

Why Ask for Permission?

MELVILLE CANE

IN A RECENT issue of *Life* reference was made to five hit tunes by Gershwin, Youmans, Schwartz, and Berlin, two lines of each lyric being quoted. After each quotation appeared a notice of copyright, with the date of copyright and the name of the copyright proprietor, a music-publishing corporation. At the foot of the article the public was further advised that these five couplets were reprinted in each case by permission of the copyright owner.

At about the same time Harcourt, Brace & Co. issued a lecture by the novelist Eudora Welty on the art of the short story. Miss Welty chose to consider the work of S. J. Perelman, Stephen Crane, Katherine Mansfield, Chekhov, D. H. Lawrence, William Faulkner, Henry James, and E. M. Forster. She quoted fragments from each author. That either Miss Welty or the publisher felt under the necessity of obtaining clearances in order to escape a charge of infringement seems evident from the list of acknowledgments covering an entire page.

I contend that in each case the publishers had a perfect right to use the quotations without so much as a by-your-leave or a credit line, that far from being guilty of a violation of copyright they were actually conferring a benefit by creating further interest in and commercial advantage to the authors thus cited, and that the copyright owners, far from exacting a permissions fee, if they did so, should have been grateful for the windfall of publicity they didn't have to pay for.

In fact and in law you don't have to get permission to insert in an article on popular songs:

Let's have another cup o' coffee,
And let's have another piece o' pie.

SOLUTION OF LAST WEEK'S
DOUBLE-CROSTIC (No. 848)

POLLARD:
JOHN GREENLEAF WHITTIER
(*Friend of Man*)

In writing verse Whittier was much less facile. Here his capital difficulty was with poetic diction. Hitting upon the just word was always hard for him, an initial obstacle that even with years of practice he never entirely conquered.

And you don't have to get permission to quote eight lines from a football song in an article on the "Green Bay Packers" in *The Saturday Evening Post* (Karl v. Curtis Pub. Co., 39 Fed. Supp 836).

The least bit of firmness will put an end to this sort of needling, often expensive. In William Saroyan's novel "The Adventures of Wesley Jackson" the hero in his more jubilant moods is in the habit of warbling a snatch from the once popular song "Valencia" with his own embellishments, as follows:

Valencia!
In my dreams
It always seems
I hear you softly calling me!
Valencia!
Dat tarrata
Dat tarrata
Dat tarrata, dat ta ta!

Before long Saroyan's publishers received a complaint, for permission—quite properly—had not been asked. "We are at a loss to know," the letter concluded, "by what authority they [fourteen words] were used." We replied, rather pompously, "that our authority derives from the judicial decisions based on the Copyright Act," and for good measure threw in a number of citations in point. The matter ended right there. The bluff had been called.

How or when this supposed need for permission to quote first came into practice I don't happen to know. But that it calls for immediate correction is abundantly clear. At the least it's a nuisance; at the worst it has a nuisance value, especially when money is demanded in return for the assumed "privilege." It may draw heavily on the purse of an author charged with delivering a manuscript free from any third-party claim. In some cases the burden of assuming this liability has even defeated publication and thus deprived the author of the fruits of his labors.

Certainly the Copyright Law of the United States gives no warrant for this practice. With equal certainty no copyright decision either directly or by *obiter dictum* supports it. To the contrary, the text writers with unanimity point out the difference between unfair use of copyright material, which constitutes infringement with its attendant penalties, and fair

use, as found in the *Life* article and in the Welty book.

I suppose the test of fair use would be whether the new work in which the quoted passages appear competes with the earlier work. If so it is an unwarranted invasion in that it impairs the market for the work from which it draws; it thus produces, whether or not intentionally, a legal injury capable of being redressed by an injunction against the further circulation of the competing book or song, as well as by damages and profits flowing from the infringement.

