George P. Reed v. Samuel Carusi: A Nineteenth Century Jury Trial Pursuant to the 1831 Copyright Act

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I) Introduction

Despite the social significance of copyright law, litigation of copyright disputes has been relatively scarce.[1] Examination of *Reed v. Carusi*, 1 Taney 72 (CCMd. 1845), offers then, a unique insight into the development of copyright law in the nineteenth-century; into the reasoning of the twentieth-century United States Supreme Court decision of *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998); and, into the role of juries in copyright litigation during the twenty-first century.

Reed v. Carusi involved allegations of music plagiarism concerning *The Old Arm Chair*, a poem by Eliza Cook set to music by Henry Russell. The poem was published in MELAIA AND OTHER POEMS in 1838. The popularity of the poem caused Cook, the youngest of eleven children of a tradesman in Southwark, England, to achieve celebrity status, with *The Old Arm Chair* being sung throughout the English speaking world. In 1841, Cook sold copyright to *The Old Arm Chair* to Charles Jeffreys for two pounds two shillings. According to THE PHILADELPHIA PRESS, Jeffreys then sold approximately half a million copies of Cook's poem set to music by a Mr. Iline for fifty cents each; and, recovered approximately ten thousand dollars in a copyright suit in England against a Scottish bookseller who published the *The Old Arm Chair* without Jeffreys' permission.[2]

The poem was set to music not only by Iline, but also by Henry Russell of London in 1840, James Hine of New York City in 1841, and Samuel Carusi of Baltimore, Maryland in 1842. In *"The Old Arm Chair": A Study in Popular Musical Taste*, Caroline Moseley speculated that

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[1] The authors of the Columbia Law School Arthur W. Diamond Law Library Music Plagiarism Project suggest that "[s]ince the 1850s federal courts have published fewer than 100 opinions dealing with this issue, and the frequency with which these cases arise is not likely to increase." http://www.ccnmtl.columbia.edu/projects/law/library/caselist.html (1/8/2005).

[2] http://www.1911encyclopedia.org/C/CO/COOK_ELIZA.htm (11/21/2004); http://hog.tzo.net/beeg/eliza/biography.html (11/21/04); PHILADELPHIA PRESS, August 13, 1859 *reprinted in* XV DWIGHT'S JOURNAL OF MUSIC: A PAPER OF ART AND LITERATURE, September 3, 1859, at 179 (John S. Dwight ed., Oliver Ditson and Company 1860).

Russell's composition was the most popular version of the song in America, appearing in over twenty-three editions of sheet music and in song collections throughout the nineteenth century. Russell was most likely a significant cause of the song's popularity in the United States during his tour as a composer and performer between 1836 and 1841. Despite criticism from the music establishment, Russell raised a substantial amount of money from performances before large crowds.[3]

Russell's touring was particularly active in New York City and Boston, Massachusetts. Presumably, it is while Russell was performing in Boston that the music publishing firm of Oakes and Swan obtained copyright to Russell's *The Old Arm Chair*: Oakes and Swan recorded its copyright in the Clerk's office of the District Court of Massachusetts on February 7, 1840. After Swan left the partnership, Oakes assigned copyright to the song to Benjamin W. Thayer of Boston, recording the assignment on January 21, 1841. Then, on December 8, 1842, Thayer assigned the copyright to George P. Reed, recording the assignment on December 16.[4]

Before Reed obtained copyright to Russell's version of *The Old Arm Chair*, Samuel Carusi had set Eliza Cook's poem to the music of *New England*, a song by I. T. Stoddard, the copyright to which was owned by Carusi. He recorded this version of *The Old Arm Chair* in the Clerk's office of the District Court of Maryland on October 25, 1842.[5]

Sometime between 1842 and 1844, George P. Reed discovered that Carusi was selling copies of *The Old Arm Chair*; and, Reed subsequently began planning a lawsuit. Although Reed operated out of Boston, Massachusetts and Carusi operated out of Baltimore, Maryland, the two

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[3] Caroline Moseley, *"The Old Arm Chair": A Study in Popular Musical Taste*, 4 JOURNAL OF AMERICAN CULTURE, Winter 1981, at 177-182 (Bowling Green State University); *The Old Arm Chair* set to music by Henry Russell, Johns Hopkins University, The Milton S. Eisenhower Library, The Lester Levy Sheet Music Collection, Box 055, #40A.

[4] Excerpts from case files, etc., Record Group 21, Stack Area E, Row 02, Compartment 02, Shelf 05, National Archives, Philadelphia, copied by Francis McCormick National Archives in Philadelphia, Pennsylvania; Stanley Sadie, 16 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 335 (Macmillan Publishers 1980).

[5] Carusi Copyright, United States Copyright Office Reel 6 Volume 37.

music publishers likely interacted prior to this litigation. Evidence of such interaction appears in an existing copy of *The Old Arm Chair* with music arranged for guitar by Carusi, published by Reed in 1840. Further evidence appears in the fact that a catalog of the works published by Reed includes at least one song to which Carusi owned the copyright, *New England* by I. T. Stoddard. If a relationship did exist, it may offer insight into the underlying purpose of the litigation. Perhaps the two music publishers considered themselves colleagues, and the litigation was initiated in order to develop the limited copyright law regarding music plagiarism. Or, perhaps, the litigation was an attempt by Reed to injure a competitor.[6]

Regardless of the underlying purpose, the historical record suggests that Reed was the intended winner. While there is a significant amount of uncertainty in a jury trial, Reed entered with a clear advantage. His counsel was John H. B. Latrobe, the well respected counsel to the Baltimore and Ohio Railroad Company, who was a military and community leader with professional and personal ties to Chief Justice Roger B. Taney. Reed's counsel offered not only strong legal skills, but also favor with both judge and jury. Reed's advantage was then confirmed by Carusi's selection of counsel: William F. Frick appears in the historical record as an unremarkable lawyer; and, records suggest that Francis Brinley was a prominent Massachusetts lawyer without friends in a Baltimore jury. And, in fact, Reed did win at the jury trial.[7]

Carusi, though, was not without his own connections. Carusi's attorneys, Latrobe, and the United States attorney for Maryland recommended Carusi to President James K. Polk for pardon of the portion of the damages owed to the United States. Certainly, Polk must have known Carusi

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[6] *The Old Arm Chair* by Russell arranged by Carusi, Massachusetts Historical Society; CATALOGUE OF VOCAL AND INSTRUMENTAL MUSIC, George P. Reed's Piano-Forte & Music Store, Boston Public Library.

