

CASE NOTES

Copyright—Infringement—Fraudulent Material Copyrightable—*Belcher v. Tarbox*.^{*1}—Plaintiff and defendant are both engaged in the business of publishing handicapping systems for betting on horse races. The plaintiffs' systems are each published in a separate publication, six of which are involved in the present action. Defendant periodically published a magazine containing reprints of various betting system formulations, including the plaintiffs'. Plaintiff brought suit for infringement of his copyrights, trademarks and trade names. The district court below found the copyright of five of the six reprints valid and infringed, and awarded plaintiff injunctive relief and damages.² The district court refused to enforce the copyright on the sixth publication because the composition itself and its attendant advertising were found to be designed to deceive the public by misrepresenting the origin of the composition as the product of computer research and analysis when in fact no computer was used.³ Defendants appealed the decision with respect to the first five publications claiming that the works were not entitled to copyright protection because they fraudulently represented to the public that users of the system could predict the winners of horse races.⁴ Plaintiffs cross-appealed on the denial of copyright protection to their sixth publication.⁵ The court of appeals, affirming in part,⁶ reversed and remanded in part, HELD: False and fraudulent material is entitled to copyright protection and the clean hands doctrine does not preclude such protection.⁷

This note will consider the clean hands doctrine as a defense to copyright infringement actions. It will be submitted that the court in *Belcher* confused the clean hands doctrine with an infringement defense based on the constitutional limitations of the Copyright Clause, and that applying the latter unnecessarily led to its rejection of the former. It will be argued that the inquiry into the content of copyrighted work when applying the clean hands doctrine is much more limited than the inquiry required when the work is judged under the constitutional limitation.

There are two ways in which a court can deny copyright protection to a work because of its content. The first is based on a constitutional theory that a copyright is a privilege granted to authors for protection of works which promote the sciences and useful

* A slightly different version of this Note was submitted to the 1974 National Nathan Burkan Memorial Copyright Competition.

¹ 486 F.2d 1087 (9th Cir. 1973).

² *Belcher v. Tarbox*, Civil No. 68-279-T, at 7 (S.D. Cal., Oct. 28, 1971).

³ *Id.* at 8.

⁴ 486 F.2d at 1087.

⁵ *Id.* at 1089.

⁶ *Id.* The district court had upheld the copyrights in the first five publications. See text at note 2 *supra*.

⁷ *Id.* at 1088-89.

arts.⁸ The second is based on the equitable principle that he who comes into equity must come with clean hands.⁹ The equitable principle is applicable to copyright infringement actions because the Copyright Act¹⁰ provides that in granting relief to vindicate rights under the Act, a court shall grant injunctions according to the course and principles of courts of equity.¹¹ The court in *Belcher* refused to follow precedent in the area¹² and apply the clean hands doctrine to this case because it believed that to do so would require the court to "pass upon the truth or falsity, the soundness or unsoundness of the views embodied in a copyrighted work,"¹³ and it perceived that the theological, philosophical, economic and scientific problems that would confront the court if it undertook that task would be staggering.¹⁴ But such scrutiny of the substance of a publication is required far less by the clean hands doctrine than by the constitutional theory that the copyright clause protects only "worthwhile" creative effort, a theory to which the *Belcher* court did not address itself. This confusion may have resulted in the rejection of a valuable equitable doctrine which courts have used occasionally to invalidate copyrights in works which are detrimental to the public interest and an abuse of the privilege of copyright protection.¹⁵

The court's fear of the inquiry into the substantive merit of a publication appears historically well founded. For years the constitutional theory was used to deny copyright protection to works which the courts found to be seditious, libelous, obscene, indecent and immoral.¹⁶ The practice was based on the constitutional mandate that works protected by copyright should promote the sciences and useful arts, and on a correlative assumption that there is no right to publish inherent in such works and therefore no property right in the work that should be protected.¹⁷ The objection of the courts was not to the misconduct of the plaintiff, as was the case where the equitable theory applied, but rather to the work itself; the ideas were simply not the subject of ownership.¹⁸

⁸ U.S. Const. art. I, § 8 cl. 8: "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"

⁹ See *Primeau v. Granfield*, 193 F. 911, 912 (2d Cir. 1911).

