clif., 549.

Anyway, the burden of proof would be on the defendant to show that the exhibition of this painting was a publication. We believe that an exhibition, public or private, of a painting or a book, is not *per se* a publication thereof, either before or after copyright; and further, that the publication of a book or

photograph or painting can only take place when copies thereof are offered to the public for sale or circulation. Under this definition the author's or proprietor's common law copyright is destroyed whenever copies are made public, whether with or without his consent; and his statutory copyright is destroyed whenever with his consent copies are made public for sale or circulation without a copyright notice.

The rule contended for by the appellant that a public exhibition of a painting should amount to a publication, because the possibility of copying exists, ought not to be the true rule, and it is impossible of proper application. Suppose Mr. Vanderbilt, in his mansion on Fifth avenue, at stated periods, allowed the public to view certain masterpieces in his gallery, would not the common law right protect these pictures from being copied? Undoubtedly it would. Would the wrongful publication of copies of some of these paintings destroy the statutory copyright? Undoubtedly it would. Such being the case, why should the exhibition of the painting at Berlin prior to statutory copyright destroy the copyright? The sale and circulation of authorized copies without copyright notice would undoubtedly destroy the statutory copyright. The case of Parton *v.* Prang, 4 Cliff, 537, appears to hold these views. That case decided that only an unqualified publication, such as is made by printing and offering copies for sale, can destroy the common law copyright.

The case of Turner *v.* Robinson, Irish Chancery, 516, referred to by appellants, does not apply. There is no necessity under our laws for fixing a *terminus a quo;* for with reference to common law copyrights there is no necessity for a *terminus a quo*, and under the statutory copyright law the *terminus a quo* begins from the date of filing the description. Therefore it is unnecessary to hold that the public exhibition of a painting is *per se* a publication. The rule above referred to would fully meet all the possible contingencies which might arise.

The exhibition in the summer of 1892 at Munich was subsequent to the taking of the copyright, and even if that should be

a publication it has no bearing upon the question under consideration, as it was without complainant's knowledge or consent.

In the case of Werckmeister *vs.* Springer Lithographing Co., 63 Fed. Rep., 808, Judge Townsend held that the sale of a replica made subsequent to the transfer of the right of reduplication to the complainant was not a publication even of the replica and certainly not of the painting. In that case the right of reduplication of the replica was reserved by the author.

In that same case the learned Judge further held that a crayon sketch of the painting published in the Salon catalogue was a qualified or limited publication which did not work a forfeiture of the right of copyright.

Mr. Brown, in his brief, refers to the case of Turner *vs.* Robinson, and speaks of the *terminus a quo*, but in that case the term began from the date of publication. There was, therefore, a difficulty under the English law to say when the copyright term began. There is no such difficulty under our law. It is for a fixed period from the date of filing, and while under the English law it may have been necessary to consider an exhibition of a painting a publication, it certainly is not necessary under our law to stretch the definition of the term publication in such a way.

III.

If the copyright is valid it carries with it protection against all reproductions of it, including the photograph of the defendant.

In Schumacher *vs.* Schwencke, 30 Fed. Rep., 690, Judge Coxe held: "Although the law recognizes a distinction between a painting and a print, a copyright for the former will protect its owner in the sale of copies thereof, even though they may

appropriately be called prints, and a party who copies such copies will be guilty of infringement."

"The owner of a copyrighted painting by publishing lithographic copies thereof does not lose the right to restrain others from copying these copies."

Quoting from the decision: "The defendants now contend: first, that the law recognizes a distinction between a painting and print, and a copyright for a painting cannot be infringed by a lithographic print thereof which is itself the subject of the copyright; and, second, that the complainants having published a large number of lithographic copies of the painting have lost the right to restrain others from copying these copies." "It by no means follows from the fact that the law recognizes a distinction between a painting and a print that a copyright for the former will not protect its owner in the sale of copies thereof, even though they may appropriately be called prints."

Judge Putnam, who referred to this case and other English cases on page 45 of the Record, states on page 46 of the Record: "We have no doubt that the law is correctly laid down in the cases to which we have referred, that the author or proprietor of a painting, who properly copyrights it, is protected against all reproductions of it in any form. This proposition is so fundamentally essential to the policy of the copyright statutes that it needs no elaboration."

Appellant's counsel refers to Drone on Copyright, p. 484, as an authority for holding that a copy of a photograph of a painting is not a copy of a painting. Drone bases his views on *ex parte* Beal Law Rep., 3 Q. B., 393, which actually holds the contrary view, and suggests that where one man owned the copyright on a painting and another on an engraving, that a copy of the latter is not an infringement of the copyright on the former, to which view no exception can be taken.

IV.

It was the duty of the complainant to inscribe the photographs published by him with the copyright notice.

If a photograph or a chromo is in any sense whatever a copy of a painting, and if it can be truthfully said that a large number of such copies, published at different periods, are editions of the painting, then, under Section 4962, it was made obligatory upon the complainant to mark these copies of the various editions by him published, with the copyright notice. If photographs, prints, cuts and chromos are not copies of a painting, then of course the complainant had no right to mark his photographs with the copyright notice; but it seems to us that this proposition is too simple to need any elaborate argument.

Section 4952 of the Revised Statutes says: "The author, inventor, designor or proprietor of any book * * * or of a painting * * * shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same."

Under this section the word "copying" is broad enough to take in photographs, and under the other section, 4962, it was obligatory upon the complainant to mark his copies.

V.

Photographs of the painting could not have been separately copyrighted.

In Burrow-Giles Co. *v.* Sarony, 11 U. S., 53, the Court said: "We entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as

they are representatives of the original intellectual conceptions of the author."

In the Sarony case, and likewise in the other cases quoted in the opinion, there appears to have been novelty, invention and originality in connection with the production of the photograph; but to take an inanimate object, like a painting, and simply to photograph it does not, in our opinion, *per se*, involve novelty, invention or originality, and no valid copyright can be taken upon a mechanical reproduction of an inanimate object. It is true that in many cases the artist may create the original as a photograph; in other words, he may first take a photograph by artistically posing an animate object or he may photograph a landscape, and then he might go to work and paint that same subject. The artistic arrangement and selection of colors might involve sufficient originality to entitle him to a separate copyright on the painting. The original creation or design would, however, be incorporated in a photograph. The same thing, no doubt, would apply in the case of a lithograph. The original artistic work might begin with a lithograph and end in a painting. In such a case separate copyrights might be taken for the lithograph and the painting.

Defendant's counsel also contends that because § 3 of the Act of 1891 provides that where copyrights are obtained upon photographs, the *two copies* which must be sent to the Librarian of Congress must be produced in the United States from negatives or drawings on stone made within the limits of the United States or from transfers, that therefore there existed an obligation on the part of the complainant to copyright his photographs.

We claim, as the Court below remarked, this provision was inserted in the statute to satisfy the clamor of the labor unions, and it has reference solely to books, photographs, chromos or lithographs.

Section 3 (in the Revised Statutes § 4962), says: "Provided, that *in the case of a book, photograph, chromo or lithograph, the copies of the same* required to be delivered or de-

posited as above shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives or drawings on stone, within the limits of the United States, or from transfers made therefrom." The law makers were well aware of the fact that engravings, musical compositions, maps and charts, paintings, drawings, statues and statuary could be reproduced in the United States. As early as 1874 Congress began to draw a distinction between works of the fine arts and between prints and labels designed to be used for any other article of manufacture.

Under the provisions of § 4952*a*, all classes of commercial matters are sent to the Patent Office, and while a painting or picture intended to be used for other articles of manufacture might well be artistic, and might in a certain sense be an article of manufacture, yet, if it is intended to be used commercially and not for the advancement of education and art, in that case the copyright must be applied for in the Patent Office and not in the Librarian's office. So likewise in this section under consideration (4956) there is a clear distinction made between works of the fine arts and between articles of manufacture, so to speak. Connected with the fine arts are paintings, statuary, engravings. From the very nature of these subjects every one knows that they are not manufactured and reproduced in those immense quantities that lithographs, chromos, photographs and books are reproduced, and therefore the statute does not make it compulsory that in these cases the work must be done in this country; but for the purpose of benefiting printers and lithographers and to satisfy their clamor, Congress insisted that in the case of copyrighted books, photographs, chromos and lithographs only, the work must be done in this country.

VI.

The Court below did not find that complainant had published copyrightable photographs, and the Court correctly held that the publication of complainant's photographs was not an abandonment of such photos to the public.

Everything that might be said in connection with this assignment of error has been discussed in connection with other points.

VII.

Complainant had the lawful right to copyright the original painting as the assignee of the author and proprietor, and he likewise properly entered the copyright in the name of the "Photographische Gesellschaft."

§ 4952 of the Revised Statutes states: "The author, inventor, designer or proprietor of any book, map * * * or of a painting, drawing * * * and the executors, administrators or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing" * * *

The statute, therefore, gives permission to take the copyright to the following six classes: first, the author, inventor and designer; second, to the proprietor of any book * * * painting * * * third, to the executors, administrators of the author, inventor, designer; fourth, to the executors, administrators of the proprietor; fifth, to the assigns of the author, inventor, designer; and sixth, to the assigns of the proprietor.

In the case under consideration the complainant was the assignee of the author, inventor, designer and proprietor of the painting in question.

In Yuengling *v.* Schile, in 12 Fed. Rep., 97, decided in the Southern District of New York, by Judge Brown, it was decided on page 106 as follows: "To a mere owner of a work as such, to a 'proprietor' in that sense only, without any express or implied transfer from the author, or inventor, of his right to a copyright, Congress, as above observed, is not by the Constitution vested with the power to grant a copyright."

Therefore it would seem that unless it appeared from the circumstances the ordinary proprietor of a painting has no right to take a copyright thereon. He buys the picture without the right of reproduction, unless indeed from the surrounding circumstances or by express or implied agreement or possibly by custom he has by virtue of the purchase of the painting become entitled to obtain the copyright. But surely after the right to obtain a copyright has already been sold, assigned and transferred the subsequent purchaser of a painting cannot obtain a copyright, and the above citation is authority for this statement. But this case seems to bristle with statements which exactly bear out our position. Thus on page 100 the Court says:

"The Act of 1870 for the first time uses the word 'proprietor,' in connection with the words 'author, inventor or designer,' as one of the persons to whom a copyright may be granted; although ever since the Act of 1790 a proprietor might obtain a copyright if he were the lawful representative of the exclusive rights of a native or resident author. Thus, although the connection in which the word 'proprietor' is used in the Act of 1870 is new, the use of the word itself in relation to copyrights is as old as the law of copyrights."

And on page 103, the Court says: "The word 'proprietor,' as used in the copyright laws, in itself means *the representative of an artist or author who might himself obtain a copyright.*"

And on page 105, referring to the Act of 1790: "Thus in this early act the term '*proprietor*' *is used to embrace all the persons*, except the original author himself, who by Section I.

might obtain a copyright, viz., the author's executors, administrators or *assigns*, or any person who had 'purchased or legally acquired the copyright.'"

And at the bottom of said page: "A third person may become such an owner or 'proprietor' through a transfer or assignment, verbal or written, embracing the right of copyright, after the work is completed, or by virtue of an original employment under a contract with the author, which, by agreement, is to confer upon the employer the complete ownership both of the work itself and of any copyright that may be obtained thereon."

The syllabus on page 97, under the number 3, in reporting this decision, contains the following: "*Held* * * * *that the word 'proprietor'* in Section 86 of the Act of 1870, and in Section 4952 of the Revised Statutes, *must be construed* in the 'limited and restricted sense' in which it has been used in every act from that of 1790 downwards, viz., *as the legal representative of a right derived from a native or resident author or artist.*"

From the following it therefore appears that the complainant, *the assignee of the exclusive right of reproduction obtained from the author and proprietor of the painting,* was the proper party to take the copyright.

See likewise the case of Werckmeister *vs.* The Springer Lithographing Co., 63 Fed. Rep., 808, and cases cited. Judge Townsend, unaware of Judge Putnam's decision, came to the same conclusion that complainant, as assignee of the author, properly took out the copyright.

Judge Townsend also held that the copyright was properly taken out in the name of the "*Photographische Gesellschaft*," and he cites Scribner *vs.* Allen, 49 Fed. Rep., 854; Burro-Giles Litho. Co. *v.* Sarony, 111 N. Y., 53; Black *v.* Allen, 42 Fed. Rep., 618, and Carte *v.* Allen, 27 Fed. Rep., 861.

VIII.

In answer to Mr. Jenner's brief we submit the following suggestions with reference to the seventh and fourth assignments of errors:

On page 2 of his brief he states: "This exclusive right to make copies * * * was merely one of the consequences and incidents of ownership, and the transferance of this right to another was a license, a mere permission, and not an assignment."

Paragraph 4952 of the Revised Statutes grants to the author or proprietor, upon complying with the provisions of this chapter, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending, and this section grants the same rights.

We, therefore, fail to see what Mr. Jenner means when he says the exclusive right to make copies is an incident of ownership. According to our view the exclusive right to make copies is that which 4952 gives to the author or proprietor, and that is all that the complainant in this case wants.

The exclusive right to make copies is not an incident, but it is the principal and only object of the copyright law. This section gives a monopolistic right to make copies either to the author or to the proprietor. Certainly giving permission to another to make a single copy is not an assignment.

Mr. Jenner very correctly says in his brief, on page 3, that a license under a patent right is never construed as an assignment, unless the instrument imports the transfer of the patentee's entire right, and then sometimes it is. This is one of the times that it is, because the author and proprietor in this case of the painting, to the exclusion of himself, gave the sole right of reproduction to the complainant, and therefore whether this document is technically an exclusive license of the entire right forever, or is a grant or an assignment, is of no consequence. It is in effect an assignment.

The case of Pulte *vs.* Derby, 5 McLean, 329, referred to by Mr. Jenner, if it has any bearing upon the issues, is in favor of all of the contentions made by the appellee. Firstly, that case was dismissed by the Court for want of jurisdiction, and therefore really all that the Court said concerning the copyright questions involved, was "*obiter dictum.*" Secondly, that was a case between two contestants for the copyright. Thirdly, in that case, as in the case under consideration, the printer (in this case the photographer) took the copyright in his name under a similar agreement as the one under consideration, and the Court stated that this was proper, and that the printer had a perfect right to take the copyright. The decision further says: "We must look out of the contract to the acts of the parties in regard to the copyright. These acts must necessarily have a strong bearing upon the contract. It will tend to show how it was understood and construed by the parties to it."

So in the case under consideration, Mr. Naujok testifies (on p. 29 of the record) how he understood this conveyance on his part. Photographs were published by the complainant with the copyright notice thereon; one of them was shown to Mr. Naujok and he never objected then nor now to complainant's taking the copyright. Besides that, the instrument shows on its face that it was the intention that the exclusive right or reproduction for the consideration expressed in the document and for no future consideration should be vested in complainant.

In the case of Jam *vs.* Mulleman, 3 Duer, 255, the definition between a grant and a license is pointed out, and it is there said that a license, whether oral or written, is always revocable. Certainly the right granted to the complainant in this case was not revocable, and, therefore, by the very definition laid down in the case cited, the right given to complainant was not a license.

Mr. Jenner seems to have confused the common law copyright in a painting with the statutory copyright. Of the former it may perhaps truly be said that it is an incident to the ownership of the painting. For all that the common law copyright

does is that it acknowledges the artistic production to be property and prohibits a trespass to be committed thereon, which consists in copying the same. Just as it is hard to realize that one man may own the absolute fee and also enjoy the possession of land, and that another should have the right to prohibit trespasses over such land, so in the case under consideration the right to forbid making copies is an incident to the ownership of the painting. The one goes with the other, and it is probably true that one man cannot own the painting and another have the right to forbid the making of copies thereof. When, however, we look at the statutory copyright we find that this consists in the creation of a privilege or monopoly. This right is not a negative one like the common law right. True, as an incident to the sole and exclusive privilege of making copies, necessarily there is the right to prevent others from copying.

Here the privilege or monopoly is in no sense an incident of the ownership in the painting any more than the ownership of the original models or drawings is a necessary incident to a patent grant. While it is true that neither a statutory copyright nor a patent can be granted for an idea, but requires an embodiment in some definite shape, still the shape or means are only necessary in order to define the monopoly granted. The specification and drawings in a patent case and the description and photograph in a copyright case add nothing to the right granted—they explain, define and limit it. Therefore it necessarily follows that not only after but before the statutory copyright or patent is applied for, the author or inventor may sell his copyright or patent, or his rights thereto, to one person, and his original paintings, model or machine, which embody his invention or design, to another.

Under Point II., on page 6, Mr. Jenner says: "The Constitution gives no authority to Congress in terms to grant either a patent or a copyright to any person except the author or the inventor." Yet we all know that patents are continually issued to the assignee of the inventor and the only reason that patents

are not granted in this country to the assigns of inventors as freely as in England and some other countries is that the oath of the author or inventor is necessary.

There is no difference in these respects between a patent or a copyright. In both cases the Government grants the exclusive right for a certain period to an author or inventor to make or produce copies of the new invention or creation. It is true that you can neither patent nor copyright ideas. Under either the patent or copyright laws the ideas must be tangibly connected with means of some kind. Nevertheless, it was truly said in the case to which we will hereafter again refer that "the property in the copyright is regarded as a different and distinct right wholly detached from the manuscript or any physical existence and will not pass with the manuscript unless included by express words in the transfer."

So in a patent case, it is not necessary for the inventor to sell his model or his machine when he transfers the right, to obtain the patent, for we may quibble with regard to whether an inventor sells his right to a patent or whether he sells his right to an invention; he certainly sells the monopoly which the Government, but for his sale, would give him, and this same monopoly Naujok in the case under consideration sold to the complainant.

Under III. we beg to make the following remarks: In our opinion the ordinary plain interpretation of paragraph 4952 is that the author, inventor, designer or his assigns, or the proprietor of the book or painting, or his assigns, or the executor, administrator of the author, inventor, designer, or their assigns, or the executor or administrator of the proprietor or their assigns, may take out the copyright, and the principal reason why there seems to be a difference of opinion between Mr. Jenner and ourselves is that he continually refers to the grant of a copyright as an incident to the ownership of the painting.

The object of the copyright law is to give a monopoly to reproduce in unlimited quantities, if one pleases, copies. That is what the statute gives, and that it does not give as an

incident to anything, and there is no reason why it should be an incident to anything.

If counsel's reasoning were correct, unless the assignee of an inventor owned the model or the first machine built by the inventor, he would never be able to get a valid patent, because the patent right would be an incident connected with the ownership of the model.

The very cases cited by counsel, notably Stevens *v.* Cady, 14 How., 528, and Stevens *vs.* Gladding, 17 How., 446, in our opinion, hold the contrary to what Mr. Jenner contends for.

In these cases it was held: "A copyright is a property in notion and has no corporeal and tangible substance and it is not the subject of seizure."

It was also held that "the ownership of a plate and the ownership of a copyright was a distinct species of property and that the plate may be used without infringing upon the copyright by printing and publishing the map." And on page 531, in the case of Stevens *vs.* Cady, it was said: "But the property in the copyright is regarded as a different and distinct right, wholly detached from the manuscript or any physical existence, and will not pass with the manuscript unless included by express words in the transfer."

Under V. we are not willing to admit that a statue cannot be said to be copied in a photograph, but we are aware that the decisions hold that a dramatization on the stage of the plot described in a book is not an infringement of the copyright in the book; but we believe, as was held in the case of Rossiter *vs.* Hall, in the 5th of Blatchford, 362, referred to in Mr. Jenner's brief, on page 17, and in Drone on Copyrights, on page 492, "that the word *copy* is a general term added to the more specific terms before used for the very purpose of covering methods of reproduction not included in the words engraving, etching, or work, and, if it covers anything, should cover the photographic method, which, more nearly than any other, produces a perfect copy."