[7] John E. Semmes, JOHN H. B. LATROBE AND HIS TIMES: 1803-1891, 200-210 (The Norman Remington Co. 1917); Conway W. Sams and Elihu S. Riley, THE BENCH AND BAR OF MARYLAND: A HISTORY, 1634-1901, 376-378, 577-587 (The Lewis Publishing Company, Chicago 1901); BOSTON EVENING TRANSCRIPT, Saturday, June 15, 1889.

as the Carusi family owned the hall where Polk celebrated his inauguration. And, in fact, Polk did pardon Carusi the damages owed to the United States.[8]

Although neither Reed nor Carusi appear to have been significantly affected by the results of this litigation, the case is historically significant for its insight into nineteenth-century society, politics, and music publishing. And, it is legally significant as an example of a jury measuring statutory damages pursuant to the 1831 Copyright Act: the majority opinion of the United States Supreme Court in *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998) cited *Reed v. Carusi*, 1 Taney 72 (CCMd. 1845) to support the decision that juries, not judges, should measure statutory damages pursuant to the 1976 Copyright Act. If *Reed v. Carusi* is to be a model of legal procedure for modern copyright litigation, the legal community should consider the case further as copyright law proceeds into the twenty-first century.

I) *Reed v. Carusi*: Facts and Issues

A) An Act to Amend the Several Acts Respecting Copyrights

Reed claimed the authority to copyright *The Old Armchair* and the authority to sue Carusi from An Act to Amend the Several Acts Respecting Copyrights, enacted on February 3, 1831. This was novel litigation as this was the first United States Act creating a copyright in musical compositions.[9]

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[8] Pardon of Samuel Carusi by President James Polk, Record Group 59, Microfilm ID T967, National Archives, College Park, copied by Francis McCormick; Samuel Carusi's Petition for Presidential Pardon, Record Group 59, National Archives College Park, copied by Francis McCormick; Roxanne Roberts, *Inaugural Galas, From Elegant to Elephantine*, WASHINGTON POST, January 20, 2001, at P21.

[9] The first copyright Act was enacted on May 31, 1790 by the first Congress of the United States. This Act granted authors of maps, charts, and books legal protection for fourteen years from recordation with the option to renew for another fourteen years if the author was still living at the expiration of the first. Then, on April 29, 1802, the seventh Congress extended copyright protection to persons "who shall invent and design, engrave, etch or work, or from his own works and inventions, shall cause to be designed and engraved, etched or worked, any historical or other print or prints" for fourteen years from recordation. Excerpts from case files, etc., Record Group 21, Stack Area E, Row 02, Compartment 02, Shelf 05, National Archives, Philadelphia, copied by Francis McCormick National Archives in Philadelphia, Pennsylvania; Richard Peters, Esq., II THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA, at 171-172 (Charles C. Little and James Brown 1846).

The 1831 Copyright Act began as Bill 145 on January 21, 1830. Bill 145 granted authors of musical compositions a twenty-eight year copyright term; and, then, the author, if still living, his widow, or his children could renew the copyright for a term of fourteen years by re-recordation.[10]

Plans to amend the copyright law began at least as far back as 1824. On March 23, 1824, according to the Senate Journal, Senator Walter Lowrie of Pennsylvania "asked and obtained leave to bring in a bill extending the benefit of copy-rights to the authors of paintings or drawings." Senator Lowrie's Senate Bill 77 conferred the copyright protection granted to the authors and publishers of engravings pursuant to the 1802 statute to the authors or proprietors of drawings and paintings. On April 13, 1824, though, the Eighteenth Senate declined to engross and read Senate Bill 77 a third time. http://memory.loc.gov/ammem/amlaw/lawhome.html (11/13/2004): JOURNAL OF THE SENATE at 245 and 289; BILLS AND RESOLUTIONS: Senate: 18th Congress: 1st Session: Bill 77.

The issue of amending the copyright statute does not appear to arise again until 1826, this time in the House of Representatives. During the first session of the nineteenth congress, Representative Gulian C. Verplanck of New York motioned, and it was resolved, "that the Committee on the Judiciary be instructed to inquire and report on the expediency of so amending the laws regulating copy rights as to give greater extension and security to the rights of authors and proprietors." There appears to be no further mention of said amendment. http://memory.loc.gov/ammem/amlaw/lawhome.html (11/13/2004): JOURNAL OF THE HOUSE at 125.

The House of Representatives considered the issue again in 1828. During the first session of the twentieth congress, on February 21, Representative Phillip P. Barbour of Virginia, from the Committee on the Judiciary, reported Bill 140. It granted a copyright term of twenty-eight years without the need for re-recordation; and, it was read twice and committed to a Committee of the Whole House. But, then, on February 21, Representative Verplanck submitted his amendment to Bill 140. Verplanck's Bill 140 would have extended copyright protection to musical compositions; and, it would have created the opportunity for authors living at the expiration of the new twenty-eight year term to renew copyright protection by re-recordation. Representative Verplanck left the length of the renewal term open to debate. here appears to be no further mention of this bill; however, it is extremely similar to the Act passed in 1831. http://memory.loc.gov/ammem/amlaw/lawhome.html (11/13/2004): JOURNAL OF THE HOUSE at 238, 324, 897; BILLS AND RESOLUTIONS: House: 20th Congress: 1st Session: Bill 140.

The United States Senate also considered revision of the copyright statutes in 1828. On February 19, 1828, during the first session of the twentieth congress, Senator Martin Van Buren of New York "presented the petition of Noah Webster and others, praying that the existing laws respecting copy-rights, may be so amended as to give to authors and their heirs the *exclusive* and *perpetual* property in their works." Later that week, on February 22, Senator William Marks of Pennsylvania "presented the memorial of Henry S. Tanner, of Philadelphia, employed in constructing and publishing maps, charts, and geographical works, praying that the laws on the subject of copy-rights be so amended as to secure to authors the full benefit of their works." Then, on February 26, Senator Mahlon Dickerson of New Jersey "presented the memorial of Thomas Gordon, of New Jersey, who has prepared for publication an accurate map of that State, praying that the existing laws in relation to copy-rights, may be so amended, as effectually to secure to authors and proprietors of maps and charts the full benefit of their labors." All such suggestions were referred to the Committee on the Judiciary; and there appears to be no further mention of such amendments. http://memory.loc.gov/ammem/amlaw/lawhome.html (11/13/2004): JOURNAL OF THE SENATE at 173, 180, 189.