¹⁰ 17 U.S.C. §§ 1 et seq. (1970).

¹¹ 17 U.S.C. § 112 (1970).

¹² See text at notes 46-54 *infra*.

¹³ 486 F.2d at 1088.

¹⁴ *Id.*

¹⁵ See, e.g., *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942); *Stone & McCarrick, Inc. v. Dugan Piano Co.*, 220 F. 837 (5th Cir. 1915); *Krauss v. Joseph R. Peebles Sons' Co.*, 58 F. 585 (C.C.S.D. Ohio 1893).

¹⁶ See *Barnes v. Miner*, 122 F. 480 (C.C.S.D.N.Y. 1903); *Broder v. Zeno Mauvais Music Co.*, 88 F. 74 (C.C.N.D. Cal. 1898).

¹⁷ See *Manhattan Medicine Co. v. Wood*, 108 U.S. 218, 224-25 (1893). See also Chafee, *Coming into Equity with Clean Hands*, 47 Mich. L. Rev. 1065, 1068 (1949); Note, 21 U. Pitt. L. Rev. 71, 72 (1959).

¹⁸ See, e.g., *Stockdale v. Onwhyn*, 172 Eng. Rep. 75, 77-78 (K.B. 1826).

An example of the use of the constitutional theory illustrating the *Belcher* court's fear of such substantive scrutiny is *Martinetti v. Maguire*,¹⁹ which held that a play, *The Black Crook*, was a composition the production of which would not promote the progress of science and useful arts and therefore not entitled to copyright protection.²⁰ The court criticized the work as a spectacle which "panders to a prurient curiosity or an obscene imagination by the very questionable exhibitions and attitudes of the female person"²¹ and claimed that to call such a spectacle a "dramatic composition" was an abuse of language and an insult to the genius of English drama.²² The defendant in *Martinetti* had produced what the court conceded to be virtually an identical play entitled *The Black Rook*, and yet the court refused protection to the plaintiff because of the content of his original play.

The notion that courts should inspect and censor work for which protection is sought and deny relief if it does not conform to the judge's notions of propriety in religion or morality has been criticized throughout the history of its application.²³

The fear of judicial inquiry into the morality, philosophy and theology of a publication is not a new one, nor is it one which should be ignored. But the other alternative—the evocation of the clean hands doctrine—does not require any such inquiry or judgment by the courts. In the *Belcher* case the issue before the court was not a moral, but a legal one; determination of what is fraudulent is based on the law of torts, not on a judge's personal beliefs. Fraud and misrepresentation has always been conduct for which the clean hands doctrine is applied without the necessity of assessing the merit of a particular work.²⁴

The clean hands doctrine has had a murky and somewhat distorted history in copyright law. Traditionally, a clean hands defense to an infringement action was accepted only if the alleged misconduct of the plaintiff occurred while dealing with the subject matter of the suit and the defendant himself was specially harmed.²⁵ The first condition was easily met in copyright cases; the second presented the courts with a problem, since the typical defendants in infringement actions—competitors of a publisher—could less easily demonstrate specific harm of fraudulent publication than could, for example, consumers of the fraudulent publication. Thus, the clean

¹⁹ 16 F. Cas. 920 (No. 9173) (C.C.D. Cal. 1867).

²⁰ *Id.* at 923.

²¹ *Id.* at 922.

²² *Id.*

²³ See, e.g., J. Milton, *Areopagitica* 48, 54 (Arber's Ed. 1868); Rogers, *Copyright and Morals*, 18 Mich. L. Rev. 390, 392-94 (1920). See M. Nimmer, *Copyright* § 3.2, at 6 (1973).

²⁴ See, e.g., *Toledo Computing Scale Co. v. Computing Scale Co.*, 142 F. 919, 925 (6th Cir. 1906); *Fay v. Lambourne*, 124 App. Div. 245, 247, 108 N.Y.S. 874, 876 (1908). See generally, Annot. 4 A.L.R. 44 (1919).

