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NOTES ON THE STATUS OF LITERARY PROPERTY,
1500-1545

At the opening of the sixteenth century printing in Europe was still a new and unregulated craft. Rights in literary property had become somewhat confused because of the survival of the mediaeval custom of selling or renting for copy the manuscripts of the classics, and because of the fashion of circulating "privately" in manuscript the works of living authors. Opposed to the survival of these customs of the past were the urgent needs of printers and publishers for a basis of definitely traceable ownership of copy which would make publishing possible as a commercial enterprise. When the publishers of printed books began to pay living authors for new manuscripts, both publishers and authors felt more keenly the need of means of defending themselves against unauthorized and piratical publications of their works.

There were as yet no definite laws of a statutory nature concerning copyright. Nor were the printers' guilds in any country before 1545 so powerful as to be a recognized and effective medium of control. Aside from the universities, which exercised a local control over their resident stationers, the chief aids in safeguarding rights in literary property were the city authorities and the leading men in church and state. Appeals to these authorities were not infrequent in the first half of the sixteenth century, a period marked by a very lively and unprincipled competition among printers, a keen sense of ownership on the part of those wronged, and an experimental procedure on the part of writers, publishers, and all authorities concerned in the attempts to handle individual cases.

The necessity of some control of literary property may be seen from the fact that in 1500 there were in Venice alone about two hundred competing printers.¹ The first attempt at regulation was by the special privilege for a particular work, which gave exclusive copyright. The system was established in Italy as early as 1469,

¹ Ed. Frommann, *Aufsätze zur Geschichte des Buchhandels im 16. Jahrh.*, Heft II (Italien), p. 15. Jena: Frommann, 1881.

when Johann von Speyer secured from the Venetian senate his privilege for the *Epistolae familiares* of Cicero.¹ An author's privilege was, so far as is known, not granted until September 1, 1486, when Sabellico secured one for his *Decades rerum Venetiarum*. Most of the very early privileges were for editions of the classics; but by 1517 the balance had already swung in favor of "new" works, that is to say, works that were strictly original or works that had not yet been privileged. By an odd confusion of ideas new editions of classics already in print seem for a time not to have been regarded as "new" works.²

The ineffectual operation of both the local privilege granted by the Senate and the theoretically more powerful and extensive privilege granted by the Pope is illustrated by the wholesale piracies of works published by the great humanist, Minutius Aldus. A printer at Breslau counterfeited one of his works, using the imprint of Aldus' edition at Florence. Again, several printers at Lyons closely imitated, even to the use of part of Aldus' imprint, many numbers of the popular series of Latin and Italian texts in the little octavo with the cursive types, which Aldus had been putting out in lots of a thousand or so at three *marcelli* a volume.

In October, 1502, Aldus sent a petition to the Senate of Venice for better protection of both books and types. In this he commented upon the merits of his establishment (the running expenses of which were about two hundred ducats a month); he described the beauties of his types—the Greek types with a ligature which appeared to have been made with a reed pen, and the cursive Roman types which looked like handwriting—and the marvelous diligence and accuracy of his workmanship, which reflected credit upon the city of Venice. After recounting the injuries done him by the Breslau edition with its counterfeited imprint of Florence and by the Lyons imitations making use of his name, imprint, and

¹ Maria Pelligrini, *Della primi origine della stampa in Venezia* (Venice, 1794), p. 7.

² Salvioni, *La proprietà letteraria nel Veneto* (1877), p. 11. The protection of authors developed earlier in Italy than elsewhere, unless it may have been in Germany. By 1545 Italian authors were incidentally benefited by a requirement that no work be licensed for publication without the written consent of the author or his representatives, submitted to the Riformatori, a commission from the University of Padua serving as censors for non-theological works. (R. Bowker, *Copyright: Its History and Law* [Boston, 1912], p. 15.)

epistle, he requested the Senate to forbid the manufacture of his special types by others and the counterfeiting of his editions in Italy or selling of such counterfeits imported from outside, under penalty of the loss of the labor on the books and a fine of two hundred ducats for each offense, a third of the fine to go to a charity, another third to the informer, and the other to the accuser.¹

The petition was granted; and in the same year Aldus secured from Pope Alexander VI a ten-year privilege which forbade reprinting any book published by him or to be published by him in Greek or Latin, or printing any book in similar types, or importing such books from without, under penalty of confiscation, a money fee, and, in the case of Italian printers so offending, excommunication. The privilege was renewed in 1513 by Julius II for a term of fifteen years, and again in 1514 by Leo X.²

But even these large privileges (amounting practically to a monopoly) did not prevent the repetition of piracies. The public was warned against counterfeits in a *Monitum* issued by Aldus March 16, 1503/4, on a folio sheet, in which, after speaking of his high ideals for the publication of the classics, he enumerates the obstacles he has met in their fulfilment through the treachery of his own workmen and the counterfeiting Lyons printers. A list of spurious works is followed by a statement of the differences between the spurious and the genuine texts:

Quater iam in aedibus nostris ab operis; & stipendariis in me conspiratum est: duce malorum omnium matre Auaritia: quos Deo adiuuante sic fregi: ut ualde omnes poeniteat suae perfidiae. Restabat: ut in Urbe Lugduno libros nostros & mendose excuderent: & sub meo nomine publicarent: in quibus nec artificis nomen: nec locum, ubinam impressi fuerint, esse uoluerunt: quo incautos emptores fallerent: ut & characterum similitudine: & enchiridii forma decepti: nostra cura Venetiis excusos putarent. Quamobrem ne ea res studiosis damno: mihi uero & damno: & dedecori foret: uolui hac mea epistola oēs: ne decipiantur, admonere: infra scriptis uidelicet signis. Sunt iam impressi Lugduni (quod scierim) characteribus simillimis nostris: Vergilius, Horatius, Iuuenalis cum Persio, Martialis, Lucanus, Catullus cum Tibullo: & Propertio, Terētius, in quibus õibus nec est impressoris nomen: nec locus: in quo impressi: nec tēpus quo absoluti

¹ Ambroise Firmin-Didot, *Alde Minuce . . .* (Paris, 1875), p. 227.

² A. A. Renouard, *Annales de l'imprimerie des Alde* (Paris: Renouard, 1803), I, 505-6; II, 15-17, 135; Firmin-Didot, *op. cit.*, p. 482.

fuert. In nostris uero omnibus sic est: Venetiis in aedibus Aldi Ro. illo: uel illo tēpore. Item nulla in illis uisuntur insignia. In nostris est Dephinus anchorae inuolutus: ut infra licet uidere.

In addition to these obvious marks, Aldus notes that the paper is poorer and has a strange odor; that the types, though not displeasing, have a Gallic suggestion; that the capitals are malformed and the consonants stand without ligature. He even furnishes a list of typographical errors in the false texts.¹

The Lyons pirates took advantage of Aldus' publication of their *errata* and issued new impressions containing corrected sheets. The Giunti of Florence also continued to counterfeit Aldine editions, making an imitation even of the anchor device.

Such daring piracy and counterfeiting as this can leave but one conclusion open—that the privileges in Italy, whether granted by Senate or by Pope, were popularly regarded as having only local force. Doubtless the warnings issued by the injured publishers were rather more effective in one way—in guarding their reputation and insuring that the discriminating, at least, would not purchase the spurious editions.² For in spite of partial disguises in new issues, the counterfeits must have been recognizable; for, even if new title-pages and corrected sheets were inserted, the paper and the fonts of type remained to betray them.

The separate issue of a warning notice of piracy, such as Aldus used, seems to have been a less common practice than the advertising of spurious work in the preface or dedication of a new edition issued by the rightful owner. An early example of such a use of the preface to the reader is that of Robert Whitinton (Wytynton, etc.), Oxford grammarian and poet laureate, in two of his works on grammar issued in 1533. Peter Trevers (or *Treueris*, of Triers) pirated several of Whitinton's works.³ One was the *De heteroclitis*

¹ This *Monitum* was discovered by the Abbé Mercier de S. Léger in a Greek manuscript of the Bibliothèque Nationale with several of Aldus' advertising circulars. It is reprinted by Renouard, *op. cit.*, II, 207–11. Cf. also pp. 17–19 and Firmin-Didot, *op. cit.*, p. 187.

² That there was a demand abroad for "Aldine" classics among the less-learned reading public appears in a letter of Glareau to Zwingli, October 19, 1516, which states that large quantities of genuine and imitated Aldines thrown upon the market had been caught up eagerly even by those too ignorant to understand them (Reber, *Beiträge z. Basler Buchdruckergesch.*, p. 86).

³ On his copying Wynkyn's *Polychronicon*, 1527, see Ames, *Typ. Antiq.*, ed. Dibdin, III, 40.

nomibus: Grammaticae Whitintonianae liber tertius, published by Wynkyn de Worde in 1523. Herbert describes a copy of Trevers' piratical edition in his possession as "without date and published without material difference except that in three or four places he has put the head-titles into the margin and so managed to print his edition on the same number of leaves in a larger type." In 1533 Wynkyn issued a new edition *cum privilegio* (a precaution which he began to use about this time for many of his works). On the verso of the title-page he printed, in the name of the author, this complaint and warning:

Whitinton to the Reader.

My kind Reader, that you have seen so many times the mangled features, the lacerated members, of my grammar, the craft of the extremely wicked Peter Trevers brought about, with the aid of his despicable paraphrast. You may call them the dogs of the snake-haired Megaera, as they destroy my things, and she herself hurls the firebrand, Tisiphone harasses the crafty minds and hearts with furies, stirs up in them Cerberian madness (the helpless mind is driven about like a mill forever turning), and causes them to show my things turned out thrice badly. But at length the grammar, snatched from the savage jaws of monsters, has given itself into my keeping: healed by the hands of the Muses and the arts of Apollo, it now comes back entire, acceptable, properly polished—as is rightly our duty to the British youth. Look with favor, dear Reader, upon our grammar, which has been put out from the press of our good Wynkyn and has been (?) recently polished by our file. But cast out from your home, dear Reader, the very corrupt impressions of the thrice wicked Trevers.