[10] During the First Session of the Twenty-First Congress, Representative William W. Ellsworth of Connecticut, from the Committee on the Judiciary, "reported a bill (No. 145) to amend and consolidate the acts respecting copy rights." Like the 1831 Act, Bill 145 required persons who copied musical compositions to forfeit the plates used; all infringing copies; and, "one dollar for every sheet of such…musical composition…which may be found in his…possession, printed or published, or exposed to sale, contrary to the true intent and meaning of this act," with half to the proprietor and half to the United States. And, if the infringer placed on the copies a statement that the work had been entered according to Congress, without having legally acquired copyright, then he was required to forfeit two hundred dollars, with half due to the person bringing suit and the other half to the United States. Further, the bill states "in all recoveries under this act, either for damages, forfeitures, or penalties" the infringer was also

Representative Ellsworth's report accompanying Bill 145 presented the bill as a consolidation of the 1790 and 1802 Acts which deleted "useless and burthensome" provisions from those statutes, and extended copyright protection "to musical compositions, as does the English law." The report stated that the aim of the Committee on the Judiciary in preparing this bill was "chiefly to enlarge the period for the enjoyment of copy-right, and thereby to place authors in this country more nearly upon an equality with authors in other countries."[11]

Ellsworth's report offered other justification for an extended term, in addition to merely keeping pace with other countries:

> Though the nature of literary property is peculiar, it is not the less real and valuable. If labor and effort in producing what before was not possessed or known will give title, then the literary man has title, perfect and absolute, and should have his reward: he writes and he labors as assiduously as does the mechanic or husbandman. The scholar who secludes himself, and wastes his life, and often his property, to enlighten the world, has the best right to the profits of those labors: the planter, the mechanic, the professional man, cannot prefer a better title to what is admitted to be his own.

Ellsworth appears to have employed a theory of labor-derived property rights and at best a plea for equality or at worst a plea for pity upon scholars. The report suggested that a copyright term

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required to pay the full costs of the plaintiff. The bill was read twice and committed to a Committee of the Whole House. On May 14, 1830, the Committee of the Whole House was discharged. Then, on December 14, 1830, during the Second Session of the Twenty-First Congress, Representative Ellsworth motioned, and it was ordered, that Bill 145 be recommitted to the Committee on the Judiciary. On December 17, Ellsworth reported amended Bill 145, accompanied by a report, from the Committee on the Judiciary; the bill was then committed to the Committee of the Whole House on the State of the Union. All relevant portions of Bill 145 remained unchanged. http://memory.loc.gov/ammem/amlaw/lawhome.html (11/13/2004): JOURNAL OF THE HOUSE OF REPRESENTATIVES at 192, 650; BILLS AND RESOLUTIONS: House of Representatives: 21st Congress: 1st Session: Bill 145.

[11] The report indicated that the United States was "far behind the States of Europe in securing the fruits of intellectual labor, and in encouraging men of letters:" in England an author had a copyright term of twenty-eight years, and then, if still living, for life; in France an author enjoyed copyright protection for his life plus fifty years; in Russia the copyright term was the life of the author plus twenty years; and, in Germany, Norway, and Sweden, copyright was perpetual. http://memory.loc.gov/ammem/amlaw/lawhome.html (11/13/2004): REGISTER OF DEBATES, 21st Congress, 2nd Session, at cxix-cxx; BILLS AND RESOLUTIONS: House of Representatives: 21st Congress: 2nd Session: Bill 145; JOURNAL OF THE HOUSE OF REPRESENTATIVES at 61, 76.

of twenty-eight years with a renewal term of fourteen years was the absolute minimum that Congress should offer to authors.[12]

Representative Michael Hoffman of New York opposed the entire bill. He initiated debate by proposing that the rights of the public, authors, and publishers could be better balanced if the bill would be sent into a Committee of the Whole House and every part of it discussed. Hoffman suggested that a fourteen year term without renewal offered a better balance between the rights of authors and publishers, and the public. He then offered a contract theory of copyright in support of his position: "it would be a breach of contract with those booksellers who had purchased copyrights of authors heretofore, and whose rights would be infringed upon, should the privileges of the authors or works be extended as proposed by this bill." [13]

Representative Ellsworth replied by stating that the bill "would, in its results, enhance the literary character of the country."[14] And, Representative Verplanck stated that he preferred the report's labor-property theory to Hoffman's contract between authors and the public:

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[12] On January 4, 1831, Representative Ellsworth motioned, and it was ordered, that the Committee of the Whole House be discharged from the consideration of Bill 145. On January 6 the House of Representatives considered Bill 145. By instruction of the Judiciary Committee, Representative Ellsworth proposed a replacement for the last section of Bill 145. This section granted to authors who had recorded their "book, map, chart, musical composition[12], print, cut, or engraving" prior to passage of this new copyright statute a term of twenty-eight years minus the time which had already passed from recordation; and, the author, if still living, his widow, or his children could renew the copyright for another fourteen years. The replacement granted to authors who had recorded their "book, map, chart, print, cut, or engraving" the same arrangement as before. However, it added text stating that if an author who recorded his work and died prior to the act, then his heirs, executors, and administrators were entitled to enjoy copyright protection of the work for a term of twenty-eight years from the initial recordation; and, the widow or children could then renew the copyright for another term of fourteen years. The replacement section, however, limited the effect of the extension by stating that "this act shall not extend to any copyright heretofore secured, the term of which has already expired." http://memory.loc.gov/ammem/amlaw/lawhome.html (11/13/2004): JOURNAL OF THE HOUSE OF REPRESENTATIVES at 61, 76, 147, 154; BILLS AND RESOLUTIONS: House of Representatives: 21st Congress: 2nd Session: Bill 145; REGISTER OF DEBATES, 21st Congress, 2nd Session, at cxix-cxx, REGISTER OF DEBATES at 422-424.

[13] http://memory.loc.gov/ammem/amlaw/lawhome.html (11/13/2004): REGISTER OF DEBATES, 21st Congress, 2nd Session, at 422-424.