²⁵ See, e.g., *Galbraith v. Devlin*, 85 Wash. 482, 490, 148 P. 589, 592 (1915). See generally, Annot., 4 A.L.R. 44 (1919).

hands defense was a doctrine which could be relied on infrequently in copyright infringement actions.²⁶ However, in *Morton Salt Co. v. G. S. Suppiger Co.*,²⁷ the Supreme Court denied relief in a patent infringement case where the patent was used as a means of restraining competition. The Court circumvented the strict requirement of specific harm by pointing out that "[i]t is the adverse effect upon the public interest of a successful infringement suit . . . which disqualifies him [plaintiff] to maintain the suit, regardless of whether the particular defendant has suffered from the misuse of the patent."²⁸ The adverse effect on the public in upholding the copyright has been adverted to by many courts in bringing the clean hands doctrine into play regardless of lack of harm to the defendant. In 1893, a federal district court, in *Krauss v. Joseph R. Peebles Sons' Co.*,²⁹ denied equitable relief to a plaintiff who claimed infringement of whiskey packaging labels. The court found that the information on the labels was false and fraudulent and stressed that the public's reliance on the labels was significant and should be protected by the denial of equitable relief.³⁰ And, in *International Biotical Corp. v. Associated Mills, Inc.*,³¹ a federal district court found that plaintiff's inequitable conduct with respect to its manufacture of infra-red heat lamps and massagers rendered its design patent and copyrights unenforceable against an infringer. Plaintiff's copyrighted brochure was found to be misleading and deceptive and the court invoked protection of the public interest as one reason for denying copyright protection.³²

Protection of the public interest in denying copyright protection is a use of the clean hands doctrine in its broadest sense. In copyright cases, this broad form of the doctrine is not only employed by many courts to deny protection against infringers, but also provides them a valuable tool deterring a supposed misuse of the copyright privilege. In this form, the principle is well stated by the court in *T.B. Harms & Francis, Day & Hunter v. Stern*.³³

The interference of the court by injunction being founded on pure equitable principles, a man who comes to the court must be able to show that his own conduct in the transaction has been consistent with equity. A book accordingly which is itself piratical cannot be protected from invasion,

²⁶ See M. Nimmer, Copyright § 149.2, at 664 (1973). Nimmer's position is that the clean hands defense is recognized only rarely when the plaintiff's transgression is of serious proportions and relates to the subject matter of the infringement action. *Id.* See generally, Note, The Misuse Defense in Copyright Actions, 37 N.Y.U.L. Rev. 916 (1962); Note, 21 U. Pitt. L. Rev. 71 (1959).

²⁷ 314 U.S. 488 (1942).

²⁸ *Id.* at 494.

²⁹ 58 F. 585 (C.C.S.D. Ohio 1893).

³⁰ *Id.* at 594.

³¹ 239 F. Supp. 511 (N.D. Ill. 1964).

³² *Id.* at 516.

³³ 231 F. 645 (2d Cir. 1916).

nor will the court protect by injunction a work which is of an immoral, indecent, seditious or libelous nature, or which is fraudulent.³⁴

The major argument against the use of the clean hands doctrine in copyright infringement actions is that the misconduct or illegality of the plaintiff involves the court in inquiries which are outside the scope of the action as outlined in the Copyright Act.³⁵ The argument is stated in *Vitagraph, Inc. v. Grobaski*.³⁶ The court, in rejecting the antitrust defense to a copyright infringement action noted:

Illegality of a combination cannot be interposed as a defense to suits for infringement of copyrights . . . the general principle being that these suits are regarded as being based not upon contract but upon tort. It is said that the fact that one has entered into some illegal contract does not authorize others to injure him with impunity.³⁷