In the case referred to, the point was made that a photographic copy could not be a copy, because photography had not been discovered at the time the copyright was taken, and yet the Court overruled this point, and held that the statute was sufficiently broad to include every method of reproduction.

On page 18, Mr. Jenner very correctly takes the position that the appellant is forced to take, that a photographic copy of a painting is not a copy of the painting in the sense of the copyright law. If he is correct, then of course the defendants have not infringed. It would follow that the complainant's photographic copy of the painting would also not be a copy of the painting. If this should be held to be the law it would be necessary for the author or proprietor of the painting to take: First, a copyright on a painting; second, a copyright on the drawing or sketch of that painting; third, on a chromo reproduction of that painting; fourth, on an engraving of that painting; fifth, on a cut of that painting; sixth, on a print of the painting; seventh, on a photograph or negative of the painting. For it certainly follows that if the defendant can escape liability by making a photographic copy, because complainant failed to take a copyright for the photograph, the defendant could likewise escape liability by making copies in the shape of chromos, engravings, drawings, cuts or prints, if no special copyright had been taken on the chromo, engraving, drawing, cut or print.

Under VI. we beg to say that while it seems unjust that anyone should pay the penalty for being misled in the case supposed by counsel, still these same risks every purchaser of a new process or machine must take continually. A new machine or a new process or a new device is offered to a large manufacturer; does he not take the same risk in using the machine or in using the process that it has been previously been patented by somebody, and if such manufacturer wants to go absolutely safe is it not necessary for him to ransack the Patent Office to ascertain whether there is any patent on such a machine or process before he can safely employ it? Therefore, we fail to see wherein

the risk is any greater under the copyright law than it is under the patent law.

Under VII. we beg to say that page 30 of the record shows that the photographs published by complainant are copies of the painting and that they are similar to the copy left with the Librarian of Congress. There is no evidence whatever that there have been any subsequent editions, and the burden of proving this would be upon the appellant in this case, and unless of course a photograph is a substantial "subsequent change," we fail to see in what respect the complainant has failed to comply with the law.

Conclusion.

The appeal should be dismissed, with costs.

Respectfully submitted,

Louis C. Raegener,
Of Counsel for Appellee,
280 Broadway, New York.

New York, Jan. 4, 1895.

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United States Circuit Court of Appeals,

FIRST CIRCUIT.

No 118

PIERCE & BUSHNELL MANUFACTURING COMPANY,
Defendant-Appellant,

vs.

EMIL WERCKMEISTER,
Complainant-Respondent.

Supplemental Brief for Defendant-Appellant.

WM. A. JENNER,
Of Counsel with Defendant.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1895.

United States Circuit Court of Appeals

FIRST CIRCUIT.

PIERCE & BUSHNELL MANUFACTURING COMPANY,
Defendant-Appellant,

vs.

EMIL WERCKMEISTER,
Plaintiff-Respondent.

Supplemental Brief for Defendant-Appellant.

The following supplement is submitted in support of the seventh and fourth assignments of error, that the Circuit Court erred in finding that the complainant was the proprietor or assign of the said picture or of the copyright of the same at the time of his alleged copyrighting thereof, and also erred in finding that the said copyright was rightfully and effectually registered by the complainant in his own name, and also finding that the prescribed public notice was given.

In respect to the point thus raised, the appellant submits that there was error in the decree below for the following reasons:

I.

The complainant was never the proprietor of the picture nor of any statutory copyright in it.

The instrument executed by Naujok upon the 5th of March, 1892, is a license and not an assignment. The language of

this instrument is herewith quoted for convenience of reference (see Record, p. 26, Exhibit B):

"I transfer hereby to the Photographische Gesellschaft, in Berlin, for my work 'Die Heilige Cäcilie,' the right of publication—by which I wish to have understood the exclusive right of reproduction—against a payment of 500 mark, and nine gratuitous copies thereof.

"Königsberg in Prussia, March 5, 1892.

"GUSTAV NAUJOK."

There is no evidence in the case as to the law of Germany, and the only presumption that can be made as to Mr. Naujok's (the artist) proprietary rights at the date of the instrument is that he was the owner of the picture, with such incidents of ownership as are recognized by the common law—that is, besides the usual incidents of the right of possession and disposition, no one could lawfully make a copy of the picture or reproduce it except the artist or those to whom he gave permission. This exclusive right to make copies, or to allow copies to be made, was merely one of the consequences and incidents of ownership, and the transference of this right to another was a license, a mere permission, and not an assignment. It simply made that lawful for the licensee which, but for the license, would have been unlawful.

Suppose an artist having painted a picture *permits* another to make a single copy, is his act an assignment, as that word is properly understood? Certainly not. The quality of the act is not changed or affected if he gives permission to a person to make as many copies as the permissee chooses, and agrees to make none himself. The right which the permissee gets is still only a permission or a license. The right is of the same quality as that acquired by the holder of a theatre ticket, the right or permission merely to enter the theatre and witness the play, or the right which a licensee under a patent right acquires which is to make *or* use *or* sell the invention for the term of the patent, or to make, use *and* sell in a limited territory or for a limited period, and a license under a patent right is never con-

strued as an assignment unless the instrument imports the transfer of the patentee's *entire* right in the invention; then sometimes it is.

The instrument signed by Naujok, the artist, does not purport to convey the right to obtain a copyright. It would be as binding against the artist in a country where he could not himself obtain a copyright, as in a country where he could. It makes no reference to the artist's right to obtain statutory protection, either in Germany or elsewhere; the only thing it conveyed, or assumed to convey, was part of the right Naujok then had, viz.: to reproduce his own picture, make copies of it, and, if he desired, to publish, sell or distribute those copies. This right being a mere incident of his ownership of the picture, it follows that the granting of that right to a third person, the grantor still retaining the ownership, was a license pure and simple. The instrument conveyed no interest or estate. It gave no ownership in the picture or right of control over it. It grants, not the whole or a part of the entire ownership, but something less than the entire ownership in the picture, viz., merely the right to look at it long enough to draw or paint it or to "reproduce" it. The artist would, under no circumstances, have any ownership in the copies made. He gave up his incidental right to interfere with copying, made that lawful which would have been otherwise unlawful, conveyed no present interest that deprived him of his whole ownership, conveyed no interest in the picture, and, therefore, the instrument is a license merely and not an assignment.

In PULTE vs. DERBY, 5 McLEAN, 329, a somewhat similar agreement was held to convey, not the copyright, for none was in existence, nor the right to obtain copyright, but to be a license to publish, and page 331 the Court said:

"It may be observed that in making a mere contract for printing and publishing, it is not usual to say anything about copyright."

And page 332:

"When the agreement was entered into, complainant had no copyright to convey. He had a right to his manuscript, which the statute protects, and the property in which would be protected at common law. The right to publish this MS., which was all that complainant could give, was provided for by agreement."

Jam. vs. Muileman, 3 Duer, 255
Washburne vs. Gould, 3 Story, Cir. Ct., 157.

II.

Section 4952 of the Revised Statutes, as amended by the Act of 1891, does not authorize the granting of a copyright to any one who does not, at the time of such granting, possess the ownership in the thing copyrighted, either by virtue of having originated the same or by virtue of assignment from the originator.

The learned Court below took an opposite view of this point, and this view has been followed by his Honor Judge Townsend, in the Second Circuit, in the case of Werckmeister vs. Springer Lithographic Co., 63 Fed. Rep., 808. The reasoning in both these cases proceeds largely upon the assumption that if the word "assigns" means one who holds the ownership of the subject matter of the copyright by virtue of assignment, then the term is synonymous with "proprietor," and, therefore, superfluous. Secondly, it is argued that the word "assigns" must mean something else than a proprietorship of the thing itself, derived by assignment from the original owner, and, therefore, may be construed to imply that the right to take a copyright may be granted to a person to whom the inventor, designor or proprietor may have assumed to convey the right to receive the copyright, and without parting with the ownership or property in the thing copyrighted.

It is to be observed in respect to this contention that, in accordance with the ordinary use of language, a person might be a proprietor of a picture without being the assignee of the owner. A legatee of a picture, and a person who wished to have a favorite horse painted and who purchased and paid for the canvas and paint, and employed an artist to paint it would, in both cases, become a proprietor of the picture, and in a very broad sense of the term, it might be said that they derived their title by assignment from the owner of the picture in the one case and the artist in the other, but this would be against the ordinary usage of language. No one would ever think of calling a legatee of a picture an assign of the testator, still less would any one think of calling the proprietor of a picture, who paid for the materials and employed an artist to paint it, the assign of the artist; but in both cases he would be the proprietor.

The publisher whose editors write in his editorial room, on paper, with pen and ink supplied by him, upon themes and adapting arguments suggested by him, is neither the author of the articles nor the assign of the authors, but he is a proprietor of them and may copyright them as such; and one collaborateur (in pictorial art collaboration is even more common than in the literary art) might easily become the proprietor of the joint production without being the assign of the other.

In construing a statute we are neither to force a word out of its usual import or to reject it as surplusage, unless necessity requires it.

There is no reason then, arising from the supposed identity of the word "proprietor" and the word "assigns," for departing from the ordinary and natural import of the language of the statute. That is, that the author of the composition, or a person to whom he has assigned the entire ownership of the composition, the painter of a picture, or the owner of the picture, or the person to whom the painter or the owner may have assigned his ownership, has the right to obtain a statu-

tory privilege, namely, the privilege of publishing or copying the thing of which he is the owner, at the same time retaining the right of restraining others from making copies of it without his permission, which he could not do after publication at common law.

When, by compliance with the statutory conditions, the composition, literary or artistic, has been copyrighted, that is, when the Government has issued its grant of privilege, a new right of propriety comes into existence, non-existent before, which may be dealt with independently of the original subject. The manuscript or the painting may now become the property of one person, and the right of printing and copying of another.

The Constitution gives no authority to Congress, in terms to grant either a patent or a copyright to any person except the author or the inventor. A liberal construction of the clause which confers this power has made the copyright and the patent, when granted, assignable as an incident of ownership; a still more liberal construction has made the invention or the subject matter of the copyright assignable before the copyright or a patent has been granted; but, as no patent can be granted to any other person except the inventor or a person to whom the inventor has assigned theinven tion itself or an undivided interest in the invention, *i. e.*, in the whole invention, so no copyright can be granted to any one except the author or designer, or some person to whom he has transferred the subject matter of the copyright. There is no such thing as transferring the right to a patent without transferring the ownership in the invention (it may be done in England, but not here), and the same rule applies to copyrights. As in patents for inventions it is the *means* and not the *idea* which may be the subject of the patent, so a picture does not consist in the *design* but in the *execution*. It is the mechanical skill in laying on the colors and defining the outlines which constitutes an essential part of the merit of the picture, and, perhaps, the most essential part,

and it is the *execution*, including therein arrangement, coloring, grouping, drawing, all the constituents which make up the picture, or, in the case of a literary work, the arrangement of words or expression, as distinguished from the idea, which may be the subject of the copyright. A person, therefore, who does not own the picture at the time when the copyright is obtained, certainly does not fulfill the literal requirements of the statute.

III.

Another circumstance tends to confirm the interpretation here contended for. The language of § 4952 is "assigns of any such person." "Such person" includes "proprietor," and this certainly implies that an "assign" is a different person from "proprietor," otherwise the words would mean "an assign of an assign" which would be tautological and superfluous.

If the words "the author" or * * * "proprietor" and the "executors, administrators or assigns of any such person," shall have an exclusive right of reproduction on complying with certain conditions, *etc.*, which is precisely equivalent to the expression "author or *his* assigns" or "proprietor or *his* assigns," be given their plain, ordinary, legal meaning, it is not affirmed that they do not denote one of the persons originally named or the successor to the whole of his interest. In the case of an artist his assignee is the one to whom he assigns his picture. There can be no such thing in law or under the statute as the assignment of an *idea* of a picture. A picture is not only an idea embodied in lines and shading, the lines and shading are an integral part of the original creation. Giving the word "assigns" this plain

ordinary legal meaning there is no warrant in the statute, and there is no warrant in the Constitution for granting a copyright to any one else than to the artist who painted the picture or the person who succeeds to all the rights in the picture which the artist himself had. The ownership of the picture carries the incidents with it, and the incidents cling to the ownership until they are separated by the statute itself upon compliance with its provisions. Any right whatever to grant copyright to an assignee, under the Constitution, is only derived by implication, and that implication only attaches as an *incident* of *absolute ownership*.

The reason given for departing from the plain meaning of the statute is that of expediency. It is suggested that inasmuch as, after copyright obtained, the artist might dispose of the picture to one person and the copyright to another, it is just as well to let him do so beforehand, and, therefore, the statute must have so intended.

The learned Circuit Court said (see Rec., p. 51):

"What the complainant claims has been accomplished in this case could clearly have been accomplished by first registering a copyright or copyrights, with various nationalities, by Nanjok, or in his name, and by his then assigning them absolutely and without reservation to the complainant. The result under those circumstances would have been precisely the same as the result which the complainant now maintains, and certainly a construction of a statute which avoids this circumlocution cannot be unjust or against good sense."

We respectfully submit that the above-quoted argument of the Court below is unsound. If the statute prescribes that a certain procedure shall be followed, certain conditions performed, precedent to the grant of a privilege, the terms of the statute must be complied with. It is not for the grantee to say that some other procedure is just as good as that prescribed by the statute; that it is the *results* which he is after, and never mind the performance of conditions precedent. By the same argument the assignee of an invention may apply himself for the patent to avoid the circumlocution of the in-

ventor applying for it. The rules governing the interpretation of statutes does not permit that degree of flexibility and indulgence.

Mere expediency is no warrant for departing from the plain legal meaning of a statute. Where it is possible to give two meanings to a statute, and the more apparent meaning would lead to obvious contradiction, or inconsistency, or plain violation of the intent of the law, the secondary and more remote meaning may be chosen. But this is the limit of legal interpretation. Where the Legislature has used words which have a plain legal signification, it is not permissible to depart therefrom by a strained interpretation, merely because it may be argued that it would be better or more convenient or wiser to do so.

Furthermore, the general idea underlies the interpretation which we dispute, that, as artists, authors and inventors are a favored class, the copyright acts should be construed liberally towards them, and every ambiguity be resolved in their favor.

As to this suggestion it is a serious error to regard copyright laws or patent laws as creating a *favored class.* Not so. Their object is to promote the *public* good. Exclusive privileges are given to authors, artists and inventors, because it is for the benefit of the public that books should be written, pictures painted and inventions made, and without the legislative grant neither authors, artists or inventors would have adequate means of making their productions profitable to themselves, and there would be less incentive to make them and the public would be by so much the loser. It is true that in granting these exclusive privileges an element of justice is involved, because they impart the attributes of property to that which was not fully recognized as property at common law; but, nevertheless, this qualified and limited right of property is taken out of the public domain, and if the public derived no benefit on its side from the transaction, the reason upon which the law-

making power has always proceeded in passing copyright and patent laws would be taken away. They are grants, just as a county issues bonds or makes a grant to a railroad company, because it is for the benefit of the public that the road should be built, and because without legislative aid there would be no adequate means or incentive to build it, and not to reward the public spirit of the promoters of the road.

It is a sufficient reason, therefore, for rejecting the interpretation given by the learned Court below to Section 4952 that it is not in accordance with the plain, ordinary meaning of the word "assign," and that it is not is made the more apparent from the labored reasoning to establish a different meaning to which both the Circuit Court in this case and his Honor Judge TOWNSEND have been obliged to resort.

Stephens vs. Cady, 14 How., 528 (reaffirmed in Stevens vs. Gladding, 17 How., 446), is not in conflict with the proposition here maintained. In that case the defendant claimed the right to print and publish a copyright map by virtue of his purchase on an execution sale of the plates upon which the map was engraved, and the question in the case was whether the title to the plates thus acquired carried with it the copyright in the map. The Court held that it did not; basing its conclusion upon the ground, among others, that the copyright was an incorporeal right to the multiplication of copies for the benefit of the author or his assigns disconnected from the plate or any other physical existence. We maintain the correctness of this conclusion, but add, in harmony with Judge NELSON'S opinion, that this exclusive right to multiply copies is purely the creature of the statute, without existence until the form of the statute is complied with, after which its existence is independent of the physical existence of the original. But, before such statutory creation, there is merely a potentiality of its being brought into existence, which cannot be said to be even an inchoate right, because, although the author before copyright may multiply

copies, he cannot do it exclusive of others doing it, and exclusiveness is of the very essence of coypyright. In Stephens vs. Cady, the Court (p. 531) makes remarks which are not, in form, limited to the case of an assignment of copyright after it has been perfected, but the remarks should be so limited, because no intention is apparent to extend the remarks beyond the question before the Court, and if so extended they would be merely *obiter dicta*, binding no one. The Court also refers to Lord MANSFIELD'S observation in Miller vs. Taylor, 4 Burr, 2330-2396, that "no disposition, "no transfer of paper upon which the composition is written, "marked or impressed (though it gives the power to print and "publish), can be considered a conveyance of the (copy by "which he means copyright as appears from a previous part of "his opinion) without the author's express consent to print "and publish, much less against his will." There is no occasion to dispute this as a general proposition, but Lord MANSFIELD'S remark seems to have been based upon a concession of counsel and on a question arising under the statute of Anne, and his decision was overruled by Donaldson vs. Beckett, 4 Burr, 2408.

IV.

The interpretation given to Section 4952 by the learned Circuit Court defeats another plain and explicit provision of the act. Prior to the amendment by which photographs were, *eo nomine*, included in the act, they were not the subject of copyright (Wood vs. Abbott, 5 Blatch., 325). They were only made so as to a limited class, and under special conditions. When Section 4952, with other sections of the Copyright Act, was amended in 1891, Congress must be presumed to have contemplated the consequences of the amendment, and to have

determined that there was nothing in Section 4952, as amended, inconsistent or at variance with the provisions regarding photographs. Yet, under the interpretation adopted by the Circuit Court, the complainant has, in effect, copyrighted a photograph and nothing else, without complying with the conditions imposed in other provisions of the act in respect to photographs, and those provisions are thus evaded.

The record shows that the original painting, "Die Heilige Cäcilie," is now adorning some gallery in Europe, but where, is unknown (Rec., p. 29), while this country has been flooded with more than ten thousand photographs of the painting made in Germany by complainant (Rec., p. 23, Int. 11), so that one of the express provisions and, indeed, a paramount object of the act has been completely defeated.

Nothing can be plainer than that Congress intended, in the case of a copyright of a book or photograph, or lithograph, the copies sold and used in this country for any purpose to be made here. This is secured by requiring that the copies of the book, photograph, chromo or lithograph which are to be delivered or deposited in the office of the Librarian as a condition of the copyright "shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives or from drawings on stone made within the limits of the United States, or from transfers made therefrom," and the importation into the United States "of any book, chromo, "lithograph or photograph so copyrighted, or any edition or "editions thereof, or any plates of the same not made from "type set, negatives, or drawings on stone made within the "as amended the United States," is prohibited (see § 4956 limits of March 3, 1891), excepting, of course, copies not exceeding two at a time, imported for *use* and not for sale, which exception need not be considered.

Nothing can be clearer than the legislative intention so expressed, that the privileges of American copyright shall not be extended to any book or photograph unless the mechanical

work of printing and reproduction is actually performed in this country. The provisions of the act are so clear and explicit that there is no occasion for referring to the protracted Congressional debates resulting in the amendments of March 3, 1891, in confirmation of this point. It is enough to say that by this amendment the privileges of American copyright were extended to foreign authors and artists, and that they would not have been extended excepting for the concession that American labor should have the advantage of doing the mechanical work involved in producing the copies of the copyrighted thing. Whatever views may be entertained respecting the wisdom of that policy, such was, beyond any doubt, the policy which Congress intended to enact into law, and it should be subserved and not defeated by the courts, and other provisions of the act should be construed in harmony with that policy.