[14] Representative Jabez W. Huntington of Connecticut "strenuously supported the measure, as one that would do honor to the country." He directed his attention to the immediate amendment to the statute, citing Webster's Dictionary as an example of a work with a copyright prior to this Act that deserved the extended term. http://memory.loc.gov/ammem/amlaw/lawhome.html (11/13/2004): REGISTER OF DEBATES, 21st Congress, 2nd Session, at 422-424.

> There was no contract; the work of an author was the result of his own labor. It was a right of property existing before the law of copyrights had been made. That statute did not give the right, it only secured it; it provided a legal remedy for the infringement of the right, and that was the sum of it. It was…merely a legal provision for the protection of a natural right….Such is the view…taken of it in the constitution of the United States, and such is my opinion of it.

Verplanck argued that there was no contract, instead only a legal remedy for a natural property right. Hoffman exclaimed that "he knew of no right but a remedial right." Despite Hoffman's protests, Bill 145 soon passed the House of Representatives. It then moved through the Senate without alteration. The bill finally became law on February 3, 1831.[15]

The 1831 Act extended copyright protection to the author of a musical composition for a term of twenty-eight years from recordation; and, then at the expiration of that term, the author, if still living, his widow, or his children could renew the copyright for another fourteen year term. According to this Act, any person who engraved, etched, worked, sold, or copied; or, caused to be engraved, etched, worked, sold, or copied—directly or by varying the main design "with intent to evade the law"—;or, printed or imported for sale; or, caused to be printed or imported for sale any copyrighted musical composition without the consent of its proprietor was required to forfeit the plate used to copy the musical composition, all copies of the musical composition, and fifty cents per copy "found in his…possession, printed or published, or

[15] Representative Horace Everett of Massachusetts voiced his support for the bill and Ellsworth's amendment. And, Hoffman's motion to strike out twenty-eight years and insert fourteen "was negatived". "The bill, as amended by Ellsworth, was then ordered to be engrossed for a third reading to-morrow—yeas 81, nays 31."

On January 7, 1831, Bill 145 "was read the third time, and passed" in the House of Representatives. On January 10, the bill was read in the Senate and ordered to pass to a second reading. On January 11, the bill was read a second time in Senate, was considered as in Committee of the Whole, and referred to the Committee on the Judiciary. On January 19, "Mr. Webster, from the Committee on the Judiciary,…reported it without amendment." On January 28, the Committee of the Whole considered the bill and reported it to the Senate without amendment, and the Senate ordered that the bill pass to a third reading.

On January 30, the bill passed the Senate. On February 2, Senator Bedford Brown of North Carolina, from the Joint Committee, "reported that they had examined, and found duly enrolled" Bill 145. And, finally, on February 3, President Andrew Jackson approved and signed "An act to amend the several acts respecting copy-rights." http://memory.loc.gov/ammem/amlaw/lawhome.html (11/13/2004): REGISTER OF DEBATES, 21st Congress, 2nd Session, at 422-424; JOURNAL OF THE HOUSE OF REPRESENTATIVES at 147, 154, 157; JOURNAL OF THE SENATE at 78, 82, 97, 117, 118, 125, 127, 218; Bills and Resolutions: House of Representatives: 21st Congress: 2nd Session: Bill 145.

exposed to sale, contrary to the true intent and meaning of this act" to the proprietor; and, another fifty cents per such copy to the use of the United States.[16]

B) Trial

Reed had his Complaint delivered to the Clerk of the United States Circuit Court for the District of Maryland. The Complaint arrived with instructions to be filed by the April Term of 1844. The historical record does not offer any clear explanation why the case did not come before the Circuit Court until the November Term of 1845. Carl B. Swisher, author of HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOLUME 5: THE TANEY PERIOD, 1836-64, has suggested that as the nation grew during the nineteenth century, the Supreme Court Justices had difficulty keeping up to date with their Circuit Court dockets.[17]

After claiming authority to sue as a legal assign of the Oakes and Swan copyright in *The Old Arm Chair*, George P. Reed accused Samuel Carusi of having acted contrary to Section seven of

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[16] If the infringer placed on the copies a statement that the work had been entered according to Congress, then he was required to forfeit fifty dollars to the proprietor of the copyright and fifty dollars to the use of the United States. And, "in all recoveries under this statute, either for damages, forfeitures, or penalties" the infringer was also required to pay the full costs of the plaintiff. However, the 1831 Copyright Act established several procedural limitations to enforcement of copyright. Protection was limited to authors who were United States citizens residing in the United States. Said authors were required to adhere to a particular ritual including the recordation of a form, the deposit of a copy of the work, and payment of a fee. Recovery could only be made in courts "having competent jurisdiction thereof;" and, the penalty against infringers asserting recordation of copyright on the copies was "to be recovered by action of debt, in any court of record having cognizance thereof." Then, an alleged infringer was not liable under the statute if he had the written consent of the proprietor, signed in the presence of two credible witnesses. Persons "sued or prosecuted" under this statute were allowed to "plead the general issue and give the special matter in evidence." And, "no action or prosecution" was permitted "in any case of forfeiture or penalty under this act" unless it commenced within two years after the cause of action arose. Richard Peters, Esq., IV THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA at 436-439 (Charles C. Little and James Brown 1846).

[17] Swisher explains that throughout the Taney period, the Supreme Court Justices dedicated more than half of their schedule to traveling to their respective circuits and holding Circuit Court. While the work of the Justices within the circuits was coordinated with district judges in district courts, Swisher suggests that the district judges tended to be dependent on the Supreme Court Justices and were unable to dispose of many of the cases in their respective Districts. Carl B. Swisher HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOLUME V: THE TANEY PERIOD, 1836-64, 248-274 (Macmillan Publishing Co. 1974); Excerpts from case files, etc., Record Group 21, Stack Area E, Row 02, Compartment 02, Shelf 05, National Archives, Philadelphia, copied by Francis McCormick.

