

1937 BETWEEN:

Dec. 15-17.  
1938  
March 9-11.

UNDERWRITERS SURVEY BUREAU }  
LIMITED ET AL..... }

PLAINTIFFS;

1939  
June 7.

AND

AMERICAN HOME FIRE ASSUR- }  
ANCE COMPANY AND CENTRAL }  
FIRE OFFICE INCORPORATED... }

DEFENDANTS.

*Copyright—Action for infringement of copyright and conversion of infringing copies—Copyright in automobile insurance rate manuals—Ownership of copyright—The Copyright Act, R.S.C., 1927, c. 32, s. 20, ss. 3 (1) and ss. 5, s. 36 (2)—Defence of common sources—Presumptions as to copyright and ownership thereof—Infringement of copyright by copying from an unauthorized copy of a work in which copyright subsists.*

The action is one for infringement of copyright, and conversion of infringing copies, in certain unpublished literary works known as Canadian Underwriters Association 1935 Rate Manual for the Provinces of Ontario and Quebec. The plaintiffs are the Underwriters Survey Bureau Ltd., owner of the copyright by way of assignment from the original registered owner, and some 170 insurance companies most of them members of the Canadian Automobile Underwriters Association, an unincorporated association of insurance companies writing automobile insurance.

The manuals are booklets issued by the Canadian Automobile Underwriters Association to serve as instructions to agents in writing automobile insurance business. They were prepared by one, J. H. King, a salaried official of the Canadian Automobile Underwriters Association.

The alleged infringing manual was issued by the defendant, American Home Fire Insurance Company, and distributed by the other defendant, Central Fire Office Incorporated, as its agent. That manual was prepared by one, L'Esperance, who acted as automobile insurance underwriter for the American Home Fire Insurance Company. He used the plaintiffs' Quebec Manual and also manuals issued by the British Oak Insurance Company, the Toronto General Insurance Company and the Canadian General Insurance Company. These latter two companies have manuals which are almost photostatic copies of the plaintiffs' manual. The British Oak Manual is prepared from material supplied by King to the Western Canada Insurance Underwriters Association. It was not disputed that this alleged infringing manual was printed and distributed by the defendants.

*Held:* That there is subject-matter for copyright in the manuals of the plaintiffs, and there has been infringement and conversion by the defendants.

2. That it is not sufficient to show that common sources of information existed from which the defendants could have obtained material for their manual; it must be shown that they went to those sources and obtained from them the information contained in their manuals.
3. That pursuant to The Copyright Act, R.S.C., 1927, c. 32, s. 20, ss. 5, as enacted by 21-22 Geo. V, c. 8, s. 7, it is not necessary that all the plaintiffs should be members of the Canadian Underwriters Association.
4. That infringement cannot be avoided by copying from an unauthorized copy of a work in which copyright subsists.

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ACTION by plaintiffs alleging infringement of copyright and conversion of infringing copies by defendants in certain automobile insurance rate manuals.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*A. M. Boulton* and *H. G. Lafleur* for plaintiffs.  
*W. B. Scott, K.C.* and *Cuthbert Scott* for defendants.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (June 7, 1939) delivered the following judgment:

This action, begun by Underwriters Survey Bureau, Ltd., is one for infringement of copyright and conversion of infringing copies, in a certain unpublished literary work known as "Canadian Automobile Underwriters Association 1935 Rate Manual," for the Province of Ontario, and in the same work for the Province of Quebec. These works were registered at the Copyright Office in Ottawa in the name of Joseph H. King, and by him assigned to Underwriters Survey Bureau Ltd. The plaintiffs claim an injunction prohibiting defendants from further infringing the plaintiffs' copyright in such works, an order for the delivery up of all infringing copies and all plates and other material used or intended to be used for the reproduction thereof, and damages.

The statement of defence denied the existence of copyright in the said works and alleged that if copyright existed at all it was in the members of the Canadian Automobile Underwriters Association. To meet the latter plea the statement of claim was amended and to the original plaintiff, the Underwriters Survey Bureau Ltd.,

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there were added some 170 various companies, most of them members of the Canadian Automobile Underwriters Association, an unincorporated body.

The defendants are two in number, the American Home Fire Assurance Company, a United States corporation, which at the material time carried on the business of automobile insurance in Canada through the agency of the other defendant, the Central Fire Office Inc., which acted as agent of the American Home Fire Assurance Company. The Central Fire Office Inc. did not defend the action. There was filed as an exhibit an undertaking given by R. E. Schofield, President of the Central Fire Office Inc., to be bound by and to comply with any judgment rendered against that defendant.

