

DALY V. PALMER, OR THE MELODRAMATIC ORIGINS OF THE ORDINARY OBSERVER

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INTRODUCTION

1867 was a good year for New York playwright Augustin Daly. For some time, as he worked as a drama critic for New York newspapers, Daly had attempted to write plays on the side and sell them to others.¹ But those efforts met with only occasional success.² In 1867, Daly decided that he should be the one to choose which plays were performed.³ In an era when any new business venture brought with it enormous risk, he formed his own company, rented a theater, and began the task of trying to find plays that would fill the house every night.⁴

One of the first plays Daly produced was his own new creation, a melodrama entitled, *Under the Gaslight: A Totally Original and Picturesque Drama of Life and Love in These Times*. Melodrama was at that time still a relatively new genre,⁵ and Daly quickly revealed himself to be

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1. JOSEPH DALY, *THE LIFE OF AUGUSTIN DALY* 32, 55 (1917).

2. *Id.* at 33, 47.

3. *Id.* at 72.

4. *Id.* at 74.

5. See GARY A. RICHARDSON, *AMERICAN DRAMA FROM THE COLONIAL PERIOD THROUGH WORLD WAR I: A CRITICAL HISTORY* 115 (1993). Although melodrama had been a popular dramatic form for decades, its heyday arrived with the “sensation” melodrama from approximately 1865 to 1900. See *id.*; Bruce McConachie, *American Theatre in Context, from the*

a master of the form. The heart of any American melodrama in the latter half of the nineteenth century was the “sensation scene,” and Daly invented its archetypal example: the so-called “Railroad Scene,” in which a character was tied to train tracks by the villain, helpless as a steam locomotive approached, only to be rescued at the last second by the protagonist.⁶

Under the Gaslight opened on August 12, 1867, and despite an inauspicious start in which a piece of the “train” broke away, revealing a stage-hand’s legs, it was a smash hit.⁷ At a time when the average play ran less than a week, *Under the Gaslight* was performed nightly for almost three months, and then a few months later, returned for another engagement.⁸ From there, it spread like wildfire, and was performed in cities across the country for most of the remainder of the nineteenth century.⁹

Under the Gaslight also crossed the Atlantic, with authorized productions in Newcastle, England in April 1868, and London in July.¹⁰ It was in London that Dion Boucicault, the foremost author of melodramas in the English-speaking world,¹¹ probably first encountered the play. Knowing a good sensation when he saw one, Boucicault decided that he need his own “Railroad Scene” in his next play, *After Dark*, which was first performed in London on August 12, 1868.¹² Daly was incensed at the theft of his “invention,” but lacking any British copyright to his play, he had no legal basis to challenge the London production.¹³ But when Boucicault sold his play a few months later to New York theater owners Henry Palmer and Henry Jarrett, Daly pounced.¹⁴

Daly v. Palmer, decided early in 1869, was a landmark case in copyright law for more than seventy years. It is widely believed to be the

Beginnings to 1870, in 1 THE CAMBRIDGE HISTORY OF AMERICAN THEATRE: BEGINNINGS TO 1870, at 164 (Don B. Wilmett & Christopher Bigsby eds., 1999).

6. JOSEPH DALY, *supra* note 1, at 75.

7. *Id.*; MARVIN FELHEIM, THE THEATER OF AUGUSTIN DALY 48 (1956).

8. FELHEIM, *supra* note 7, at 5, 51.

9. JOSEPH DALY, *supra* note 1, at 77.

10. FELHEIM, *supra* note 7, at 51. As the author of a foreign work, Daly would not have been able to claim any copyright to his play in Britain, but he would still have been able to sell access to his script to theater directors abroad. At the time, copyright in a play could be registered in the United States prior to publication, by depositing a copy of the title page with the district court clerk. *See Boucicault v. Wood*, 3 F. Cas. 988, 989 (C.C.N.D. Ill. 1867) (No. 1,693).

11. *See McConachie, supra* note 5, at 165 (“Boucicault . . . was the most successful practitioner of sensation melodrama.”).

12. FELHEIM, *supra* note 7, at 55.

13. *Id.*

14. *Id.*

source of the “ordinary observer” standard for substantial similarity,¹⁵ it came to define the scope of dramatization under the Copyright Act of 1909,¹⁶ and it paved the way for claims that taking only a portion of a work could infringe.¹⁷ And although federal courts abruptly stopped using it after 1947,¹⁸ it lives on in legal scholarship as a sort of afterglow. *Daly* has long been seen as a significant departure point in copyright, “[t]he first great intellectual leap”¹⁹ in which the concept of copyright shifted from rights in tangible objects—copies—to rights in “an intellectual essence that could appear in a manifold of concrete forms or media.”²⁰

Assessing these claims about *Daly*’s significance requires placing it in its historical context, and then retracing its effects. That effort demonstrates that *Daly*’s rise and fall marked not just one turning point, but three. First, as other scholars have shown, the case itself was an important milestone in an intellectual transition of tremendous importance, from a view of copyrighted works as objects protected against reprinting, to one that viewed works as the imaginative creations of an author.²¹ But *Daly* was hardly the first step on that road, and its causal role has been somewhat overstated. Rather, its full significance emerged only later, when copyright law entered a second period of turmoil, as it attempted to grapple with the sudden explosion of a mass market in popular culture. Courts looked to the past for guidance, and found a number of useful tools in the *Daly* opinion. *Daly*’s sudden disappearance from the case law forty years

15. See *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F.2d 533, 535–36 (2d Cir. 1938) (citing *Daly v. Palmer*, 6 F. Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3,552)); 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.03[E][2] (2017); 3 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 9:113 (2017).

16. See Act of Mar. 4, 1909, 60 Pub. L. No. 60-349, 35 Stat. 1075; *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 61–62 (1911); Brian L. Frye, *Copyright in Pantomime*, 34 *CARDOZO ARTS & ENT. L.J.* 307, 342 (2016).

17. See HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* § 174 (1944).

18. Some New York cases continued to cite it until 1968. See, e.g., *Turner v. Century House Publ’g Co.*, 290 N.Y.S.2d 637, 642 (N.Y. Sup. Ct. 1968). The Ninth Circuit last cited the *Daly* litigation in *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 363 n.7 (9th Cir. 1947) (citing *Daly v. Webster*, 56 F. 483, 486–87 (2d Cir. 1892))—until, that is, *Daly v. Palmer* was cited in 2016’s *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 880–81 (9th Cir. 2016), as the origin of substantial similarity.

19. Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 *J. COPYRIGHT SOC’Y U.S.A.* 209, 213 (1983); see BENJAMIN KAPLAN ET AL., *AN UNHURRIED VIEW OF COPYRIGHT* REPUBLISHED 31 (2005) (referring to *Daly* as a test case in “[t]he claim for plot”).

20. OREN BRACHA, *OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790-1909*, at 163 (2016).

21. *Id.*

later marks a probable third turning point, as judges began to despair of a workable test for nonliteral infringement, and instead began to put their faith in procedure. I will cover each of these developments in turn.

I. *DALY V. PALMER* AND NINETEENTH-CENTURY COPYRIGHT

A. *The Work*

Augustin Daly was a transitional figure in the history of American drama. His rise to become the preeminent theater manager in New York City²² was marked by the same sorts of challenges then confronting copyright law: a rapidly developing national economy of specialized production, massive scale, and interconnected networks was upending the old regime of bespoke goods and services serving isolated communities.²³ The theater world was no different.²⁴

At the beginning of the nineteenth century, theater productions tended to be organized as “stock companies,” a group of actors associated with a single theater that performed similar roles in a repertory that varied from night to night, but was stable month to month.²⁵ The closest modern equivalent is a Shakespeare theater company.²⁶ The stock company served a local audience whose tastes it knew well and that had limited alternatives for entertainment.²⁷ But by the middle of the nineteenth century, stock companies were fading.²⁸ The growth of railroads, telegraphs, and newspapers made it possible for actors to build a following in various cities and to serve those audiences by going on tour, capturing the rewards of a single production in multiple locations.²⁹ The growth of the

22. See AMERICAN DRAMA FROM THE COLONIAL PERIOD THROUGH WORLD WAR I, *supra* note 5, at 116 (“In the period between his initial successes in the late 1860s and his death in 1899, no one exercised more influence over the American theater.”).

23. See generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977) (discussing the economic and social changes that swept the United States in the late nineteenth century); ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877-1920* (1967) (discussing how the spread of science, technology and industrialism caused many economic and social changes during the late nineteenth century).

24. See John Frick, *A Changing Theatre: New York and Beyond*, in 2 *THE CAMBRIDGE HISTORY OF AMERICAN THEATRE: 1870-1945*, at 196, 198 (Don B. Wilmet & Christopher Bigsby eds., 1999).

25. *Id.* at 198–99.

26. Indeed, Shakespeare was a regular part of the repertory throughout the nineteenth century. See FELHEIM, *supra* note 7, at 228; see generally LAWRENCE W. LEVINE, *HIGHBROW/LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* (1988) (during the nineteenth century, a wide variety of expressive forms, including Shakespearean drama, enjoyed both high cultural status and mass popularity).

27. Frick, *supra* note 24, at 198.

28. *Id.* at 201.

29. *Id.* at 200.

cities themselves, as urban centers swelled with rural migrants and foreign immigrants, made tours far more lucrative than they had been previously.³⁰ This was the “star system,” in which well-known actors selected plays that suited their talents, and worked with local stock companies to produce those plays in each location.³¹ In the 1870s, “combination companies” emerged, in which the entire company went on tour, relying not on a star performer to draw audiences, but hit plays.³²

Daly resisted these trends. He operated a stock company without stars from 1867 until 1894,³³ and although he took his company on occasional tours, for the most part it stayed at its home in New York.³⁴ This left Daly’s company in a precarious position, one that overwhelmed most others in the period. After the Panic of 1873, the number of stock companies in the U.S. dwindled from over fifty to seven.³⁵ Daly, known as the “autocrat of the stage,” survived in part through sheer force of will.³⁶ But Daly had enough flexibility and foresight to adopt some of the innovations that had eluded his competitors. Foremost among those was the “long run,” the practice of finding a single hit show to attract audiences, rather than drawing audiences to a steady rotation from an established repertoire.³⁷ A decade before, the phenomenal success of *Uncle Tom’s Cabin* had demonstrated that the long run could be profitable.³⁸ The trick was finding the right plays.³⁹

30. AMERICAN DRAMA FROM THE COLONIAL PERIOD THROUGH WORLD WAR I, *supra* note 5, at 115; McConachie, *supra* note 5, at 113.