Notice that the requirement that in the case of a book, photograph, etc., the copies required to be delivered to the Librarian's Office shall be printed from type set or from plates or negatives made within the limits of the United States, and the prohibition of exportation into this country of the copyrighted book or photograph or plate or negative thereof not made within the United States is contained in the "Proviso" to Section 4956. It is a rule in the construction of statutes that the proviso always prevails over the general purview.

Potter's Dwarris on Stat., 118.
Matter of New York & Brooklyn Bridge, 72 N. Y., 527.

So that the restriction and prohibition contained in the proviso must dominate the preceding portion of the section, and if there is inconsistency between them, the preceding part of the section must yield to the proviso, and as the preceding part of the section provides that "no person shall be entitled to a copyright unless he shall" comply with its provisions, the section must be understood as providing that no person shall

be entitled to a copyright unless the provisions of the proviso are respected.

Congress exempted paintings from the requirement that copies should be reproduced within the limits of the United States because it recognized the difference between a painting and a photograph, chromo or lithograph in respect of the genius, talent or skill involved in reproducing it, and, therefore, Section 4956, as amended, required that a photograph of a "painting, drawing, statue, statuary, model or design for a "work of the fine arts" should be deposited in the librarian's office without prescribing where the photograph should be made, and the condition is fulfilled, if the photograph is deposited, whether it is made in Europe or in this country, and the exemption was reasonable, because in the case of a painting painted, statue modeled, &c., by a foreign artist, such photograph would naturally and conveniently be made abroad, and the foreign artist ought not in reason to be compelled to send his painting or statue here so that a photograph might be taken of it to be delivered to the librarian in order to perfect his copyright. But notice that this exemption includes only paintings, drawings, statuary, models or designs "for a work of the fine arts," and a painting, statue, model and the like intended for say merely advertising or commercial purposes, or for any purpose not properly to be termed "for the fine arts," would not be included in the exemption, and would be classed with books, photographs and lithographs. No inference can be drawn from the language of the statute that Congress intended to permit a foreign painting to be copyrighted, and, under the protection of that copyright, photographs of it to be made and multiplied abroad, imported into this country and sold here to the profit of the foreign owner of the copyright and the detriment of the American mechanic. No reason can be suggested or imagined for distinguishing in this respect between the photograph of a painting or statue made abroad and the photograph of a prominent person made abroad.

For illustration, suppose the case of a portrait of the Emperor William painted abroad and copyrighted here by depositing with the Librarian a photograph of the painting, and suppose further that the Emperor William is photographed by another artist, in the same costume, in the same pose, with the same accessories, all of which would be perfectly lawful, and such photograph to be copyrighted here, then, under the interpretation of the Circuit Court, the photograph of the painting may be made and multiplied indefinitely in Europe and be imported into this country and be sold here lawfully; but, in the case of the photograph from life, a negative must be made here necessarily from a foreign-made negative, and the photographic copies must be made here. There is as much reason for attaching the policy of the amendment to the first class of photographs as to the second. There can be no doubt that Congress intended that all photographs should be dominated by its declared policy. Yet, if the interpretation of the Circuit Court is sound, the first class of photographs evades the provisions of the law, and may exist here in spite of the declared intention of the law maker. Such a result should be avoided.

V.

The fundamental error from which other errors arise is in holding that a photograph is a copy of a painting. It is not, either in fact or within the view of the statute, because it is not in the same or an analogous medium, and does not give the color, nor, in many respects, the light and shade. That it is not a copy in the ordinary meaning of the term copy, and as the term copy and photograph are used in common speech, requires no elaboration. We may familiarly speak of a photograph of a painting or of a copy of a painting. The former

suggests to the mind one thing, the latter an entirely different thing. No contract calling for a copy of a painting would be satisfied by the delivery of a photograph of it. A photographic copy is also a phrase of common use, and by it is meant only a photograph of the thing. In such phrase the word "copy" is tautological. Surely a photograph of a statue is not a copy of the statue. A copy of a statue may not necessarily be a duplicate of it, for a copy of a statue may perhaps be of a different size or in a different medium from that of the original and still be a copy within the meaning of the act. Thus, a marble statue may be copied in plaster or bronze, and reduced in size and the replica would probably still be within the meaning of the act, a copy, though not strictly so, and a painting, the original being in oil, may be copied in oil or water color, and the replica still be a copy, but this is as far as the reasonable use of language can go. Certainly a statue cannot be said to be copied in a photograph, and if it cannot in such case, a painting cannot be copied in a photograph. This distinction is observed in Section 4956, which requires in the case of the copyright of a painting or statue that "a photograph of same" shall be delivered to the Librarian. Such a construction is in harmony with the provisions of Section 4952 referring to other subjects of copyright. Thus, it was recognized that a dramatic representation of an unpublished play, or the dramatization of a copyrighted novel or a translation of a copyrighted book would not be an infringement of the author's copyright in the original, and a special enactment was required to enable authors to reserve "the exclusive right to dramatize and translate any of their works for which copyright should have been obtained," and in the case of a dramatic composition of "publicly performing or representing it."

In Stowe vs. Thomas, 2 Wall., Jr., 547, it was held that a translation into another language is not an infringement of the author's copyright of the original. A translation may be called

a transcript or copy of the author's ideas, but in no correct sense can it be called a copy of his book. Mrs. Stowe procured a translation of "Uncle Tom's Cabin" to be made into German, and both the original and her translation were copyrighted. Nevertheless the defendant translated the work anew, and published his version, which she sued to enjoin. The Court held that the suit could not be maintained under the law then (1853) in force, which forbade any "copy" of a copyrighted work, and that the copyright law protects not the substance of the ideas, knowledge or conception embodied in the work, but the literary *form* and the verbal or pictorial representation adopted by the author.

The provisions of the section giving "sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same" was not sufficiently comprehensive to include the oral performance or representation upon the stage of a dramatic composition or to include the dramatization or translation of a literary work, and special provision was required to cover the latter. But the change of medium which occurs in the oral dramatic representation of a written composition or the dramatization or translation of a written composition is not greater or more emphatic than the change of medium which occurs in the translation of a painting or of a statue into a photograph of it. In every case the original is not in the translation, though something of it is, that something being, to speak broadly, the conception.

The deduction here argued for would be reconciliable with Rossiter vs. Hall, 5 Blatchf., 362, in which it was held that reproduction of copies of a copyrighted engraving by photography is an infringement, because the photograph substantially copies the color of the original.

The terms used in Section 4952, defining the scope of "the sole liberty" thereby conferred, are all used in their common and ordinary sense, and there is no reason for forcing upon any of them a signification less or more than the ordinary. The

section as a whole is comprehensive, and gives to the originator of a literary, dramatic or artistic composition the exclusive property in the expression of his composition. The term "copying" as well as the other terms used, such as printing, publishing, executing, vending, refer to a book as well as to a picture, and printing may refer to a picture or drawing or lithograph as well as to a book.

If our contention is right that the term "copying" means the making of a copy wherever it occurs in the act or amendments, then the copyright of a painting does not prevent a stranger from photographing the painting, and the question would then arise how shall the artist protect himself from unauthorized photographing of his painting. This question presents no difficulty. Before the publication of the painting the common law protects him as completely as the copyright acts protect him after publication. He may copyright his painting if he chooses by complying with the provisions of the act, or he may copyright a photograph of it by complying with the provisions of the act regulating the copyright of photographs, or he may do both. In the case of a foreign artist, and a painting painted abroad, he may take a photograph of it there, send either it or the negative here, make another negative from it and from the latter print his impressions, and in this way his protection is complete, the act is complied with and its policy obeyed. Any other course is not only against the implication, but against the expression of the statute, because Section 4952 says that "the author * * * or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or *photograph or negative thereof, or of a painting*, drawing, etc., * * * shall, upon complying with the provisions of this chapter, have the sole liberty of printing, etc., * * * and vending the same;" and the originality inhering in the painting is certainly transferable to a photograph of it so as to support copyright of the latter, within Burrows-Childs Lith.

Co. vs. Sarony, 111 U. S., 53 ; and if, under the Constitution, a photograph may be the subject of copyright at all, such a photograph would be entitled to the protection of the act and could not be classed as a photograph of a mere inanimate object in which the creative genius of an artist has no share. There can be hardly any doubt but that photographs were coupled with engravings, cuts and prints, and all four with paintings, so that the protection of the artist's invention should be complete. And the express mention of photographs ss a subject of copyright excludes the inference that a photograph should receive protection as an *alias* of a painting or statue.

The act confers a privilege non-existent before, and every right derived from it exists on condition of compliance with its requirements. The law ought not to permit the owner of a photograph to acquire a right of property in it by *indirection*, when it prescribes methods for the acquisition of the right. It is not a question of "circumlocution," but a question of obeying the statute.

VI.

This view of the act would require the artist, pursuant to Section 4962, as amended March 3, 1891, to give notice of the copyright, in the case of a photograph or painting "by inscribing upon some visible portion thereof or of the substance upon which the same shall be mounted" one or other of the legends specified in the section. The Court below held that the inscription of the notice need not be upon the original painting, and that it was enough if the notice was inscribed upon the photographs of the painting. This might, and probably would, lead to very serious consequences. The copyright, including its renewal, endures for forty-two years. Assume the published

photographs, after their season of novelty, to have passed into oblivion, as they generally do, and assume the painting to be years afterwards imported here and purchased and sold here ultimately, with the object of reproducing it photographically or by engraving. It contains no notice of copyright and nothing to suggest to the purchaser any limitation upon the unrestricted property in it ; he proceeds to photograph or engrave it, without inquiring at the Librarian's office, and thereby exposes himself to a penalty of ten dollars for every copy found in his possession, to the forfeiture of the plates, which, if etched or engraved, might be a large sum, several thousands of dollars, and the loss of the printed copies of the work in which it was to be inserted, besides indefinite sums by way of damages and profits, and yet the victim of such injustice would have done everything which would be expected of a reasonably prudent man. If the law of the Circuit Court is sound, such grave catastrophes are not only possible and probable, but are certain to happen, and the owner of the copyright may rely on the decision of the Circuit Court in this case to sustain his procedure. It cannot be supposed that Congress intended to open the door to such possibilities. The intention of the section was to require notice to be given. If the painting is copyrighted, every purchaser should buy with the notice ; if the photograph is separately copyrighted, every purchaser of that should buy with the notice on it; for mutilation of either painting, photograph or mounting would naturally suggest inquiry, and one cannot copy without either original or photograph or the equivalent. Unless this is the law, no one can safely purchase a painting made within forty-two years without first inquiring at the Librarian's office to ascertain if it has been copyrighted.

VII.

Subsequent Editions.

Section 4959, as amended, requires the delivery to the Librarian of "a copy of every subsequent edition wherein any substantial changes shall be made," and this applies to "every copyrighted book or other article." If a photograph is a copy of a painting in colors there is at least a substantial change in the photograph as compared with the painting, the substantial change being in the *expression*, corresponding to a change in phraseology, or expression in the case of a literary composition. The act intended that every change made in a copy as compared with the original should be a matter of record and open to public examination in the Librarian's Office. There is no evidence in the record that two copies of the photograph were delivered to the Librarian, or any copy excepting that delivered at the time of obtaining the alleged copyright. Suppose replicas of the original painting to be made, there would then be two editions of the same original painting on the market, differing substantially, but only one record in the Librarian's Office, or must the copyright owner deliver two copies of the veritable copy or replica of the painting? This is not a fanciful supposition, because we have only to suppose the case of an original water-color painting, photographs of it, and, subsequently, *fac similes* of it made by the Goupil process, which cannot be distinguished from the originals except by experts.

Evening Post Job Printing House—N. Y.

United States Circuit Court of Appeals,

FIRST CIRCUIT.

Pierce & Bushnell Manufacturing Company,
Defendant-Appellant,

against

Emil Werckmeister,
Complainant-Respondent.

SUPPLEMENTAL BRIEF FILED ON BEHALF OF RESPONDENT.

The principal difficulty in this case seems to lie in the proper construction of paragraph 4962, and the definition of the word "copy." Paragraph 4962 begins: "No person shall maintain an action for the infringement of *his copyright unless*" * * * Therefore the first question which suggests itself is, What is meant by "*his copyright*"? For the answer to this question we must look to paragraph 4952, which says: "The author, inventor, designer or proprietor of any book * * * musical composition, engraving * * * shall, upon *complying with the provisions of this chapter*, have the sole liberty of *printing*, reprinting, *publishing*, completing, *copying, executing*, finishing and vending *the same*." * * *

Applying this section to the case under consideration, we understand the same to mean that the author, inventor, designer or proprietor of the painting "St. Cacilie," upon complying with the *provisions of this chapter*, became entitled to the sole liberty of "*printing*, * * * *publishing*, * * * *copying*, *executing* * * * and vending said painting" St. Cacilie.

In our opinion, the clause "and in the case of dramatic composition of publicly performing or representing it, or causing it to be performed or represented by others," indicates very plainly that the preceding phraseology, "printing, reprinting, publishing, completing, copying," has reference to each and every one of the enumerated copyrightable subjects, books, musical compositions, engravings, prints, photographs, paintings, statues, &c.

There cannot, we believe, be the slightest doubt that under paragraph 4952 there was granted to the owner of the copyright of the painting "St. Cacilie," by the terms printing, publishing, copying, executing and vending, as ordinarily interpreted, the sole and exclusive liberty to make photographs, cuts, prints, engravings and other copies of his painting. It does not follow from the foregoing that the owner of the copyright of the painting had the right or that it was his duty to put the *copyright notice* on photographs published by him, but that the making and publication of photographs without his consent by others would be an infringement, and that the sole right to make photographs of the painting was the sole privilege of the owner of the copyright admits of no doubt.

For the sake of argument, therefore, we shall assume that the owner of a copyright of a painting has the sole liberty of printing, copying and selling photographs of his painting. The owner of the copyright is now confronted with this difficulty: If he puts the copyright notice on the photograph, he may subject himself to the penalties under paragraph 4963, upon the theory that the law required

him to secure a specific copyright for the photograph, and he has neglected to do so. If he is afraid of incurring the penalties under paragraph 4963 for falsely marking, and therefore omits the notice under paragraph 4962, he is confronted by that section which says that he shall not maintain an action for infringement unless he shall give the copyright notice with reference to which the Circuit Court of Appeals, in Falk *vs.* Gast Lithographic Co., 54 Fed. Rep., 890, says that the notice must be inserted upon *every edition published* and offered for sale.

In our opinion it was the duty of the owner of the copyright to put the copyright notice upon each photograph by him published, and that the proviso of the paragraph 4956 applies only to such cases where a specific copyright for a photograph has previously been obtained.

In connection with the proviso referred to in paragraph 4956, it is interesting to note that paragraph 4960 uses the term "proprietor of any copyright," and that it contains a distinct reference to the duty imposed upon the proprietor of a copyright for a painting to deposit in the office of the Librarian of Congress, "a photograph."

In conclusion we cannot refrain from calling attention to the following suggestions upon the question *whether the original painting should have borne the copyright notice.* Upon the argument it was suggested that paragraph 4962 should be construed differently than the Court below construed it, and that the words "*in the several copies of every edition published*" had reference only to books, for the reason that the original embodiment of the printed thoughts, ideas and features was some "manuscript," while in the case of a photograph or lithograph each and every one was an original in itself, and that therefore there was no necessity for using this phraseology in case of a book. This rather effective argument we attempted to combat by saying that some books were written on vellum and

never printed or published, and that in that respect they were like some paintings, and that it might be assumed that the lawmakers knew this, and that for that reason the clause "in the several copies of every edition published," was equally applicable to paintings as it was to books.

However, Section 4962 itself seems to us to contain a complete answer why the words "*in the several copies of every edition published*" have reference not only to books, but also to paintings. *The words "musical composition" are grouped with photographs and paintings.* For commercial and copyright purposes the original musical composition in manuscript has comparatively little value; yet in its original condition every musical composition was first in manuscript form. It can hardly be claimed that it could serve any sensible purpose to mark the original manuscript with a copyright notice and not mark the printed copies offered to the public for sale, nor can it be claimed that each printed copy is an original in the same sense that every photograph is an original. The original manuscripts of Schubert's and Wagner's compositions have a value, and it can be said with equal force, as it was said upon the argument with reference to original paintings, that if such manuscripts were brought to this country, no one could tell they were copyrighted unless the copyright notice was upon them. *Both paintings and manuscripts are exhibited in art galleries or museums to which the public have access.* According to our view expressed elsewhere, this would not constitute a publication of such paintings or manuscripts, and as such original paintings and manuscripts would not be copies of an edition published under paragraph 4962, as interpreted in the case of Falk *vs.* the Gast Litho. Co., they would not require a copyright notice.

In this connection it should also be remembered that *nobody has the right to copy an original painting or an original manuscript under the common law until after publication.* It requires no notice

on the original painting or the original manuscript that the common law protects the owner against unlawful reproduction. *Why, then, should there be under the statutory copyright a special copyright notice required upon the original painting and the original manuscript* to prevent copies being made therefrom? It was always the law of our country, before the copyright law was in existence, that original productions, such as paintings and manuscripts, were the sole property of the author, and it was the duty of every one to let them alone and not to copy them until the author himself published copies or allowed copies to be made therefrom. So that to-day, if any one should see an original painting or an original manuscript, it would be entirely unnecessary for such person to know whether there was a copyright notice thereon; he would be supposed to know the common law, and that would tell him that he must not make copies without the permission of the owner. We cannot see, therefore, in what respect the public would be injured, even though no copyright notice appeared upon an original painting or manuscript. In either event, whether the painting was copyrighted or was not copyrighted, no one could rightfully make copies thereof without the owner's consent, and it may well be assumed that the framers of the copyright law were aware of this.

In conclusion we beg to say that we cannot see *wherein the original manuscript of a musical composition differs from the manuscript of a book or the manuscript of a painting*, if we may so designate an original painting. *For copyright purposes all originals are matrices or moulds*, and the sole right to make reproductions, castings or copies from these original matrices or moulds is given to the owner of the copyright upon the original matrix or mould, be the same a painting, negative, lithograph, manuscript of a book or musical composition.

In discussing the meaning of the word "copy" the query naturally suggests itself: *Why is a printed copy of a musical composition, the manuscript being*

poorly written as great men usually write, more of a copy of the musical composition than a literal photographic reproduction of a painting is a copy of the painting?

It is, therefore, respectfully suggested that paragraph 4962 requires so to be read that the copyright notice must only be upon the several copies of every edition published; that a photograph is a copy of a painting; that it is unnecessary to put the copyright notice upon the original painting; and that the true solution of all the doubts and arguments on the part of the appellant is contained in the able opinion of the Court below.

New York, February 5, 1895.

Louis C. Raegener,
Of Counsel for Respondent,
280 Broadway,
New York.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1894.

No. 118.

PIERCE & BUSHNELL MANUFACTURING COMPANY,
DEFENDANT, APPELLANT,

v.

EMIL WERCKMEISTER,
COMPLAINANT, APPELLEE.

BRIEF FOR APPELLANT.

This is a suit in equity for infringement of a copyright alleged to have been taken under the laws of the United States (as amended by the act of March 3, 1891), upon a certain painting entitled "Die Heilige Cäcilie."

In the Circuit Court, at final hearing, before PUTNAM, J., the copyright in question was decreed valid and infringed.