The plaintiffs went to trial under the apprehension that the question of ownership of the copyright was not in issue but after the trial had proceeded the statement of defence was amended to more clearly deny the ownership of the copyright in the plaintiffs, and an adjournment was taken to allow the plaintiffs to plead to the amended statement of defence, and to make preparation to meet it.

The manuals in question are booklets issued by the Canadian Automobile Underwriters Association to serve as instructions to agents in writing automobile insurance business and might be properly called "Instructions to Agents." Each manual is issued to become effective on a particular date, and from that date no other instructions are to be followed by the agents. As rates for premiums vary in different parts of a province—they are determined by the cost of writing insurance in those particular parts and the loss sustained by companies therein—the various parts of a province are grouped into different territories and those territories are designated in the manuals by a letter such as A, B, C, and so forth. The different makes of automobiles are also associated together and divided into main classes such, for example, as private passenger automobiles and commercial automobiles. The various makes of cars are grouped together and these are called rating groups, so that an agent operating in any particular territory can tell from his manual the cost of insuring any particular make or kind of automobile in that territory against any and all hazards. There are

special sections of the manuals dealing with public automobiles such as buses, taxicabs and livery cars, funeral directors' automobiles, garages and automobile dealers, trucks and trailers, and so forth. The manuals also prescribe the terms of policies such as insurance for radios in automobiles, plate glass, winter storage or suspension of part of a policy, employers liability, passenger hazard coverage, excess limits of liability, minimum premiums and all special endorsements on policies.

By Chap. 222, s. 69 (a) of the Revised Statutes of Ontario, 1927, The Insurance Act, every licensed insurer carrying on in Ontario the business of automobile insurance was required to prepare and file with the Superintendent of Insurance, or with such statistical agency as he might designate, a record of its automobile insurance premiums, and of its loss and expense costs in Ontario, in such form and manner, and according to such system of classification as the Superintendent might approve. The Superintendent might require any designated statistical agency to compile the data so filed in such form as he might approve, and the expense of making such compilation was to be apportioned by the Superintendent among the insurers whose data were compiled by such statistical agency, and the amount found due from each insurer by the Superintendent was to be payable by the insurer to such statistical agency. The Canadian Automobile Underwriters Association, afterwards succeeded by Canadian Underwriters Association, was designated the statistical agency by the Superintendent of Insurance and all insurers in the Province of Ontario were required to file their data with that Association, whether they were members of the same or not. Similar legislation was passed in many other provinces, but not in the Province of Quebec. The Canadian Automobile Underwriters Association was designated as the statistical agency for the provinces of Manitoba, Saskatchewan and Alberta, and, I think, other provinces. The defendants, it appears, were not members of the Canadian Automobile Underwriters Association or later the Canadian Underwriters Association.

That the alleged infringing manual was printed and distributed by the defendants is not in dispute.

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The principal witness on behalf of the plaintiffs to prove the existence of copyright in their manuals was one, J. H. King, who from 1919 to 1935 was secretary of the Canadian Automobile Underwriters Association, an unincorporated association of insurance companies writing automobile insurance business. This organization ceased to exist after November 1, 1935, when there took place an amalgamation of three associations, the Canadian Fire Underwriters Association, the Canadian Casualty Underwriters Association, and the Canadian Automobile Underwriters Association. The new organization was named Canadian Underwriters Association and it now carries on the work of the amalgamated associations under three branches, the fire, casualty and automobile branches. Since 1935 King has been the chief official in charge of the automobile and casualty insurance affairs, in the Toronto office of this new organization. Not all of the plaintiffs now belong to the Canadian Underwriters Association, and though counsel for the defendants made some point about this I am of the opinion it matters not if a few of the plaintiffs are not now members of that Association. See ss. 5 of s. 20 of the Copyright Act.

King prepared the manuals issued by the Canadian Automobile Underwriters Association, gathering his material from various sources, some from corresponding United States organizations with which the Canadian organization co-operated. He was assisted by his staff and each year that a new manual was issued it would contain material from former manuals with new material incorporated therein. As the result of a judicial inquiry into the automobile insurance business in the Province of Ontario the legislation to which I have earlier referred was enacted, and under that legislation the Canadian Automobile Underwriters Association was appointed the statistical agency for the Government of Ontario to compile such data as were filed with it by insurers. This information or data came from both board and non-board companies and after it was compiled and classified by the statistical agency it was submitted to the Superintendent of Insurance who forwarded copies of the same to all insurers in Ontario. Thus the members of the Canadian Automobile Underwriters Association had no advantage over other insuring companies in this regard.