The court in *Krauss*,³⁸ however, when faced with a trademark case³⁹ where the court had rejected the clean hands defense by reasoning similar to that of *Grobaski*, dismissed such reasoning by pointing out that the reason relief is refused complainant has nothing to do with the defendant's rights or wrongs.⁴⁰ Relief was refused because a court would not protect a fraudulent business of a plaintiff, however much in the wrong a defendant might be.⁴¹

Another major argument against the use of the clean hands defense in copyright actions, and one by which the *Belcher* court was persuaded, is that the denial of equitable relief in the form of an injunction to a holder of a copyright in a work alleged to be fraudulent or in some way adverse to public policy is not really in the public interest at all since it eliminates a restriction on the circulation of the material and allows it to be reprinted freely.⁴² Judge Wallace, in his dissent to the case, answered this argument in two ways.⁴³ He pointed out first that while granting copyright

³⁴ Id. at 649, quoting W. Kerr, *Injunctions* 413 (5th Ed. 1914). The refusal of a court of equity to protect immoral or indecent works should not be confused with the refusal of a court in a copyright infringement action to protect such works because of the constitutional requirement that copyrighted works promote the sciences and useful arts. See text at note 7 supra.

³⁵ 17 U.S.C. § 101 (1970). See M. Nimmer, *Copyright* § 36, at 146.28-.29 (1973). See also note 70 infra.

³⁶ 46 F.2d 813 (W.D. Mich. 1931).

³⁷ Id. at 814.

³⁸ *Krauss v. Joseph R. Peebles Sons' Co.*, 58 F. 585 (C.C.S.D. Ohio 1893). See text at note 29 supra.

³⁹ *Appeal of Pratt*, 117 Pa. 401, 404, 11 A. 878, 881 (1888).

⁴⁰ 58 F. at 595.

⁴¹ Id.

⁴² 486 F.2d at 1088 n.3. See Rogers, *Copyright and Morals*, 18 Mich. L. Rev. 390, 394 (1920); Note, 21 U. Pitt. L. Rev. 71, 84 (1959).

⁴³ 486 F.2d at 1089 (dissenting opinion).

protection to fraudulent material will assure that only one person will defraud members of the public with a single fraudulent scheme, rather than several defrauders using the same scheme, it will not insure that any fewer members of the public will be defrauded.⁴⁴ He added further that in granting copyright protection to such material the law is not only condoning fraud, but is placing its power, endorsement and support behind fraudulent works.⁴⁵ A third possible answer is that the public interest might well be served by allowing as many copies of fraudulent schemes to be circulated since it will increase the likelihood that someone defrauded by the scheme will sue the author, or that the state Attorney General will decide to prosecute under state criminal laws.⁴⁶ Thus, enforcement of the clean hands doctrine against an infringement claimant may well serve the public interest.

The clean hands defense often presents the court with the task of reconciling two conflicting policies—the policy of preventing piracy of copyrighted works and the policy of preventing unlawful use of that monopoly. In *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*⁴⁷ the court, in rejecting the antitrust defense to a copyright infringement action, formulated a balancing test to be used when such conflicting policies come before the court in a copyright case. The test includes taking into account the comparative guilt or innocence of the parties, the moral character of their respective acts, the extent of harm to the public interest, and the penalty inflicted on the plaintiff if relief is denied.⁴⁸ If the *Belcher* court had used this test and determined that the copyright policy should prevail, its reasoning could have been supported.⁴⁹ It may be argued, however, that the harm to the public interest is greater in the case of fraud than in the case of an antitrust violation. While the harm to the public at large from lack of competition may be serious, the harm resulting from fraud to individuals—the loss of specifically calculable amounts of money as a result of reliance on a fraudulent scheme—is arguably more serious and might outweigh the copyright policy against piracy.

As the court in *Belcher* observed, there is scant authority on the application of the clean hands doctrine to the precise question of granting copyright protection to false and fraudulent material. *Stone*

⁴⁴ Id. at 1090 (dissenting opinion).

⁴⁵ Id.

⁴⁶ See, e.g., Cal. Bus. & Prof. Code §§ 17500, 17535 (West 1964). However, since the nature of the service provided by both plaintiff and defendant is one to aid in gambling, it would be difficult to prove that the loss of money resulted from reliance on a fraudulent system rather than on chance.