31. Frick, *supra* note 24, at 199.

32. Frick, *supra* note 24, at 200–01; McConachie, *supra* note 5, at 175; Douglas McDermott, *Structure and Management in the American Theatre from the Beginning to 1870*, in 1 THE CAMBRIDGE HISTORY OF AMERICAN THEATRE: BEGINNINGS TO 1870, at 205–10 (Christopher Bigsby & Don B. Wilmetts eds., 1998). Laura Keane formed one of the first successful combination companies in the United States. *Id.* at 205. Keane’s production of *Our American Cousin* was being performed at Ford’s Theatre in Washington D.C. the night Abraham Lincoln was assassinated. *Id.* at 210.

33. FELHEIM, *supra* note 7, at 16.

34. See AMERICAN DRAMA FROM THE COLONIAL PERIOD THROUGH WORLD WAR I, *supra* note 5, at 116.

35. McConachie, *supra* note 5, at 175.

36. That will was often brought to bear against his actors, particularly female actors. See FELHEIM, *supra* note 7, at 19; Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men’s Consciences and Women’s Fidelity*, 101 YALE L.J. 775, 807 (1992).

37. McConachie, *supra* note 5, at 175.

38. Frick, *supra* note 24, at 199.

39. The long run was both a cause and effect of the socio-economic changes sweeping the nation. It emerged due to the larger audiences possible in rapidly growing cities, and to improved communications networks that made it possible to inform those people of a hit play. But the long run in turn changed the relationship of theater-goers to the theater; it “helped to commodify audience enjoyment. Spectators could no longer count on seeing the same production over the course of several years; they had to purchase a ticket when the show was in

That was probably Daly's most impressive talent. The tastes of audiences were shifting in the latter half of the nineteenth century, in part because the audiences themselves were changing.⁴⁰ Once a stable collection of long-term local residents, the late-nineteenth-century audience in urban areas such as New York suddenly swelled with recent arrivals from both rural America and foreign countries.⁴¹ Attracting a large audience to a single play, night after night, required finding works that could speak to New Yorkers of starkly different backgrounds.⁴² Although Daly had considerable success adapting French musicals, German comedies, and even Shakespeare, his early hits came from what was then a relatively new genre: melodrama.⁴³

Melodrama has been called by one theater historian "the most misunderstood of all dramatic forms."⁴⁴ Its poor reputation stems in part from its misfortune in being followed by its antithesis, realism.⁴⁵ The primary goal of melodrama was to confront its characters repeatedly with seemingly insurmountable and inexplicable crises, through which the protagonists prevailed by dint of their moral character.⁴⁶ The characters were kept simple in order to enhance the conflict and the ability of audiences to identify with the protagonists.⁴⁷ The result was, to modern eyes, a hideous mixture of ludicrous coincidences, laughable villains, and saccharine heroism.⁴⁸ But at a time of tremendous economic, social, and cultural turmoil, confronted by war, economic depressions, the rise of class divisions, and the rending of the social fabric, melodrama spoke to audiences'

fashion, like buying a new hat." McConachie, *supra* note 5, at 175.

40. See AMERICAN DRAMA FROM THE COLONIAL PERIOD THROUGH WORLD WAR I, *supra* note 5, at 115.

41. *Id.* at 115–16. While the early-nineteenth-century audiences were more local and predictable, they were not elite. See McConachie, *supra* note 5, at 132. The transformation of theater-going into a badge of high status occurred later, toward the end of the nineteenth century. *Id.* at 175; see generally LEVINE, *supra* note 26 (discussing the class split in the latter half of the nineteenth century leading to the openings of separate theaters catering to more elite audiences).

42. AMERICAN DRAMA FROM THE COLONIAL PERIOD THROUGH WORLD WAR I, *supra* note 5, at 116.

43. See JOSEPH DALY, *supra* note 1, at 77.

44. AMERICAN DRAMA FROM THE COLONIAL PERIOD THROUGH WORLD WAR I, *supra* note 5, at 114.

45. See Gary A. Richardson, *Plays and Playwrights: 1800-1865*, in 3 THE CAMBRIDGE HISTORY OF AMERICAN THEATRE: BEGINNINGS TO 1870, at 250, 258 (Christopher Bigsby & Don B. Wilmet eds., 1998). In this respect, melodrama bears the same relationship to theatrical realism as legal formalism does to legal realism.

46. See *id.* at 259.

47. *Id.* at 260.

48. See FELHEIM, *supra* note 7, at 48; *Plays and Playwrights: 1800-1865*, *supra* note 45, at 260.

deep-felt need to see that triumph was possible in such situations.⁴⁹

The climax of most mid-century melodramas occurred at the end of the penultimate act, when the protagonist (and the audience) was threatened with some terrible and gruesome danger on the stage.⁵⁰ It was essentially a special-effects bonanza. In Dion Boucicault's *The Poor of New York*, it was a massive fire in a building, set by an evil banker to kill a witness to his financial crimes;⁵¹ in *The Red Scarf*, a later play by Augustin Daly, the hero was tied to a plank in a saw mill, *Goldfinger*-style;⁵² and in *Under the Gaslight*, it was the Railroad Scene.⁵³ The "sensation" was both an act of showmanship and the apotheosis of the Manichean conflict at the heart of the play.⁵⁴

Daly had an evident talent for devising sensations that would draw in audiences, and his use of the long run helped him to capitalize on the production of hit plays at his theatre in New York. But his devotion to the stock company limited his ability to extract additional revenue in other locations.⁵⁵ That put him at a competitive disadvantage relative to stars and combination companies, as well as to playwrights such as Dion Boucicault who wrote for those operations.⁵⁶ For additional box office draw beyond what he could pull in from his own productions, Daly would have been dependent on his ability to sell copies of his plays and license its performance to others.

Thus, quite apart from his irascible and possessive nature, Augustin Daly would have had a strong economic motive to use the recently amended Copyright Act⁵⁷ to enforce licenses to perform his plays. In doing so, Daly would have faced significant challenges. Borrowing was rampant in the theater industry at the time.⁵⁸ Daly himself had adapted

49. See AMERICAN DRAMA FROM THE COLONIAL PERIOD THROUGH WORLD WAR I, *supra* note 5, at 116; Christopher Bigsby & Don B. Wilmeth, *Introduction*, in THE CAMBRIDGE HISTORY OF AMERICAN THEATRE: 1870-1875, at 1, 2, 4 (Christopher Bigsby & Don B. Wilmeth eds., 1999); BRUCE A. MCCONACHIE, MELODRAMATIC FORMATIONS: AMERICAN THEATRE AND SOCIETY, 1820-1870, at 217-18 (1992).

50. See, e.g., DION BOUCICAULT, THE POOR OF NEW YORK 40 (1857); FELHEIM, *supra* note 7, at 63.

51. BOUCICAULT, *supra* note 50, at 40.

52. See FELHEIM, *supra* note 7, at 63.

53. *Id.* at 53.

54. See *id.* at 51.

55. See AMERICAN DRAMA FROM THE COLONIAL PERIOD THROUGH WORLD WAR I, *supra* note 5, at 116.

56. Frick, *supra* note 24, at 201.

57. Act of Aug. 18, 1856, ch. 168, 11 Stat. 138, 139 (extending copyright protection to "dramatic compositions").

58. See FELHEIM, *supra* note 7, at 55.

many of his plays from foreign novels without permission,⁵⁹ and even the Railroad Scene in *Under the Gaslight* was likely inspired by an earlier British play.⁶⁰ In 1868, it was still unclear the extent to which an author could successfully claim copyright in material that bore a significant resemblance to earlier works.⁶¹

But the primary difficulties stemmed from the novelty of rights in dramatic works. The Copyright Act had been amended only twelve years prior to add “dramatic compositions” to the list of copyrightable subject matter,⁶² and to add for the first time an exclusive right of public performance.⁶³ Pathbreaking cases, by none other than Dion Boucicault, had only recently clarified how copyright in dramatic compositions could be claimed, and only a handful of successful infringement claims involving plays had been brought in federal court.⁶⁴ Daly himself had earlier in 1868 successfully pressed an infringement claim against San Francisco theater owner Daniel Maguire over a production of *Griffith Gaunt*, a play Daly had successfully adapted from a British novel.⁶⁵ Daly persuaded Judge Samuel Blatchford of the Southern District of New York to have Maguire arrested during a visit to New York and to order the production of photographic copies of Maguire’s script in California.⁶⁶

But Daly’s suit to stop Boucicault’s *After Dark* involved a much more novel and difficult claim than that involved in prior cases. Almost all of those, such as Daly’s suit against Maguire, had involved claims that the defendant was performing a nearly exact copy of the plaintiff’s entire play.⁶⁷ Daly’s claim, however, was not that *After Dark* was a mere copy

59. In one instance, the litigious Daly sued for defamation over an allegation of plagiarism of one of his plays—not because he had wrongly been accused of borrowing his play from another, but because he had been accused of stealing from the wrong play. *Id.* at 127.

60. *Id.* at 50 (discussing the contemporary claim that the scene was based on *The Engineer; or, the Life of George Stephenson*); *id.* at 55 (discussing Boucicault’s claim that the effect was taken from 1845 play *London by Night*).

61. See *Daly v. Palmer*, 6 F. Cas. 1132, 1136 (C.C.S.D.N.Y. 1868) (No. 3,552).

62. See Act of Aug. 18, 1856, ch. 168, 11 Stat. 138, 138–39. The 1831 Copyright Act had extended copyright to books, maps, charts, musical compositions, prints, cuts, and engravings. See Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

63. See Act of Aug. 18, 1856, ch. 168, 11 Stat. 138, 138–39.

64. See *Boucicault v. Wood*, 3 F. Cas. 988, 990 (C.C.N.D. Ill. 1867) (No. 1,693); *Roberts v. Myers*, 20 F. Cas. 898, 898 (C.C.D. Mass. 1860) (No. 11,906). A perhaps larger number of cases involving dramatic works proceeded under common law causes of action, as many plays were both unpublished and had not had their title pages deposited. See, e.g., *Keene v. Wheatley*, 14 F. Cas. 180, 208 (C.C.E.D. Pa. 1861) (No. 7,644).

65. See *Suit for Infringement of Theatrical Copyright*, N.Y. HERALD, May 15, 1868, at 5.

66. *Id.*; *Daly v. Maguire*, 6 F. Cas. 1132, 1132 (C.C.S.D.N.Y. 1868) (No. 3,551).