Now, though King had access to what may be called common sources for some of his material, yet it is claimed that certain phrases, certain arrangements, and certain figures and calculations in the plaintiffs' rate manuals are definitely the work of King, and this is not contradicted.

King did this work as a salaried official or employee of the Canadian Automobile Underwriters Association. Proposed alterations, new material and so on would be submitted by King to committees representative of the members of the Association and which when passed upon by them, with or without alterations, would be incorporated in the manual. The main foundation of the plaintiffs' rate manuals was laid in 1919 and then built up until that of 1935-36 issued, and which is the manual alleged to be infringed. King testified to certain parts of the manual being his original work and he pointed out wherein the defendants' manual was similar. A comparison of the manuals was best set forth by the evidence of Frank Bowden, an employee of the Montreal office of the Canadian Underwriters Association, and the sum total of his testimony is that 50 per cent of the plaintiffs' manual had been copied by the defendants, and that 50 per cent made up 85 per cent of the whole of the defendants' work, so that the defendants can only claim 15 per cent of their manual to be original. He produced, as Exhibit 24, a compilation prepared by him showing the pages in the plaintiffs' manuals which correspond to pages in the defendants' manual. This compilation is, I think, absolutely correct and may be relied upon.

The Canadian Underwriters Association works in harmony with the Western Canada Insurance Underwriters Association, hereafter referred to as "Western Canada Association," and furnishes that organization with any available material requested of it. The Canadian Underwriters Association is the statistical agency designated by the Superintendents of Insurance for the Provinces of Manitoba, Saskatchewan and Alberta. The rate manual for the use of the members of the Western Canada Association, in the Provinces of Manitoba, Saskatchewan and Alberta, was provided by that Association. R. J. Parker, secretary of the Western Canada Association, prepared this manual, from material gathered or furnished by himself, and he registered the copyright therein in the name of

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his Association. One of the members of the Western Canada Association was the British Oak Insurance Company, hereafter referred to as "British Oak," and that company received the authorized copies of the Western Canada Association manual; it withdrew from that Association in 1934, and is not a member of the Canadian Underwriters Association.

The submissions of the plaintiffs may be stated in the following way: The Underwriters Survey Bureau Ltd. is a plaintiff because it was registered as owner of the copyrights in question, by assignment from King, and immediately a presumption arose that it was the owner of the copyright and so it is a plaintiff solely because of that presumption; that the manuals alleged to have been infringed were prepared by King, a salaried employee of the Canadian Automobile Underwriters Association, and consequently any copyright he may have been entitled to belonged to this Association, which, being an unincorporated body its several members had to be brought in as plaintiffs; that while some of the material in the manuals of the plaintiffs was taken from other manuals, yet the particular phrasing, its arrangement and so on, was the original work of King, and that copyright subsists therein; that a comparison of the manuals of the plaintiffs and the defendants shows such marked similarity that one was bound to conclude that the defendants' manual was substantially a copy of the plaintiffs; that though there were common sources to which the defendants might have gone for some of its material they did not do so and instead took a short cut by copying the plaintiffs' works; that the foundation for the plaintiffs' works was laid in 1919 and that was built upon from year to year until 1935 when there was made an almost complete revision of the manuals, with several new features added, fifty per cent of which was carried over into the defendants' manual, and which fifty per cent constitutes eighty-five per cent of the manual of the defendants; and that upon the evidence there had been established infringement and conversion.

The chief evidence offered by the defendants was the testimony of J. H. L'Esperance given at the trial, and certain exhibits. L'Esperance had been in the insurance business since 1920 and in 1931 he joined the American

Home Fire Insurance Co. and the Central Fire Office Inc., the defendants. He acted as an automobile insurance underwriter for the latter company and in that capacity he fixed the rates for the both companies, since 1932. The American Home Fire Assurance Co. ceased writing automobile insurance in Canada on December 31, 1936. L'Esperance prepared, issued and distributed the alleged infringing manual, and he stated that in compiling this manual he took several pages from the British Oak manual of 1935, and certain material from the 1935 manual of the American Home Assurance Co., and that very little of the manual was original. While preparing this manual L'Esperance admitted having before him the plaintiffs' manuals, at least the plaintiffs' Quebec manual. This witness dealt with various parts of the defendants' manual to show that they corresponded with parts of various other manuals such as that of the British Oak, the 1935 manual of the American Home Assurance Co., and the Western Canada Association manual of 1934. He stated also, as I recall it, that in preparing his manual he had before him manuals issued by the Toronto General Insurance Company, and the Canadian General Insurance Company.