⁴⁷ 191 F.2d 99 (2d Cir. 1951).

⁴⁸ Id. at 106.

⁴⁹ The court seems highly skeptical of defendant's claim of fraud with respect to the first five publications. 486 F.2d at 1088. Using the *Bell* test the court then could have concluded that even if there was fraud it was not of such serious proportions or so detrimental to the public interest as to overcome the copyright policy.

& *McCarrick, Inc. v. Dugan Piano Co.*⁵⁰ was the one major case where fraud was the reason for the denial of copyright protection through equitable relief. Here the court held that a manual of instruction in a system of salesmanship, consisting of a collection of advertisements to be used by dealers in connection with the sales of pianos, contained representations of fact which had a tendency to mislead and deceive the public and that such material was also not a proper subject for copyright.⁵¹ Although the court held that the material was not a proper subject for copyright, it went on to point out that even if it were, the law should extend its protection only to those advertisements that reflect the truth and avoid representations which mislead and deceive the public.⁵²

The *Stone* case is an excellent example of the way the courts have used the clean hands doctrine to protect the public interest in copyright cases.⁵³ The *Belcher* court's rejection of it is also an excellent example of its confusion of the clean hands doctrine and the constitutional theory.

The *Stone* court used the broad clean hands principle, employing an analogy to a trademark case, *Manhattan Medicine Co. v. Wood*.⁵⁴ The *Manhattan Medicine* case relied not only on the equity maxim, but upon the argument heard in the immorality cases that no property right inheres in a trademark which contains an assertion that is false and that the right to exclusive use of such a trademark cannot be protected.⁵⁵ Since this was the prevailing theory with respect to denial of copyright to offensive material, the *Stone* court could have relied solely on this analysis. However, it went on to note that there were strong policy reasons to act in equity, pointing out that Louisiana had enacted state punitive legislation to prohibit fraudulent advertising.⁵⁶

In applying the clean hands doctrine, the *Stone* court did not engage in a serious inspection of the work in question with respect to its merits or morality, nor did it invoke the lack of merit or morality as the basis for its denial of relief. It merely applied the equity principle to a set of facts. It did not inquire into the truth or falsity of the *views* of the work; it inquired only into the *conduct* of the plaintiff according to the principles of equity through which the plaintiff was seeking relief. Such an inquiry is far more limited than

⁵⁰ 220 F. 837 (5th Cir. 1915).

⁵¹ *Id.* at 841, 843. Advertisements are now held to be a proper subject for copyright. 17 U.S.C. § 6 (1970).

⁵² 220 F. at 843.

⁵³ But see Note, 21 U. Pitt. L. Rev. 71, 82 (1959), where the author suggested that *Stone* is not a clean hands case because it did not meet the test of conduct detrimental to the defendant.

⁵⁴ 108 U.S. 218 (1883), cited in *Stone*, 220 F. at 841.

⁵⁵ 108 U.S. at 223-24, quoting *Leather Cloth Co. v. American Leather Cloth Co.*, 11 Eng. Rep. 1435 (Q.B. 1865).

⁵⁶ 220 F. at 842. The same argument would apply to *Belcher* given the California state law prohibiting false advertising. See note 46 *supra*.

that engaged in by the courts where the constitutional theory is used. Yet the *Belcher* court's rejection of *Stone* as unsound⁵⁷ was based on its erroneous belief that the court's inquiry in *Stone* was the same as that required when courts have applied the constitutional theory. While it may be argued that the clean hands doctrine should not be applied in copyright cases,⁵⁸ it is unfortunate that the *Stone* case and its application of the clean hands doctrine was rejected by *Belcher* for reasons which do not inhere in its application.