67. See *Suit for Infringement of Theatrical Copyright*, *supra* note 65, at 5. Maguire had himself successfully argued the prior year that the play his competitor Julian Martinetti was

of *Under the Gaslight*.⁶⁸ The two plays were, for the most part, entirely different.⁶⁹ Rather, Daly's claim was that Boucicault had lifted a single scene from Daly's play.⁷⁰ It was far from clear at the time whether copying something less than the entire work would qualify as infringement.⁷¹ And Daly's claim was even more of a leap than that, for Boucicault had not copied Daly's Railroad Scene verbatim—far from it. For instance, the setting was different: Daly's play had the heroine breaking out of a storage shed next to a railroad to save the victim tied to the tracks;⁷² Boucicault's play moved the scene to the London Underground, and had the rescuer breaking out of a cistern in which he was trapped.⁷³ Furthermore, *After Dark* duplicated none of the dialog in the Railroad Scene, and none of the written stage directions.⁷⁴ Indeed, the two plays had not a single sentence in their scripts in common.⁷⁵ Rather, what Daly alleged was similar was the *action* of the scene as performed on the stage.⁷⁶ This was a type of claim that had never been made before.⁷⁷

B. THE CASE

Daly v. Palmer was brought in equity in federal court soon after *After Dark* opened in New York in November 1868.⁷⁸ Daly immediately requested a preliminary injunction barring Henry Palmer and Henry Jar-

producing, *Black Rook*, was almost identical to a play he had an exclusive license to, *Black Crook*. *Martinetti v. Maguire*, 16 F. Cas. 920, 921 (C.C.D. Cal. 1867) (No. 9,173). Maguire lost only because the judge found *Black Crook* too scandalous to be “suited for public representation” under the Act. *Id.* at 923.

68. *Daly v. Palmer*, 6 F. Cas. 1132, 1133–34 (C.C.S.D.N.Y. 1868) (No. 3,552).

69. Compare AUGUSTIN DALY, UNDER THE GASLIGHT (1867), with DION BOUCICAULT, AFTER DARK (1868), reprinted in BRITISH PLAYS OF THE NINETEENTH CENTURY 281 (J. O. Bailey ed., 1966).

70. *Palmer*, 6 F. Cas. at 1134. Blatchford's synopsis of Daly's bill in equity indicates that Daly alleged that “several of the scenes and incidents of the plaintiff's play” had been duplicated, but the arguments focused only on the Railroad Scene, as did the injunction requested in the bill. *Id.* at 1133.

71. *Id.* at 1136.

72. UNDER THE GASLIGHT, *supra* note 69, at 85.

73. AFTER DARK, *supra* note 69, at 36–37.

74. *Id.*

75. UNDER THE GASLIGHT, *supra* note 69; AFTER DARK, *supra* note 69.

76. *Daly v. Palmer*, 6 F. Cas. 1132, 1133–34 (C.C.S.D.N.Y. 1868) (No. 3,552).

77. See *id.* at 1136. As discussed below, the only prior analogs to Daly's claim came from outside the world of theater, two cases in which plaintiffs alleged that their musical compositions had been appropriated because the defendants' compositions sounded similar when played. See *infra* note 130 (citing cases).

78. *Id.* at 1332–34; *Amusements: Theatrical*, N.Y. TIMES, Nov. 22, 1868, at 5.

rett, the owners of the Niblo's Garden Theater, from performing the Railroad Scene.⁷⁹ Both sides were ably represented by experienced attorneys, and the hearings were widely reported in the newspapers.⁸⁰ The case wound up before Judge Blatchford, the sole district judge in the Southern District of New York, who had only been appointed to the bench the year before.⁸¹ Blatchford, who for years was a case reporter in New York,⁸² would go on to have a stellar judicial career. He was appointed to the Second Circuit in 1878, and became an Associate Justice of the Supreme Court in 1882, where he served until his death eleven years later.⁸³ In an era where most judicial opinions ran for a page or two, Blatchford tackled the issues in *Daly* with a sixteen-page written opinion, which he then inserted directly into his own reporter, ensuring that nothing was lost in the transcription.⁸⁴

79. *Palmer v. De Witt*, 5 Abb. Pr. (n.s.) 133, 134 (Super. Ct. N.Y. 1868).

80. See JOSEPH DALY, *supra* note 1, at 77 (explaining that Palmer and Jarrett hired “experienced theatrical lawyers” William Booth of New York and Thomas W. Clarke from Boston and Daly was represented by William Tracy, Thomas S. Alexander, and Augustin’s own brother and collaborator, Joseph, who was also an attorney).

81. THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 212 (Clare Cushman ed., 3d ed. 2013).

82. *Id.*

83. *Id.* at 212–14. In 1872, Blatchford began serving on the Circuit Court, which predated the modern Courts of Appeal, including the Second Circuit Court of Appeals.

84. See generally *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552) (showing that Blatchford wrote a sixteen-page opinion which was published in his own reporter).

The *Daly* case presented several novel and difficult issues. First, the defendants argued that Daly could not claim a valid copyright in the Railroad Scene at all, because it was nothing new: scenes involving trains hitting or nearly hitting persons had been performed on stage or depicted in literature for at least twenty years prior.⁸⁵ Dion Boucicault himself submitted an affidavit claiming that “[t]he Railway effect is not

<p style="text-align: center;"><i>Under the Gas-Light</i> Act IV, Sc. 3</p> <p><i>Laura.</i> (In agony.) O, I must get out! (Shakes window bars.) What shall I do? <i>Snorkey.</i> Can't you burst the door? <i>Laura.</i> It is locked fast. <i>Snorkey.</i> Is there nothing in there?—no hammer?—no crow bar? <i>Laura.</i> Nothing! (Faint steam whistle heard in the distance.) O, heavens! The train! (Paralysed for an instant.) The axe!!! <i>Snorkey.</i> Cut the woodwork! Don't mind the lock—cut round it! How my neck tingles! (A blow at door is heard.) Courage! (Another.) Courage! (The steam whistle heard again—nearer, and rumble of train on track. Another blow.) That's a true woman! Courage! (Noise of locomotive heard—with whistle. A last blow; the door swings open, mutilated—the lock hanging—and LAURA appears, axe in hand.) <i>Snorkey.</i> Here—quick! (She runs and unfastens him. The locomotive lights glare on scene.) Victory! Saved! Hooray! (LAURA leans exhausted against switch.) And these are the women who arn't to have a vote! (As LAURA takes his head from the track, the train of cars rushes past with roar and whistle from L. to R. H.)</p>	<p style="text-align: center;"><i>After Dark, Act III, Sc. 3</i></p> <p><i>Old Tom.</i> About four courses of bricks will leave one room to pass. What is that on the line? There is something, surely, there. (A distant telegraph alarm rings. The semaphore levers play, and the lamps revolve.) Great Heaven! 'tis Gordon. I see his pale upturned face—he lives! Gordon! Gordon! I'm here. He does not answer me. (A whistle is heard, and distant train passes.) Ah! murderers. I see their plan. They have dragged his insensible body to that place, and left him there to be killed by a passing train. Demons! Wretches! (He works madly at the orifice. The bricks fall under his blows. The orifice increases. He tries to struggle through it.) Not yet. Not yet. (The alarm rings again. The levers in the front play. The red light burns, and a white light is turned to L.H. tunnel. The wheels of an approaching train are heard.) Oh, heaven! give me strength—down—down. One moment! (A large piece of wall falls in, and Old Tom comes with it.) See, it comes, the monster comes. (A loud rumbling and crashing sound is heard. He tries to move Gordon, but seeing the locomotive close on him, he flings himself on the body, and, clasping it in his arms, rolls over with it forward. A locomotive, followed by a train of carriages, rushes over the place, and, as it disappears, Old Tom frees himself from Chumley, and gazes after the train.)</p>
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Figure 1⁸⁶Figure 2⁸⁷85. *Id.* at 1134.86. UNDER THE GASLIGHT, *supra* note 69, at 42–43.87. *Palmer*, 6 F. Cas. at 1135.

derived from Mr. Daly's "Under the Gaslight," but is a London stage machinist's invention" dating back to at least the play *London by Night* in 1845.⁸⁸ There is no evidence Daly was familiar with *London by Night*, but he was familiar with *The Engineer; or, the Life of George Stephenson*, produced in London in 1863, which apparently depicted a man being hit by a train.⁸⁹ Boucicault, Palmer, and Jarrett also pointed to a short story, *Captain Tom's Fright*, published in 1867, which related the mounting terror of a person tied to train tracks who narrowly escapes being run over by an oncoming locomotive.⁹⁰

It is unclear whether the defendants' argument was that Daly's Railroad Scene was unoriginal because he had taken it from earlier sources, or unoriginal in the sense of it having been done before, regardless of whether Daly knew of the earlier works or not.⁹¹ Palmer and Jarrett's argument presaged a long-running dispute over the extent to which copyrights, like patents, could be anticipated by prior works, one that was not definitively resolved until 1936's *Sheldon v. Metro-Goldwyn Pictures Corp.*⁹² The argument was concomitant with the sort of claim that Daly was making: if the originator of a certain sort of scene gained extremely broad rights to perform scenes like it, then, Boucicault and his American licensees argued, Daly's claim of authorship was itself preempted by vaguely similar scenes that had been performed before.⁹³ Nevertheless, Blatchford dispatched the challenge with a single sentence: "Nothing that has been adduced on the part of the defendants affects the validity of the plaintiff's copyright, on the question of the originality and novelty of the 'Railroad Scene' in his play."⁹⁴

More troublesome for Blatchford was the question of whether Boucicault had infringed on Daly's play. There were three interrelated issues. First, what, exactly, was included in the copyrighted "dramatic composition"?⁹⁵ Was it limited to lines of dialog in the script, or did it include the actions performed on the stage?⁹⁶ Second, Boucicault's play had taken

88. FELHEIM, *supra* note 7, at 55.

89. *See id.* at 50.

90. *Palmer*, 6 F. Cas. at 1134 n.6 (explaining that in *Captain Tom's Fright*, the victim is not rescued, but rather learns after the train has passed that in fact he had been tied to an adjoining track to give him a scare); *The "After Dark" and "Under the Gaslight" Controversy*, N.Y. HERALD, Nov. 26, 1868, at 6; *Captain Tom's Fright*, GALAXY, Mar. 15, 1867, at 659-60.

91. *Palmer*, 6 F. Cas. at 1134.

92. 81 F.2d 49, 53-54 (2d Cir. 1936).

93. *Palmer*, 6 F. Cas. at 1133-34.

94. *Id.* at 1138.

95. *Id.* at 1135.