THE BALTIMORE SUN: November 11, 1845: There were two cases before the United States Circuit Court for the District of Maryland during the November term of 1845: *Reed v. Carusi*; and, *William Black, use of Samuel Ridgely, Jr. v. Richard Iglehart, Jr.* The case of *Black v. Iglehart* involved an action to recover for an alleged violation of a patent for a plough. George Reed's attorney, John H. B. Latrobe, remained in the court to represent the defendant in the patent case.

the 1831 Copyright Act. Reed accused Carusi of causing *The Old Arm Chair* to be engraved, published, and sold; and, varying the main design of the musical composition with intent to evade the law. The complaint appears to request two thousand dollars pursuant to the statutory formula of one dollar per copy: Reed must have believed that Carusi had in his possession, printed or published, or exposed to sale—contrary to the true intent and meaning of the 1831 statute—two thousand copies of the *The Old Arm Chair*.[18]

William F. Frick, one of Carusi's two attorneys, later recorded his memories regarding this case before Supreme Court Chief Justice Roger B. Taney and District Judge Upton S. Heath, in a letter to James Mason Campbell, Taney's son-in-law. Frick described the case as "entirely novel in its features" with "some very perplexing questions as to what constituted 'originality' in musical composition." Frick suggested that there was "a great deal of learned musical testimony

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[18] In his complaint, Reed alleged that Carusi

> well knowing the premises but contriving and wrongfully and injuriously intending to injure the Plaintiff and to deprive him of his profits, benefits, and advantages which he might otherwise would have acquired and derived from the sole right and liberty of printing, reprinting, publishing, and vending the aforesaid musical composition for the term of years in the said copyright mentioned to with at the district aforesaid—on the first day of January in the year eighteen hundred and forty three and at other days and times and every day between the day of the purchase of this writ did, within the times limited by the Act of Congress entitled an Act to amend the several acts respecting copyrights, cause to be engraved, published, and sold to wit at the district aforesaid, a musical composition the title of which is in the following words "The Old Arm Chair, a Ballad by Eliza Cook set to music by the publisher, Baltimore published and sold by Samuel Carusi," which said musical composition is substantially the same with that for which the copy-right aforesaid was granted to the said Plaintiff.

On November 5, 1845, THE BALTIMORE SUN announced the men who composed the grand and petit juries for United States Circuit Court for the District of Maryland. Grand Jury: John T. H. Worthington, Levi Hepsley, Paul Rust, John Mitchell, Robt. Gale, Wm. G. Howard, Robert Bines, Isaac Taylor, John Calvert, Samuel Parker, Samuel Gover, Samuel B. Foard, Otho Thomas, Wm. S. Peterkin, Hugh Jenkins, Thomas M. Coleman, Samuel O. Moale, Nath. Hickman, Samuel B. Silver, Phillip Muth, Jr., Abraham Hush, Jacob Powder, John Davis; Petit Jury: James Carroll, Granville S. Oldfield, Wm. Mason, John Smith Hollins, John S. Stiles, Hugh McEldery, James Moiz, Wm. H. Stump, Joseph K. Stapleton, Andrew Armstrong, George R. Gaither, Wm. T. Leonard, David T. Thurston, Samuel G. Hyde, D. B. Banks, Alonzo Lilly, John Baldwin, Henry J. Kalkman, N.H. Ware, John McPherson, Alpheus W. Marriott, Joseph Schell, Geo. Bramwell, James Keefer, John Byers, John A. Wagner, Horatio N. Harne, John Donoho, James W. Hunter, Zachariah Forrest, Robert H.Lanham, Nicholas Brooks.

And, on November 7, the attorneys involved in the case of *Reed v. Carusi* filed an agreement to proceed with the trial despite the absence of juror Robert Lanham. Excerpts from case files, etc., Record Group 21, Stack Area E, Row 02, Compartment 02, Shelf 05, National Archives, Philadelphia, copied by Francis McCormick; Richard Peters, Esq., IV THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA at 436-439 (Charles C. Little and James Brown 1846).

and forensic discussion."[19] Witnesses testifying on behalf of Reed argued that Carusi's "The Old Arm Chair" was identical to Reed's, while witnesses testifying on behalf of Carusi argued that there was a "marked and easily to be recognized difference between them."[20] Reed's attorney, John H. B. Latrobe, proposed that "Mr. John Cole, an old professional singer, should be sworn in as a witness, and required to sing the two songs to the jury, that they might judge for themselves whether the two airs were similar or not." Chief Justice Taney overruled Frick's objection to the "novel species of evidence;" and, Frick described the testimony of Cole as follows:

> Mr. Cole accordingly proceeded in the gravest manner, under the direction of the Chief Justice, to intone the two songs successively in open court; and the appearance of the singer, the lamentable, monotonous cadence of both airs, the bathos of the words…together with the singular and varied expressions of pleasure or disapprobation on the faces of the musical *dilettanti* present, produced by Mr. Cole's emphatic rendering of the songs, would, under any other circumstances, have created in the crowd of bystanders irresistible laughter and confusion. But the Chief Justice, with that power peculiarly his own, of restraining almost by a glance the slightest breach of decorum in his Court, overawed and repressed every demonstration of disrespect by the placid and dignified attention which he bestowed throughout upon Mr. Cole's musical efforts. I doubt if the same scene could have been enacted in any other Court without inducing some, at least, of the listeners to forget and violate the customary rules of judicial decorum.

Perhaps Cole's rendition of the two songs was intentionally absurd. Friendly with Latrobe and competing with Carusi as a Baltimore music publisher, Cole had reason to emphasize any similarities between the two versions of *The Old Arm Chair*.[21]

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[19] Frick failed to note, though, any evidence regarding the number of copies for which Carusi would have been liable.

[20] On December 30, 2004, Peter Fuchs, a pianist, arranger, and conductor, compared the Russell and Carusi versions of "The Old Arm Chair." Fuchs noted minor differences between the two versions: Russell is in the key of E flat and in 4/4, while Carusi's is in D major and in 2/4. Fuchs concluded that the Carusi version is more melodic and interesting; however, the basic structural concepts of the songs are the same.

[21] John Cole was a music publisher competing with Carusi in Baltimore. The Maryland Historical Society's sheet music collection includes a copy of *The Blue Bells of Scotland* composed by N. Carusi, presumably Samuel's brother Nathaniel; and, published by John Cole in Baltimore. Further, Cole was Latrobe's music publisher. Latrobe wrote verses which Judge Frick, William Frederick Frick's father, set to music. Cole then published these songs. John E. Semmes, JOHN H.B. LATROBE AND HIS TIMES, 1803-1891, 188 (Norman Remington Co. 1917); Samuel Tyler, MEMOIR OF ROGER BROOKE TANEY, LL.D.: CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, 312-314 (John Murphy & Co. 1872).