Another more recent case in which the question of the copyrightability of fraudulent material was presented was *Advisers, Inc. v. Wiesen-Hart, Inc.*⁵⁹ The court in *Belcher* cited *Advisers* as contra to the *Stone* holding.⁶⁰ While the court in *Advisers* did find that the copyright in works which it found to be fraudulent was valid and infringed,⁶¹ its reasoning with respect to damages provides support for the argument that the congressional intent of the Copyright Act was to exclude such material from its protection. In *Advisers*, the court found that plaintiff's "CASH 100 Book" which contained discount coupons for the purchase of jewelry were fraudulent because they represented to the public that the book was worth one hundred dollars when in fact the same discounts were given to everyone regardless of the coupons.⁶² In so finding, the court refused to grant the statutory award of one dollar per book in damages, but instead granted damages in its discretion as allowed by the Copyright Act, since it had found the copyright valid and infringed.⁶³

It might be argued that the *Advisers* court was making a distinction between material which is the proper subject for copyright and a copyrighted work which should not in equity be granted the court's help in enforcing.⁶⁴ This is supported by the court's statements that cash books are properly copyrightable, but that because of their fraudulent content, statutory damages could

⁵⁷ 486 F.2d at 1088.

⁵⁸ See text at notes 37-48 *supra*.

⁵⁹ 161 F. Supp. 831 (S.D. Ohio 1958).

⁶⁰ 486 F.2d at 1088, 1088 n.2.

⁶¹ 161 F. Supp. at 834.

⁶² *Id.*

⁶³ *Id.* 17 U.S.C. § 101(b) (1970) authorizes a court to allow damages in the amounts stated in the section (\$1 for every infringing copy made or found in possession of the infringer or his agents or employees). The Act also allows the court, in lieu of actual damages and profits to award such damages as to the court shall appear just and in assessing such damages the court has the discretion of allowing statutory damages or other damages within the limits of the section. *Id.*

⁶⁴ The argument for making this distinction is a strong one. Without it, the courts and the public would be faced with the situation where the Registrar of Copyrights becomes the determiner of what is subject matter suitable for copyright. Although the Registrar is given some discretion in determining what is copyrightable under the Copyright Act, that discretion does not extend to content evaluation. See 41 Op. Att'y Gen. 395 (1958); *Bouve v. Twentieth Century Fox-Film Corp.*, 122 F.2d 51 (D.C. Cir. 1941). But see *Vacheron & Constantin-LeCoultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958).

not be awarded.⁶⁵ Since the court in *Advisers* did not mention either the clean hands defense or the constitutional theory, its handling of the case might be a valid compromise to those courts which wish to work totally within the statutory framework.⁶⁶ The *Advisers* court in effect reads the clean hands doctrine into the Copyright Act.

Despite the precedent of *Stone & McCarrick, Inc. v. Dugan Piano Co.* and the use of the clean hands doctrine as a potential protector of the public interest, a court faced with the question of whether fraudulent material should be copyrighted might reasonably reject the various theories upon which a denial of protection could be based. Although fraudulent material does not promote the sciences and useful arts, the constitutional theory might be rejected for its involvement in the merits of a publication. The clean hands doctrine, unless broadly construed, might be inapplicable because of a failure of the parties to demonstrate specific harm to their interests.⁶⁷ The statutory construction approach, although presumably grounded in equitable principles, might be rejected because of failure to find direct support for the supposed congressional intent in the Copyright Act.⁶⁸

But even if all these theories are rejected, it seems that there is a strong public policy argument, made applicable by the invocation of a court's equity jurisdiction, against the court lending its protection to fraudulent work. The position of a court of law as an instrument of justice is severely compromised when it lends its support to illegal activity. If a state legislature has determined that false and fraudulent advertising is against the law, a court neglects

⁶⁵ 161 F. Supp. at 834.