96. *Id.* at 1136.

only the action from the scene, and none of the dialog.⁹⁷ Was that enough to establish infringement?⁹⁸ And third, Daly's claim alleged infringement of only one scene in a five-act play.⁹⁹ Was the taking of material from only a small portion of a work sufficient?¹⁰⁰ In other words, the issues before Judge Blatchford in the *Daly* case presented novel questions of both quality and quantity: had enough protectable material been taken from Daly's play to establish infringement, or was something more, or different, required?¹⁰¹

This is a question that is exceedingly familiar to copyright lawyers in the twenty-first century, but was vexing and unexplored in 1868.¹⁰² Copyright had been founded in the eighteenth century as a protection for books, as well as maps and nautical charts—physical objects that were guarded against reprinting without permission.¹⁰³ Fairly quickly questions arose about whether that protection extended to publications that were less than verbatim copies of entire works.¹⁰⁴ By the middle of the nineteenth century, a small body of cases had produced the beginnings of an answer: the determination of the line between justifiable use of a prior work and infringement depended “not so much of the quantity, as of the value of the selected materials.”¹⁰⁵ Indeed, Lord Cottenham of the High Court of Chancery had declared in one influential case that “[i]t is useless to refer to any particular cases as to quantity.”¹⁰⁶ Justice Story's famous opinion in *Folsom v. Marsh* likewise focused on the value lost or taken:

If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto. . . . In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which

97. *Id.*

98. *See Daly*, 6 F. Cas. at 1136.

99. *See id.* at 1133.

100. *See id.* at 1134.

101. *See id.* at 1138.

102. *See id.* at 1135.

103. *See Palmer*, 6 F. Cas. at 1135.

104. *West v. Francis* (1822) 106 Eng. Rep. 1361, 1361 (KB) (holding that prints with minor variations were still infringing); *see Clayton v. Stone*, 5 F. Cas. 999, 1003 (C.C.S.D.N.Y. 1829) (No. 2,872) (involving an infringement claim for copying market reports from a newspaper).

105. *Gray v. Russell*, 10 F. Cas. 1035, 1038 (C.C.D. Mass. 1839) (No. 5,728).

106. *Bramwell v. Halcomb* (1836) 40 Eng. Rep. 1110, 1110 (Ch). Lord Cottenham's explanation is familiar to anyone conversant with modern fair use doctrine: “When it comes to a question of quantity it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity.” *Id.*

the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.¹⁰⁷

But the law on partial copying was even more undeveloped than this thin line of cases would suggest. The works at issue in almost all of these cases involved, not artistic works such as Daly's play, but informational works and compilations, works that made heavy use of preexisting materials, facts, and scientific or mathematical principles.¹⁰⁸ *Bramwell v. Hallcomb* involved two treatises on getting bills passed in Parliament.¹⁰⁹ *Gray v. Russell* involved two competing editions of the same Latin grammar textbook.¹¹⁰ *Folsom v. Marsh* involved a collection of George Washington's letters.¹¹¹ *Emerson v. Davies* involved two arithmetic textbooks.¹¹² In all of these cases, the plaintiff's authorship was based not on the underlying material or concepts, but the efforts the plaintiff had taken to gather such materials and the arrangement and explanatory use made of them.¹¹³ The task for a court determining whether there was an infringement was therefore whether the defendant, by using the plaintiff's materials, had taken enough to capture some of the value of the plaintiff's efforts and arrangement, or whether the defendant's sales were due to his or her own efforts in compiling and explaining the materials.¹¹⁴ As the plaintiff in *Greene v. Bishop* put it, the question in such cases was whether the defendant's work was "substantially of the same motive and plan throughout as the books of the complainant, and intended to supersede him in the market with the same class of readers and purchasers."¹¹⁵

These cases were of limited assistance, however, in determining whether too much of an *artistic* work had been taken by the defendant.¹¹⁶ An author's effort in producing an artistic work, or the way in which it is arranged or annotated, are poor measures of the source of its value to

107. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901). *Folsom* is now thought of as a fair use case, but Story seems clearly to have been drawing the line between infringement and non-infringement, a task now performed by the doctrine of substantial similarity. *Id.*

108. *See, e.g., Bramwell*, 40 Eng. Rep. at 1110; *Gray*, 10 F. Cas. at 1037.

109. 40 Eng. Rep. at 1110.

110. 10 F. Cas. at 1039.

111. 9 F. Cas. at 345.

112. 8 F. Cas. 615, 623 (C.C.D. Mass. 1845) (No. 5,728).

113. *See, e.g., id.* at 619.

114. *See, e.g., id.*

115. *Greene v. Bishop*, 10 F. Cas. 1128, 1129 (C.C.D. Mass. 1858) (No. 5,763). The quoted statement appears in the synopsis of the plaintiff's bill in equity.

116. Judge Blatchford quoted the *Emerson* test, which looked to "whether there is a servile or evasive imitation of the plaintiff's work, or whether there is a bona fide original compilation," but almost as an afterthought. *See* *Daly v. Palmer*, 6 F. Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3,552).

purchasers. Judge Blatchford, confronted with Daly's claim that the heart of his play had been stolen by Boucicault,¹¹⁷ was exploring relatively new territory in copyright law.

The first task was to determine whether Boucicault had taken anything copyrightable from Daly.¹¹⁸ Although copyright in dramatic works was a dozen years old by the time of *Daly v. Palmer*, most prior infringement cases had involved unlicensed productions of entire plays, not merely some portion of the play.¹¹⁹ *Daly* therefore raised a question about whether dramatic composition copyrights differed in an important respect from copyrights in books.¹²⁰ The copyright in a book was thought to be limited to the words or language written in the book;¹²¹ a play's script, however, contained both words to be spoken during the performance, and instructions to actors and stagehands in the form of stage directions.¹²² Obviously the dialog was part of the dramatic composition, but what about the stage directions? And more particularly, what about the actions performed on stage in response to the stage directions?

As demonstrated above, Boucicault's play took none of the dialog from the Railroad Scene, nor had he literally copied any of the stage directions.¹²³ Judge Blatchford found, however, that all of the important elements of the action of the scene had been taken.¹²⁴ And that action was part of the copyrighted dramatic composition, Blatchford concluded, because a play, unlike a book, was intended to be publicly performed.

A composition, in the sense in which that word is used in the act of

117. *Id.* at 1133.

118. *Id.* at 1135.

119. *See, e.g.*, *Martinetti v. Maguire*, 16 F. Cas. 920, 920 (C.C.D. Cal. 1867) (No. 9,173); *Roberts v. Myers*, 20 F. Cas. 898, 898 (C.C.D. Mass. 1860) (No. 11,906).

120. *Palmer*, 6 F. Cas. at 1135.

121. *Id.* So much so that Justice Grier had denied Harriet Beecher Stowe the right to control translations of *Uncle Tom's Cabin*. *Stowe v. Thomas*, 23 F. Cas. 201, 208 (C.C.E.D. Pa. 1853) (No. 13,514).

122. *Palmer*, 6 F. Cas. at 1137.

123. *Id.* at 1138.

124. *See id.* at 1136.

The series of events . . . in the two plays in question here, embraces the confinement of A. in a receptacle from which there seems to be no feasible means of egress; a railroad track, with the body of B. placed across it, in such manner as to involve the apparently certain destruction of his life by a passing train; the appearance of A. at an opening in the receptacle, from which A. can see the body of B.; audible indications that the train is approaching; successful efforts by A., from within the receptacle, by means of an implement found within it, to obtain egress from it upon the track; and the moving of the body of B., by A., from the impending danger, a moment before the train rushes by. In both of the plays, the idea is conveyed that B. is placed intentionally on the track, with the purpose of having him killed.

Id.

1856, is a written or literary work invented and set in order. A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. When a dramatic composition is represented, in dialogue and action, by persons who represent it as real, by performing or going through with the various parts or characters assigned to them severally, the composition is acted, performed, or represented To act, in the sense of the statute, is to represent as real, by countenance, voice, or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking, if such be his part in the play, is none the less an actor in it than one who, in addition to motions and gestures, uses his voice.¹²⁵

Drama's status as a performing art impelled Blatchford to take a novel approach—to look beyond the language on the page in determining what Daly's copyright protected, and find it instead in the narrative that emerged on the stage.¹²⁶ According to Judge Blatchford, dramatic copyrights protect not the words contained *in* the script, but the story told *by* the script.¹²⁷

This was, as others have noted, a crucially important step in the transition from copyright as a protection for books, to copyright as a protection for intangible expression.¹²⁸ But it was not the first step, nor was it a sudden transition. As Judge Blatchford observed, *Daly* was not a case of first impression.¹²⁹ For there had been one other performing art recognized in the law prior to dramatic works: musical compositions.¹³⁰ In *D'Almaine v. Boosey*, decided more than thirty years before *Daly*, the Court of Exchequer held that an arrangement of operatic melodies to make them suitable for dancing was an infringement.¹³¹ The defendant objected that he had not taken the entire opera, only certain melodies, and he cited the extensive case law holding that abridgements and digests of books do not infringe where they serve a different purpose than the originals.¹³² The court, however, rejected the analogy, stating that “the subject of music is to be regarded upon very different principles. It is the air or

125. *Id.* at 1135–36. Blatchford cited in his support the language of the statute, which defined a dramatic composition as one “designed or suited for public representation.” *Palmer*, 6 F. Cas. at 1135.

126. *Id.* at 1136.

127. *See id.*

128. *See* BRACHA, *supra* note 20, at 163; Goldstein, *supra* note 19, at 213–14.

129. *Palmer*, 6 F. Cas. at 1136.

130. *D'Almaine v. Boosey* (1835) 160 Eng. Rep. 117, 123. *D'Almaine* was followed by a later American case involving musical compositions, *Jollie v. Jaques*, 13 F. Cas. 910, 911 (C.C.S.D.N.Y. 1850) (No. 7,437).

131. 160 Eng. Rep. at 123.

132. *Id.* at 122.

melody which is the invention of the author . . . ; and you commit a piracy if, by taking not a single bar but several, you incorporate in the new work that in which the whole meritorious part of the invention consists.”¹³³

D’Almaine provided Blatchford a way to answer the second and third questions posed by *Daly*: whether Boucicault’s copying of only the action from a single scene of a five-act play was infringement.¹³⁴ If the protected material emerged from the work only as it was performed on stage, as Blatchford had held, how was a court looking only at the script to evaluate whether an important piece of the plaintiff’s work had been taken by the defendant? *D’Almaine* had considered a similar question in distinguishing between musical compositions and books.¹³⁵ According to Lord Abinger in *D’Almaine*, the melody of a piece of music was so integral to its value as a copyrighted work that, unlike a selection from an informational book, it could not be taken and reused for any other purpose without infringement.¹³⁶ The defendant’s use did not matter; the only question was “whether the air taken is substantially the same with the original.”¹³⁷

The reason for this distinction, according to Lord Abinger, had to do with a difference in how the audience perceived the work.¹³⁸ The melody was the central focus for most listeners.

[T]he most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same.¹³⁹

This suggested a test for infringement in musical composition cases, one that relied on audience perception of similarities: “Substantially, the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in the principle.”¹⁴⁰

Judge Blatchford quoted Lord Abinger’s opinion in *D’Almaine* at

133. *Id.* at 123.