Defendant Samuel Carusi, through his attorneys William F. Frick and Francis Brinley, made two arguments. First, Carusi alleged that Henry Russell's *The Old Arm Chair* was not an original composition: Carusi attempted to persuade the jury that "portions of Russell's song were taken from two older airs, to wit, *The Blue Bells of Scotland*, and *The Soldier's Tear*.[22] Second, Carusi argued that his *The Old Arm Chair* was different from Russell's: Carusi presumably made this argument by showing that his *The Old Arm Chair* was "an alteration of a song called *New England*, composed by I. T. Stoddard, prior to the date of the copyright of Russell's song."[23]

According to the LAW REPORTER, after the close of evidence on both sides, the respective counsel then argued their prayers, the legal propositions that they thought the evidence warranted, before the judges and jury. The LAW REPORTER stated that Chief Justice Taney and Justice Heath rejected all proposed prayers. Taney then drafted his own directions to the jury.[24]

The first instruction reflected Carusi's first argument: "The defendant is not liable to this action, unless the jury find that Russell was the author of the musical composition called 'The Old Arm Chair.'" Taney explained that Russell could not be considered the author if his *The Old Arm Chair* was a direct borrowing of an older song, or a compilation of older musical

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[22] There does not appear to be any express originality requirement in the 1831 Copyright Act; however, Carusi may have sought to convince the Court that this requirement was implied by use of the term "author."

[23]Presumably, this defense of distinguishing the music could have related to the 1831 Act by refuting the plaintiff's argument that Carusi varied, added to, or diminished the main design of Russell's *The Old Arm Chair* with intent to evade the law: rather than varying Russell's composition, Carusi varied Stoddard's *New England*.

U.S. Copyright Office in Washington, D.C., Reel 6, Volume 37: *Samuel Carusi recorded his copyright to New England, New England, My Home O'er the Sea* composed by I. T. Stoddard with Thomas Spicer, Clerk of the District of Maryland on March 26, 1841. Upon review of recordings of Carusi's *The Old Arm Chair* and Stoddard's *New England*, the music is strikingly similar, if not identical. Peleg W. Chandler, VIII THE LAW REPORTER, at. 411-413 (Bradbury, Soden, and Company 1846); James Mason Campbell REPORTS OF CASES AT LAW AND EQUITY AND IN THE ADMIRALTY DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND BY ROGER BROOKE TANEY, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES: APRIL TERM 1836 TO APRIL TERM 1861, 72-75 (Kay & Brother, Law Booksellers, Publishers and Importers 1871).

[24] Peleg W. Chandler, VIII THE LAW REPORTER, at. 411-413 (Bradbury, Soden, and Company 1846); James Mason Campbell REPORTS OF CASES AT LAW AND EQUITY AND IN THE ADMIRALTY DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND BY ROGER BROOKE TANEY, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES: APRIL TERM 1836 TO APRIL TERM 1861, 72-75 (Kay & Brother, Law Booksellers, Publishers and Importers 1871).

compositions without any material change; but, circumstantial similarities in musical style would not make Russell's composition a plagiarism of *The Blue Bells of Scotland* and *The Soldier's Tear*. Further, the recordation of *The Old Arm Chair* by Oakes and Swan placed the burden on Carusi to demonstrate that Russell was not the author.[25]

While the first instruction appears fairly balanced between the two parties, the second instruction created several obstacles to a verdict for the plaintiff. Taney explained that Carusi could not be liable unless the main design of his *The Old Arm Chair* was the same with that of Russell, or the material and important parts of the two songs were the same, or Carusi altered Russell's composition to evade the law. Further, Carusi was not liable if his *The Old Arm Chair* was "the effort of his own mind, or taken from an air composed by some other person, who was not a plagiarist from that of Russell." Taney's second instruction appears to have manipulated Carusi's second defense into two reasons why the jury should find him not liable: being a variation of *New England*, Carusi's *The Old Arm Chair* was not the same as nor a variation of Russell's; and, even if the compositions are substantially similar, Carusi created his *The Old Arm Chair* by taking from Stoddard's *New England*, not Russell's composition.[26]

Then, the third instruction stated that Carusi could be liable only if he infringed upon the copyright in Russell's *The Old Arm Chair* within the two years before this action was brought. This instruction appears to correspond with Section thirteen of the 1831 Copyright Act, which stated, "no action shall be maintained, in any case of forfeiture or penalty under this act, unless

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[25] Peleg W. Chandler, VIII THE LAW REPORTER, at. 411-413 (Bradbury, Soden, and Company 1846); James Mason Campbell REPORTS OF CASES AT LAW AND EQUITY AND IN THE ADMIRALTY DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND BY ROGER BROOKE TANEY, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES: APRIL TERM 1836 TO APRIL TERM 1861, 72-75 (Kay & Brother, Law Booksellers, Publishers and Importers 1871).

[26] James Mason Campbell REPORTS OF CASES AT LAW AND EQUITY AND IN THE ADMIRALTY DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND BY ROGER BROOKE TANEY, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES: APRIL TERM 1836 TO APRIL TERM 1861, 72-75 (Kay & Brother, Law Booksellers, Publishers and Importers 1871).

the same shall have been commenced within two years after the cause of action shall have arisen." Which term the complaint was filed during, then, may have been determinative of this case. If the alleged infringement occurred on October 25, 1842, when Carusi recorded copyright to his *The Old Arm Chair*, then commencement of Reed's action during the November term of 1844, when the complaint was filed, or 1845, when the case was decided, should have resulted in a victory for Carusi. Yet, apparently, Frick and Brinley conceded the fact that the case was commenced on April 1844: James Mason Campbell's report of the case stated that "under the agreement endorsed by counsel upon the declaration, the suit so far as limitation is concerned must be regarded as brought on the first Monday of April 1844."[27]

Taney's final instruction significantly manipulated the 1831 Copyright Act. He instructed the jury to extract from Carusi, if liable, one dollar for each sheet he may have caused to be printed for sale within the two years before suit was commenced, presumably on April 1844. According to the Act Carusi should have been liable to forfeit the plates on which the musical composition was copied, all the copies made, and one dollar for every copy of *The Old Arm Chair* "which may be found in his possession, printed or published, or exposed to sale, contrary to the true intent and meaning of this act." Taney appears to have arbitrarily defined Carusi's liability by those copies which he caused to be printed from April 1842 to April 1844. He apparently ignored forfeiture of the plates and copies; and, he ignored both the possession element, and the issue of whether the copies were exposed to sale "contrary to the true intent and meaning" of the 1831 statute. Further, Taney appears to have invented a two year limitation on the damages. Again, the

[27] James Mason Campbell REPORTS OF CASES AT LAW AND EQUITY AND IN THE ADMIRALTY DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND BY ROGER BROOKE TANEY, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES: APRIL TERM 1836 TO APRIL TERM 1861, 72-75 (Kay & Brother, Law Booksellers, Publishers and Importers 1871) ;Richard Peters, Esq., IV THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA at 436-439 (Charles C. Little and James Brown 1846); Excerpts from case files, etc., Record Group 21, Stack Area E, Row 02, Compartment 02, Shelf 05, National Archives, Philadelphia, copied by Francis McCormick National Archives in Philadelphia, Pennsylvania; U.S. Copyright Office in Washington, D.C., Reel 6, Volume 37.