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By the terms of the Copyright Act a literary work includes maps, charts, plans, tables and compilations. The Act makes no requirement as to the value of a literary work; it requires an original literary work and it is sufficient if there has been labour, skill, time, ingenuity, selection or mental effort expended in the production of the same. The Copyright Act is not concerned with the originality of ideas, but with the expression of thought in print or writing: See the *University of London Press Ltd. v. University Tutorial Press Ltd.* (1). And there are presumptions as to copyright and ownership as provided by s. 20, ss. 3 (1) and s. 36 (2) of the Act. The manuals of the plaintiffs bore the name of the Canadian Automobile Underwriters Association, and also the words "Copyright, Canada, by the Canadian Automobile Underwriters Association."

The manuals of the plaintiffs, in my opinion, afford fit subject-matter for copyright, and the plaintiffs had therefore the sole right to reproduce the same or any sub-

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stantial part thereof. The plaintiffs could not complain of the defendants' manual if satisfied it was the result of independent work and that the similarity of words and expressions was only coincident, but they contend that on a comparison of the works in question the similarity is such that it could not have been a mere coincidence. The names of towns, cities and districts, are of course not original, but what is claimed to be original is the particular grouping of these areas into designated territories, based upon the experience of insurers in the several territories, the information relative to such experience having been collected and classified for the plaintiffs by King. This work, I think, is something apart from any compilation of the data supplied by insurers to the Canadian Automobile Underwriters Association, as the statistical agency for the Superintendent of Insurance for the Province of Ontario. The classification of cars, territories and rates, into fifteen groups is so arranged and correlated that selection is shown, and this, I think, is subject-matter for copyright, and I might add that the defendants have adopted the same number of groups. The plaintiffs do not claim the sole right to make up an alphabetical list, for example, of private passenger automobiles, with their trade names, wheel bases, rating groups, cylinders, etc., but they do claim that when such a table is made up and expressed in certain language and form, that table is not to be adopted by any one else unless it is the result of independent work. Then, the plaintiffs claim particularly that original material is to be found in their manuals having reference to radios in automobiles, funeral directors' cars, combination hearse and invalid cars, and casket wagons, which are reproduced in the defendants' manual. It is my view that copyright subsists in the plaintiffs' manuals.

L'Esperance admits that he did not produce, independently, and by his own research and labour, the alleged infringing manual. It was almost wholly what one might call a scissors and paste production. The index, one or two foot notes, and the consolidation of two territories, were the only original contributions made by L'Esperance in the production of that manual. L'Esperance did not have the facilities at his command to assemble the material necessary for the production of such

a manual, and he admitted that the Canadian Underwriters Association was the only organization in Eastern Canada equipped to produce an Automobile Rate Manual. There is no pretense of saying that the defendants' manual was produced independently by reference and recourse to available common sources. There is even no allegation of this, and there is no evidence that L'Esperance went to any published common sources, and even if he had gone to those sources it is clear he would not have found the material appearing in his manual, with the exception of perhaps two pages to be found in the 1931 Automobile Statistical Plan which was apparently issued by the Superintendent of Insurance of Ontario, to insurers in that Province. The contention that the defendants went to common public sources for its material cannot, I think, be sustained.

In preparing his copy for the printer L'Esperance had before him the British Oak manual, but that company, it is admitted, had no independent information or facilities for producing a complete Automobile Rate Manual; it copied the Western Canada Association manual and any correspondence between the manual of the latter and that of the plaintiffs was furnished by King to Parker, the secretary of the Western Canada Association. L'Esperance admits that he had the plaintiffs' Quebec manual before him when preparing his copy for the printer, and eighty-five per cent of his manual is to be found in the plaintiffs' manual. I have no doubt his eyes were as much, and perhaps more, on the plaintiffs' manual than on the British Oak manual. There is no particular significance in the fact that L'Esperance cut many pages out of a British Oak manual in making up his copy for the printer; that does not mean it was not the manuals of the plaintiffs that he was intending to follow and reproduce, so far as was necessary for his purposes. It may have been convenient for many reasons to mutilate a copy of the British Oak which he had on hand instead of a copy of the plaintiffs' manual. If he were intending to copy the British Oak manual there would be no purpose in referring to the plaintiffs' Quebec manual at all. The British Oak manual was prepared primarily for use in Western Canada whereas the plaintiffs' manual was intended for use in the Provinces of Quebec and Ontario, and was based upon the general experience of insurers in