134. *Id.*; see *Palmer*, 6 F. Cas. at 1137.

135. *D’Almaine*, 160 Eng. Rep. at 123.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* Lord Abinger suggested another reason why musical adaptations were more likely to be infringing—they required, he believed, less talent to produce. “The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment.” *D’Almaine*, 160 Eng. Rep. at 123.

140. *Id.*

length, and then repeated its logical steps, substituting dramatic works for musical works.¹⁴¹ Just as the core value of a musical composition depended on how it sounded to a listener's ear *as it was performed*, so too the core value of a dramatic composition lay in how it "excite[d] emotions and impart[ed] impressions . . . through the medium of the eye as well as the ear."¹⁴² Just as a musical composer had the right to the series of notes in a melody, reproduced in exactly that order, so too the playwright had exclusive rights to

the series of events directed in writing by the author, in any particular scene, . . . and a piracy is committed if that in which the whole merit of the scene consists, is incorporated in another work, without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series.¹⁴³

And, as with musical compositions, the test for infringement depended on the impressions made on the audience:

[I]t is a piracy, if the appropriated series of events, when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order.¹⁴⁴

This is what later would become known as the audience test for infringement, and *Daly* is purportedly its source.¹⁴⁵ The test has been criticized for giving factfinders little guidance as to which aspects of the work to focus on.¹⁴⁶ But it is worth observing, however, that *Daly* was a case in equity, and therefore there was no jury.¹⁴⁷ The "spectator" that the *Daly* test was directed to was Judge Blatchford himself: "[T]he 'Railroad Scene' in Boucicault's play, is, undoubtedly, when acted, performed, or represented on a stage or public place, an invasion and infringement of the copyright of the plaintiff in the 'Railroad Scene' in his play."¹⁴⁸ Nor was Blatchford's conclusion unguided; rather, it followed from his determination that the relevant protectable elements were copied in the defendant's work: "All that is substantial and material in the plaintiff's

141. *Id.* at 123–24; *see Palmer*, 6 F. Cas. at 1137–38.

142. *Palmer*, 6 F. Cas. at 1137.

143. *Id.* at 1138.

144. *Id.*

145. NIMMER, *supra* note 15, at § 13.03[E][2].

146. *Id.*

147. *See Palmer*, 6 F. Cas. at 1139.

148. *Id.* at 1138.

‘Railroad Scene’ has been used by Boucicault, in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who see it represented, as in the plaintiff’s play.”¹⁴⁹ The purpose of the audience test in *Daly* was not to ask the judge to put him or herself in the place of a hypothetical and undiscerning “ordinary” observer, but rather to focus attention on the play as performed as opposed to the play as written.¹⁵⁰

C. *The Aftermath*

Blatchford’s *Daly* opinion had an immediate impact. The leading treatises in the United States and Britain both included lengthy excerpts from the opinion, citing it as an example of the concept of “substantial identity” as applied to dramatic works.¹⁵¹ It was widely cited by courts in determining what constituted a “dramatic composition” subject to protection under the Copyright Act.¹⁵² Later, it was cited to determine what constituted an infringing dramatization of a literary work.¹⁵³

But for such a path-breaking opinion, *Daly v. Palmer*’s impact was in certain ways surprisingly muted, at least initially. Several plaintiffs attempted to argue that *Daly* marked a sea-change in copyright law, allowing authors to protect small pieces of their works from infringement, as long as there was actual copying.¹⁵⁴ But late-nineteenth century courts generally rejected the argument that any fundamental change had occurred. For example, the plaintiffs in *Perris v. Hexamer* argued that *Daly*’s protection of stage directions supported their claim that copying their map key was infringement.¹⁵⁵ But the Supreme Court was not persuaded. The plaintiff in *Chatterton v. Cave* tried to make a similar argument with respect to his play, but the Lords rejected his claim, holding that “the principle de minimis non curat lex applies to a supposed wrong in taking a part of dramatic works, as well as in reproducing a part of a

149. *Id.*

150. *See id.* at 1134–35.

151. WALTER ARTHUR COPINGER, *THE LAW OF COPYRIGHT IN WORKS OF LITERATURE AND ART* 326–30 (2d ed. 1881); EATON S. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* 635–37 (1879); E.J. MACGILLIVRAY, *A TREATISE UPON THE LAW OF COPYRIGHT* 286 (1902).

152. *Barnes v. Miner*, 122 F. 480, 491 (C.C.S.D.N.Y. 1903); *Henderson v. Tompkins*, 60 F. 758, 764 (C.C.D. Mass. 1894); *Fuller v. Bemis*, 50 F. 926, 928 (C.C.S.D.N.Y. 1892); *Serrana v. Jefferson*, 33 F. 347, 348 (C.C.S.D.N.Y. 1888).

153. *See, e.g., Kalem Co. v. Harper Bros.*, 222 U.S. 55, 61 (1911).

154. *See, e.g., Perris v. Hexamer*, 99 U.S. 674, 675 (1878); *Chatterton v. Cave* (1878) 3 A.C. 483 (HL) 483–84 (appeal taken from Eng.).

155. Brief for Appellants at 6–7, *Perris*, 99 U.S. 674 (No. 93).

book.”¹⁵⁶

And even with respect to its core holding, subsequent cases narrowed *Daly* rather than expanding it. In *Serrana v. Jefferson*, the court held that while a sequence of events might be protected as part of a dramatic composition, an on-stage special effect—in *Serrana*, the use of a water tank to represent a river—could not be.¹⁵⁷ And in *Daly v. Webster*, the Second Circuit limited the breadth of *Daly v. Palmer*’s holding considerably.¹⁵⁸ *Daly* involved an attempt by Daly to enforce his injunction against “After Dark” against a new production of the play, one with a modified railroad scene.¹⁵⁹ Daly argued that the scene still infringed his copyright, but the Second Circuit held that copyright in a series of incidents in a scene “must be confined, in his claim to copyright, closely to the story he has thus composed.”¹⁶⁰ Specifically, altering the scene to eliminate the last-minute rescuer would avoid infringing Daly’s copyright, as, according to the court, “in all except the rescue by a third person, the complainant was not the first to conceive the story.”¹⁶¹ Daly’s copyright in the Railroad Scene therefore gave him an exclusive right to last-minute on-stage rescues of characters tied to train tracks, but little else.

The nineteenth century closed with *Daly* setting a new standard for the scope of protection of dramatic works, but with little indication of a fundamental shift in how infringement was determined for works generally. For that, *Daly* would have to wait until the twentieth century.

II. THE SEARCH FOR SUBSTANTIAL SIMILARITY

Daly v. Palmer had a strange career as a leading case. Although recognized as an important development in its time, it was only when twentieth-century courts began looking for support for a new way of analyzing infringement that *Daly*’s significance took off. *Daly* is thus more of a twentieth-century citation than a nineteenth-century development. And the primary driver of that shift was not so much a change in the law as a change in the economy, in particular the rise of mass consumer culture.

156. (1878) 3 A.C. at 492. Thirty years later, British courts appeared to depart completely from the holding of *Daly v. Palmer*, with one King’s Bench judge declaring, “[a]ll that we have here is a certain similarity of stage situations and scenic effects, which ought not, in my opinion, to be taken into consideration at all in a case where there is no appreciable similarity between the words of the two productions.” *Tate v. Fullbrook* (1908) 1 KB 821, 830 (UK).

157. 33 F. 347, 348 (C.C.S.D.N.Y. 1888).

158. 56 F. 483, 486–88 (2d Cir. 1892).

159. *Id.* at 484–85.

160. *Id.* at 487.

161. *Id.*

A. The Socio-Cultural Background

As the twentieth century began, the world of cultural production was in tremendous ferment.¹⁶² The industrial revolution that began in the United States in the late nineteenth century affected artistic and informational works as well.¹⁶³ Technological improvements in both the production and transportation of goods led to the emergence of a national market.¹⁶⁴ At the same time, the U.S. population rapidly expanded, from 50 million in 1880 to 106 million in 1920, with most of that expansion filling the nation's urban areas.¹⁶⁵ The result was a period of traumatic cultural transformation "so swift and thorough that many Americans seemed unable to fathom the extent of the upheaval."¹⁶⁶

Businesses, including publishers, film studios, and theater companies, rushed to take advantage of the new technologies and fill the expanding markets.¹⁶⁷ They extended their reach by adopting new methods of business organization: the corporate form, hierarchical management, and specialization of tasks.¹⁶⁸ The larger enterprises used mass production to generate thousands of goods where previously only dozens could be made.¹⁶⁹ And they advertised and sold their wares across the country.¹⁷⁰

The effect on the nation's culture was profound. Book publication exploded, growing sixfold between 1880 and 1910.¹⁷¹ The types of books being published shifted as well, from largely informational works to mass-produced dime novels and other forms of fiction.¹⁷² Music publishers took root in Tin Pan Alley and began generating hits for the nation's

162. See Carl F. Kaestle & Janice A. Radway, *A Framework for the History of Publishing and Reading in the United States, 1880-1940*, in 4 *A HISTORY OF THE BOOK IN AMERICA: PRINT IN MOTION* 7 (Carl F. Kaestle & Janice A. Radway eds., 2009).

163. See *id.* at 12-13.

164. See *id.* at 7.

165. The percentage of the population living in urban areas rose from twenty-eight percent in 1880 to fifty-one percent in 1920. U.S. DEP'T OF COMMERCE, UNITED STATES SUMMARY: 2010 POPULATION AND HOUSING UNIT COUNTS 20, 31 (2012).

166. ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* 5 (2007).

167. See Kaestle & Radway, *supra* note 162, at 13.

168. See *id.* at 7.

169. See *id.* at 15.

170. See *id.* at 15-16.

171. See Michael Winship, *The Rise of a National Book Trade System in the United States*, in 4 *A HISTORY OF THE BOOK IN AMERICA: PRINT IN MOTION* 56, 57 (Carl F. Kaestle & Janice A. Radway eds., 2009).

172. See *id.* at 60-61 tbl.3.1. Further, the shift in infringement doctrine during this period has been attributed to the rise of a concept of the "romantic author," that is, a view that copyright law was primarily a protection of the author's artistic genius. See Peter Jaszi & Martha

growing number of mass-produced pianos.¹⁷³ Theatrical productions became increasingly mobile with the rise of booking agents and theatrical circuits.¹⁷⁴ The film industry rose from novelty to global dominance within twenty years.¹⁷⁵

The result was the emergence of the popular culture we are familiar with today.¹⁷⁶ Publishers in every creative field suddenly faced a huge demand for new works, which led to a scramble to find source material for the next big hit.¹⁷⁷ Plays borrowed from books, films borrowed from short stories, plays and films borrowed from each other, all with a considerable amount of money at stake.¹⁷⁸ This led, naturally, to a boom in litigation between rival industries, authors, and publishers over the limits of the property rights underlying their efforts.¹⁷⁹ Daly, struggling to maintain his stock theater company in the midst of a shift to regional productions, had anticipated this trend by several decades.