Act stated that "no action or prosecution shall be maintained" if commenced more than two years after the cause of action had arisen; but, it does not appear to have limited the forfeiture to infringing copies made within two years of the commencement. Finally, there is no mention in Taney's instructions regarding Section eleven of the statute, which could have penalized Carusi for claiming copyright in his *The Old Arm Chair*.[28]

According to Frick, "[the jurors] made up their minds that there was only a difference in the songs between 'Tweedledum and Tweedledee,' and there was accordingly a verdict for the plaintiff." The jury did reduce the liability from the two thousand dollars requested by Reed to two hundred dollars, half of which was due to the United States. Presumably, the jury found that Carusi had published only two hundred copies of *The Old Arm Chair*.[29]

C) Pardon

Almost immediately after the jury returned its verdict on November 8, 1845, Samuel Carusi, through his attorneys William F. Frick and Francis Brinley, began to prepare a petition for a pardon of the one hundred dollars owed to the United States. Carusi's petition to President Polk summarized the accusations made by Reed, and then appears to have repeated his trial defense, with emphasis on his ignorance and good faith. Writing in the third person, Carusi stated that

> [he] acted with no intention to evade the Act of Congress aforesaid, or to injure the rights, if any, of the said Reed…[and] published his song of the "Old Armchair" (adapting to familiar words an air which he had himself previously copyrighted) under the honest impression that he had a perfect right to do so, notwithstanding the said Act of Congress.

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[28] James Mason Campbell REPORTS OF CASES AT LAW AND EQUITY AND IN THE ADMIRALTY DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND BY ROGER BROOKE TANEY, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES: APRIL TERM 1836 TO APRIL TERM 1861, 72-75 (Kay & Brother, Law Booksellers, Publishers and Importers 1871); Richard Peters, Esq., IV THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA at 436-439 (Charles C. Little and James Brown 1846).

[29] Samuel Tyler, MEMOIR OF ROGER BROOKE TANEY, LL.D.: CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, 312-314 (John Murphy & Co.1872); James Mason Campbell REPORTS OF CASES AT LAW AND EQUITY AND IN THE ADMIRALTY DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND BY ROGER BROOKE TANEY, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES: APRIL TERM 1836 TO APRIL TERM 1861, 72-75 (Kay & Brother, Law Booksellers, Publishers and Importers 1871).

Carusi's petition presented a music dealer struggling to meet the demands of a large family, who found himself liable, despite good intentions, for a debt of two hundred dollars, because of a song which was only worth twelve and a half cents per sheet.[30]

Carusi filed, with his petition to President Polk, a letter from George Reed's attorney, John H. B. Latrobe, to William Frick. Latrobe demonstrated his support for Carusi's petition by stating that Reed had been compensated by the hundred dollars paid to him, and the object of the copyright statute had been accomplished without payment of one hundred dollars to the United States.[31]

On January 14, 1846, Carusi's petition and Latrobe's letter were enclosed with a cover letter from Carusi's attorney, Francis Brinley, to President Polk. This letter stated that Brinley concurred in the views expressed by the petition drafted by William F. Frick; and, that Carusi was a person worthy of pardon. Upon receipt, President Polk directed the Secretary of State, James Buchanan, to transmit a copy of the petition to the U.S. attorney for the District of Maryland for further investigation of the facts and an opinion regarding pardon.[32]

On January 19, U.S. Attorney William S. Marshall addressed a letter to the Secretary of State. Marshall's letter began by stating that a review of the evidence is unnecessary. He then stated that "the case was one which excited the curiosity of the bar;" and, that he heard most of the evidence as a spectator. Marshall suggested that there was reason to believe that Carusi reasonably thought he had a right to publish his *The Old Arm Chair*. And, Marshall concluded

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[30] THE BALTIMORE SUN, November 10, 1845; Carusi's Petition for Pardon: National Archives in College Park, Maryland, Record Group 59, Stack Area 250, Row 48, Compartment 17, Shelf 5, Box 3.
[31] Carusi's Petition for Pardon: National Archives in College Park, Maryland, Record Group 59, Stack Area 250, Row 48, Compartment 17, Shelf 5, Box 3.
[32] Id.

that the object of the payment to the United States is to punish fraud, which was absent in this case.[33]

On February 3, President James K. Polk pardoned Samuel Carusi's judgment debt of one hundred dollars to the United States. The pardon, signed by Polk and Buchanan, summarized the arguments in Carusi's petition and cited to Marshall's letter recommending Carusi as a "fit subject for executive clemency." On February 4, U.S. Marshal Moreau Forrest addressed a letter to Buchanan, stating that he received the "President's remission of the penalty incurred by Samuel Carusi for an alleged violation of the copy right Act approved February 3, 1831."[34]

II) *Reed v. Carusi*: Critical Essay

Reed v. Carusi, 1 Taney 72 (CCMd. 1845) was most recently cited by the United States Supreme Court in *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998)[35] to demonstrate

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[33] Id.

[34] Pardon of the hundred dollars was conditioned upon payment, by Carusi, of "all costs that have accrued in this case." Carusi, in his petition, states that he was liable for the two hundred dollar judgment plus costs of about fifty dollars. It is not clear whether Polk's pardon required Carusi to pay anything more than the hundred owed to Reed and the costs of fifty dollars mentioned in Carusi's petition. Pardon of Samuel Carusi by President James Polk, Record Group 59, Microfilm ID T967, National Archives, College Park, copied by Francis McCormick.