In the same year, 1533, Wynkyn issued a new edition of the *De octo partibus* by Whitinton, originally published in 1527, and meanwhile pirated by Trevers. The address to the reader in 1533 is as follows:

The work which the hateful carelessness of Trevers has besprinkled with blemishes, Reader, receive corrected in the smallest details. If the care (?) of our revision is pleasing to you, or the quite painstaking press-work of my Wynkyn, reject the faulty copies of the dishonorable Peter Trevers, cherishing our revised ones in accordance with their merits.¹

¹ Both these protests are reprinted, in an obviously corrupt form, in Herbert's edition of Ames, *Typ. Antiq.*, I, 186-87. Professors John M. Manly and C. H. Beeson, of the University of Chicago, suggested a few emendations, and I made others to get a reading. The changes do not alter any matters of fact.

No evidence appears as to whether, in connection with the issuing of privileges to Wynkyn for the later editions and the grammar's coming back safe into Whitinton's possession, "snatched from the savage jaws of monsters," there was any real reparation of the injury. But the printed warning to the reader was sometimes used as supplementary to other forms of procedure, as we have seen in the case of Aldus. It was so used also by Martin Luther when, in 1524-25, a compositor stole about half of the manuscript of one of his Bible translations and had it printed and for sale in Nürnberg before Luther could get his own edition completed. In a letter to the Rat at Nürnberg, dated September 26, 1525, Luther asked for action on the matter, naming the suspected printer, Johann Herrgott, who, he said, was lying in wait to seize upon the rest of the book. Luther begged the council to require the printers of Nürnberg at least to wait about two months before reprinting works published in other districts, and threatened (much as he would prefer not to have to name Nürnberg) to warn the robbers in an open letter if satisfactory action was not taken.¹

The modesty of the request for an eight weeks' start for the publishers of Wittenberg before the works should be reprinted "ausser land" suggests that in Germany, as in Italy and England, printing rights may have been thought of as merely local. Reprinting of important works by their local printers may even have been encouraged by some city authorities because of civic ambition.²

The decision of the council of Nürnberg on October 7, 1525, provided for partial satisfaction of Luther's demands:

Item auff Doctor Martin Luthers schreiben soll man sich bei den puchtruckern erfahren, was seiner gemachten pucher durch sy nachgedruckt

¹ *Luthers Briefe* (ed. De Wette, 1856), Theil 6, s. 70. Cf. Theil 6, s. 78-79, and Theil 8, s. 69 and 381; also, *Börsenvereins für Gesch. d. deutschen Buchhandels* (Leipzig, 1878-98), I, 26 and 49.

² Though Luther's works were supposedly under the ban after the Imperial Edict of Worms, May 8, 1521 ("Wider Martin Luther Bücher . . . auch Gesetz der Druckerey"), the Nürnberg Reichstag stated that it would carry out the prohibition "so viel wie möglich"—an ambiguity which may be significant in view of the piratical reprinting of Luther's translations of the Bible that year in Nürnberg. (See F. H. Reusch, *Der Index der verbotenen Bücher* (Bonn, 1883-85), I, 80-81, 108, *et passim.*) Cf. also F. Gess, "Versuchter Nachdruck des Lutherischen deutschen Neuen Testaments durch Jacob Thanner in Leipzig, 1524," *Börsenvereins*, XII, 302-3—a case where the city authorities pleaded that the "poor printer" be allowed to proceed after substituting certain features of Erasmus' translation.

und geendert seyen und darinnen ein ordnung geben, damit seiner pucher keins in ainer bestimpten zeit nachgedruckt auch bei den puchfuernern verschaffen, nichtst neus zu verkauffen vor und eche solchs besichtigt werd.¹

Luther protested again on November 7, 1525, to the Nürnberg *Syndikus*, Lazarus Spengler, concerning the use of false imprints by the re-printer. This and the corruption of the text were forbidden by an order in the Ratsbuch dated May 11, 1532 (seven years after the protest):

Allen Buchdruckern alhie soll bei iren pfflichten bevohlen werden, wann sie hinfür Doctor Luthers und andre Buchlein nachdrucken wollen das sie den namen Wittenberg zu drucken unterlassen und die stat Nürnberg und ihre namen dafür setzen. auch sich besser correctur befleyssen, oder ein rat müsst mit ernstlicher straf gegen inen handeln.²

In the meantime Luther carried out his threat of publicity by prefixing a preface (Sig. Aii a) to his *Auslegung der Episteln und Evangelien von der heyiligen Dreykonige fest bis auff Ostern gebessert durch Martin Luther, Gedruckt zu Wittenberg MDXXV*, in which he likened the piratical printers to highwaymen and thieves:

Gnade und Fride. Was soll doch das seyn, meyne lieben druckerherrn, das eyner dem andern so offentlich raubt und stillt das seyne, un undern andern euch verderbt? Seyt yhr nu auch Strassenräuber un diebe worden? odder meynet yhr, das Gott euch segenen und erneeren wird, durch solche böse tücke und stücke? Ich habe die postillen angefangen von der heyiligen Dreykönige tage an, bis auff Ostern, so feret zu eyn bube, der setzer, der von unserm schweys sich neret, stilet meyne handschrift ehe ichs gar ausmache, und tretts hynaus, und lesst es draussen um lande drucken, unser kost und erbeyt zu verdrucken. . . . Du bist eyn Dieb, und fur Gott schuldig die widerstattung. Nu were der schaden dennoch zu leyden wenn sie doch meyne bücher nicht so falsch und schendlich zu richten. Nu aber drucken sie die selbigen und eylen also, das, wann sie zy myr widder komen, ich meyne eygene bücher nicht kenne. Da ist etwas aussen, Da ist versetzt, Da gefelscht, Da nicht corrigirt. Haben auch die kunst gelernt das sie Wittenberg oben auff etliche bücher drucken, die zu W. nie gemacht noch gewesen sind. . . . Das sind ja bubenstück den gemeinen man zu betriegen, weyl von Gots gnaden wyr ym geschrey sind, das wyr mit allem vleys, un keyn unnutzes buch auslassen, so viel uns muglich ist. . . . Es ist yhe eyn ungleich ding, das wyr erbeyten und kost sollen drauff wenden,

¹ Friedrich Kapp, "Gesch. d. deutschen Buchhandels bis in d. siebzehnte Jahrh.," *Börsenvereins* (1886), pp. 426-27.

² Kapp, *op. cit.*, pp. 426-27.

und andere sollen den genies und wyr den Schaden haben . . . Man kennet ja unseren buchstaben wol, darnach man sich richten und falsche bücher von den rechten scheyden müge.¹

There is no evidence that Luther received, or even attempted to secure, any repayment of financial losses through the piracies, though he was not above noting in his published protests that the thieves were making money by the sweat of his brow—a monstrous wrong. But he did recover his manuscript, published it, secured action by the city to prevent repetition of the piracy, and broadly advertised the theft and his attitude toward it. The case was long remembered in the history of German publishing.²

It is often stated by writers on copyright that it was not until the eighteenth century that there was any recognition of the legal principle that the gift of a manuscript does not necessarily carry with it the right to publish. While it may be true that the principle was late in appearing in copyright *law*, and is true that it has been wrangled over as recently as in the time of Pope, we need not suppose that this very elementary principle of ownership burst upon the astonished vision of the publishing world in 1710. A case that will illustrate at the same time the legal attitude toward the principle involved and a method of procedure by which a wronged author might defend himself in part may be found in the history of the publication of the *Emblems* of Andreas Alciat, a distinguished

¹ The original is in the Kirchenbibliothek at Frankenberg (Ph. Dietz, *Wörterbuch zu Luthers deutschen Schriften*, Leipzig, 1870, I.L., Quellenverzeichniss No. 116). I use a reprint in *Börsenvereins*, II, 64. The complaint continued to be printed in later editions; but by 1545 it had taken the form of a more general but no less violent denunciation of all piratical publishers, on the text of Paul's saying, "The love of money is the root of all evil." A reprint of the 1545 protest is accessible in "Wider Hans Worst" *Kleinere Schriften Dr. M. Luthers*, Bielefeld, 1876, Band I. The reader may be interested in comparing with the earnestness of this "Gott strafe" condemnation by Luther a playful (if not really insincere) attack by Erasmus upon manuscript thieves. It is in the preface to his *Opus Epistolarum*, 1536 (Nichols, *Epistles of Erasmus*, I, lxxviii-ix), where he protests against an alleged unauthorized publication of certain juvenilia, characterizing the pilfering of manuscripts as an act of theft, sacrilege, forgery, libel, treason, whose perpetrators deserve to be "suffocated with burned paper." In view of Erasmus' dealings with his many publishers, which were questionable even according to the publishing ethics of his day, one must take anything he says about pilfered manuscripts with allowance. It is, however, interesting to note that, like Luther, Erasmus had a lively sense of authors' rights in literary property.

² There is a reminder of Luther in the Verordnung Kurfürst Christians von Sachsen, 1594, "Von den Buchhändlern und Buchdruckerrn, " which calls *Nachdruck* a sin against the seventh commandment and "hiermitt bey Peen verboten und abgeschafft." Luther is specifically named in the *Gutachten der Leipziger Buchhändler*, March 30, 1667 (*Börsenvereins*, II, 53).