B. *The Sequence of Events Test*

When the first cases began to arise in this new era, the courts looked to Judge Blatchford's lengthy analysis in *Daly v. Palmer* for guidance.¹⁸⁰ At the turn of the century, courts were faced with a number of difficult claims of whether a play that resembled the plot of a short story, or a silent film that acted out scenes from a novel, without taking any of the dialog or language of the story, was infringing.¹⁸¹ In Britain, contemporaneous courts took the view that some appropriation of the words from a novel or script was necessary to find infringement.¹⁸² But American

Woodmansee, *Copyright in Transition*, in 4 A HISTORY OF THE BOOK IN AMERICA: PRINT IN MOTION (Carl F. Kaestle & Janice A. Radway eds., 2009). That view might have been easier to maintain, however, given the shift from informational works to artistic works toward the end of the nineteenth century. See Winship, *supra* note 171, at 60–61 tbl.3.1.

173. See DAVID SUISMAN, SELLING SOUNDS: THE COMMERCIAL REVOLUTION IN AMERICAN MUSIC 18–19 (2009); Frick, *supra* note 24, at 209.

174. Frick, *supra* note 24, at 205, 212–13.

175. ANN DOUGLAS, TERRIBLE HONESTY: MONGREL MANHATTAN IN THE 1920S 191 (1995).

176. According to Douglas, “[t]he modern world as we know it today, all the phenomena that to our minds spell the contemporary . . . arrived on the scene” in the 1920s. *Id.* at 192.

177. *Id.* at 189.

178. See, e.g., Jessica Litman, *Silent Similarity*, 14 CHI.-KENT J. INTELL. PROP. 11, 16–17 (2015) (describing rise in litigation over silent films).

179. *Id.* at 16–17.

180. See, e.g., *Harper & Bros. v. Kalem Co.*, 169 F. 61, 63 (2d Cir. 1909) (discussing Judge Blatchford's opinion).

181. See, e.g., *id.* at 62.

182. See *Tate v. Fullbrook*, (1908) 1 KB 821, 830 (Eng.). At least one United States judge, Martin Manton of the Southern District of New York, appeared to agree with this position, and thus rejected *Daly*: “A copyright extends only to the arrangement of the words. A copyright does not give a monopoly in any incident in a play.” *Eichel v. Marcin*, 241 F. 404, 408–

courts rejected this view, noting that any adaptation between media would necessarily change much of the language.¹⁸³ Fairly quickly, the courts, with the Second Circuit taking the lead, developed a two-pronged approach: plot elements that had appeared in earlier works would not be protected, but if a comparison of the two works revealed a series of incidents in common, sufficient to “appropriate[] the theme of another’s story,” infringement would be found.¹⁸⁴

An early example of this sort of reasoning was *Dam v. Kirk La Shelle Co.*, a lawsuit by the author of a short story published in a magazine against the producers of an allegedly similar play.¹⁸⁵ Dam’s story, *The Transmogrification of Dan*, concerned the “change of the disposition and character of ‘Dan,’ the central figure, from a man of submissive temperament in his household and toward his wife and mother-in-law to a man of commanding and asserting mien upon his becoming a father.”¹⁸⁶ The trial court found the story copyrightable because “[n]o other play, drama, or literary production is called to my attention, and I have examined the exhibits in evidence, from which it may be ascertained that the subject of the author’s composition . . . was not original.”¹⁸⁷ And the court held that the defendants’ play “substantially imitated” Dam’s story because “[t]he actors in the play . . . portray or imitate the characters in the copyrighted story, and in addition thereto make use of incidents and situations which apparently give expression to the central theme or purpose of the author.”¹⁸⁸

There were two problems with this use of *Daly*’s sequence of events method, however. One was that the line between uncopyrightable “plots” and copyrightable “themes” was difficult to discern, and thus an unreliable basis for distinction. Take, for example, *London v. Biograph Co.*, a case decided a few years after *Dam* that involved a rather obvious attempt by D.W. Griffith to make a silent film version of Jack London’s short

09 (S.D.N.Y. 1913).

183. See *Dam v. Kirk La Shelle Co.*, 175 F. 902, 907 (2d Cir. 1910).

184. See *id.* at 907; *Hubges v. Belasco*, 130 F. 388, 388 (C.C.S.D.N.Y. 1904).

185. 175 F. at 907. Dam had sold his story to the magazine, but the court found, improbably, that he had retained ownership of the dramatization right. *Id.* at 909.

186. *Dam v. Kirke La Shelle Co.*, 166 F. 589, 592 (C.C.S.D.N.Y. 1908), *aff’d*, 175 F. 902 (2d Cir. 1910).

187. *Id.*

188. *Id.* Although neither the trial court nor the Second Circuit in *Dam* cited *Daly*, or many other cases, later cases attributed the “sequence of events” inquiry to *Daly*. See, e.g., *Chappell & Co. v. Fields*, 210 F. 864, 865 (2d Cir. 1914); *Curwood v. Affiliated Distribs. Inc.*, 283 F. 223, 228 (S.D.N.Y. 1922); *Int’l Film Serv. Co. v. Affiliated Distribs. Inc.*, 283 F. 229, 234 (S.D.N.Y. 1922); *Frankel v. Irwin*, 34 F.2d 142, 143 (S.D.N.Y. 1918).

story, “Just Meat.”¹⁸⁹ The district court found infringement and enjoined the film,¹⁹⁰ but the Second Circuit reversed.¹⁹¹ It boiled the plots of both works down to “the fundamental idea . . . the one strong dramatic touch, which makes both salable,” which the Second Circuit summarized as “the mutual poisoning of the criminals, who thus die by their own hands.”¹⁹² That plot idea, however, was “an old one; it appears in Chaucer’s Pardoner’s Tale.”¹⁹³ The Second Circuit therefore found it unprotectable “common property,” despite the fact that it was hardly less specific than the story protected in *Dam*.¹⁹⁴ The remainder of the similarities between the two works the court dismissed as minor and unimportant: “[N]ot a single one of them is dramatic, exciting, or attractive as was the Railroad Scene in *Under the Gaslight*.”¹⁹⁵

A second problem with the sequence of events method was that the search for common incidents encouraged plaintiffs’ attorneys to compile long analyses of each work, pointing out the numerous similarities in the plot or incidents, and leaving the judge sitting in equity to sift through them all.¹⁹⁶ For example, in *Curwood v. Affiliated Distributors, Inc.*, after reviewing “the voluminous exhibits introduced upon the trial,” Judge John Knox held that the silent film *I Am the Law* had not infringed upon a scene from the plaintiff’s novel, *The River’s End*.¹⁹⁷ In both, the female protagonist winds up captive at a Chinese opium den in western Canada.¹⁹⁸ Drawing from his own knowledge of dime novels and melodramas outside the record, Judge Knox held the general scenario to be “more or less indigenous to stories of the Western and Northern frontier,” and thus uncopyrightable.¹⁹⁹ And in the specific details of the two scenes, Judge

189. 231 F. 696, 697 (2d Cir. 1916); see Litman, *supra* note 178, at 24.

190. *London*, 231 F. at 699.

191. *Id.*

192. *Id.* at 697–98.

193. *Id.* at 698; see Eichel v. Marcin, 241 F. 404, 411 (S.D.N.Y. 1913) (“The copyright cannot protect the fundamental plot, which [wa]s common property . . . long before the story was written.”).

194. *London*, 231 F. at 699.

195. *Id.* at 698.

196. See Litman, *supra* note 178, at 28–29 (citing cases); Underhill v. Belasco, 254 F. 838, 838–41 (S.D.N.Y. 1918); Stodart v. Mutual Film Corp., 249 F. 507, 508–09 (S.D.N.Y. 1917); Fendler v. Morsoco, 171 N.E. 56, 56 (N.Y. 1930).

197. 283 F. 223, 224, 228 (S.D.N.Y. 1922) (“It follows that upon this branch of the case I can afford plaintiff no relief.”).

198. *Id.* at 224 (“The attack in this regard is principally directed at a certain scene of the picture which depicts the imprisonment of the story’s heroine in, and her rescue from, a certain ‘Chinese den’ located at a mythical outlying settlement somewhere in the Hudson Bay country of Canada.”).

199. *Id.* at 227.

Knox concluded that even if the film had been inspired by the book, there were important differences in the sequence of events.²⁰⁰ “To apply the reasoning of [*Daly*] to the one at bar, I fail to find that the same impressions will be created, and the same emotions excited, in the same sequence and order, by a dramatic presentation of the Chinese ‘den’ scenes of the two stories in litigation.”²⁰¹

In a companion case, however, Judge Knox decided that *I Am the Law* infringed the entire plot of a different Curwood novel, *The Valley of Silent Men*.²⁰² Both works featured heroes and villains who were members of the Royal Canadian Mountain Police.²⁰³ In both, the hero confessed to a crime he had not committed, for similar reasons, and became a fugitive; ultimately captured, the heroes were saved as they awaited transportation to a different place for trial.²⁰⁴ Judge Knox concluded, “[p]ossibly other points of similarity might be found, but I am of the opinion that such as have been specified are sufficient to indicate that the ‘same use is made . . . of the same series of events to excite, by representation, the same emotions, in the same sequence.’”²⁰⁵ The different results in the two cases, reached after a review of several similar details in each, pointed to the shortcomings of the “sequence of events” analysis.

The culmination of this trend came in 1929, in *Nichols v. Universal Pictures Corp.*—the “Abie’s Irish Rose” case—when Judge Henry Goddard received evidence from the parties on both the “old plot” and “sequence of events” issues for almost a month.²⁰⁶ The size of the *Nichols* record drew a reproofing comment from Judge Learned Hand on appeal.²⁰⁷ But even before then, some judges and lawyers had begun looking for an alternative to detailed analyses of the sequence of events to help them make the infringement determination in complex cases, or in cases involving visual or musical works, where there *was* no sequence of events. In 1917, Arthur Weil suggested one such possibility.²⁰⁸ In his influential

200. *Id.* at 228.

201. *Id.*

202. *Int’l Film Serv. Co. v. Affiliated Distributions, Inc.*, 283 F. 229, 235 (S.D.N.Y. 1922).

203. *Id.* at 231.

204. *Id.* at 234.

205. *Id.* (quoting *Daly v. Palmer*, 6 F. Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3,552)).

206. 34 F.2d 145 (S.D.N.Y. 1929), *aff’d*, 45 F.2d 119 (2d Cir. 1930). For a summary of the proceedings, see Litman, *supra* note 178, at 31–41.