If Eudora Welty instead of writing an essay on the art of the short story had compiled an anthology of short stories and included without permission a story by Faulkner she would have been guilty of an actionable infringement by creating a rival work to the original copyrighted Faulkner. Similarly, if anyone should publish an anthology of modern poetry and use without permission copyrighted poems by Robert Frost or T. S. Eliot he would equally be guilty of infringement and responsible in the courts. The same rule applies to reprints in digests or the like. One cannot make a use of this kind unless he pays for it. Which is as it should be.

THE English Copyright Act of 1911, still the law today, specifically provides that "any fair dealing with any



work for the purpose of private study, research, criticism, review, or newspaper summary, shall not constitute an infringement." This definition simply restates the law in England and in this country. I don't suppose any publisher or author would question the right of a book reviewer to make free use of quotation. Certainly, in a review of a book of poetry quotation is perhaps the most effective way of communicating the quality and substance of the work. And yet when quotation is to be made in a more extended piece of literary criticism the copyright owner usually insists that his permission is not only necessary but will be withheld unless his money demands are satisfied. I contend this to be wholly indefensible, both legally and as a matter of common sense.

IN HIS preface to "New Directions Eleven," published this year, James Laughlin speaks from painful experience and with serious concern over this unhealthy condition:

If we have a poorly thriving literary criticism in this country, one reason is the Critical Permissions Racket. If a critic writes a critical study of an author, he naturally needs to quote quite a bit from that author's work. But when he asks permission from the author's publisher to use these citations, nine times out of ten he will get a whopping bill for the privilege. I had to do with one case where the permission fees demanded were four times the critic's possible royalties from the sale of the entire first printing of his book. Naturally a situation like this discourages literary criticism. And it is extremely shortsighted too; good critical books help to build up the reading public for quality literature. But since critics have no union to stand up for their rights the publishers victimize them continually on this score. Mind you, I am not talking about anthology permissions. That is a different story. An anthologist should pay for the use of another man's poem—always and in full measure. I am speaking simply of quotations from an author's work necessary to illustrate a critical point about him in a serious work of literary criticism. Think it over.

I know of no legal decision which says that you can't quote an *entire* poem in a work of literary criticism. I know that publishers wince at the mere suggestion that this is legal and proper and that they decline to take the risk of following advice in the matter. But I do wish that some publisher with an uncollapsible spine would break the ice-jam and be prepared to defend a lawsuit if tendered.

In asserting the foregoing position I find it to be diametrically opposed to that of Margaret Nicholson. In her

useful "Manual of Copyright Practice" (Oxford University Press, 1945) where she deals with quotations in biographies, histories, and other scholarly and scientific works Miss Nicholson makes this, to me, astounding unsupported statement: "Not more than four lines of poetry should be used without permission, even in this type of work, and *never* a full stanza or poem." I can only add my belief that it is neither good advice nor good law.

The doctrine of fair use, to conclude, springs inevitably from the nature of authorship. The act of publication is an invitation to consider the work, to value it, and to comment upon it freely, whether favorably or unfavorably. Advance in the arts, the sciences, and all the other fields of human thought and concern would be gravely crippled if the right to make legitimate use of the original work were curtailed in any degree.

The following statement in *Ginn v. Apollo Pub. Co.*, 215 Fed. Rep., 772, may be pertinent to show that even a legal copyright, apparently monop-

listic, may have its inherent limitations:

When a copyrighted book is published and sold, however, something is necessarily given to the purchaser and acquired by the general public. One thing acquired is that the author has expressed certain thoughts. This is a fact in literature of which anyone is free to avail himself as he is of any fact made public. It can be commented upon and discussed and the author's work reproduced so far as to make the comments intelligible.

"So far as to make the comments intelligible." Such is the latitude permissible and necessary to the pursuit of scholarship and culture.

It seems to me therefore that publishers owe a plain duty to the public and to posterity to keep open these channels of communication and without the imposition of tolls.

Melville Cane, New York attorney, specializes in copyright law and allied fields. He is a frequent contributor of verse to *SRL* and is the author of several volumes of poetry.



"What we're after in this play, Blandford, is realism. Now, you play a professor who has written an unsuccessful book . . ."