Italian lawyer and senator (1490–1550). Alciat had sent to a scholar, Conrad Peutinger, as a token of admiration, the manuscript of his *Emblems* together with a complimentary poem. On February 28, 1531, Henry Steyner, of Augsburg, put the *Emblems* in print, prefaced by this poem. The form of the work greatly displeased Alciat, and within two months Steyner issued a new impression, correcting the *errata* and changing borders and devices. But Alciat was not content with these improvements. Being a good lawyer (at a time when lawyers' minds were happily unclouded by a study of devious decisions such as are to be found in modern statutory copyright procedure), Alciat understood that giving away a manuscript did not imply abandonment of rights in it; and he proceeded to act upon this knowledge. He supervised a new edition by a celebrated Paris printer, Christian Wechel, in 1534. The printer stated that Alciat, being "scarcely able entirely to suppress" the earlier editions, had been persuaded to complete and revise his work for republication. Alciat dedicated the book to Philibert Baboo, Bishop of Angoulême, and criticized the corruption and poor workmanship of the previous edition, which "superioribus annis, idque, autoris iniussi, tam neglecté, ut ne quid grauius addam, apud Germanos inuulgatus fuit, ut illius minuendae existimationis ergô, à maleuolis quibusdam id fuisse factum, plurimi interpretantur."¹

In the same year, 1534, Steyner got out a new edition professing to be revised by Alciat, probably in an effort to compete with the authorized edition. It is doubtful whether Alciat took measures to suppress this. Possibly he felt that his edition with its condemnation of the apparently malevolent ill workmanship of Steyner could hold its own against a third unauthorized edition. Whatever may lie back of the statement that Alciat was "scarcely able entirely to suppress the two earlier editions," it is clear from a letter written on another occasion that Alciat felt the righting of the text to be the chief consideration. Again the complaint concerning a publisher is addressed to a bishop, this time the Bishop of Bologna:

A publisher has recently put out my book under the title *Si certum petatur*. I would not be so vexed about it if only more pains had been taken

¹ *Andr. Alciati Emb. Fontes Quat.*, a facsimile by Henry Green. Manchester: A. Brothers, for the Holbein Society, 1870.

to put the edition into the purchasers' hands in a less corrupt form. But there are lacking in the impression not only single sentences but in one spot whole pages.¹

Alciat's procedure in the case of the *Emblems* shows that a writer had it in his power to repudiate unauthorized issues of his work, have it correctly reprinted with an advertisement of the spurious editions, and register complaint with the bishops, whether or not the manuscript had been given away by the author. Evidence is lacking as to whether the bishops gave him any assistance.

Even an authorized publication was repudiated in England a few years later by Coverdale, who withdrew the use of his name, of a dedicatory letter, and of his translation from the Bible as printed by James Nicolson in 1537-38, on the ground that John Hollybush² had published the work in his absence without keeping his agreement to follow a true copy of the Latin and English texts. Coverdale republished the work through Grafton and Whitchurch in 1538, repudiating, in his dedication to Cromwell, the Hollybush edition of the Lent preceding (which was perhaps suppressed by authority, as Herbert says it is very rare). In 1538 there was also issued *The neue testament both in Latyne and Englyshe Faythfullye translated by Johann Hollybushe*, printed by James Nicolson, with the same types and paging as in the 1537 edition, but with every sheet newly composed and minor differences in the text.³ As Coverdale admitted that he had authorized Hollybush to publish his work, the check placed upon the unsatisfactory edition was as strong as could be hoped for.

A successful legal protest against unauthorized reprinting of posthumous works was made about 1536 by the heirs of Ulric Zasius, a Swiss or German jurist (born at Constance, 1461) and a noted lecturer on law at Freiburg im Breisgau. Shortly after the death of Zasius, which occurred November 24, 1535, Nicholas

¹ Theodor Muther, "Dr. Conrad Lagus: Ein Beitrag zur Geschichte des juristischen Studiums," *Jahrbücher für Gesellsch. u. Staatswissensch.* (J. C. Glaser), Band V, Heft 5, s. 419.

² Hans van Ruremund until 1535, when he took out letters of denization (E. J. Worman, *Alien Members of the Book-Trade during the Tudor Period*, L., for the Bibliogr. Soc'y, 1906, p. 56). He is probably one of the ignorant "Douchemen" so severely criticized by Grafton in his petition to Lord Cromwell for privilege in 1537 (Styrye, *Memorials of Archbishop Cranmer*, II, 285-87, App. xx; Ames, *Typ. Antiq.*, 1911).

³ Ames, *op. cit.*, ed. Herbert, III, 1147-50; cf. I, 511-12.

Freigius (or Frey), who had been a distinguished scholar under Zasius at Freiburg and was himself a professor of Latin grammar there, published several of the jurist's writings under the title *Recensio editionum librorum Ud. Zasii posthumorum*. One son of Zasius was an able lawyer, and the heirs managed to suppress the publication promptly:

So verdienstlich seine Bemuhungen sein mochten, so ernte er [Frey] doch anfanglich wenig Dank mit denselben. Die Universitat schickte ihm ein ihr gewidmetes Werk wieder zuruck, und die Erben des Zasius schlugen wegen eines andern sogar den Rechtsweg gegen ihn ein.¹

An early discussion concerning the form under which strictly legal suits concerning literary property might be entered appears in the explicit mention of several possible complaints in 1543, arising out of the unauthorized publication of a work by Conrad Lagus, lawyer, ambassador, and lecturer on law at the university of Wittenberg. The work was an incomplete compilation of materials on law issued in folio by Christian Egenolf, originally under the title *Iuris utriusque traditio methodica, per clarissimum Iureconsultum Dr. Conradum Lagum, Ordinarium Vitebergensem publice praelecta* (as it appears on page 5 of the text), but changed (perhaps because of Lagus' protest) to *ex ore doctissimi Conradi Iureconsulti annotata*.