At the outset it is important to consider precisely the facts presented:

1. The painting, "Die Heilige Cäcilie," is an original work designed and executed by one Gustav Naujok, a citizen and resident of Germany.
2. The picture was completed by him in October, 1891.
3. From January, 1892, to March, 1892, the said picture was

publicly exhibited by the artist at Berlin, Germany (Record, p. 28).

4. Upon the fifth day of March, 1892, Naujok assigned in writing to the complainant "the right of publication, by which I wish to have understood the exclusive right of reproduction," of the painting in question (Record, p. 26).

5. On the sixteenth day of May, 1892, the complainant under his business name, viz., The Photographische Gesellschaft, deposited in the office of the Librarian of Congress the title of the painting, and a photograph and description thereof, claiming a copyright therein as proprietor. The plaintiff then was and now is a citizen of Germany (Record, pp. 2, 8).

6. In the summer of 1892, the picture was sold by the artist through an agent, to some person to the artist unknown (Record, p. 29).

It distinctly appears that no copyright notice has ever been placed or inscribed either upon any visible portion of the said painting or of the substance upon which it was mounted (Record, p. 28).

7. On the twenty-fourth day of August, 1892, photographic copies of the picture, made in Germany by the employees of the complainant, were first sent to the United States. It does not appear, however, when these copies, or any copies, were first published by the complainant in the United States (Record, p. 23).

8. On the 19th of September, 1892, photographic copies of the picture were first published by the complainant in Germany (Record, p. 23).

9. At some time during the year 1893, and prior to the commencement of this suit, viz., May, 1893, a photograph, Complainant's Exhibit No. 2, was made, published, and sold by the defendant corporation (Record, p. 30).

10. This photograph was made from one of the photographs of the painting made in Germany by the complainant's employees, and by him published and sold in the United States.

It is not alleged nor claimed that any copyright was ever attempted to be secured by the complainant upon his said photograph or upon any photographic or other reproduction of the painting.

The decree of the Circuit Court is alleged to be erroneous (1) in that it finds the copyright valid, and (2) in that it finds the defendant's pictures to infringe.

I.

The complainant, having failed to inscribe the notice required by law upon some visible portion of the painting alleged to be copyrighted, or of the substance on which the same is mounted, is debarred from maintaining this action for the infringement of his copyright.

The law as to copyright notice is as follows: —

> "Be it enacted, etc., that no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz., —
>
> "'Entered according to act of Congress in the year , by A. B., in the office of the Librarian of Congress at Washington;' or, at his option the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out, thus — 'Copyright, 18 , by A. B.'"

U.S. Stat. 1874, c. 301, sec. 1.

It will not be questioned that, unless the complainant herein has complied with the provisions of the copyright law as to notice, his right of action is lost.

Higgins v. *Keuffel*, 140 U.S. 428.

The object of the copyright notice required by law is to give notice to the public that the work has been copyrighted.

Lithographic Co. v. *Sarony*, 111 U.S. 53.

It is clearly the intent of the statute, and for the general welfare of the public, that every copyrighted work shall bear due notice of the fact that it is copyrighted, in order that the public shall be duly warned against unlawfully copying the same.

In the present case, the copyright notice was not placed upon the picture itself. Every photograph of the painting, however, published by the complainant was visibly inscribed with the copyright notice, either upon the face of the photograph itself or upon the cardboard upon which the said photograph was mounted.

Assuming this to be so, has the statute been complied with?

The court below has held that —

> "There is no requirement that any [notice] shall be inscribed on the painting itself."

We submit that this is error.

Upon this question we are to consider, first, the substantial difference in this respect between paintings and drawings and the other wooks named in the act, including books and photographs. A painting or drawing is a work produced directly by the hand of the artist, and is therefore of necessity a unique entity. On the other hand, a book, photograph, engraving, or other thing, into the production of which a mechanical process enters, is of necessity not unique. A book being an impression made from type, it is clear that, although each separate impression is loosely called a copy, yet each is the copyrighted book. The same is true of photographs and other impressions made, not from a plate of type, but from one chemically or mechanically prepared to produce a certain impression. Every photograph from a given negative is, of course,

as much an original as every other photograph from the same negative.

Now it is true that the section of the act which we are considering speaks of placing the notice upon every copy of a book, but, when it comes to other subjects of copyright, directs that the notice shall be placed upon the thing itself.

We submit that this difference in the wording is not one of discrimination, and that the expression "every copy of a book" does not mean or express anything different from the subsequent expression "a photograph" or "a painting."

The substance of the law is this: In every case notice must be given. If the thing copyrighted is a single entity, as a painting or statue, the copyright notice must be placed upon the thing itself. If it is not unique, but manifold, as in the case of a book or photograph, then the copyright notice must be placed upon every manifold or "copy."

Let us consider this question from another standpoint. The plaintiff contends that, by imprinting upon each *photograph* of the painting the words, "Copyright, 1893, by the Photographische Gesellschaft," he has given notice to the public that the *painting* itself has been copyrighted. But the contrary is the fact. The photograph being in itself one of the copyrightable subjects mentioned in the act, the imprint of the copyright notice upon it is a notice that *it* has been copyrighted. In the present instance it is a false notice and misleading to the public. *The photograph has not been copyrighted.*

Furthermore, the notice on the photograph says nothing either expressly or by implication about the painting, or indeed that there is any painting. None but an expert can tell that the photograph is a photograph of a painting. *The complainant, having failed to mark the painting, which was copyrighted, and having falsely marked as copyrighted the photograph which is not copyrighted, has complied neither with the letter nor with the spirit of the law requiring notice.*

The fact that the painting, although a copyrightable thing, is with-

out notice of copyright, is in substance a declaration which the complainant is estopped to deny that it is open to the public to be copied, so far as the copyright law is concerned.

The fact that the photograph, being a copyrightable thing, bears a notice that it has been copyrighted when in fact it has not, amounts to a false representation of this complainant to the public by reason of which he is disentitled to relief in a court of equity.

It is respectfully submitted that the ruling of the Circuit Court that the copyright notice need not be placed upon the picture itself is unsound. It leads of necessity to this proposition — Although you have copyrighted a painting and published that painting, as by exhibition without restriction as to copying, and yet have imprinted no copyright notice thereon, you have still complied with the law; because, in the case of a painting, the notice is not to be put upon the painting itself, but only upon such reproductions thereof, not being themselves paintings, as you may see fit to publish. It is true that if you do publish such reproductions you must impress upon them a notice that your painting is copyrighted, but so long as you do not publish reproductions you need give no notice of your copyright whatever.

We submit that the logically absurd consequences above pointed out grow entirely out of the fallacy involved in confusing the two classes of copyrightable things, viz., those single and those multiple in their nature, and hence in failing to perceive that a different rule as to marking must apply in the two cases if the public are to be informed in every instance of the existence of copyright.

II.

The painting having, as appears, been publicly exhibited for nearly three months before the deposit of title, etc., in the office of the Librarian of Congress, this deposit was not made before publication as required by the act, and hence no valid copyright has been obtained.

The Revised Statutes, section 4956, as amended by chap. 565,

sec. 3, of the act of 1891, provide that "no person shall be entitled to a copyright unless he shall, *on or before the date of publication in this or any foreign country*, deliver at the office of the Librarian of Congress . . . a description of the painting . . . for which he desires a copyright; nor unless he shall also, *not later than the date of publication thereof*, in this or any foreign country, deliver at the office of the Librarian of Congress . . . in case of a painting, . . . a photograph of [the] same."

Now, according to the proofs, it appears that nothing was deposited with the librarian until April 5, 1892, and that for three months prior to that date the painting had been on public exhibition in the "Kunsthandlung von Schulte," which is understood to be the equivalent in German of the "Schulte Art Gallery."

The question then arises whether the public exhibition of a copyrightable painting is a publication thereof within the meaning of the United States copyright laws.

That it is a publication in the ordinary sense of the word cannot be denied. In the Century Dictionary we find the first definition of "publication" to be "the act of publishing or bringing to public notice."

In the case of *Turner* v. *Robinson*, 10 Irish Chancery, 516, is found the following dictum of BRADY, Lord Chancellor: —

> "In the statutes bestowing protection upon the work of sculpture, the *terminus a quo* from which the protection commences is the publication of the work, that is, from the moment the eye of the public is allowed to rest upon it. Many large works in this branch of art which decorate public squares and other places are, of course, so published, but there are others not designed for such purposes, which could never be published in any other way than in exhibitions; therefore I apprehend that these works of sculpture must be considered as published by exhibition at such places as the Royal Academy and Manchester, so as to entitle them to the protection of the statutes from the date of such publication."

Now in the United States the *terminus a quo* is the time of recording the title (Rev. Stat. sec. 4953), which must be not later than the date of publication. Hence, if the learned chancellor's dictum is correct, it applies as well to our law as to the English.

There are, furthermore, many considerations of public policy which should lead courts to hold that, in the case of a copyrightable painting, its public exhibition should be held to be a publication within the statute.

That by public exhibition the painting is publicly exposed or brought to public notice cannot be denied. If publicly exposed, there is no question that opportunity for copying it is thus afforded to the public.

It is true that this opportunity may be more or less interfered with or limited by the police regulations of the particular gallery or place of exhibition. But if the rule of law were that, whether public exhibition is or is not statutory publication, rests upon the rules and regulations as to copying existing in each instance, it would be obviously a very unsatisfactory rule.

The true rule, we submit, is this:

The copyright law has provided a notice which, if placed upon a painting before publication, is notice to all the world that it may not be copied, and therefore, if the author or proprietor of a painting wishes to retain copyright therein, he must comply with all the provisions of the law, including that as to notice, before it is so publicly placed or exhibited that possibility of copying exists.

To require that when an artist desires and intends to reserve to himself the right of copying his picture he shall copyright and mark it before he places it upon public exhibition is simple and salutary. On the other hand, to hold that whether or not the placing of a picture upon public exhibition is or is not a publication shall depend upon the facts of each particular case, is to leave the rights of the public at large wholly dependent upon private regulations of which they may have no knowledge.

We submit that, upon the above considerations of the spirit of the copyright law, the simplicity of its provisions, and public policy generally, public exhibition of a painting should be held to be a publication thereof within the meaning of the statute.

The case of *Turner* v. *Robinson* above cited was itself a case where, in the absence of any copyright law under which it could be protected, a painting had been publicly exhibited, and had been copied by the defendant while so on exhibition. The court intimated that, if there had been a copyright law, it would have held the exhibition a publication under that law. There being no such law, the court proceeded to consider the question of intent as affecting a common law publication or dedication of the right of copying by public exhibition, and an examination of the report will show that the determination of this question was attended with the usual difficulty.

The Circuit Court in its opinion makes no allusion to the case of *Turner* v. *Robinson* nor to the foregoing arguments of counsel. It merely states, "A mere exhibition of a picture in a public gallery does not at common law forfeit the control of it by the artist or the owner, unless the rules of the gallery provide for copying." No authority is cited as to this proposition. While it may not be entirely clear what is meant by the expression "forfeit the control," yet we submit that the court below in substance ruled that the exhibition of the present painting in a public gallery for three months before it was copyrighted was not a publication of the painting within the meaning of the copyright law. We submit that this ruling was erroneous.

III.

The plaintiff having given to the public a copyrightable but uncopyrighted photograph of his copyright painting, and the defendant having copied from this uncopyrighted photograph and not from the copyrighted painting itself, can he be held liable?

The only case which has been found in which the right of copy-

ing from an uncopyrighted copy of a copyrighted original has been directly passed upon is that of *Schumacher* v. *Schwencke*, 25 Fed. Rep. 466; 30 Fed. Rep. 690. This case arose prior to the act of 1891, and consequently is not entirely analogous to the present case. It was held, however, in that case that the defendant should be enjoined, and hence the reasoning of the decision and its applicability to the present state of facts must be carefully considered.

In the Schumacher case the subject matter of the copyright was a painting of which the complainant was the owner, and he used chromo-lithographic productions of the painting as cigar-box labels. These chromo-lithographic reproductions were not copyrighted, but whether they were copyrightable or not does not appear from either report. It may have been that, being the work of a foreign chromo-lithographer, they were not copyrightable at that time under the then existing copyright law.

Since that case, however, the amendment of the law by the act of 1891, and subsequent presidential proclamations thereunder, have expressly extended to certain foreigners, and particularly to citizens of the German Empire, the same rights of copyright as to American citizens.

In the case of a "book, photograph, chromo, or lithograph," however, the act of 1891 provides that when the same are to be copyrighted, the copies deposited with the librarian "shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives or drawings on stone made within the limits of the United States or from transfers made therefrom." The same law further prohibits the importation into the United States of any copies of the copyrighted book, chromo, lithograph, or photograph during the existence of the copyright.

We find, therefore, in the act of 1891, under which the present suit is brought, a distinct change in the policy of the government as to the copyrighting of *photographs*, with which this present case has particularly to do. We find in substance that any person wishing to enjoy the benefits of a copyright under the laws of the United States in a photograph shall be limited to the manufacture

and sale of such manifolds of the copyright property as are printed from negatives made within the limits of the United States.

Now in the present case, if it be held that the complainant, having copyrighted his painting, has obtained thereby the exclusive right of making and selling within the United States photographs thereof, then he has in substance and effect exclusive rights as to the manufacture and sale of photographs which by the express provisions of the act of 1891 he shall not have. He may, as in the present case he does, make his photographs exclusively abroad from negatives made exclusively abroad, and he may import the photographs so made freely into this country, and still have the exclusive right of making or of selling them here. *In other words, he has, in substance and effect, copyright protection for a photograph made and sold under circumstances under which the copyright law expressly states that such protection shall not be granted.*

Now it is elementary that, in construing a statute, effect must be given to all of its provisions. Hence, when we find that Congress has expressly attached to the acquisition and enjoyment of the sole right of multiplying copies of a photograph, certain provisions of law as to manufacture and non-importation, each of which has been distinctly violated in the present case, it is submitted that the court cannot be called upon to give such a construction to one portion of the statute as to a painting as shall result in the obvious disregard of another portion as to a photograph.

It is to be noticed that no hardship would be imposed upon the complainant in the present instance, under the act of 1891, by restricting him to the sale within the United States of photographs made from a negative made here, and forbidding the importation by him of photographs made from negatives made abroad. It was entirely in his power before publication to bring, as he did do, a copy of his unpublished photograph to this country, and here have the same rephotographed, and then publish and sell within the United States only prints from the new negative thus obtained; all of which he has failed to do.

It is not perhaps material in the present case to inquire as to the objects which Congress had in view when, simultaneously with the removal from the statute book of the clause discriminating against the right of copyright in a foreigner, it annexed to that right in certain instances certain conditions as to manufacture and sale. That it has so annexed them is clear, and therefore they cannot be disregarded. The present case, then, arises under a law different from that which governed in *Schumacher* v. *Schwencke*, and therefore the doctrine of that case, even if sound of itself, is no longer applicable where suit is brought for infringement by copying an uncopyrighted photograph of a copyrighted painting. If the complainant's uncopyrighted photograph be copyrightable, and the provisions of the statute be not complied with, either as to manufacture or importation, then clearly a decision securing to the complainant the exclusive right of reproducing this photograph would amount to a substantial abrogation of the statutory requirements in regard thereto.

We have thus far assumed that the complainant's photograph would have been copyrightable had the provisions of the act of 1891 been complied with.

It is quite true that in *Lithographic Co.* v. *Sarony*, the Supreme Court expressly refused to decide whether or not a photograph which was "a mere mechanical reproduction" of some object, involving "no originality of thought, or any novelty in the intellectual operation connected with its visible reproduction," was copyrightable within the purview of the Constitution.

Lithographic Co. v. *Sarony*, 111 U.S. 59.

In the present case, however, we submit that this state of facts does not arise. In the first place, the burden of proving that the photograph lacks copyrightable quality is upon the complainant, and no such allegation or proof appears. On the contrary, it appears that the photographs in question are copies of the painting, that they have been made at large expense, and that there is a large

sale and demand for them, all as alleged in the bill. And furthermore, we confidently submit that, *prima facie* at least, and in the absence of allegation or proof to the contrary by the complainant, the court will find of its own motion, upon inspection of the sample of complainant's photograph produced, that it is an artistic work and worthy of copyright protection.

Indeed, it is matter of common knowledge that in such cases as the present, while the mechanical process of photographing a painting is precisely the same by whomever performed, yet the artistic value of the result will depend upon the judgment, taste, and intellectual skill of the operator. There is the question of lighting the painting to be photographed, which is purely and directly one of intellectual judgment. Then there is the question of tone, as determined by the subsequent development of the plate, which is also purely a matter of artistic judgment. It is therefore submitted that, whenever a photograph is of such a character as to possess of itself artistic or æsthetic value, it is the work of an artist within the purview of the Constitution of the United States, and copyrightable within the spirit of the decision in the Sarony case.

Falk v. *Brett Lithographic Co.*, 48 Fed. Rep. 678.
Falk v. *Gast Lithographic Co.*, 48 Fed. Rep. 262.

In England it has been recently held that a photograph of a painting is an original and copyrightable work.

Graves, *ex parte*, L.R. 4 Q.B. 715.

Furthermore, in *Nottage* v. *Jackson*, L.R. 11 Q.B.D. 627, the court say, —

> "There is nothing in the nature of the thing to make us give a different interpretation of the word 'author' in the case of a photograph than that which we should give to it in the case of a painting."

Finally, we do not wish to be understood as admitting the accuracy upon general principles of the decision in *Schumacher*

v. *Schwencke*, if it was the fact in that case that the complainant negligently failed to protect by copyright the published copies of his painting. We submit on general principles that *the owner of a copyrighted painting, desiring to publish mechanical or other copies thereof and to preserve the right of multiplying copies of those copies, must copyright them whenever they are in themselves of copyrightable nature, or else he will be held to have dedicated the right of copying them to the public.* The painting and the copy thereof are two distinct entities, and it is well settled that the right of multiplying copies of the original and of the copy are distinct rights and may be held by different individuals. Clearly, then, either right may be preserved or may be lost independently of the other.

Thus, in *Ex parte Beal*, L.R. 3 Q.B. 387, the defendant was complained of for copying a copyrighted engraving, the property of the plaintiff, who also owned the painting from which the engraving was itself made. In the course of the argument BLACKBURN, J., said if it were shown that the plaintiff had no copyright on the engraving, then it might be a question whether he could proceed against the defendant for copying it merely upon the strength of his copyright in the painting.

It is further stated by Drone, a writer of authority, upon this point, as follows: —

> "The principle that copying from a *protected* publication is an essential element of piracy must hold good when an author has published substantially the same work in two forms of which but one is copyrighted. The one unprotected is common property; hence its use cannot be a violation of the copyright in the other. It is true that to copy one may be but an indirect copying of the other. But the answer to this objection is that copyright does not prevent any person from using a work which he has obtained from a source open to all. Thus, if an author publish and copyright a novel, and then publish substantially the same production in the form of a play without copyrighting it, the latter becomes common

property, and its unlicensed publication cannot be an invasion of the copyright in the novel. This principle may be illustrated by supposing a case which may arise under the statutes of the United States. Section 4962 makes the printing of the notice of entry in each copy of every edition of a book published essential to copyright. Suppose the first edition is printed with and the second without a notice, the latter edition is not entitled to protection; and even if the copyright in the first edition continue valid, it cannot prevent any person from reprinting any copy of the second edition."

Drone, Copyright, page 400.

Again, Mr. Drone says, —

"The statute secures copyright in a painting, and also in an engraving, a photograph or other copy of it. The copyright in the original is one thing. It affords a remedy against the unlawful copying of the original by any process. The copyright in any copy is another thing. It is this copyright which makes unlawful the unlicensed copying of the copy. There appears to be no reason why the general principle that copyright is violated only when the thing copyrighted as copied, should not govern in the case under consideration. If an engraving of a painting should become common property, and the copyright in the painting itself be valid, there is no reasonable doubt that the latter right would not be violated by any publication of the engraving, so if the owner has sold the copyright in the engraving, and retained that in the painting, it does not appear that he would have any remedy against the unlicensed copying of the engraving, although such copying might be injurious to the property in the painting."