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those Provinces. I entertain no doubt but that having the plaintiffs' manual before him, he scanned it carefully to see that the printer's copy corresponded with it. It is as fair to say that he copied the manual of the plaintiffs as to say that he copied the British Oak manual, and I cannot avoid the conviction that it was the former which he chose to follow in the main. For his rates, L'Esperance relied upon the manual of the Canadian General Insurance Company and Bowden testified that this manual was almost a photostatic copy of the plaintiffs' manual. I do not think it matters whether the unauthorized copies were made directly from the plaintiffs' work or from other unauthorized copies of the same work. I do not think infringement can be avoided by copying from an unauthorized copy of a work in which copyright subsists.

Another point advanced by the defendant was that the British Oak, as a member of the Western Canada Association until 1934, was one of the owners of the manual issued by the latter, in 1933, and from which L'Esperance alleges that he copied, and that the proper party to bring this action would be the British Oak, or the Western Canada Association, or both. But this manual was prepared by Parker, the secretary of the Western Canada Association, and it was copyrighted by that Association in 1933. Parker, in preparing his manual, used more or less material supplied him by King of the Canadian Automobile Underwriters Association. That Association was also the statistical agency for the Superintendent of Insurance for the Provinces of Manitoba, Saskatchewan and Alberta, but, as I understand it, King supplied Parker with material other than that compiled by it as the statistical agency for those Provinces. Parker in preparing the Western Canada Association manual never claimed copyright in any material furnished him by King. He adapted it to his own requirements, and improved it, and the resulting manual was copyrighted by the Western Canada Association in 1934. One compiling a rate manual may gather his data from any available source but that does not destroy any copyright in the manual as a whole. The British Oak took any material contributed to Parker by King, as well as Parker's own work. So if the defendants copied the British Oak they infringed the manual of the Western Canada Association as well as that of the plaintiffs.

The defendants may go to common sources for material and make their own calculations, prepare their own tables and forms, and present their rates as they wish. But they must do this themselves. And it is not sufficient for the defendants to say or to show that common sources of information existed. They must go to those sources and obtain their information from them. See the remarks of Sir W. Page Wood V.C. in *Kelly v. Morris* (1), and which are referred to in Copinger on Copyright at page 118. As already stated the offending manual here could not have been prepared by the defendants without recourse to the work of the plaintiffs, or that of the Western Canada Association, both of which were copyrighted. As I have already stated there was no common source from which the defendants could have obtained but very little of the material found in their 1935 manual, and in any event they did not go to any common source. Whether the Automobile Statistical Plan issued by the Superintendent of Insurance for the Province of Ontario, effective January 1, 1937, would now be available to the defendants in preparing a manual, I need not decide. I therefore am of the opinion that infringement has been established.

The defendants also claim that it was a breach of trust for Canadian Automobile Underwriters Association to use in advance material collected by it as the statistical agency for the Superintendent of Insurance for the Province of Ontario, and which was not available to insuring companies in Ontario, until after this cause of action arose. Upon the evidence before me I cannot say that this occurred. It is unlikely that the material found in the manuals of the plaintiffs is the same, or is in the same form, as the data furnished it, as the statistical agency, by insurers in Ontario. In any event the Canadian Automobile Underwriters Association did not act as a statistical agency for the Government of Quebec, or for automobile insurers in the Province of Quebec. The defendants were not members of the Canadian Automobile Underwriters Association, and they, so far as the evidence shows, supplied no data to that Association as the statistical agency of the Government of Ontario, and I do not think they can be heard to say in this action that the Canadian Underwriters Association acted in breach of trust in preparing and compiling its manuals in the form it did.

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(1) (1866) L.R. 1 Eq. 697 at 701.

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It is my view that both defendants are liable, the one as agent of the other, that is, the American Home Fire Insurance Company was the principal and Central Fire Office Inc. was the agent. The latter distributed the manuals as agent of the former, and so both are liable for infringement and for conversion.

I am therefore of the opinion that there is subject-matter for copyright in the manuals of the plaintiffs and that there has been infringement and conversion on the part of the defendants. The plaintiffs are therefore entitled to the relief claimed. The plaintiffs are entitled to an injunction without proof of actual damages. There will be a reference as to damages if the plaintiffs request the same on the settlement of the minutes of judgment.

The plaintiffs will have their costs of the action.

*Judgment accordingly.*