Lagus considered the publication a disgrace, and published a protest to defend his reputation and warn law students against dishonest speculators who cared only for gold, as might be seen from the fact that scarcely a sentence in the book was free from errors in grammar. The protest called forth a defense by the guilty publisher. The two documents are entitled respectively:

1. Protestatio Cunradi Lagi adversus improbus (?) suorum commentarium de doctrina iuris editionem ab Egenolpho factam. Gedani. (Mar.) 1544.

¹ Johann H. Schreiber, *Gesch. d. Albert-Ludwigs-Universität zu Freiburg im Breisgau* (1859), II, Theil 16, s. 330. I can find no account of the nature of the legal action taken; but lawsuits concerning literary property seem to have been prosecuted in Germany even before this time. Printing rights of some sort were judged at court in Basel as early as August 21, 1479, when Bernhard Inkuss got a judgment against Schöffler and others giving him possession of a long list of books and publishing rights in them for a certain district; the books seized from Schöffler to be marked by the mayor and his officials so that the people would know what had happened ("Archiv für Gesch. d. deutschen Buchhandels," *Börsenvereins* [1888], XI, 23-25, Nos. 101, 103, 110, 111). A suit definitely concerning piratical reprinting is that against Wendel Ruehell, or Rikel, defended in Strassburg in 1536 (*Börsenvereins*, V, 88-93).

2. Defensio Christiani Egenolphi ad Domini Conradi Lagi Iureconsulti protestationem, Francof. (Sept.) 1544.

The following account is based upon extracts from these documents and from letters in the *Danziger Archiv* which are found in a study of Dr. Conrad Lagus by Dr. Theodor Muther.¹

Lagus complained especially of the corruption of the text, which showed not only countless errors in style and grammar and typography, but insertions and omissions, and the fragmentary character which betrayed its origin in the jottings of lecture notes. Although he had dictated these materials to his students for their use, he had safeguarded his rights by forbidding them to publish his lectures, as he intended to complete and perfect the work when he should have found a patron to support him for the time.

Egenolf had applied for permission to print the book. Lagus had not only refused consent, but cautioned him not to publish, threatening action for theft (*Protestatio* A, 26; and *Defensio Egen.* A, 4b and B, 1a). Now that the publication had been carried out in spite of threats, Lagus proposed a charge of plagiarism, since Egenolf, to evade reproach for theft of an unpublished mental property, had suggested that the compilation was publicly dictated by Lagus in the capacity of *Ordinariat* at Wittenberg; whereas Lagus protested that, although he did lecture there, he was not even a *Lehramt*, much less an *Ordinariat*. The charge of plagiarism, said Lagus, would apply:

Denn da Plagianus der heisst, welcher einen fremden Menschen demjenigen in dessen Gewalt sich dieser befindet entzogen hat: was steht entgegen, dass dieses Verbrechens jener für schuldig erachtet werde, welcher wissend und sehend, dass er gegen meinen Willen und meinem Protest zuwider die Herausgabe meiner Commentarien vornehme, sich nicht abschrecken liess, sein Vorhaben auszuführen: das Vorhaben unter Missachtung meiner Ehre, meines Rufes, meiner Glaubhaftigkeit, wider meinen Willen meine Dictate sehr fehlerhaft zu publiciren.²

The judge would have to decide upon a fitting penalty for such a case. Lagus suggests, however, a special form of legal remedy for purchasers who feel that they have been cheated by more than

¹ *Op. cit.*, pp. 394-425. The interpretative comment is my own.

² Muther, *op. cit.*, p. 416.

half the value. If there are any, he says, "welche über die Hälfte verletzt zu sein glauben da der Inhalt des Buches dem Titel nicht entspricht, so können sie mit der Wandelklage (*actio redhibitoria*) wider den Verkäufer klagen." There is nothing in the way, he says, of applying the suit to book sales:

Denn obwohl es bisher nicht üblich war, die Redhibition von Büchern abseiten der Verkäufer zu erlangen, wenn nach der Tradition sich herausstellte, dass dieselben fehlerhaft seien, so ist doch da jene Klage gegeben wird, damit der Käufer nicht durch die Arglist des Verkäufers getauscht wurde bezüglich eines verborgenen Fehlers des Viehes und eines nicht offenbaren Mangels der Waare überhaupt, kein Hinderniss, dieselbe auch Bücherkäufern zu gestatten.

But if there should be any question of the applicability of these suits to this case, the authorities of state might then exert themselves to restrain by laws (Gesetze) such unruliness of printers.