Drone, Copyright, page 484.

The court below in its opinion, it is respectfully submitted, fails to take any notice of the point above urged. No authorities are cited in support of the proposition that copying from an unprotected

copy is not infringement, although copying from a protected original or a protected copy would be. None of the authorities cited by the court have any bearing upon the question, because in none of them was it presented. Furthermore, no answer upon principle or by reasoning appears in the opinion. From this we are led with great regret to believe that the question must have failed to have been fully presented and understood in the court below.

In conclusion, it is submitted that, upon either of the three grounds of defence above set forth, the bill must be dismissed.

ALEX. P. BROWNE,
of Counsel for Defendant, Appellant.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

United States Circuit Court of Appeals

FIRST CIRCUIT.

PIERCE & BUSHNELL MANUFACTURING COMPANY,
Defendant-Appellant,

vs.

EMIL WERCKMEISTER,
Complainant-Respondent.

Counsel wishes to call the attention of the Court to the following section of the statute:

SEC. 4963. Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, dramatic or musical composition, print, cut, engraving or photograph, or other article, for which he has not obtained a copyright, shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty, and one-half to the use of the United States.

WM. A. JENNER,
Of Counsel with Defendant.

Filed Feb. 2, 1895
By Court
John G. Gibson
Clerk

[2214a]

D. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

United States Circuit Court of Appeals

FIRST CIRCUIT.

PIERCE & BUSHNELL MANUFACTURING COMPANY,
Defendant-Appellant,

vs.

EMIL WERCKMEISTER,
Complainant-Respondent.

Additional Note.

The copyright act as amended March, 1891, provides respecting the notice :

"§ 4963. Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or other article, for which he has not obtained a copyright, shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty, and one-half to the use of the United States."

Unless the photograph was actually copyrighted, the notice on it was wrongful. The notice on it could be rightful only if copyright was "obtained" on *it*. Where an "article" is copyrighted, the copyright covers every copy, and every copy is to be regarded as an original, and should properly be impressed with the notice under § 4962. This dilemma is presented: If complainant's photograph is a "copy" of the copyrighted painting, it was itself copyrighted, and was rightfully impressed with the

Filed Feb. 2, 1895
by Geary Comrs
J. Mc G. Sloan
Clerk

notice, but in such case the proviso of § 4956 requiring manufacture here would apply to it, but the proviso of § 4956 would not apply to it only on the view that the photograph was not copyrighted, and in that case the notice was improperly impressed upon it under § 4963, but if the notice had been omitted there would then have been no notice at all to the public, none on the original painting and none on the photographs. To hold that the photograph is not a copy of the painting but is copyrightable separately avoids the dilemma. If the photograph had been copyrighted here the requirements of the proviso of § 4956 would have been satisfied, the notice required by § 4962 could have been given, and the penalty imposed by § 4963 avoided.

It is not an answer to this, that the present complainant will risk his liability for the penalty. It may be true that he cannot be held liable because he is in Berlin and committed the act of impressing the notice there, and the penalty is not attached to the importing or sale here of a falsely marked article, but the illegality in the act of impressing the notice is not to be affected by the residence of the wrong-doer. The act should apply in all its parts to foreigners as well as residents, otherwise a resident might copyright his painting, send a negative abroad, have photographs of it made and marked with the notice, import them and sell them here and thus evade the requirements of the proviso, and the penalty, and still enjoy the monopoly.

Respectfully submitted,

Wm. A. Jenner,

Of Counsel.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1894.

No. 118.

Pierce & Bushnell Manufacturing Company,

DEFENDANT, APPELLANT,

v.

Emil Werckmeister,

COMPLAINANT, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM INTERLOCUTORY DECREE (PUTNAM, J.), SEPTEMBER 12, 1894.

TRANSCRIPT OF RECORD.

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Transcript of Record:

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TABLE OF CONTENTS.

Circuit Court of the United States

FOR THE DISTRICT OF MASSACHUSETTS.

In Equity.

Emil Werckmeister

vs.

Pierce & Bushnell Manufacturing Co.

Emil Werckmeister, a citizen of the Empire of Germany, brings this his bill of complaint against the Pierce & Bushnell Manufacturing Company, a corporation duly organized and established under the laws of the State of Massachusetts, and a citizen of said State; and thereupon your orator complains and says:

That your orator does business under the firm name of Photographische Gesellschaft, and for many years prior to the year 1890 did business under the said firm name of Photographische Gesellschaft.

And your orator further shows unto your Honors, that on or about October 1, 1891, one G. Naujok invented, designed and painted a certain painting called "Die Heilige Cäcilie." That said painting "Die Heilige Cäcilie" is of an allusive character, and by means of representing the patron saint of music, St. Cecilia, sitting before an organ, and cherubs dropping flowers, and by means of the artistic coloring of the picture and the expression in the face of St. Cecilia, expresses emblematically the power of sacred music.

And your orator further shows, that the said G. Naujok, on

or about the 5th day of March, 1892, assigned, transferred and sold to your orator all his right, title and interest in any copyright obtainable in the United States of America and in all other countries, and also the sole liberty and right of printing, reprinting, publishing, completing, copying, executing, finishing and vending said painting.

And your orator further shows unto your Honors, that having acquired the right to obtain the copyright for said painting and the sole right for printing, reprinting, publishing, completing, copying, executing, finishing and vending the same, and being a subject of the Empire of Germany, and desiring to secure the copyright thereof under the laws of the United States respecting copyrights, your orator, before the publication thereof in this or any foreign country, to wit, on the 16th day of May, 1892, delivered at the office of the Librarian of Congress, at Washington, District of Columbia, a copy of the title and description of said printing, which description was in the following words, to wit:

"St. Cecil is playing on an organ, whilst cherubs are strewing roses on the key-board,"

and also a photograph thereof; and that such title and description and photograph were duly deposited in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, on the 16th day of May, 1892, and that the Librarian of Congress duly received the same and recorded the title thereof on said 16th day of May, 1892, as will more fully and at large appear from a duly authenticated copy of said record, ready in Court to be produced, if required, a copy whereof is hereto annexed, marked "Exhibit Certificate A."

And your orators further shows unto your Honors, that he began the publication of said painting on or about the 15th day of September, 1892, and not before, either in this country or any foreign country.

And your orator further shows unto your Honors, that by reason of the premises and of the statutes in such cases made

and provided there was secured to your orator, his executors, administrators and assigns, or intended so to be, for the term of twenty-eight years from the said 16th day of May, 1892, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the said painting.

And your orator further shows unto your Honors, that being the lawful proprietor of said copyright as aforesaid and in possession of the same, and being able and desirous of supplying copies of the same to purchasers, your orator had made and prepared at his place of business, in the City of Berlin, in the Empire of Germany, certain negatives from which to print photographs of said painting "Die Heilige Cäcile," which negatives belonged to and were paid for by your orator and prepared under the direction of your orator's employees by persons paid to prepare the same for your orator, and that your orator had printed and continues to print therefrom copies of said painting; and that your orator, after the day of depositing the said title and description as aforesaid, and not before, commenced to publish copies of said painting and duly gave notice of your orator's copyright as is required by law, by inscribing upon a visible portion of every copy of said painting published by your orator, the word "Copyright," together with the year the copyright was entered and the name of the party by whom it was taken out, thus: "Copyright, 1892, by Photographische Gesellschaft."

And your orator further shows unto your Honors, that in the production of copies of said painting and since he secured the copyright for said painting as aforesaid, he has invested and expended large sums of money and been to great trouble and expense in making, selling and advertising copies of the same for sale, and for the purpose of carrying on the business of selling the same and making the same profitable to your orator and useful to the public; and that said painting has been and is of great benefit and advantage to your orator; and that there is a large sale and demand for copies of said painting; and that your orator at all times has had and now has on hand sufficient copies of said painting for sale to the public at a rea-

sonable price, and is prepared to supply the demand therefor and sell copies of such painting at a reasonable price; and that the public have generally acknowledged and acquiesced in the aforesaid rights of your orator, and your orator believes that he will realize and receive large gains and profits therefrom, if infringements by the said defendant and its confederates shall be prevented.

And your orator further shows unto your Honors, on information and belief, that said Pierce & Bushnell Manufacturing Company, the defendant, well knowing the premises and the rights secured to your orator as aforesaid, but contriving to injure your orator and to deprive him of the benefits and advantages which might and otherwise would accrue unto him from said painting and copyright, on or about the 1st day of March, 1893, and at other times after the recording of the title and description of said painting as aforesaid, and within the term limited (to wit, within the said twenty-eight years as aforesaid), and before the commencement of this suit, and without the consent of your orator first obtained in writing, signed in the presence of two or more witnesses, and against the will of your orator, and in violation of your orator's rights, and in infringement of said copyright, did, as your orator is informed and believes, at the City of New Bedford and the City of Boston, both in the State of Massachusetts, and at the City of Chicago, in the State of Illinois, and at other places within the United States, print, reprint, publish, complete, copy, execute and finish great numbers of copies of said painting, the property of your orator and for which your orator had obtained said copyright as aforesaid; and that said defendant, at said times and places aforesaid, and knowing that such copies of said painting were worked, printed, reprinted, published, completed, copied, executed and finished without the consent of your orator first obtained as required by law and as aforesaid, and against the will of your orator, did publish such copies thereof, and sell such copies thereof, and expose to sale such copies thereof, and that the defendant still continues so to do, and that it is threatening

to make copies of the aforesaid painting in large quantities, and to supply the market therewith and to sell the same.

And your orator further shows unto your Honors, upon information and belief, that said defendant has published, sold and exposed to sale large quantities of pirated copies of said painting at the times and places aforesaid and has large quantities on hand, which it is offering for sale, and has made and realized large profits and advantages therefrom, but to what extent and how much exactly your orator does not know, but believes that the same amount to about five thousand dollars.

And your orator further shows unto your Honors, upon information and belief, that at the time of publishing and of selling and of exposing to sale the said pirated copies of said painting by the defendant the defendant knew that the said copies by it published and by it sold and by it exposed to sale were published and were sold and were exposed to sale without the consent of your orator and in violation of your orator's rights and in infringement of your orator's said copyright.

And your orator further shows unto your Honors, that the publishing, the selling and the exposing to sale of such piratical copies of your orator's said painting by said defendant, and its preparation for and continuance thereof, and its other aforesaid unlawful acts, in disregard and defiance of the rights of your orator, have the effect to and do encourage and induce others to infringe said copyright, in disregard of your orator's rights.

All in defiance of the rights acquired by and secured to your orator as aforesaid, and to your orator's great and irreparable loss and injury, and by which your orator has been and still is being deprived of great gains and profits, which he might and otherwise would have obtained, but which have been received and enjoyed by the said defendant, by and through its aforesaid unlawful acts and doings.

And your orator further shows unto your Honors, that it fears and has reason to fear that unless the defendant is restrained by a writ of injunction issuing out of this Court it will

continue to print, reprint, publish, complete, copy, execute, finish, sell and expose to sale great numbers of piratical copies of said painting "Die Heilige Cäcilie," and thereby will cause irreparable injury to your orator's aforesaid exclusive rights.

And your orator prays that the said defendant, the Pierce & Bushnell Manufacturing Company, may be compelled by a decree of this Honorable Court to pay over unto your orator all such gains and profits as have accrued or arisen to or been earned or received by the said defendant, and all such gains and profits as your orator would have received but for the said wrongful acts and doings of the said defendant.

And your orator prays that the said defendant, the Pierce & Bushnell Manufacturing Company, its servants, agents, attorneys and workmen, and each and every of them, may be restrained and enjoined, provisionally, pending this suit, and forever afterwards, by the order and injunction of this Honorable Court, from directly or indirectly working, printing, reprinting, publishing, completing, copying, executing or finishing any copies of the aforesaid painting, so as aforesaid the property of your orator, or any part thereof; and from publishing, exposing to sale, selling or otherwise disposing of any piratical copies of said painting, or any like or similar to those which it has heretofore made, sold or exposed to sale, or any part or parts of such copies; and also from publishing, exposing to sale, selling or otherwise disposing of any of the plates upon which the same were copied, and from directly or indirectly copying, imitating or counterfeiting the aforesaid copyright painting, of which your orator is proprietor; and that the exclusive right and privilege of your orator in said painting, and the working, printing, reprinting, publishing, completing, copying, executing, finishing and vending thereof, may be established; and that the defendant may be decreed to pay the costs of this suit; and that your orator may have such further relief, or such other relief, as to this Honorable Court shall seem meet, and as shall be agreeable to equity.

May it please your Honors to grant unto your orator the

writs of injunction, as well provisional as perpetual, issuing out of and under the seal of this Honorable Court, commanding, enjoining and restraining the said defendant, the Pierce & Bushnell Manufacturing Company, its servants, agents, attorneys and workmen, and each and every of them, as is hereinbefore in that behalf prayed.

To the end, therefore, that the said defendant, the Pierce & Bushnell Manufacturing Company, may, if it can, show why your orator should not have the relief hereby prayed, and may, according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the several matters hereinbefore averred and set forth, except to such of said matters as may subject the defendant to a penalty or forfeiture, which matters the said defendant is not required to answer.

Your orator also waives answer under oath to this bill.

May it please your Honors to grant unto your orator a writ of subpœna *ad respondendum* issuing out of and under the seal of this Honorable Court, directed to the said defendant, the Pierce & Bushnell Manufacturing Company, commanding it by a certain day and under a certain penalty to be and appear in this Honorable Court, make answer to this bill of complaint, and to perform and abide by such order and decree herein as to this Court may seem required by the principles of equity and good conscience.

And your orator will ever pray, &c.

EMIL WERCKMEISTER.

GOEPEL & RAEGENER,
Complainant's Solicitors,
280 Broadway, New York.

LOUIS C. RAEGENER,
Of Counsel.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, ss.:

CHARLES E. WENDT, being duly sworn, deposes and says, that he is the attorney-in-fact in the United States of America of Emil Werckmeister, the complainant herein, and that he has heard read the foregoing bill of complaint and knows the contents thereof to be true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason this verification is not made by the complainant in person is because the said complainant resides in the City of Berlin, in the Empire of Germany.

CHARLES E. WENDT.

Subscribed and sworn to before me this 23d day of May, 1893.

BENJ. B. KENYON,
[SEAL.] Notary Public,
N. Y. Co.

("Exhibit Certificate A.")

Also marked "Complainants' Exhibit No. 1," May 5. 1894.

(L. S.)

No. 20698 X. LIBRARY OF CONGRESS,
Copyright Office, Washington.

To wit: BE IT REMEMBERED,

That on the 16th day of May, anno domino 1892, Photographische Gesellschaft, of Berlin, Ger., have deposited in this Office the title of a Painting, the title or description of which is in the following words, to wit:

DIE HEILIGE CÄCILIE,
G. NAUJOK.
Photo. & Descript. on file;

the right whereof they claim as proprietors in conformity with the laws of the United States respecting Copyrights.

A. R. SPOFFORD,
Librarian of Congress.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

No. 3149. *In Equity.*

EMIL WERCKMEISTER

v.

PIERCE & BUSHNELL MANUFACTURING COMPANY.

The answer of THE PIERCE & BUSHNELL MANUFACTURING COMPANY, *defendant, to the bill of complaint of* EMIL WERCKMEISTER, *complainant.*

This defendant, answering, says that it does not know and is not informed, save by the bill of complaint, whether the complainant does and has done business as therein averred, and leaves the complainant to make such proof thereof as he may be advised is material.

This defendant denies that at the time stated in the bill, or at any other time, one G. Naujok invented, designed or painted the painting called "Die Heilige Cäcilie."

This defendant denies that the said Naujok, at the time set forth in the bill of complaint, assigned, transferred, or sold to the complainant any right, title or interest in any copyright obtainable in the United States of America, or that he assigned the sole liberty and right of printing, reprinting, publishing, completing, copying, executing, finishing and vending said painting as therein alleged.

The defendant denies that the complainant, before the publication of said painting, delivered at the office of the Librarian of Congress a copy of the title and description of said painting, as averred in the bill, or that the same were duly deposited in the

mail within the United States, addressed to the Librarian of Congress, as averred in the bill, or otherwise, or that the said Librarian duly recorded the title thereof, as averred in the bill, or otherwise.

The defendant further denies that a photograph of said painting was delivered by the complainant at the office of the Librarian of Congress, as averred in the bill, or otherwise.

The defendant further denies that the complainant began the publication of said painting on or about the 15th day of September, 1892, as averred in said bill; but avers that the same was published by the complainant or the said Naujok long before the said 15th day of September, 1892, and also long before the 16th of May, 1892, being the date averred as the date of the alleged delivery and mailing of the copy of the title and description and of the photograph of said painting.

The defendant denies that there has been secured to the complainant, either for the term averred in the said bill or for any other term, any right or liberty or copyright with respect to said painting, either as averred in the bill of complaint or otherwise.

The defendant admits that photographic negatives of the said painting were made and prepared by or for the complainant, as averred in said bill, and that photographs were printed therefrom. and that the photographs so printed were published and sold, but denies that any notice of the complainant's alleged copyright was given, as required by law, and avers that, even if the complainant did inscribe upon a visible portion of every photograph so published and sold by him, the words and figures, as averred in the bill, yet that this was not the notice required by law of the alleged copyright in the said painting, and also avers that the complainant failed to give notice of his alleged copyright upon the said painting by inscribing upon the face or front thereof the notice required by law, or any other notice of the same legal tenor and effect.

The defendant denies that the complainant has invested and expended large sums of money or been to trouble and expense in connection with the manufacture and sale of the

said painting or copies thereof, or that the same is of great benefit and advantage to the complainant, or that there is a large sale and demand for copies thereof, or that the complainant has any copies thereof on hand for sale to the public or otherwise, or that the public has acknowledged or acquiesced in any alleged rights of the complainant.

The defendant denies that at the time, or in the manner averred in the bill or otherwise, it has printed, reprinted, published, completed, copied, executed or finished any copies of said painting, either as averred in the said bill or otherwise, or that it threatens or intends to do so in the future.

The defendant denies that it has published, sold or exposed for sale any pirated copies of said painting, or has any such copies on hand, either as averred in the bill or otherwise.

The defendant submits to this Honorable Court that the complainant has no right to any further answer to the bill of complaint, or any part thereof, than is hereinbefore contained, and no right to any injunction, account or other relief, as prayed for in said bill, and the defendant prays to be hence dismissed, with its reasonable costs and charges.

THE PIERCE & BUSHNELL MANUFACTURING CO.,
By ARTHUR G. GRINNELL,
Treasurer.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

In Equity.

EMIL WERCKMEISTER

vs.

PIERCE & BUSHNELL MANUFACTURING COMPANY.

The replication of EMIL WERCKMEISTER, *complainant, to the answer of* PIERCE & BUSHNELL MANUFACTURING COMPANY, *defendant.*

The repliant, saving and reserving unto himself now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, says that he will aver, maintain and prove his said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by the repliant. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein or hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things the repliant is and will be ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by his said bill he has already prayed.

GOEPEL & RAEGENER,
Complainant's Solicitors,
280 Broadway,
New York.

N. B.—And you shall take such deposition in a place separate and apart from all other persons, and permit no person to be present during such examination, except the deponent and yourself, and such disinterested person (if any) as you may think fit to appoint as a clerk, to assist you in reducing the answers to writing; and you shall not suffer any counsel or attorney to be present at the deponent's in their order, and take the answer of the deponent to such, fully and clearly. ☞ Depositions to be taken on paper of like size with this commission.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, SS.:

THE CIRCUIT COURT OF THE UNITED STATES

WITHIN AND FOR THE MASSACHUSETTS DISTRICT.