207. *Nichols*, 45 F.2d at 123 (“We cannot approve the length of the record, which was due chiefly to the use of expert witnesses.”).

208. See ARTHUR W. WEIL, *AMERICAN COPYRIGHT LAW* 396–97 (1917).

treatise on copyright law, the most comprehensive until the Nimmer treatise appeared many decades later,²⁰⁹ Weil proposed a “suggested definition” of an infringing copy as “that which, having been derived or taken from the original, comes so near to the original as to make the same or a substantially similar impression, as was made or would be made by the original, upon the mind of every average, reasonable person seeing it.”²¹⁰ While making clear that his proposed test was his own invention, Weil added a footnote citing *Daly*’s discussion of the impressions and emotions created in the mind of the spectator.²¹¹ But he did so with a “*cf.*” signal, indicating that his test was not drawn directly from *Daly*.²¹²

C. The Audience Test

Whether they got it from Weil, or from music infringement cases earlier in the decade,²¹³ later courts quickly embraced the audience test for infringement as a simple way to make a determination of infringement without a detailed consideration of every similar incident. The audience test did not, however, wholly displace the sequence of events test. Courts tended to use one or the other, or sometimes both.²¹⁴ One of the earliest adopters of the audience test was Judge Charles Hough of the Southern District of New York.²¹⁵ In an initially unpublished opinion in *Frankel v. Irwin*,²¹⁶ Hough largely dismissed the efforts of counsel to prove or disprove that the sequence of events was the same:

Counsel have furnished labored analyses of each play; the work on both sides is excellent, but is to me illustrative of the classic difficulty of not being able to see the forest for the trees. Infringement of a work of imagination is determined by the result of comparative reading on the imagination of the reader, not by a dissection of sentences and incidents, suitable for the study of a digest or text-book, but inherently unnatural

209. See Stanley Rothenberg, *Book Review*, 11 BULL. COPYR. SOC’Y U.S.A. 207, 208 (1964) (reviewing NIMMER, *supra* note 15).

210. WEIL, *supra* note 208, at 396.

211. See *id.* at 396–97 n.74 (citing *Daly v. Palmer*, 6 F. Cas. 1132, 1138 (S.D.N.Y. 1868) (No. 3,552)).

212. WEIL, *supra* note 208, at 396 n.74.

213. See, e.g., *Hein v. Harris*, 175 F. 875, 877 (C.C.S.D.N.Y. 1910), *aff’d*, 183 F. 107 (2d Cir. 1910). In *Hein*, Judge Learned Hand concluded that “[t]he collocation of notes, which constitutes the composition . . . ceases to be an invention, and becomes an infringement, only when the similarity is substantially a copy, so that to the ear of the average person the two melodies sound to be the same.” *Id.*

214. See, e.g., *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F. 533, 535–36 (2d Cir. 1938).

215. See *Frankel v. Irwin*, 34 F.2d 142, 143 (S.D.N.Y. 1918).

216. Although decided in 1918, Hough’s opinion in *Frankel* was not published until 1929, when it was apparently included because it was cited in the *Nichols v. Universal Pictures Corp.* district court opinion. See 34 F.2d 145, 148 (S.D.N.Y. 1929).

for any man who has the kind of brains that make him able to adapt a work of fiction.²¹⁷

Applying his more holistic test to the two plays at issue in *Frankel*, Judge Hough concluded “I can see nothing but differences.”²¹⁸

By 1924, Judge Hough had been elevated to the Second Circuit, where he was joined by Judge Martin Manton, one of the few early dissenters from the adoption of the sequence of events test.²¹⁹ In *King Features Syndicate v. Fleischer*, Judge Manton held a toy horse patterned after the Mutt & Jeff comic to be infringing, based on ordinary observation: “A copy is that which ordinary observation would cause to be recognized as having been taken from or the reproduction of another.”²²⁰ In *Dymow v. Bolton*, Judge Hough reversed the district court’s grant of an injunction to one playwright against another based on what Judge Hough called the “incomplete skeleton the two plays have in common”:

[T]he copyright, like all statutes, is made for plain people; and that copying which is infringement must be something ‘which ordinary observations would cause to be recognized as having been taken from’ the work of another. It requires dissection rather than observation to discern any resemblance here. If there was copying (which we do not believe), it was permissible, because this mere subsection of a plot was not susceptible of copyright.²²¹

Judge Learned Hand, who was prone to engage in his own lengthy dissections of works, nevertheless agreed after seeing Anne Nichols’s elaborate efforts to find similarities between the two works in *Nichols v. Universal Pictures Corp.*, that “[t]his is not the proper approach to a solution; it must be more ingenuous, more like that of a spectator, who would rely upon the complex of his impressions of each character.”²²² By the time

217. *Frankel*, 34 F.2d at 144. Judge Hough, however, appeared to view his test as a window into what the defendants had done, rather than how it would impact the plaintiff’s market; that is, as a test for copying rather than misappropriation: “The object of comparison is to find out what the alleged infringer probably did; and, the investigation should be gauged to the kind of man who does the sort of work under consideration.” *Id.* at 145. This confusion between copying and infringement would not be confronted head on until *Arnstein v. Porter* in 1946. 154 F.2d 464, 468 (2d Cir. 1946).

218. *Frankel*, 34 F.2d at 144. The two plays had a common premise—families that had broadcast their intent to summer in Europe are instead forced to hide in their own houses—but beyond that, Judge Hough found little similarity. *See id.*

219. *See Eichel v. Marcin*, 241 F. 404, 409 (S.D.N.Y. 1913) (“A copyright does not give a monopoly in any incident in a play.”).

220. 299 F. 533, 535 (2d Cir. 1924).

221. 11 F.2d 690, 692 (2d Cir. 1926) (quoting *King Features Syndicate*, 299 F. at 535).

222. 45 F.2d 119, 123 (2d Cir. 1930).

of Judge Manton's opinion in *Fleischer Studios Inc. v. Ralph A. Freundlich, Inc.*, the audience test had metamorphosed even further, from the judge's "ordinary observation" to an assessment of what the "ordinary observer" would perceive: "What the appellant constructed is recognizable by an ordinary observer as having been taken from the copyrighted source. Such is an infringement."²²³

It is important to keep in mind that almost all copyright decisions at this time were made by courts sitting in equity, without a jury.²²⁴ Prior to the adoption of the Federal Rules of Civil Procedure in 1938, all claims for injunctive relief were heard by a court sitting in equity, and even long afterward, courts continued to hear claims for equitable relief without juries.²²⁵ Thus, the audience test, as it was used in *Daly*, was really an appeal to the judge's own subjective impressions of the two works and was not intended to establish the market impact of copying among the relevant audience.²²⁶ One of the few exceptions to this prior to 1946 came from the Ninth Circuit. In *Harold Lloyd Corp. v. Witwer*, the court attempted to determine whether the defendants' silent film infringed on the plaintiff's short story by imagining the reaction of "a fairly indifferent and disinterested spectator of the moving picture play, . . . given an interval of two or three weeks between a casual reading of the story and a similar uncritical view of 'The Freshman.'"²²⁷

The audience test proved no more predictable in application than the sequence of events test, and worse, the search for a way to shorten infringement trials had generated its own problems. The district courts began comparing works at an early stage of the case to assess their similarities, using party-prepared synopses in many cases to apply either the sequence of events test or the audience test.²²⁸ District courts were granting summary judgment or even motions to dismiss on such a basis, without, in many cases, even determining whether or not there had been any

223. 73 F.2d 276, 278 (2d Cir. 1934) (citing *Nutt v. Nat'l Inst., Inc. for Improvement of Memory*, 31 F.2d 236, 238 (2d Cir. 1929)).

224. WEIL, *supra* note 208, at 171.

225. For reasons that are unclear, copyright and patent infringement actions continued to be tried in bench trials long after a jury trial right was established, until approximately 1980. Cf. Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1706 (2013) (documenting sudden rise in patent jury trials "from 8.3% in 1978 to 70% in 1994").

226. *Caruthers v. R.K.O. Radio Pictures*, 20 F. Supp. 906, 907 (S.D.N.Y. 1937); *Shipman v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 249, 250 (S.D.N.Y. 1937); *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632, 639 (S.D. Cal. 1935); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 7 F. Supp. 837, 840 (S.D.N.Y. 1934); *Lowenfels v. Nathan*, 2 F. Supp. 73, 80 (S.D.N.Y. 1932).

227. 65 F.2d 1, 27 (9th Cir. 1933).

228. See, e.g., *Echevarria*, 12 F. Supp. at 637.

actual copying.²²⁹ The Second Circuit warned district courts away from this practice in *Dellar v. Samuel Goldwyn, Inc.*, noting that the issue of substantial similarity “is the most troublesome in the whole law of copyright, and ought not to be resolved in cases where it may turn out to be moot, unless the advantage is very plain.”²³⁰ Perhaps concerned by the subjectivity of the inquiry, the Second Circuit discouraged the investment of substantial judicial resources in substantial similarity determinations when easier factual issues might resolve the case.²³¹

By late 1938, Judge Manton had had enough. In *Shipman v. R.K.O. Radio Pictures, Inc.*, he penned a diatribe against the way the infringement determination had been made within the Second Circuit for the past seventy years, ever since *Daly*.²³² *Daly v. Palmer*, Manton asserted, was the case that had started it all: “From this case stemmed the modern law of copyright cases, with the result that it is now held that ideas are not copyrightable but that sequence of events is; the identity of impression must be capable of sensory perception by the audience.”²³³ In other words, Manton attributed both the audience test and the sequence of events test to *Daly*. The audience test, he claimed, “perhaps because of its impracticability, has had an artificial and disappointingly inaccurate application.”²³⁴ The sequence of events test was hardly better, as it did not distinguish those events that were copyrightable from those that were not.²³⁵ Referring to the Railroad Scene, he noted:

Clearly though, it would seem an impossible task to separate the author’s idea of having a heroine rescuer from actually having a rescuer. To label the former an idea and the latter an incident or event is not helpful in determining what is protected by copyright and what is not.²³⁶

Manton criticized *Dam v. Kirk La Shelle Co.* for protecting an idea,

229. See *Caruthers*, 20 F. Supp. at 906; *Shipman*, 20 F. Supp. at 250; *Echevarria*, 12 F. Supp. at 639; *Sheldon*, 7 F. Supp. at 844; *Lowenfels*, 2 F. Supp. at 80.

230. 104 F.2d 661, 662 (2d Cir. 1939).

231. See *id.* In *MacDonald v. Du Maurier*, 44 F.2d 696 (2d Cir. 1944), the Second Circuit later explained in more detail what it believed the problem to be with such a procedure:

In an infringement suit coming up in this way we believe that a judge unconsciously tends to make a summary judgment which disregards the concession of copying; when upon a reading of the two works it seems unlikely from their relative merits that the common matter could have been borrowed, the judge will hold, without quite saying so even to himself, that it was not borrowed. To do this is to deprive the plaintiff of his day in court; and that is the real vice of the procedure here adopted.