The apparent uncertainty as to what sort of suit was relevant seems to me to imply not a doubt as to the existence of any legal remedy, but a natural hesitation as to the choice of a form of suit which the tricky piratical printer could not evade. For Egenolf, having been refused permission to publish the manuscript he had managed to purchase, took extraordinary precautions to escape penalties by advertising in his preface that the copy was corrupt, that Lagus was not responsible for the publication—was, in fact, ignorant of it—and that the printer had laid himself open to the charge of *Nachdruck* for the reader's sake:

Daher will ich vor allen Dingen das Zeugniß ablegen, nicht nur, dass Conrad Lagus diese Publication keineswegs veranlasst, sondern dass er nicht einmal etwas davon gewusst hat. Denn wenn er geneigt gewesen wäre, seine bessernde Hand anzulegen, so würde zweifelsohne das Buch weit correcter und in allen Beziehungen vollkommener in die Oeffentlichkeit gelangt sein. Darauf habe ich mit Nachdruck aufmerksam machen wollen, damit der Leser, wenn ihm Dunkelheiten oder sonstige Unvollkommenheiten aufstossen, dies nicht etwa dem Lagus als Nachlässigkeit anrechnet, sondern vielmehr der Fehlerhaftigkeit der Abschrift, welche mir in die Hände kam, zuschreibt. . . . Herr Conrad Lagus wird über die Veröffentlichung des Buches in dieser Gestalt nicht ungehalten sein dürfen, denn dieselbe geschah nicht, um Jemand Unrecht zu thun, sondern sicherlich nur zur Bequemlichkeit der Studirenden und zum Vortheil der Wissenschaft.

In his *Defensio* Egenolf took the position that the author's publication of his work in manuscript and by lectures justified others in multiplying copies in print (his position with regard to public lectures anticipating the attitude of English copyright lawyers some centuries later). If Lagus had only kept his manuscript upon his own desk, reasoned Egenolf, matters would have been far otherwise. But the work was to be found everywhere in the libraries of students. Why, then, make such a disturbance over the publication of a book already spread abroad and sold by the author to those to whom he dictated? To a text progressively corrupted by copying in manuscript printing could only be advantageous, as the reprinted version could be gradually purified of error. Pains had not been spared in the work. It was wrong of Lagus to say that scarcely a sentence was free from errors. The name of Lagus had been printed, not for commercial reasons, but to give due credit to the author. The use of the title *Ordinariat* was simply a mistake. If Lagus was greatly vexed over this, he might strike it out or, for that matter, repudiate the whole *Methodus*; for, said Egenolf, "die studenten freuen sich über das Buch und fragen nichts nach dem Verfasser."

To the charge of plagiarism Egenolf replied that, if he had wished to act secretly, he could have published anonymously or without the printer's name. Instead, he had acted openly. No sensible person could blame him for having had something for his pains. Besides, the suit for plagiarism would not hold against such as he, for

Dieses vergehen sei bloss an freien Menschen möglich, nie an Slaven, und sei nicht abzusehen, wie an dasselbe bei diesem durch ganz Deutschland Buch gedacht werden könne.

He added the taunt,

Lagus habe es auch unterlassen, die Klage, mit der er gedroht, anzustellen.

It is surprising, he said, that Lagus published this Pasquill filled with threats and insults when the much more honorable way of the lawsuit stood open to him. If he did not wish to institute a suit, he should at least have refrained from insult.

As for the entering of a *Wandelklage*, that would be impossible, said Egenolf, because in his preface he had distinctly stated that the print was from a corrupt copy unauthorized by Lagus. After enumerating unprotested publications involving offenses much greater than his, Egenolf expressed his opinion of the applicability of the *Wandelklage* thus:

Gegen den, welcher im bösen Glauben eine fremde Sache öffentlich feil halt, als wenn der Eigenthumer das erlaubt hatte, möchte die Wandelklage eher zulässig sein.

There are two possible interpretations of the nature of the *Wandelklage* proposed by this sixteenth-century lawyer. In its older and broader meaning it was merely a form of suit which permitted the retraction of errors, and was applicable to all kinds of cases. This usage may be illustrated in Germany as early as 1281 and as late as 1516. If, as is barely possible, Lagus used the word in this old loose way, he was merely proposing a safeguard to the purchaser (for any kind of action he might take) against the formalism of the legal procedure of the time, by entering a kind of suit that could not be lost or nonsuited by a mere technical error such as a flaw in the wording of a statement of the case by advocate or plaintiff. The danger of non-suiting or loss of suit seems to have been based on a mediaeval rigidity of attitude toward the sanctity of the statement under oath ("Ein Wort ein Wort"—a man under oath must speak the truth, and may not alter or take back what he has once uttered before a judge).¹ The *Wandelung*, however, gave an opportunity for the retraction of error. It was sometimes made at once, but at least in the thirteenth and fourteenth centuries seems to have been a sort of retrial before a special court set once