To the Consular Officer of the United States at Berlin, Germany:

Know ye, That, reposing confidence in your wisdom, prudence and fidelity, we have appointed, and by these presents do authorize and empower you to take the answers to the interrogatories hereunto annexed of Emil Werckmeister and Franz Schroeder, witnesses to be examined on behalf of the complainant, and to be used in a certain cause now pending in said Court, wherein Emil Werckmeister is plaintiff, *versus* Pierce & Bushnell Manufacturing Company, defendant.

And to this end, at certain days to be by you appointed for that purpose, to cause said witnesses, as aforesaid, to be brought before you, and each witness, while present before you, to examine carefully on oath touching the premises. And when you shall have taken the examination as aforesaid, to reduce or cause the same to be reduced to writing, and to be subscribed by each of said witnesses in your presence. And the same, so taken and subscribed, to return, together with this commission and your doings herein, enclosed, sealed and directed to the Circuit Court aforesaid, holden at Boston, in said district, as soon as the same shall have been executed.

In testimony whereof, we have caused the seal of the said Circuit Court to be hereunto affixed.

Witness, the Honorable Melville W. Fuller, Chief Justice, at Boston, this 23d day of November, in the year of our Lord one thousand eight hundred and ninety-three.

ALEX. H. TROWBRIDGE,
Clerk.

CIRCUIT COURT OF THE UNITED STATES

For the District of Massachusetts.

In Equity.

Emil Werckmeister

vs.

Pierce & Bushnell Manufacturing Company.

Interrogatories to be administered to Emil Werckmeister, as a witness on behalf of complainant, under and pursuant to a commission issued by this Court:

1. What is your name, age, residence and occupation?

2. Of what country are you a citizen?

3. If you state in answer to the last question that you are a citizen of Germany, please state since what time you have been a citizen of Germany?

4. Under what firm name do you do business?

5. If, in answer to the last interrogatory, you give the name of a firm, please state for how long a period you have done business under such firm name?

6. Are you the only one that does business under the firm name that you have given in answer to the last interrogatory?

7. Do you know whether G. Naujok, the painter of the painting called "Die Hielige Cäcilie," transferred the right of

publishing said painting to the complainant, and the right to take a copyright thereon in the United States?

8. If you have answered the last question in the affirmative, please state what you know upon the subject referred to in the preceding interrogatory, and produce any documents or letters which you have received from the said G. Naujok upon the subject matter of the aforesaid interrogatory?

9. Do you know Franz Schroeder, and if so, in what relationship does he stand to you and your business?

10. What experience, if any, have you had qualifying you to give testimony as an expert in this case?

11. Are you familiar with the painting called "Die Heilige Cäcilie," painted by G. Naujok?

12. Are you able to state whether said painting is a valuable work of art?

13. Have you permitted, either directly or indirectly, the defendant, the Pierce & Bushnell Manufacturing Company, of New Bedford, Mass., to make and sell copies of the painting called "Die Heilige Cäcilie"?

CIRCUIT COURT OF THE UNITED STATES

For the District of Massachusetts.

In Equity.

Emil Werckmeister

vs.

Pierce & Bushnell Manufacturing Company.

Interrogatories to be administered to Franz Schroeder, as a witness on behalf of complainant, under and pursuant to a commission issued by this Court:

1. What is your name, age, residence and occupation?

2. In what relationship do you stand to the complainant in the above entitled suit?

3. Do you know of what country the complainant, Emil Werckmeister, is a citizen? If so, please state the same?

4. Do you know under what firm name the complainant does business? If so, state the same, and also for how long a period the said complainant has done business under such firm name?

5. When did the complainant begin the publication of copies of a certain painting painted by G. Naujok and called "Die Heilige Cäcilie"?

6. Please produce a copy of said painting, and have it marked by the Commissioner "Exhibit A."

7. Do you know whether G. Naujok, the painter of the painting called "Die Heilige Cäcilie," transferred the right of

publishing said painting to the complainant, and the right to take a copyright thereon in the United States?

8. If you have answered the last question in the affirmative, please state what you know upon the subject referred to in the preceding interrogatory, and produce any documents or letters which you have received from the said G. Naujok, upon the subject matter of the aforesaid interrogatory.

9. Did the complainant prepare any negatives from which photographs of said painting "Die Heilige Cäcilie" were prepared? If so, where?

10. Do you know to whom the negatives referred to in the preceding interrogatory belong? If so, state to whom they belong?

11. How many copies of said painting called "Die Heilige Cäcilie" did the complainant produce and sell?

12. Are you able to state whether the copies of the said painting "Die Heilige Cäcilie" had any copyright notice upon them, and if so, please state whether every one of the copies produced by the complainant bore such copyright notice, and also state the exact phraseology of such copyright notice, and in giving your testimony you may refer to "Exhibit A"?

13. Please state what experience, if any, you have had which qualifies you to give testimony as an expert in this matter?

14. Are you able to state whether the said picture "Die Heilige Cäcilie" is a valuable work of art?

15. If you know whether the public, excepting the defendant herein, have respected the rights of the complainant, please state so?

16. Has the complainant gone to any trouble and expense in advertising the said picture "Die Heilige Cäcilie," and in putting the same upon the market? If so, state to what trouble and what expense he has gone?

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

No. 3149. *In Equity.*

EMIL WERCKMEISTER

vs.

PIERCE & BUSHNELL MANUFACTURING COMPANY.

CROSS-INTERROGATORIES to be administered to Franz Schroeder as a witness on behalf of complainant, under and pursuant to a commission issued by this Court:

1. Was any copy of the painting by G. Naujok, called "Die Heilige Cäcilie," whether by photographing, etching, engraving, or otherwise, ever published by any one, to your knowledge, before the date given by you in answer to interrogatory 5, and if so, when, where and by whom, and in what form? Please answer fully?

2. If the copy produced by you in answer to interrogatory 6 is a photographic copy of the said painting, please state by what person the negative of said photograph was actually made, and at what time and under what circumstances.

3. Has the complainant or his firm ever published any copy of the said painting "Die Heilige Cäcilie" by any other process than by photography, or any photographic copy made from any other negative than the one hereinbefore referred to? If yes, when? and please produce samples of all such other copy or copies to be marked as exhibits in this case; and if said copies so produced are marked with any statement or notice of copyright

or registration, please state when said statement or notice was first imprinted upon said copy, and by whom?

4. If you know of any copy, photographic or otherwise, of the said painting "Die Heilige Cäcilie," whether produced by the complainant or otherwise, which has borne any copyright notice different from that given by you in answer to interrogatory 12, please state the facts fully?

Depositions of witnesses produced, sworn and examined the 15th day of December, in the year one thousand eight hundred and ninety-three, at the Consulate General of the United States of America at No. 49 Markgrafens Strasse, Berlin, German Empire, under and by virtue of a commission issued out of the Circuit Court of the United States within and for the Massachusetts District, to the Consular Officer of the United States at Berlin, Germany, directed, for the examination of witnesses in a cause therein depending between Emil Werckmeister, plaintiff, and Pierce & Bushnell Manufacturing Company is defendant, on the part and behalf of the plaintiff:

Emil Werckmeister, of Berlin, German Empire, by occupation a publisher, aged forty-nine years and upwards, being duly and publicly sworn, pursuant to the directions hereto annexed, and examined on the part of the plaintiff, doth depose and say as follows:

First.—To the first interrogatory he saith: My name is Emil Werckmeister, my age forty-nine years, my residence Berlin, German Empire, my occupaiion that of a publisher.

Second.—To the second interrogatory he saith:

I am a citizen or subject of the German Empire.

Third.—To the third interrogatory he saith:

I have been a citizen or subject of the German Empire since the day of my birth in 1844.

Fourth.—To the fourth interrogatory he saith:

My firm name is "Photographische Gesellschaft."

FIFTH.—To the fifth interrogatory he saith:

The firm name exists since 1862, and I have been sole proprietor of the firm since 1872.

SIXTH.—To the sixth interrogatory he saith:

So far as I know, I am the only person who does business under the firm name Photographische Gesellschaft.

SEVENTH.—To the seventh interrogatory he saith:

The painter, G. Naujok, transferred to my firm the right of publishing the painting called "Die Heilige Cäcilie." Being thus the assign of the author, my firm was entitled to secure the copyright of the painting under the laws of the United States.

EIGHTH.—To the eighth interrogatory he saith:

All letters and documents concerning the subject are filed with our records. The document of transfer runs literally as follows: "Ich übertrage der Photographischen Gesellschaft in "Berlin, für mein Werk 'Die Heilige Cäcilie,' das Verlagerecht "—worunter ich das unbeschrankte Nachbildungsrecht ver- "standen wissen will—gegen Zahlung von Rm. Fünfhundert "und neun Freiexemplars.

"Königsburg, i/Pr. den 5 März, 1892.

"(Signed) GUSTAV NAUJOK."

A copy authenticated by a notary public may be produced any time.

NINTH.—To the ninth interrogatory he saith:

I know Franz Schroeder; he is my attorney and the manager of my business since nearly 25 years.

TENTH.—To the tenth interrogatory he saith:

Doing business since a very long time on a very large scale, hardly surpassed by any other houses, and having branches in London, Paris and New York, I dare to say I am rather an expert in art publishing matters.

ELEVENTH.—To the eleventh interrogatory he saith:

I am familiar with the painting called "Die Heilige Cäcilie," painted by G. Naujok.

TWELFTH.—To the twelfth interrogatory he saith:

It is a very valuable work of art, exhibited in the Munich Salon of 1892, and sold at a high price.

THIRTEENTH.—To the thirteenth interrogatory he saith:

I did not permit the Pierce & Bushnell Manufacturing Company to make and sell copies of the painting called "Die Heilige Cäcilie," neither directly nor indirectly.

EMIL WERCKMEISTER.

Subscribed and sworn to before me on the day, at the place, and within the hours first aforesaid.

W. H. EDWARDS, Consul General,

[SEAL.] *Commissioner.*

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA, City of Berlin, German Empire, } ss.:

Pursuant to the foregoing commission, I caused the said Emil Werckmeister to come before me on the 15th day of December, A. D. 1893, and having sworn the said Emil Werckmeister to testify the truth, the whole truth, and nothing but the truth relating to the cause for which the deposition is taken, I examined the said Emil Werckmeister, and his testimony was reduced to writing by William Haupt, a disinterested person, in my presence.

The said plaintiff Emil Werckmeister was present by himself, and was not represented by an agent or attorney while giving his deposition, and I took said deposition separate and apart from all other persons, no person being present except myself and William Haupt, a disinterested person, and the witness Emil Werckmeister; and in taking the deposition I put the interrogatories and cross-interrogatories to the deponent as

directed in the foregoing commission, and in all respects fully and exactly complied with the directions in said commission in taking the same.

And after said deposition was taken I carefully read the same to the said Emil Werckmeister, and he subscribed it in my presence.

Witness my hand and official seal, the day and year above written.

W. H. EDWARDS, Consul General,
[SEAL.] *Commissioner.*

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MASSACHUSETTS.

In Equity.

EMIL WERCKMEISTER

vs.

PIERCE & BUSHNELL MANUFACTURING CO.

(St. Cäcilie.)

Translation of the Testimony of Franz Schröder.

1. To the first interrogatory he saith: My name is Franz Schröder; my age fifty years. My residence is Gross Lichtefelde, near Berlin. My occupation is that of a painter and power of attorney for the Photographische Gesellschaft.

2. To the second interrogatory he saith: I am in no way related to the complainant

3. To the third interrogatory he saith: Emil Werckmeister is a citizen of the German Empire.

4. To the fourth interrogatory he saith: The complainant, Emil Werckmeister, does business under the firm name "Photo-

graphische Gesellschaft," art publisher. Since 1872 the complainant is the sole proprietor of this business. Since 1867 the complainant, however, has been with the said business.

5. To the fifth interrogatory he saith: The first copy of the painting called "Die Heilige Cäcilie" was published in Germany on the 19th of September, 1892. The first copies were sent by the Protographische Gesellschaft to America on the 24th day of August, 1892.

6. To the sixth interrogatory he saith: Hereby I add to my deposition a copy of the aforesaid picture called "Die Heilige Cäcilie," and designate the same as Exhibit A.

7. To the seventh interrogatory he saith: Yes. I know this, as I keep the records for the same. G. Naujok, the painter of the picture "Die Heilige Cäcilie," transferred the right of publication for the aforesaid painting to the complainant, with the right for the copyright in the United States of America.

8. To the eighth interrogatory he saith: I personally attended to the assignment of the right of publication, and I personally obtained from the painter Naujok, in Königsberg, the exclusive right of publication of the picture "Die Heilige Cäcilie" for the Photographische Gesellschaft of Berlin, by an instrument transferring the right of publication, dated March 5, 1892. A copy of this instrument, in writing, I annex to my testimony and designate the same Exhibit B. Application for the copyright for "Cäcilie" was made in Washington on May 16, 1892.

9. To the ninth interrogatory he saith: Yes; the complainant has made a great many negatives in his art establishmen- from the picture "Die Heilige Cäcilie"; that is to say he had them made.

10. To the tenth interrogatory he saith: The negatives belong to the complainant.

11. To the eleventh interrogatory he saith: The complainant published, from the day of the publication up to now, about ten

thousand copies of the so-called painting "Die Heilige Cäcilie." Just as many were sold.

12. To the twelfth interrogatory he saith: All copies bore the inscription "Copyright 1892, by Photographische Gesellschaft." It is not conceivable that other copies, which did not bear this inscription, left the establishment of the Photographische Gesellschaft, because the cartones for this purpose were not printed until the application for the copyright had been made in Washington and we had received notice that the copyright had been there entered.

13. To the thirteenth interrogatory he saith: I am a painter. I have studied in the academy of art at Dresden and at Berlin. Besides this I am familiar with all technical matters in reference to the art productions, and have been with the Photographische Gesellschaft over twenty-four years as art salesman and expert.

14. To the fourteenth interrogatory he saith: I consider the picture "Die Heilige Cäcilie" a very valuable work of art.

15. To the fifteenth interrogatory he saith: Yes, indeed, I know that very well, that the picture "Die Heilige Cäcilie" has not been infringed by anybody except the defendant.

16. To the sixteenth interrogatory he saith: The Photographische Gesellschaft undertakes either through Mr. Werckmeister or through me journeys to all the larger art centres for the purpose of visiting the designers of paintings, and for the purpose of acquiring the right of reproduction from them. Besides this the "Gesellschaft," through its travelers, causes the art dealers in Europe to be visited and samples shown to them. Besides this the Photographische Gesellschaft founded a branch in New York, and from New York all the larger cities in America are visited. Besides that the Photographische Gesellschaft has branches in London and Paris for the same purpose.

CROSS INTERROGATORIES.

1. To the first cross-interrogatory he saith: The painting "Die Heilige Cäcilie," by G. Naujok, to the best of my knowledge, has been reproduced by nobody, either through photography, etching and engraving, or in any other way, before or after the date to which I have testified, with the exception of the rightful publication by the Photographische Gesellschaft.

2. To the second cross-interrogatory he saith: The negatives from all paintings, including those from the painting by Naujok, are not made in our establishment by one, but by different of our employees, and therefore I cannot designate a particular person. At all events, the negatives were immediately made as soon as we had received the aforesaid painting from Naujok.

3. To the third cross-interrogatory he saith: "Die Heilige Cäcilie" has been published in photographic folio size, imperial size and normal size, which latter is the largest size. Besides this it has been published in photogravure in imperial size. All of these negatives of the various sizes are all copies of the original by Naujok and therefore only differ in their size, and I refer in this respect to the Exhibit A as a sample. The same may be said with regard to the photogravure of this picture. The negatives were made after receipt of the painting from Naujok. All these copies bore the inscription "Copyright 1892, by Photographische Gesellschaft." This inscription was printed on the cartones for the copies by us as soon as we were assured that the painting by Naujok called "Die Heilige Cäcilie" had been entered in Washington.

4. To the fourth cross-interrogatory he saith: About this I know nothing. I have never seen a copy of the so-called painting upon which there was any other notice than the one put on by us, and no one excepting the defendant has reproduced the picture called "Die Heilige Cäcilie."

Exhibit B (Copy).

I transfer hereby to the Photographische Gesellschaft in Berlin for my work "Die Heilige Cäcilie" the right of publication – by which I wish to have understood the exclusive right of reproduction—against a payment of 500 mark, and nine gratuitous copies thereof.

KÖNIGSBERG, in Prussia, March 5, 1892.

(Signed) GUSTAV NAUJOK.

The undersigned hereby consent that the aforesaid answers of the witness Franz Schröder translated into English as aforesaid, may be accepted and printed in lieu of the answers of said witness in German, and that Exhibit B, above, is a correct translation and may be accepted and printed in lieu of the original.

March , 1894.

GOEPEL & RAEGENER,
Complainant's Solicitors.

ALEX P. BROWNE,
Defendant's Solicitor.

U. S. CONSULAR AGENCY,
KÖNIGSBERG, PR., January 12th, 1894.

CONRAD H. GÄDEKE, United States Consular Agent at Königsberg, P. Germany, having been appointed by the Circuit Court of the United States within and for the Massachusetts District to have the answers to the interrogatories and cross-interrogatories, annexed at this appointment, of G. Naujok, as witness in a certain cause wherein Emil Werkmeister is Plaintiff *versus* Pierce and Bushnell Manufacturing Co. Defendant. I have called the said witness G. Naujok this 12th day of January, 1894, at half-past nine o'clock before me at my office, who having carefully been examined on oath, answered the interrogatories and cross-interrogatories as follows:

INTERROGATORIES.

1. What is your name, age, residence and occupation.

Answer. Gustav Naujok, 32 years, Königsberg, Pr., Painter.

2. Do you know the Photographische Gesellschaft of Berlin?

Answer. Yes.

3. Do you know who invented and designed a certain painting called "Die Heilige Cäcilie," a copy of which is herewith presented to you marked "Exhibit B2"?

Answer. Yes, I have invented and designed it myself.

4. Did you transfer and assign the right of publishing the said painting "Die Heilige Cäcilie" and the right to take a copyright thereon in the United States to any one? If so, when and to whom?

Answer. Yes, I have transferred and assigned the right of publishing the said painting "Die Heilige Cäcilie" and the right to take a copyright thereon in the whole world and therefore also in the United States to the Photographische Gesellschaft at Berlin on March 5, 1892.

5. How did you transfer the right of publication and the right of taking copyright in the United States?

Answer. By handwriting, not especially for the United States but as aforesaid for the whole world.

CROSS-INTERROGATORIES.

1. If you answer interrogatory 3 to the effect that you invented and designed the painting called "Die Heilige Cäcilie" state when the picture was begun by you and when it was finished?

Answer. The picture was begun by me in February, 1891, and finished in October, 1891.

2. Did you ever paint a replica of said painting "Heilige Cäcilie" and if yes, when was such replica begun and finished by you?

Answer. No, I never have painted a replica of said picture "Die Heilige Cäcilie."

3. State whether or not there has ever been put upon said painting " Die Heilige Cäcilie " or replica, or upon the canvas or frame thereof, at any time, any statement or notice that the same has been copyrighted or registered or otherwise protected by law, and if yes, state at what time or times and in what way any such statement or notice was put on and by whom, and give the words and figures of all said statements or notices in full.

Answer. No, only my name, " G. Naujok " is put on the picture by myself.

4. State whether or not any picture or replica " Die Heilige Cäcilie," invented and painted by yourself, was ever publicly exhibited, and if so, at what time or times and places and under what circumstances. Please answer fully.