Id. at 701.

232. See 100 F.2d 533 (2d Cir. 1938).

233. *Id.* at 536.

234. *Id.*

235. *Id.*

236. *Id.*

the mere theme of the plaintiff's story, and *Dymow v. Bolton* for conflating plot and theme and saying neither were copyrightable.²³⁷ Even though Learned Hand was a member of the panel, Manton derided Hand's levels of abstraction test in *Nichols* as "using the terminology of metaphysics," which, he suggested, might be why "the rule thus provided does not seem to have been used since its suggestion."²³⁸ Manton dismissed Hand's opinion in *Sheldon v. Metro-Goldwyn Pictures Corp.* as conflating copying and substantial similarity (or "fair use," as Hand had called it), answering both questions "by examining exactly the same characteristics."²³⁹ Manton proposed, instead, a "simplified test": "[I]f there is access, the probability that the similarities are the result of copying intentional or unintentional, is so high that there is only one pertinent question: are there similarities of matters which justify the infringement claimed?"²⁴⁰

Hand, mortified, responded carefully: "I agree with the result and with the general reasoning by which it is reached as I understand it, but I do not agree with all that is said."²⁴¹ Hand disagreed that levels of abstraction meant anything different than separating incidents and general ideas, and that the court's prior discussion of "themes" and "plots" reflected a similar distinction.²⁴² Within a few months of *Shipman*, Judge Manton had resigned from the court, one step ahead of a bribery scandal.²⁴³ In *Dellar*, the three judges of the panel took the opportunity to demote Manton's *Shipman* opinion to "the minority opinion," and Hand's opinion to "the majority opinion," which "alone is authoritative."²⁴⁴

It is unclear why Manton cited *Daly* as the origin of the audience test in *Shipman*. Although the Weil treatise suggested such a possibility, no prior court had cited *Daly* in support of using an audience test, as opposed to making a subjective evaluation of the sequence of events.²⁴⁵ In any event, the designation has stuck, particularly once it was repeated and *Daly* was criticized at length in the first Nimmer treatise.²⁴⁶ It is particularly tenuous to cite *Daly* as the source of the ordinary observer test,

237. *Shipman*, 100 F.2d at 536–37.

238. *Id.* at 537 (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936)).

239. *Id.*

240. *Id.*

241. *Id.* at 538 (Hand, J., concurring).

242. *Shipman*, 100 F.2d at 538.

243. See Allan D. Vestal, *A Study in Perfidy*, 35 IND. L.J. 17, 40 (1959).

244. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

245. See WEIL, *supra* note 208, at 396.

246. See MELVILLE NIMMER, COPYRIGHT §§ 143.51–.52 at 634–47 (1964) (on file with Law Library of Congress).

which only began to emerge for nonmusical works in the 1930s. There is, ironically, nineteenth-century support for inquiring about the ordinary observer, but it is not *Daly*, but rather *Falk v. Donaldson*, which in turn borrowed the test from design patent law.²⁴⁷

Judge Hand, along with Judge Jerome Frank, made their own attempt to reform infringement doctrine eight years after Judge Manton's outburst. In *Arnstein v. Porter*, Judge Frank's opinion identified the sequence of events test and the audience test as two different components of a single test for infringement.²⁴⁸ First, the *Arnstein* opinion classified the comparison of similar events or incidents in two works, by dissecting the works into their component parts, as a test for *copying*, not infringement.²⁴⁹ This reduced the need to compare long and detailed analyses of all of the similar plot points between works, because once actual copying was established, the first element was satisfied.²⁵⁰ Second, the *Arnstein* opinion assigned the audience test the task of determining whether the copying had risen to an infringing level—to substantial similarity, as it became known.²⁵¹ And for the first time, the court clearly stated that the audience test is not to be evaluated from the point of view of the judge acting as an observer, but rather from that of a lay juror.²⁵²

The citations to *Daly* ceased almost immediately after *Arnstein*.²⁵³ The last federal case citation until recently was 1947's *Universal Pictures Co. v. Harold Lloyd Corp.*,²⁵⁴ which involved a situation almost exactly like the original *Daly*—the duplication of the action of a particular scene from an earlier work.²⁵⁵ *Daly* thereafter lay dormant in federal case law until 2016, when it was cited in the Ninth Circuit's opinion in *VMG*

247. *Falk v. Donaldson*, 57 F. 32, 35 (C.C.S.D.N.Y. 1893) (citing *Gorham Co. v. White*, 81 U.S. 511, 528 (1872)).

248. 154 F.2d 464, 468 (2d Cir. 1946).

249. *Id.*

250. *See id.*

251. *Id.*

252. *Id.* at 473.

253. Citing references for *Daly v. Palmer*, LEXISNEXIS, <https://advance.lexis.com/shepards/shepardspreview/> (enter “Daly v. Palmer” in search field; select “Daly v. Palmer”; follow “citing references” hyperlink) (showing that cases have not cited *Daly v. Palmer* since 1968).

254. 162 F.2d 354, 363 n.7 (9th Cir. 1947) (citing *Daly v. Webster*, 56 F. 463, 486–87 (2d Cir. 1892)); Citing references for *Daly v. Webster*, LEXISNEXIS, <https://advance.lexis.com/shepards/shepardspreview/> (enter “Daly v. Webster” in search field; select “Daly v. Webster”; follow “citing references” hyperlink) (showing that *Daly v. Webster* has not been cited in federal courts since *Universal Pictures Co. v. Harold Lloyd Corp.* in 1947).

255. *Universal Pictures Co.*, 162 F.2d at 360.

Salsoul, LLC v. Ciccone, a case considering the applicability of the substantial similarity test for sampling of sound recordings.²⁵⁶ The Ninth Circuit cited *Daly* for the proposition that “[t]he rule that infringement occurs only when a substantial portion is copied” can be traced “to the mid-1800s.”²⁵⁷ Of course, *Daly* is widely cited in the academic literature, typically as the source of the audience test for substantial similarity.²⁵⁸ But *Daly*’s complicated relationship to that test is seldom explored.

CONCLUSION

Copyright law often seems anecdotal, particularly for judicially made doctrines such as substantial similarity and fair use. Parody is illustrated with 2 Live Crew’s *Pretty Woman*;²⁵⁹ copying an artist’s style with Saul Steinberg’s *A View of the World from Fifth Avenue*;²⁶⁰ and following a trend with Anne Nichols’s *Abie’s Irish Rose*.²⁶¹ For a time, Augustin Daly’s Railroad Scene provided one of those anecdotes as well. Its rise as precedent is somewhat easily explained. It had the benefit of a thorough, well-written judicial opinion. It involved an easily understood factual scenario. And it anticipated a later conflict by about thirty years—long enough to make it into the treatises, but not so long as to be forgotten.

What explains *Daly*’s sudden disappearance from the case law? A number of factors seem to have coalesced roughly contemporaneously. For one thing, the genre of melodrama, and the Railroad Scene in particular, came to be a target of ridicule in the twentieth century,²⁶² making *Daly* less attractive as an anecdote. Second, the switch to using probative similarity, instead of a full comparison of similar incidents, and the adoption of the ordinary observer test, removed the need for significant judicial decision-making on either inquiry.²⁶³ The same could be said for the

256. 824 F.3d 871, 874 (9th Cir. 2016). *Daly* was cited in the interim in one New York case, *Turner v. Century House Pub. Co.*, 290 N.Y.S.2d 637, 642 (N.Y. Sup. Ct. 1968).

257. *Id.* at 880.

258. *See, e.g.*, NIMMER, *supra* note 15, § 13.03[E][2].

259. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572–73 (1994).

260. *See* Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 712 (S.D.N.Y. 1987).

261. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 120 (2d Cir. 1930).

262. *See* Fritzi Kramer, *Silent Movie Myth: Tied to the Railroad Tracks*, MOVIES SILENTLY (Mar. 12, 2013), <http://moviessilently.com/2013/03/12/silent-movie-myth-4-tied-to-the-railroad-tracks/>. The Railroad Scene was parodied in films as early as 1913’s *Barney Oldfield’s Race for a Life*, and by 1961 was so familiar as to be featured in *Dudley Do-Right*. *Id.*; *Inspector Do-Right*, INTERNET ANIMATION DATABASE, http://www.intanibase.com/shorts.aspx?shortID=9899#page=general_info (last visited Nov. 9, 2017).

263. *See* ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN

need to prove access to establish infringement, which terminates a number of infringement actions before the issue of similarities is even reached. Third, the end of the silent film era in the early 1930s eliminated the source of one of the most troublesome infringement issues, namely the challenge of determining whether a novel or play was duplicated by a short series of moving images interspersed with title cards.²⁶⁴

But, also, copyright law simply moved on. By the 1940s, the boom era of mass consumer culture was ending.²⁶⁵ The transition from local to national markets was complete; even if new media were to arise, there was no longer a desperate need to fill a void with mass-produced entertainment products.²⁶⁶ And in the 1950s and '60s, the Second and Ninth Circuits began to consider other issues, such as contributory liability for duplicating sound recordings,²⁶⁷ the extent of copyright protection in industrial products such as fabric and toys,²⁶⁸ and the rise of fair use as a defense to an infringement claim.²⁶⁹ Traditional substantial similarity cases fell to become only a small portion of the courts' dockets, a situation that would not change until the 1970s, when the growing importance of television, film, and recorded music would again produce disputes between rival creators and publishers.

The citation to *Daly* in *VMG Salsoul* comes at a time when the appropriateness of judicial and jury decision-making based on reasonableness standards is again being questioned. It may perhaps signal the beginning of an effort to revisit the issues that *Daly* put on the table over one hundred and fifty years ago.

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264. See Diana Foster, *The History of Silent Movies and Subtitles*, VIDEO CAPTION CORP. (Nov. 19, 2014), <https://www.vicaps.com/blog/history-of-silent-movies-and-subtitles>; Litman, *supra* note 178, at 46–47.

265. See Kaestle & Radway, *supra* note 162, at 7.

266. See Quint Randle, *A Historical Overview of the Effect of New Mass Media Introductions on Magazine Publishing During the 20th Century*, FIRST MONDAY (Sept. 3, 2001), <http://firstmonday.org/article/view/885/794>.

267. See *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260, 262 (2d Cir. 1957).

268. See *Mazer v. Stein*, 347 U.S. 201, 202 (1954); *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 488 (2d Cir. 1960).

269. See *Benny v. Loew's Inc.*, 239 F.2d 532, 533 (9th Cir. 1956).