¹ R. G. Siegel, "Die Erholung und Wandelung im gerichtlichen Verfahren," *Wiener Akademie, Sitzungsab. d. phil.-hist. Cl.*, XLII (1863), 201-44; cf. also his "Die Gefahr von Gericht und im Rechtsgang," *ibid.*, LI (1865), and an explanation of the necessity of *Erholung* or *Wandelung* by Richard Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, Leipzig, 1889, p. 709 ("Der geringste Form verstoss," etc.). Other illustrations of the early uses are as follows: A. Kohler, *Zur Geschichte des Rechts in Alemannen; Beiträge zur German. Privats-rechts-Geschichte*, III, 1888; Freiburger Statuten, XXXI, 16 and 17 (Schott, III, 255); Culm, *Rechtssbuch*, II, 83a and V, 73; Haltaus, *Glossar* c. 590 (a fifteenth-century decision); Benecke and Müller, *Mittelhochd. Wörterbuch*, concerning the meaning of *dinget das Wandel*; a request for such a suit in *Rheinhart Fuchs*, ed. Grimm, vss. 1370-74; a similar and more formal declaration by Nicholas Wurms: "Hyre her richter ich dinge ym holunge und wandil"; *Blume des Sachsenspiegels*, Nr. 45 (Homeyer, pp. 366-67).

or twice a year, when he who wished *iteracionem sue cause, que vulgo erholunge dicitur, habere poterit*.¹

There is a rarer, but much more applicable, meaning of *Wandel*, which applies specially to laws of purchases, contracts, etc., with the meaning of a right to recall a bargain or contract if it is found (usually within a fixed period) to be unfair, very disadvantageous, or made under false pretenses. In 1448 a recall was provided for contracts made in drunkenness or on an unfair occasion.² Also, a person selling property was required to allow twenty-four hours for the purchaser to consider his bargain:

Swelher burger erb und eigen verkoufen wil, der sol dem kouf den wandel dingen von einem mitten tag ze dem andern und daz wandel sol ietweder der kouft oder verkouft haben den kouf abzesagen.³

The privilege extended to horse sales and even to ordinary shopping:

“Wär aber das niht Wandel an dem kauff gedingt wurd, so hat ains iglichen hausfraw, der chaufft oder verchaufft, den chauff von ainem mittentag zu dem andern auch abzesagen.”⁴

The choice of meaning for *Wandelklage* lies between (1) a form of suit which gave the right to retract errors or appeal the case because of manifest injustice (both being precautions against the formalism of legal procedure), and (2) a legally recognized right to return defective goods purchased in ignorance of their defects. Though the first meaning is the commoner, the second is clearly more applicable to the case of Lagus; for he has given as the Latin equivalent *actio redhibitoria*, which concerns the return of a thing found bad or defective (a practice apparently as old as Cicero: *In mancipio vendendo dicendane vitia, quae nisi dixeris redhibeatur mancipium jure civili*). This interpretation is also favored by Lagus' remarks urging the relevance of the complaint to book sales, which suggest that he has in mind a law governing sales under false pretenses, as well as by Egenolf's statement that the suit is not applicable because he has made no false pretenses but has correctly advertised the defects.

¹ Siegel, *op. cit.*, 238. Two such sessions of court are mentioned for Bayreut in *Bayreuther Verordd.* of 1720 and 1728, cited by Schmeller, *Bayerisches Wörterbuch*, II, 937.

² Ingolstädter Ratschluss, Cgm. 240 f. 70, cited by Schmeller, *loc. cit.*

³ Münch. str. art. 448, cited by Benecke and Müller, *op. cit.*, p. 697.

⁴ Schmeller, *op. cit.*, II, 937.

Lagus died within seventeen months after the publication of Egenolf's defense. No evidence has been found to indicate that he carried out the threatened lawsuits. Indeed, in the *Protestatio* Lagus admitted that, because of the abundance of error, he would not attempt to set the text right, and that he lacked both leisure and money to complete it for publication. Still, the fact remains that one of the leading men of law published in 1543 threats of three forms of legal suits for violation of an author's rights, and that his threats called forth a serious (though tricky) defense from the accused. The suit for theft (*Diebstahlklage*), the pirate thought, would not apply because he had bought, not stolen, the manuscript, and because the lectures, being already in circulation, were in a sense published (a difficulty which has stood for centuries in the way of protecting rights in spoken discourse). The charge of plagiarism (*Plagiat*), which we may guess would have been the most applicable, apparently gave the guilty printer more concern; for he resorted to the evasion that he was technically disqualified by birth for appearance in such a suit, in addition to the genuine argument that he had not taken the author's work without giving him credit. The *Wandelklage*, as we have seen, he objected to as inapplicable because he had frankly confessed in his preface that his text was unauthorized and from a corrupt copy. As to which, if any, of these evasions would then have held in law one can only speculate. Certainly as foolish ones have turned decisions in nineteenth-century lawsuits concerning dramatic copyright. At any rate, one can see in these ingenious evasions of the piratical printer and in his precautions some reasons why a busy author might be slow to seek legal redress. Lagus, a great lawyer, though convinced that he had at hand legal remedies if he chose to use them, apparently contented himself with the printing of a repudiation and a protest.¹ This should make us careful not to assume that, whenever the mild form of protest was employed against unauthorized publication, it was because no legal remedy bearing on the case had yet been conceived.

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EVELYN MAY ALBRIGHT

¹ If Lagus' work was on the list of forbidden books before he died, this may explain the failure to take action. Paris 51 refers to a Paris edition of 1545, and Lyons 50 to a 1546 edition (F. H. Reusch, *Der Index d. verbotenen Bücher*, I, 119-20).