Answer. This picture is publicly exhibited by myself at Berlin in the " Kunsthandlung von Schulte " from January, 1892, until March, 1892, and at Munich, in the " Grosse Internationale Kunstausstellung im Glaspalast" in summer 1892.

5. State whether or not any reproduction of the said painting " Die Heilige Cäcilie " or of any replica thereof, whether by photographing, etching, engraving, or otherwise copying has ever been made by yourself or by others (except the complainant herein) with your knowledge or consent, and if yes, state the nature and character of every such reproduction, by whom made, if not by yourself, and by whom, where and when published. This interrogatory is intended to include reproductions in exhibition catalogues, illustrated journals, etc., and is to be answered accordingly.

Answer. No, to my knowledge not.

6. If in answer to interrogatories 4 and 5, you state that you transferred the right of publishing the painting " Die Heilige Cäcilie " and the right to take copyright thereon in the United States to Emil Werkmerster or the Photographische Gesellschaft by an instrument in writing, please produce the same to be made an exhibit and attached to this deposition.

Answer. I cannot produce any instrument in writing, as I

have transferred all rights to the Photographische Gesellschaft at Berlin only by handwriting, and as I have not retained any copy of the same.

7. Have you transferred the right of publication or any right of copyright in the said picture "Die Heilige Cäcilie" for any country other than the United States to any person, and if so, when and to whom, and if by an instrument in writing, please produce the same to be annexed to your deposition and made an exhibit in this case.

Answer. I have transferred the right of publication and the right of copyright in the said picture "Die Heilige Cäcilie" for the whole world to the Photographische Gesellschaft at Berlin by handwriting, whereof copy is not retained by me.

8. By whom is the painting by you entitled "Die Heilige Cäcilie," or any replica thereof, now owned and at what place? If you state that it is owned by any one other than yourself please state when it left your possession and give in full its history so far as you are able.

Answer. I do not know by whom the painting entitled by me "Die Heilige Cäcilie" is now owned and at what place; it left my possession in summer 1892, as I sent it to Munich to the Grosse Internationale Kunstausstellung, where it is sold by the "Ausstellungs commission."

GUSTAV NAUJOK.

Subscribed and sworn to this 12th day of January, 1894.

CONRAD H. GÄDEKE,

[L. S.] U. S. Consular Agent.

CIRCUIT COURT OF THE UNITED STATES

For the District of Massachusetts.

In Equity.

Emil Werckmeister

vs.

Pierce & Bushnell Manufacturing Co.

New York, May 5, 1894.

Testimony on behalf of complainant taken *de bene esse* before Thomas M. Rowlette, a Notary Public for New York County, pursuant to notice.

Present: Alexander P. Browne, Esq., of Counsel for Deft.
Louis C. Raegener, Esq., of Counsel for Complt.

Complainant's counsel offers in evidence certificate from the Librarian of Congress, dated May 16, 1892, and the same is marked "Complainant's Exhibit No. 1, May 5, 1894."

It is conceded and admitted by defendant's counsel that "Die Heilige Cäcilie" referred to in Exhibit 1, and in the instrument signed by Gustav Naujok, is the same picture, a photographic copy of which is attached to the commissions of complainant, Emil Werckmeister, Franz Schroeder and Gustav Naujok, and that the description thereof filed with the Librarian of Congress was set forth in the bill of complaint.

Complainant's counsel also offers in evidence a photograph, and defendant's counsel admits that the same was made, published and sold by the defendant at some time during the year

1893, and prior to the commencement of this suit. The same is marked "Complainant's Exhibit No. 2, May 5, 1894."

Adjourned, subject to notice.

Attest,

THOMAS M. ROWLETTE,
Notary Public,
New York Co.

TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS.

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston within and for the District of Massachusetts, on Tuesday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Before,
THE HONORABLE WILLIAM L. PUTNAM,
Circuit Judge.

No. 374, Equity.

EMIL WERCKMEISTER, *Complainant*,
v.
PIERCE & BUSHNELL MANUFACTURING COMPANY, *Defendant.*

The Bill of Complaint in this cause was filed in the clerk's office on the twenty-fourth day of May, A. D. 1893, and was duly entered at the May Term of this Court, A. D. 1893, and is in the words and figures following: —

BILL OF COMPLAINT.

[FILED MAY 24, 1893.]

[MEMORANDUM. The Bill of Complaint as printed in this Transcript of Record, beginning on page 1, is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

At the same term the following Answer was filed: —

ANSWER.

[FILED SEPT. 1, 1893.]

[MEMORANDUM. The Answer as printed in this Transcript of Record, beginning on page 9, is here inserted. ALEX. H. TROWBRIDGE, *Clerk.*]

Also at the same term the following Replication was filed : —

REPLICATION.

[Filed Sept. 2, 1893.]

[Memorandum. The Replication as printed in this Transcript of Record, on page 12, is here inserted. Alex. H. Trowbridge, *Clerk.*]

This cause was thence continued from term to term to the present May Term, A. D. 1894, when, publication of the testimony having passed in the clerk's office, the same is set down for hearing and fully heard by the Court, the Honorable William L. Putnam, Circuit Judge, sitting.

On the seventh day of August, A. D. 1894, the opinion of the Court is announced.

On the twelfth day of September, 1894, the following Decree is entered : —

DECREE.

September 12, 1894.

This cause having come on to be heard upon the bill of complaint herein, the answer thereto of the defendant, the Pierce & Bushnell Manufacturing Company, the replication of the complainant to such answer, and the proof oral, documentary and written, taken and filed in said cause.

Now, therefore, on consideration thereof, after hearing Louis C. Raegener, Esq., of counsel for complainant, and Alexander P. Browne, Esq., of counsel for defendant, it is ordered, adjudged and decreed, and the Court doth hereby order, adjudge and decree, as follows : —

That Gustav Naujok, on or about Oct. 1, 1891, was a German subject and a resident of Germany, and the author and designer of a certain painting in oil called " Die Heilige Cäcilie ", and that said painting is a work of art. That on March 5, 1892, the said Gustav Naujok assigned and transferred to the complainant, who does business under the firm name of " Photographische Gesellschaft ", the right to obtain a copyright for said painting.

That on May 16, 1892, the complainant, under the name of the

" Photographische Gesellschaft ", delivered to the office of the Librarian of Congress a description of the said painting, together with a photograph of said painting.

That on May 16, 1892, the complainant became duly vested with a copyright for said painting and has the sole right of printing, reprinting, publishing, completing, executing, finishing and varying the said painting.

That on or about Sept. 15, 1892, the complainant made and published in Germany a photograph of the said painting, and subsequently imported or caused to be imported the same photograph, and has sold it or caused it to be sold in the United States.

That the complainant inscribed upon a visible portion of every photograph of said painting published by him the words " Copyright 1892, by Photographische Gesellschaft."

That the defendant, the Pierce & Bushnell Manufacturing Company, has made and sold in the United States at some time during the year 1893, prior to May 1, 1893, a photograph which is a copy of said painting, and that defendant has infringed upon the exclusive rights of the complainant under the aforesaid copyright.

And it is further ordered, adjudged and decreed that the complainant do recover of the defendant the profits, gains and advantages which the said defendant has received or made, or which have arisen or accrued to it from the sale of photographs and copies of the said copyrighted painting " Die Heilige Cäcilie ".

And it is further ordered, adjudged and decreed that it be referred to ....., a special master of this court, residing in the city of , to ascertain and take, and state and report to the Court, an account of the number within the United States of photographs and copies of the said copyrighted painting made, and also the number within the United States sold by the said defendant, and also the gains, profits and advantages which the said defendant has received or which have arisen or accrued to it since the first day of January, 1893, from infringing, within the United States, the said exclusive rights of the said complainant by the making and selling of photographs and copies of said copyrighted painting.

And it is further ordered, adjudged and decreed that the com-

plainant, on such accounting, have the right to cause an examination of said defendants and its officers *ore tenus* or otherwise; and also the production of the books, vouchers and documents of said defendant, and that the officers of said defendant attend for such purpose before said master from time to time, as such master shall direct.

It is also further ordered, adjudged and decreed that a perpetual injunction be issued in this suit against the said defendant, the Pierce & Bushnell Manufacturing Company, restraining it, its officers, agents, clerks, servants, and all claiming or holding under or through the said defendant, from directly or indirectly, within the United States, working, printing, reprinting, publishing, completing, copying, executing or finishing any photographs or copies of the said painting "Die Heilige Cäcilie" not made by the complainant, and from, within the United States, publishing, exposing for sale, selling or otherwise disposing of any photographs or copies of said painting not made by complainant, or any like or similar to those which it has heretofore made, sold or exposed to sale, or any part or parts of such copies, and also from, within the United States, publishing, exposing for sale, selling or otherwise disposing of any of the plates or negatives from which the defendant's photographs of the said painting were produced.

By the Court,

ALEX. H. TROWBRIDGE, *Clerk.*

From this decree the defendant claims an appeal to the United States Circuit Court of Appeals for the First Circuit, and gives good and sufficient security that it will prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, and said appeal is allowed.

A true record:

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, Alexander H. Trowbridge, clerk of the Circuit Court of the United States for the First Circuit and District of Massachusetts,

certify that the foregoing is a true copy of the record in the cause in equity, entitled,

No. 374.

EMIL WERCKMEISTER, *Complainant*,

v.

PIERCE & BUSHNELL MANUFACTURING COMPANY, *Defendant*,

in said Circuit Court determined, and that annexed hereto are true copies of the Opinion of the Court, the Claim of Appeal and Assignment of Errors and Bond to Party on Appeal, and also annexed hereto is the original Citation on Appeal with Acknowledgment of Service thereon, all constituting a true copy of the record and all proceedings in said cause.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this twenty-sixth day of November, in the year of our Lord one thousand eight hundred and ninety-four and of the Independence of the United States the one hundred and nineteenth.

[SEAL] ALEX. H. TROWBRIDGE, *Clerk*.

CLAIM OF APPEAL AND ASSIGNMENT OF ERRORS.

[FILED OCT. 11, 1894.]

And now comes the respondent and claims an appeal in this suit, and assigns therefor the following errors, viz. : —

First. That the Court having found that the complainant failed to inscribe the notice required by law upon some visible portion of the painting alleged to be copyrighted, or of the substance on which the same was mounted, erred in finding that he was not thereby debarred from maintaining this action for the infringement of his copyright.

Second. That the Court erred in finding and holding that the painting alleged to be copyrighted had not been published within the sense of the copyright law prior to the deposit of the description and photograph thereof in the office of the Librarian of Congress.

Third. That the Court having found that the complainant had published copyrightable but uncopyrighted photographs of his al-

leged copyrighted painting, and that the defendant had copied solely the uncopyrighted photograph and not the copyrighted painting itself, erred in finding that such copying was an infringement of the copyright upon the said painting.

Fourth. That the Court having found that the complainant had placed upon the uncopyrighted photographs a notice of copyright, and had failed to place the same upon the copyrighted painting, erred in not finding that the plaintiff, by virtue of such false and incorrect marking of his uncopyrighted photograph, had debarred himself from equitable relief.

Fifth. That the Court erred in finding that the complainant's uncopyrighted photograph could not have been copyrighted under Sect. 3 of the Act of 1891.

Sixth. That the Court having found that the complainant had published copyrightable but uncopyrighted photographs of the said alleged copyrighted painting, erred in finding that he had not thereby dedicated the right of copying said photographs to the public, including the defendant herein, and therefore also erred in enjoining the defendant herein from copying said copyrightable but uncopyrighted photograph.

Seventh. That the Court erred in finding that the complainant was the proprietor or assign of the said copyrighted picture or of the right to copyright the same at the time of his alleged copyrighting thereof, and also erred in finding that the said copyright was rightfully and effectually registered by the complainant in his own name.

ALEX. P. BROWNE,
Solicitor and of Counsel for
Defendant, Respondent.

Nov. 13, 1894.

This appeal and also the appeal bond and citation were first presented to me this day. I allow the appeal without passing on the question of seasonableness, as no supersedeas is asked.

W. L. PUTNAM, *Circuit Judge.*

A true copy:

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

BOND TO PARTY ON APPEAL.

[Filed Nov. 5, 1894.]

Know all men by these presents, that we, The Pierce & Bushnell Manufacturing Company, of New Bedford, Massachusetts, The Pierce & Bushnell Manufacturing Company, as principal, and Arthur G. Grinnell and William D. Howland, both of New Bedford, county of Bristol, Massachusetts, as sureties, are held and firmly bound unto Emil Werckmeister, doing business as The Berlin Photographische Gesellschaft of New York, N. Y., in the full and just sum of three hundred dollars ($300), to be paid to the said Emil Werckmeister, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this eleventh day of October, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas, lately at a Circuit Court of the United States for the District of Massachusetts, in a suit in equity depending in said court between said Emil Werckmeister, complainant, and said Pierce & Bushnell Manufacturing Company, defendant, a decree was entered against the said defendant, and the said defendant, having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said Emil Werckmeister, complainant, citing and admonishing him to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Mass., on the

Now, the condition of the above obligation is such, that if the said Pierce & Bushnell Manufacturing Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

THE PIERCE & BUSHNELL MFG. CO. [SEAL]
ARTHUR G. GRINNELL. [SEAL]
WM. D. HOWLAND. [SEAL]

Sealed and delivered in presence of
Eliot D. Stetson,
to all these signatures.

Assented to.
Goepel & Raegener,
Attorneys for E. Werckmeister, *Plaintiff.*

Approved Nov. 13, 1894.
W. L. Putnam, *Circuit Judge.*

A true copy:
Attest: Alex. H. Trowbridge, *Clerk.*

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To EMILE WERCKMEISTER, *a citizen of the Empire of Germany, doing business as the Berlin Photographische Gesellschaft, of New York, N. Y.*, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the first day of December next, pursuant to an appeal duly obtained from a decree entered Sept. 12, 1894, of the Circuit Court of the United States for the District of Massachusetts, wherein the Pierce & Bushnell Manufacturing Company, a corporation duly organized and established under the laws of Massachusetts, and a citizen of said State, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William L. Putnam, Judge of the Circuit Court of the United States for the District of Massachusetts, this thirteenth day of November, in the year of our Lord one thousand eight hundred and ninety-four.

WILLIAM L. PUTNAM,
U. S. Circuit Judge.

Due service of the above citation acknowledged this twenty-first day of November, 1894.

GOEPEL & RAEGENER,
LOUIS C. RAEGENER,
Solicitors and of Counsel for Plaintiff.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 3149.

EMIL WERCKMEISTER

v.

PIERCE & BUSHNELL MANUFACTURING COMPANY.

OPINION OF THE COURT.

August 7, 1894.

Putnam, J. On or about October 1, 1891, G. Naujok, a German subject and a resident of Germany, painted in oils a picture called by him, and in this case, "Die Heilige Cäcilie", an undoubtedly meritorious work of art. On the fifth of the succeeding March he executed, in behalf of the complainant in this case, who describes himself in his bill as a citizen of the Empire of Germany, and who transacts his business under the name of the Photographische Gesellschaft, an instrument of which the following is a copy:

"I transfer hereby to the Photographische Gesellschaft, in Berlin, for my work, 'Die Heilige Cäcilie' the right of publication — by which I wish to have understood the exclusive right of reproduction — against a payment of 500 marks, and nine gratuitous copies thereof.

Königsburg, in Prussia, March 5, 1892.

Gustav Naujok."

The artist never painted a replica. In the summer of 1892 he sent the picture to Munich, to the Grosse Internationale Kunstausstellung, where it was sold to some person

unknown to the artist, and not shown in this case; and neither the artist nor either of the parties to this case know where the picture is, or where it has been since the sale. From January, 1892, until March, 1892, the picture was publicly exhibited at Berlin in the Kunsthandlung von Schulte, a public art gallery, the rules of which as to suffering copies to be taken are not shown. No other publications are proven, except the photographs of the parties to this case.

On the sixteenth of May, 1892, complainant delivered at the office of the Librarian of Congress a copy of the title of the painting and a description of it, and obtained the following certificate:

"LIBRARY OF CONGRESS,
COPYRIGHT OFFICE, WASHINGTON.

TO WIT: BE IT REMEMBERED,

That on the 16th day of May, anno domini 1892, Photographische Gesellschaft, of Berlin, Ger., have deposited in this Office the title of a Painting, the title or description of which is in the following words, to wit:

DIE HEILIGE CÄCILIE,
G. NAUJOK.
Photo. & Descrip. on file;

the right whereof they claim as proprietors in conformity with the laws of the United States respecting Copyrights.

A. R. SPOFFORD,
Librarian of Congress."

Afterwards, on or about the fifteenth of September, 1892, complainant put on the market in Germany a photograph of the painting, and subsequently imported, or caused to be imported, the same photograph, and has sold it, or caused it to be sold, in the United States. Subsequently the defendant sold in the United States a photograph which is an undoubted infringement, if under the law there can be an infringement, and the bill is brought to restrain the defendant touching its photograph, and for other relief.

The photograph of the complainant bears the inscription, "Copyright. 1892, by Photographische Gesellschaft", and reproduces from the picture the signature of the artist; but it contains no notice, unless implied in the foregoing words, that the painting itself was ever copyrighted, nor has there been inscribed on the painting, or its mounting, the notice pointed out by section 4962 of the Revised Statutes.

By the proclamation of the President of April 15, 1892, 27 Stat. 1021, the benefit of the International Copyright Act of March 3, 1891, c. 565, 26 Stat. 1106, was extended to German subjects.

The Act of 1891, sec. 3, provides that the two copies of a copyrighted photograph required to be delivered at the office of the Librarian of Congress, shall be printed from negatives made within the limits of the United States, or from transfers made therefrom, and that during the existence of the copyright the importation into the United States of the photographs copyrighted, or any edition or editions thereof, or any negatives, shall be prohibited. Consequently, the complainant's imported photographs cannot be directly protected by statute. As they are not copyrighted, and are therefore, perhaps, not prohibited from importation, it is claimed that if his positions in this case are sound, the policy of the provisions of the third section to which we have referred, may be partially defeated These provisions, however, are apparently precise, in that they are limited to the cases of "book, chromo, lithograph or photograph"; *Littleton* v. *Oliver Ditson Company*, decided by this court August 1, 1894. They do not assume to reach any reproduction which does not involve depositing with the Librarian of Congress two copies; and the case at bar does not fall within the latter class, but within the class requiring one photograph of the subject matter of copyright. Therefore we are apparently not met by any broad policy, such as would trouble us in reaching a result not fairly excluded by the letter of the

statute. But as the right of the complainant to enjoin the defendant does not depend on the right of the former to import photographs, we need not particularly investigate the effect of these statute provisions.

At the common law the artist, or the owner of the painting, can prohibit reproductions of it until he in some way publishes it; but, after publishing it, either by photographs or otherwise, it becomes subject to the same rules as other published matter, and the public becomes entitled to it. This principle is so fundamental that it need not be elaborated, or fortified by any citation of authorities; and we will only refer on this point to *Parton* v. *Prang*, 3 Cliff. 537, 548, 549. Moreover, a mere exhibition of a picture in a public gallery, like that at Berlin, does not at common law forfeit the control of it by the artist, or the owner, unless the rules of the gallery provide for copying, of which there is no evidence in this case. But if, by proper authority, which it does not lie in the mouth of the complainant in this case to deny, photographs of this painting have been put on the market in the United States, under such circumstances that they are not protected by the copyright statutes, the public is free to copy ~~it~~, and to sell copies of ~~it~~ in the legitimate course of trade, and the bill cannot be maintained.