⁶⁶ The statutory argument that the Copyright Act did not intend that fraudulent works be copyrightable is referred to by Judge Wallace in his dissent in *Belcher*, 486 F.2d at 1089 n.1 (dissenting opinion). Since the Act states that injunctions should be granted only under principles of equity, and principles of equity would not allow fraud to be protected, therefore the Copyright Act would disallow such protection. See 17 U.S.C. § 112 (1970). The legislative history supports this argument only to a limited extent. Section 112 of the present Copyright Act was derived from 17 U.S.C. § 36 (1946 ed.) (Act of March 4, 1909, ch. 320, 17 U.S.C. § 36, 35 Stat. 1084), where the original wording was: "Any court . . . shall have power, upon bill in equity filed by any party aggrieved" to grant an injunction. The law now reads "upon complaint filed." 17 U.S.C. § 112 (1970). This change suggests that when the 1909 Act was first passed, greater emphasis was placed on equity jurisdiction and its principles. Although the court in *Advisers* does not explain where it finds congressional intent to disallow damages for infringement of fraudulent works, since the present Act provides for "such damages as to the court shall seem just," 17 U.S.C. § 101(b) (1970), the *Advisers* court might have interpreted this language as further codification of equity principles and congressional intent that those principles prevail when awarding damages. The argument is further supported by the fact that injunctive relief, codified by the Copyright Act, is an equitable remedy and one which is prevalent in copyright actions, therefore requiring that equitable principles be applied.

⁶⁷ See, Note, The Misuse Defense in Copyright Actions, 37 N.Y.U.L. Rev. 916, 926 (1962), where the author suggests that since courts are so insistent that the strict requirements of the clean hands doctrine be present—offensive conduct be present in the action and that the defendant be specially harmed—the doctrine usually turns into one of the other misuse defenses.

⁶⁸ See note 66 supra.

its judicial responsibility when it acts even in indirect contravention of that law.⁶⁹ Furthermore, although it is not the court's general responsibility to be the keeper of public morality, it is the court's equitable responsibility to determine, even in the limited context of a copyright infringement action, what is and what is not fraudulent.⁷⁰ A refusal to accept that responsibility is to allow illegal conduct to continue, and, as is the case in *Belcher*, to continue with the court's blessing.⁷¹

The court in *Belcher*, if it accepts the district court's finding of fraud with respect to the sixth publication,⁷² had a number of alternative ways to determine whether or not such material should be protected by copyright. Although its apparent confusion of the constitutional theory with the clean hands doctrine clouded its reasoning, its ultimate conclusion appears unsupportable and its decision is one which compromises the integrity of the judicial system.

JEAN S. PERWIN

Copyright—Photocopying as Fair Use—*Williams & Wilkins Co. v. United States*.¹—Plaintiff, Williams & Wilkins Company, a publisher of medical journals, brought a copyright infringement action against the United States.² Specifically, plaintiff alleged that the Department of Health, Education and Welfare, through the National Institutes of Health (NIH) and the National Library of Medicine (NLM), infringed plaintiff's copyrights in four of its medical journals.

The facts reveal that the government libraries had distributed the articles free of charge and on a no-return basis. Nevertheless, they generally enforced their self-imposed regulations of limiting requests to fifty pages and to a single copy of a journal article. The utilization of this regulated photocopying resulted in the yearly

⁶⁹ See note 46 *supra*.

⁷⁰ There seems to be a conflict of authority over whether the determination of fraud is outside the scope of a copyright infringement action. Professor Nimmer states that since an allegation of fraudulent content necessarily puts in issue facts extraneous to the work itself, it seems proper to regard such facts as insufficient to constitute a defense in a copyright infringement action even though it may constitute grounds for rendering the plaintiff liable in a separate proceeding. M. Nimmer, Copyright § 36, at 146.29 (1973). However, deceptive and misleading advertising is specifically listed as an affirmative defense to copyright infringement in 9 Am. Jur. Trials, Copyright Infringement Litigation § 78, at 383 (1965).

⁷¹ 486 F.2d at 1090.

⁷² See note 49 *supra*.

¹ 487 F.2d 1345 (Ct. Cl. 1973), cert. granted, 94 S. Ct. 2602 (1974).

² Suit was brought pursuant to 28 U.S.C. § 1498(b) (1970), which provides that in the event of copyright infringement by the United States "the *exclusive* remedy of the owner of such copyright shall be . . . recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages" [Emphasis added.]