The Saturday Review

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Published by The Saturday Review
Associates, Inc., 25 West 45th Street, New
York 19, N. Y. Harrison Smith, President;
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Save the Libraries

The following editorial was adapted from an address at the recent dedication of the Charles Hayden Memorial Library of the Massachusetts Institute of Technology in Cambridge.

ONE of the world's richest storehouses of cultural treasures before it was destroyed by the bombs in World War II was The Zwinger, of Dresden. The Zwinger was a Versailles-like palace dedicated to the preservation of the glories of the creative spirit in man.

One thing about The Zwinger has always intrigued me. Its name. The Zwinger, literally, is a general name for a prison or place of confinement. I have never been able to make up my mind whether The Zwinger was named in anger or irony. Perhaps the latter; to invest such a place with the image of a prison may reflect a somewhat grim awareness of the fate of too many cultural repositories. Mere preservation of a work of art is lifeless imprisonment, victims of solitary confinement under indefinite sentence.

This is not to say that too large a part of the general public fails to accord works of art with preserving sufficient honor. Indeed, so far as the average American library is concerned, what it suffers from today is excessive public veneration and insufficient public support. People bow from the bottom of their cerebral lobes as they pass a library's august columns; they speak in memorial-chapel whispers when they venture inside the far-from-pearly library gates; they observe an almost statuesque solemnity

in front of the catalogue cards. There is plenty of hushed awe but very little of the welcome tinkle of silver.

As a result, the average American community today is not far from finding itself in a critical position with respect to its library facilities and services. When Andrew Carnegie established his nationwide community library endowment the population of the United States was about half what it is today. Meanwhile, in the last half century the educational level of America has had the most prodigious rise in human history, with respect to numbers and time. Assuming that there is some connection, however frighteningly slight at times, between education and books, it should be apparent that the American people have all but outgrown their present library facilities. Hundreds of new communities in the United States are without any public libraries at all. Meanwhile many hundreds of established libraries are operating in structures badly in need of extensive repairs. Even without reference to the drastic need for expansion, existing equipment in many cases is fast approaching obsolescence. Budgets for new books, the librarians tell us, are only a fraction of what is required just to keep the library's shelves up to date. As for the new developments that properly fall within the sphere of the public library which likes to regard itself as a community center—such developments as documentary-film departments, music-recording departments, microfilming, etc.—only a small handful of public libraries in the country have been fortunate enough to be able to keep up with the times.

All these difficulties of the public library—particularly in the field of research—have added enormously to

the burden of the college and university library. Increasingly, the university library has been called upon by the community and the region to meet a wide variety of needs which formerly could be handled locally. The time is not far off, it seems to me, when the university may be asked to take a direct and leading part in meeting the fast-approaching crisis in community library service. Whether this is done as an extension division of the university, supported by public funds, or on a cooperative basis by colleges and universities over a statewide or regional area, or in cooperation with existing public-library facilities, are questions which may have different answers in different parts of the country.

ONE thing seems certain: public library service in the United States cannot carry on much longer without major reinforcements. Basically, however, the matter comes down to public support. Whether through direct taxation or as part of the community education budget or through voluntary contributions, the library in a democratic society must sooner or later be maintained on a democratic basis. It would be nice to suppose that there is another Andrew Carnegie somewhere getting ready to give \$53,000,000 for local libraries. It would be nice to suppose that there are dozens of John Jacob Astors and Samuel Tildens and James Lenoxes and Enoch Pratts sprinkled all over the United States waiting to establish the seven- and eight-figure endowments in every city and community to meet the new and enlarged needs. Yes, I suppose it would be nice to believe that all this would happen but don't count on it. True, millions of dollars are still being made

This Judas

Georgie Starbuck Galbraith

WEEP not for him who stands betrayed,
Delivered unto anguish.
The riven heart is unafraid.
The spirit does not languish.

Weep not for him whose virtue burns,
A jewel no thieves can plunder.
That regal head can wear its thorns
As mountains wear their thunder.

Weep not for him who walks unbent
Where villainy has bade him.
Weep rather for this penitent,
This Judas who betrayed him!