The propositions of the complainant necessary to maintain his case are, that by virtue of the agreement given him by the artist, which we have already set out, he was entitled to copyright the painting itself, and that he has lawfully done so; and that the painting being copyrighted, all reproductions of it in every form are infringements. While he admits that he is neither the author nor the proprietor of the painting, yet he claims, by virtue of the instrument given him by Naujok, to come in under the words "assigns of any such person", found in section 4952 of the Revised Statutes. In response to the complainant's claim, the defendant, among other things, refers

to section 4962 of the Revised Statutes, and asserts that even if the complainant's position was correct in other respects, he could maintain no action for any infringement of his copyright, because the words specified in the section last referred to have not been inscribed on any visible portion of the original painting, or on the substance on which the painting is, or may have been, mounted.

Neither party has cited to the court any decided cases, nor referred us to any other authorities, bearing directly on the principal questions involved. *Yuengling* v. *Schile*, 12 Fed. Rep. 97, has been brought to our attention, as leading up to the proposition that the proprietor of a painting, merely as such, has no right to a copyright thereon. We do not understand that such is a proper inference from that case, or that the statute law is to that effect. We have no occasion to make any issue touching any questions which were actually decided in that case. Our attention is also called to *Schumacher* v. *Schwencke*, 30 Fed. Rep. 690; but this case, so far as it applies to the case at bar, is only in harmony with *Gambart* v. *Ball*, 14 C. B. (N. S.) 306, *Rossiter* v. *Hall*, 5 Blatch. 362, and *Ex Parte* Beal, Law Rep., 3 Q. B. 387, 394, to the effect that the person holding the copyright of an original painting is protected against any reproduction of it, whether by a photograph of it, by a reproduction of an authorized photograph, or in any other manner. The decisions of the English courts are of but little assistance, because their statute touching copyrights of original paintings, 25 & 26 Vict. c. 68, makes special provisions with reference to the right to a copyright impliedly passing with the picture itself, and also the general copyright act now in force, 5 & 6 Vict. c. 45, contains, in section 2, a definition of the word assigns, and, in section 25, provisions about the nature of the estate in copyrights, not found in the statutes which govern us. Some English cases will, however, be referred to, which relate incidentally to the determination of this case.

Returning to the principal propositions at issue, they divide themselves into three: First, whether the complainant had a lawful right to copyright the original picture; second, whether, if the copyright is valid, it carries with it protection against all reproductions of it, including the photographs of the defendant; and third, whether the omission to inscribe on the original painting, or its mounting, either of the expressions required by the copyright statutes, and already referred to, bars this action. If either of these propositions are determined against the complainant, we, of course, need go no farther.

We have no doubt that the law is correctly laid down in the cases to which we have referred, that the author or proprietor of a painting who properly copyrights it, is protected against all reproductions of it in any form. This proposition is so fundamentally essential to the policy of the copyright statutes, that it needs no elaboration; and it follows logically that, if the complainant in this case, who received from the artist the exclusive right of reproducing the painting, became thereby entitled to a copyright, his copyright protects him as fully as the artist would have been protected, if he had reserved his right of reproduction and taken the copyright himself. Therefore on the second proposition at issue we are clearly with the complainant.

It is to be observed that the instrument given by Naujok to the complainant contained no expression of any authority to copyright, in the name either of Naujok or the complainant; but this is of no consequence if the complainant's contention is correct, that he is covered by the words "assigns of any such person", already cited. In accordance with that contention the complainant registered the copyright in his own name, and on his own right, and not in the name of Naujok, nor on the assumption of any agency coming from Naujok, either revocable or otherwise. It is also to be noticed that the case runs clear of the difficulties which would arise from the word sole

in section 4952 of the Revised Statutes, if the right vested in the complainant by Naujok had not been exclusive, even as against Naujok himself.

At the common law, the right to control the publication of a painting follows the title of the painting. It vests in the artist so long as he retains the painting; but, when it is sold by him, if sold without any qualification, limitation or restriction, all the incidents of the painting, including that of controlling its publication, vest in the purchaser. This is in strict harmony with the law touching the incidents of property, and flows necessarily out of it. We hardly need to cite authorities to sustain this proposition, but refer again in this connection to *Parton* v. *Prang*, 3 Cliff. 537, 550, 551. The English copyright statute, 25 & 26 Vict. c. 68, which created the law authorizing copyrighting of paintings, *Fishburn* v. *Hollingshead*, (1891) 2 Ch. 371, 379, and which is still in force, contains regulations touching this matter, enabling the artist, when disposing of his painting, to retain or dispose of the right to reproduce it. But nothing of this nature is found in our statutes, and the question arises, therefore, how far their general terms are intended to vary from the practice of the common law referred to. Is there, or is there not, enough in them to overcome the presumption that the statutes do not change the common law, except so far as the intention to do so is apparent? In the absence of something showing an intention to vary the common law rule, it must be presumed to stand. We do not mean by this that, at common law, the owner of a painting might not empower some other person than himself to elect as to publication, or that he might not dispose of the painting, reserving to himself the right of such election; but we mean to say that, inasmuch as at the common law this right is presumably in the proprietor of the painting, it requires something more than general expressions in a statute to satisfy the court of an intention to vest the privilege of secur-

ing a copyright in any other person than the one in whom it presumably exists. Moreover, the word assigns, on which the complainant relies, is ordinarily construed as only indicating the nature of the estate, and its ordinary effect is only to the extent of declaring that whatever is obtained is of an assignable character. Strictly, an authority to assign, or an assignment, relates to what already exists, and has no pertinency to the creation of a right out of another right, as by the instrument given by Naujok to the complainant. Such instruments are ordinarily spoken of as licenses and not assignments, and the holders of them as licensees and not assigns. This is the common rule under the statutes touching patents, although they contain a system so much more elaborated than those touching copyrights, that it is not safe to reason too liberally from one to the other. Instruments of this class relating to patents are ordinarily regarded as strictly in gross. *Oliver* v. *Rumford Chemical Works*, 109 U. S. 75, 82.

But the instrument in this case is so strongly expressed that it must be construed as vesting in the complainant all the right of publication which Naujok had, or ever could have, and therefore as vesting a full estate, which would pass by succession, and also be assignable. The instrument having been executed in Germany, where the technical rules of the common law touching the particular phraseology required to create more than a life estate or a personal interest, do not exist, is especially free from doubt on this score. It cannot be questioned that all the right which Naujok had to publish or reproduce passed out of him, and as it was in him assignable and descendible, it follows necessarily that the same qualities attach to it as vested in the complainant. It is for this, with other reasons, that, as we have already stated, no embarrassment arises in this case from the word sole in section 4952 of the Revised Statutes.

Following out the same line touching the distinction be-

tween transferring interests already existing and creating new ones, and between assignments and licenses, it is stated in Copinger on the Law of Copyright, 3rd ed., page 449, that it has been decided that a document conveying the sole right to reproduce a picture in chromos, or in any other form of color painting, for the term of two years, was not an assignment, and therefore did not need to be registered; but the learned author questions this decision. In *Lucas* v. *Cooke*, 13 Ch. D. 872, Mr. Justice Fry, of especially large experience and ability in cases of this character, used, with reference to an instrument of this nature, the words assignment and license interchangeably; and, on the whole, it involves no violent presumption to maintain that section 4952 of the Revised Statutes, in its use of the word assigns, had no reference to its narrow, technical meaning to which we have referred.

The English statute, 25 & 26 Vict. c. 68, already referred to, in designating the persons who may copyright an original painting, uses only the word author and the words "and his assigns". The word proprietor occurs at various points in the English copyright acts, but not in this connection; and the same may be said as to the copyright statutes of the United States prior to the act of July 18, 1870, c. 230, sec. 86, 16 Stat. 212. The provisions of the statute last named were re-enacted by section 4952 of the Revised Statutes, and further re-enacted, so far as this point is concerned, by the first section of the International Copyright Act of March 3, 1891, c. 565, 26 Stat. 1107. As there found, it provides in terms that the "author" * "or proprietor of any" * "painting" * "and the assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending". The phraseology of the statute, 25 & 26 Vict. c. 68, might not require going beyond the ordinary implications of the common law, or ~~beyond~~ to the extent of holding that the word assigns

contemplated anyone except the purchaser of the painting itself. But section 4952 of the Revised Statutes, as re-enacted in the International Copyright Act, in addition to the word author, uses the word proprietor; and this latter word extends to paintings as well as to the other matters designated in the section. By the word author and the word proprietor our statute exhausts everything which the English statute necessarily covers by the word author and the words "or his assigns"; and if nothing more was contemplated than is provided by the English statute, the word proprietor, or the word assigns in our statute — one or the other of them — would be necesarily surplusage and of no effect. The language of our statute is not only explicit in including author, proprietor and assigns, but is rendered even more so by the use in the same connection of the words "upon complying with the provisions of this chapter". These demonstrate that the assigns, equally with the author or proprietor, may register and complete the copyright.

Applying the ordinary rules of construction, the court must ascertain, if it can, why, after using the word proprietor, our statute also uses the word assigns. Certainly this requirement cannot be met if the word assigns is limited to its ordinary technical meaning, already referred to, or to the holder of the original painting; because all this is covered by the word proprietor. We therefore cannot escape the conclusion that the statute requires us to broaden out the class of persons authorized to take out a copyright, so as to include others than mere proprietors of the paintings themselves, having regard always, of course, to the word sole, which the section contains, and to which we have already referred. We are unable to perceive the force of all these words, unless the statute covers cases of the precise character of this at bar.

What the complainant claims has been accomplished in this case, could clearly have been accomplished by first registering

a copyright, or copyrights with various nationalities, by Naujok, or in his name, and by his then assigning them absolutely and without reservation to the complainant. The result under those circumstances would have been precisely the same as the result which the complainant now maintains; and certainly a construction of a statute which avoids this circumlocution, cannot be unjust or against good sense. On the whole, we think the complainant rightfully and effectually registered the copyright, as maintained by him.

So far the history of the legislation in the United States has not been of much assistance to the court; but on the remaining proposition it proves to be of great value.

The defendant claims that section 4962 of the Revised Statutes is to be read literally, and that being thus read, it requires the notice to be inscribed on the painting itself, or at least on the mounting of it. If the defendant is right in this literal reading, it follows that the statute is satisfied by inscribing the notice on the original painting, or its mounting, and that all reproductions thereof, whether in engravings, photographs or other forms, go free from the notice. The Supreme Court has said, what must be patent to everyone, that the object of the statute in this particular is to give notice of the copyright to the public. *Burrow-Giles Lithographic Company* v. *Sarony*, 111 U. S. 53, 55. The purpose of the statute, therefore, would wholly fail of accomplishment by inscribing notice on the painting only, which presumably passes into some private collection, entirely out of the view of the general public. This is so patent that it need not be enlarged upon, and would be enough of itself to persuade the courts very urgently to look, if necessary, beyond the mere letter of the statute. Moreover, the same clause of section 4962 on which the defendant relies, groups paintings with engravings, photographs, chromos and various other articles which need not be specified; and if the defendant's construction properly applies to paintings, it would

seem to follow that it applies to all the other articles named in the same clause, and that the notice, therefore, should be inscribed on some original, or quasi original, engraving, photograph or chromo, and not on the copies thereof which go out to the public. But the practice as to such articles is distinctly the other way; and its correctness was expressly recognized in the decision of the Supreme Court last cited, in which the court said that the notice is to be given by placing it "upon each copy". Thus in a single sentence the Supreme Court has torn down the structure of apparent literalness on which the defendant relies.

An examination of the history of the legislation out of which section 4962 developed, makes the result entirely clear. The first statute requiring the inscription of a notice was that of April 29, 1802, c. 36, 2 Stat. 171. At that time the province of the copyright laws was narrow, and was divided in that statute into two fields. Section 1 provided that the copy of the record of registration required by law to be published in one or more newspapers, should be inserted on the title page, or the page immediately following it, of every book, but that in the case of a map or chart certain abbreviated phraseology, pointed out by the statute, should be impressed "on the face thereof". Section 2 extended the copyright privilege to historical and other prints, and required that the same entry impressed on the face of maps and charts, should be engraved on the plate, with the name of the proprietor, and printed on every print. Under this statute it was clear that the notice prescribed should go out to the public on every copy protected by the statute, and evidently the engraving of it on the engraver's plate was only to make sure that the main purpose of the statute was accomplished.

The next statute is the act which so long stood as the copyright code of the United States, that of February 3, 1831, c. 16, 4 Stat. 436. The provisions of that act touching the question now under examination we reproduce here at length:

"SEC. 5. And be it further enacted, That no person shall be entitled to the benefit of this act, unless he shall give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured on the title-page, or the page immediately following, if it be a book, or, if a map, chart, musical composition, print, cut, or engraving, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, or engravings, upon the title or frontispiece thereof, the following words, viz: 'Entered according to act of Congress, in the year , by A. B., in the clerk's office of the District Court of ', (as the case may be)."

This statute somewhat extended the scope of the copyright privilege, but left the provision on this point entirely clear. A distinction was made by section 5 between a book, on one hand, and a "map, chart, musical composition, print, cut or engraving", on the other, but it was only as to the precise place on which the notice should be inscribed,—in the one case on the title-page, or the page immediately following it, and in the other on the face, with a provision that in cases of volumes of maps, charts, music or engravings, it should be on the title or frontispiece. Except as to the mere place of impressing the notice, the statute applied without discrimination to all articles within the scope of the copyright privilege, and looked for the inscription of the notice on every copy which went out to the public, and nowhere else. The words "the several copies of each and every edition" ran through and governed every part of the section. This is so clear that it needs nothing to be added to the statement of the fact.

The next act was that of August 18, 1856, c. 169, 11 Stat. 138, which contained nothing to be noticed in this connection. Next came the act of March 3, 1865, c. 126, 13 Stat. 540. This is important, because it first extended the copyright privilege to photographs, and provided that this extension should enure to the benefit of the authors of photographs

"upon the same conditions as to the authors of prints and engravings". In other words, when photographs first came into the copyright statutes, they came in under the clear provisions of the fifth section of the act of 1831, requiring the inscription of the notice to be on every copy going out to the public, and nowhere else. That was the law when the revised code of July 8, 1870, c. 230, 16 Stat. 198, was adopted. The provision we are looking for is found in section 97 of that act. This statute first extended the copyright privilege to paintings, statues, statuary, models and designs, and section 97 was a consequent attempt to cover the additional articles by condensation of phraseology. It was afterwards incorporated into section 4962 of the Revised Statutes, on which the defendant rests.

To this time there had been no indication of any policy except that which the Supreme Court, in the citation we have made, had said was necessary to give the public notice of the copyright privilege claimed,— a policy which we have already seen, expressly included photographs, maps and charts as well as books. In this attempted condensation, maps, charts and photographs were dislocated from the express provision touching books, and associated with paintings, statues, statuary, models and designs. As no reason can be suggested for any change touching maps, charts and photographs, the presumption is that Congress intended, notwithstanding the awkward phraseology used, that the law should continue the same as to them; and, if this presumption stands, it carries with it the same law for paintings as for maps, charts and photographs. *Logan* v. *United States*, 144 U. S. 263, 302. The whole section was as follows:

"Sec. 97. And be it further enacted, That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, draw-

ing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words, viz: 'Entered according to act of Congress, in the year ———, by A. B., in the office of the librarian of Congress, at Washington'."

The words "several copies of every edition published" may well be held to permeate and govern that portion of the section commencing with the words "if a map, chart", etc., as effectively as it does the words "if it be a book", and the section may well be construed precisely the same as if the words "if it be a book" preceded the words "on the title-page". The word "thereof", in the latter part of the section, may well be held to refer back to the words "the several copies" in its early part. For clearness, we give the section as thus re-arranged:

"That no person shall maintain an action for the infringement of his copyright, unless he shall give notice thereof by inserting in the several copies of every edition published, if it be a book, on the title-page or the page immediately following, or if a map, chart, * painting, * by inscribing upon some portion of the face or front thereof * ."

Under the circumstances, the breaking up and dislocation of the section into sentences, or phrases, should be held to have been merely for the purpose of indicating the place where the notice is to be inscribed, according to the subject matter of the publication, that is to say, on the title page, or on the page immediately following, if it be a book, but, if it be other matter, on the face, or front; and it should be further held that in all other particulars the directions of the statute are identical with reference to each article to which the subject matter relates. A re-arrangement of clauses, or parts of sentences, is justifiable under the most common circumstances, and is especially justifiable in order that the statute may not be read contrary to its plain purpose and the general public policy.

A careful comparison of this section of the act of 1870 with the corresponding section of the act of 1831, shows that there are no other differences, except those of detail required by the extension of the copyright code, nor any which can affect the proposition we are considering.

This provision of law, as we have already said, was re-enacted without substantial change in section 4962 of the Revised Statutes. It was again re-enacted in the act of June 18, 1874, c. 301, 18 Stat., 78. The only differences are the option of the shorter form of notice contained in the latter statute, and a broadening out of the provision touching the portions of the published article on which the notice may be inscribed. No other purpose in the last enactment was suggested in *Higgins* v. *Keuffel*, 140 U. S. 428, in which it is somewhat referred to.

The only remaining act to be considered is that of August 1, 1882, c. 366, 22 Stat. 181. The main purpose of this statute was to make sure of the accomplishment of one general purpose of the act of 1874. The latter required that the notice be inscribed on some visible portion of the published articles, while the act of 1882 expressly permitted it, under some circumstances, to go on the back or bottom of such articles, although in some senses the back or bottom might not always be visible portions thereof. The reading of the act of August 1, 1882, contains, however, a legislative construction of the prior statutes on the point which we are considering. The prior statutes included designs in the same class with maps, charts, photographs and paintings. Therefore if, with reference to paintings, the inscription is to go on the painting itself, it would follow as a matter of course, that, with reference to models and designs, under section 4962 of the Revised Statutes, it should appear on the original models and designs, and not on the articles put on the market constructed according to them. But the act of 1882 says in terms, that the manufacturers of designs of molded decorative articles may put the mark prescribed by stat-

ute, not on the designs, but "upon the back or bottom of such articles". As the clear purpose of this statute related entirely to the place where, on any particular article. notice might be inscribed, and it clearly was not in any way intended to change the law as to what the inscription shall be impressed on, the effect of this phraseology cannot be mistaken.

On the whole, while we must admit that the phraseology of the statute is unfortunate, and might have been more clearly and positively expressed, we are convinced that, as we have already said, the differences in the various phrases relate entirely to the place on which the notice is to be inscribed, according to the subject matter of the article published, and that, with that exception, the phrases apply alike to all classes of articles, and relate entirely to the notices to be inscribed on what goes to the public in various forms and editions, and that there is no requirement that any shall be inscribed on the painting itself, more than there is that there shall be an original, or quasi original, map, chart, musical composition, print, cut, engraving, photograph, drawing, chromo, or model or design, to be inscribed with the notice, as the defendant claims the painting in this case should have been inscribed.

The defendant also claims that the words inscribed on the photograph, namely, "Copyright, 1892, by Photographische Gesellschaft", give no notice that the painting has been copyrighted, and imply only that the photograph has been. If this is so, the fault is that of the statute and not of the complainant, as he has used exactly the phraseology imposed by law. Undoubtedly the statute, if it had not been so condensed, might have given a form of notice more in harmony with the facts of cases of this character; but we can see that in this notice there is enough to give any one who is looking for the truth, and who desires to avoid infringement, the thread which will lead him easily to the actual condition of the copyright. There is something in the form of this notice which tends to sustain the con-

tention of the defendant that it should have been inscribed on the painting itself, but not enough to overcome the force of the rules of construction which have led us to the result we have explained.

We perceive nothing further in the case which requires any observations from the court.

Decree for the complainant; complainant to file draft decree on or before the twenty-fifth instant, and the defendant corrections thereof on or before the first day of September next.