[35] Feltner was the owner of Krypton International Corporation. In 1990 Krypton International Corporation acquired three television stations in the southeastern United States. Columbia Pictures Television ("Columbia") held the copyright to several television series licensed to Feltner's television stations. Feltner's stations soon became delinquent in making required royalty payments to Columbia. Subsequently, after failed negotiations, Columbia terminated the license agreements in October of 1991. As Feltner's television stations continued to broadcast these television series, Columbia pursued a copyright infringement action in the United States District Court for the Central District of California.

Judge Edward Rafeedie granted Columbia Summary Judgment on the issue of liability, finding Feltner vicariously and contributorily liable for copyright infringement. The District Court denied Feltner's request for a jury trial on the issue of statutory damages. After a bench trial on this issue, the Court found four hundred and forty acts of infringement and awarded Columbia twenty thousand dollars per act of infringement, plus costs and attorney's fees.

Feltner appealed his case to the United States Court of Appeals for the Ninth Circuit, arguing that the District Court's denial of his request for a jury trial on the issue of statutory damages was erroneous both as a matter of interpretation of 17 U.S.C. §504(c)(1), and as a deprivation of his Seventh Amendment right to a jury trial. Feltner's appeal came before Circuit Judges Brunetti, Farris, and Kozinski. Circuit Judge Brunetti wrote the opinion rejecting Feltner's argument.

Feltner argued that the word "court," as used in Section 504(c)(1) refers to the jury. Circuit Judge Brunetti addressed this issue briefly by directing Feltner to inaction by Congress following the decision in *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). In the *Krofft* decision the Ninth Circuit interpreted the word "court" in the analogous statutory damages provision of the 1909 Copyright Act to mean the judge, not the jury. Circuit Judge Brunetti's opinion states that "[i]f Congress intended to overrule *Krofft* by having the jury

that, historically, damages for violation of a copyright statute were determined by a jury in a court of law, not a court of equity or admiralty. Justice Thomas' majority opinion recalled that

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determine the proper award of statutory damages, it would have altered this language." Congress did not, and still has not, altered the language indicating that the award of statutory damages is whatever the "court" considers just.

Feltner also argued that the District Court's denial of his request for a jury trial deprived him of his right to a jury trial under the Seventh Amendment to the United States Constitution. Circuit Judge Brunetti's rejection of this argument was extremely brief. The opinion cites to several cases holding that the Seventh Amendment does not provide a right to a jury trial on the issue of statutory damages, and to several cases holding that the Seventh Amendment does provide a right to a jury trial. It states "we agree with those cases holding that the Seventh Amendment does not provide a right to a jury trial on the issue of statutory damages because an award of statutory damages is equitable in nature."

In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), the Supreme Court first looked to the statutory language. It affirmed the Ninth Circuit's holding that the term "court", as used in Section 504(c), refers exclusively to the judge. *Feltner*, 523 U.S. at 347. The Court reasoned that "other remedies provisions of the Copyright Act use the term 'court' in contexts generally thought to confer authority on a judge, rather than a jury;" and, that the Copyright Act does not use the term "court" in the subsection addressing awards of actual damages, which is generally accepted as a jury issue. Id. at 346.

The Supreme Court then considered whether the Seventh Amendment provides a right to a jury trial on the issue of statutory damages. The Court stated the rule that the Seventh Amendment applies to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty. *Feltner*, 523 U.S. at 348 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989)). The Court then found that copyright suits for monetary damages were tried in English courts of law, before juries, in the late 18th century. Id. at 348-352. A nearly unanimous Court, then, concluded that the "Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under §504(c) of the Copyright Act, including the amount itself." Id. at 355.

By finding that Congress intended "court" to describe the judge and that the Seventh Amendment provides a right to a jury trial, the Court found section 504(c) to be unconstitutional; yet, the Court was silent regarding its continued application. David Nimmer and Jason Sheasby, *After "Feltner," How Will Juries Decide Damages? Case That Rules 7th Amendment Requires Jury Trial For Copyright Statutory Damages Leaves Gaps* 20 THE NATIONAL LAW JOURNAL February 8, 1999, at C19. An article by David Nimmer and Jason Sheasby in THE NATIONAL LAW JOURNAL suggests one reading of the majority and concurring opinion which would eliminate statutory damages for copyright infringement until Congress passed a law providing statutory damages which could be determined by a jury. Id.

The Supreme Court did reverse the judgment and remanded the case for proceedings consistent with its majority opinion. *Feltner*, 523 U.S. at 355. The Ninth Circuit rejected Feltner's argument that as a prevailing party he was entitled to attorneys' fees, and remanded his case to the District Court for further proceedings in accordance with the Supreme Court's opinion. *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 152 F.3d 1171 (9th Cir. 1998). The United States District Court for the Central District of California, then gave Feltner his jury trial. Where a Judge originally set the amount of Feltner's liability at 8.8 million dollars, the jury set his liability at 31.68 million dollars. See *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186 (9th Cir. 2001). On appeal to the Ninth Circuit, Feltner argued that the Supreme Court decision "rendered the statutory damages provision of the Copyright Act constitutionally unenforceable." *Columbia Pictures Television, Inc.*, 259 F.3d at 1192. The Ninth Circuit rejected Feltner's argument. Id. The Ninth Circuit found language in the Supreme Court's opinion that "evinces the Court's intent to preserve a plaintiff's ability to seek statutory damages under §504(c) of the Copyright Act;" and, the Ninth Circuit found precedent for continued enforcement of a statute that is found to violate the Seventh Amendment. Id. The Ninth Circuit also noted that the United States District Court for the Southern District of New York and the United States Court of Appeals for the First Circuit and already conducted jury trials on the issue of statutory damages, pursuant to the Supreme Court's decision. Id. at 1193.

actions seeking damages for violation of the Statute of Anne[36] were tried in courts of law. Then, the Court in *Feltner* stated that there was "no evidence that the Copyright Act of 1790 changed the practice of trying copyright actions for damages in courts of law before juries." To demonstrate that the 1790 copyright statute did not disrupt the eighteenth century English legal procedure, the Court cited several cases in which actions to recover damages under the 1831 Copyright Act—"which differed from the Copyright Act of 1790 only in the amount (increased to $1 from 50 cents) authorized to be recovered for certain infringing sheets"—were tried to juries. *Reed v. Carusi* and the other cases cited were relevant to the Court's consideration of whether the Seventh Amendment to the United States Constitution provided a right to a jury determination of the amount of statutory damages provided by Section 504(c) of the 1976 Copyright Act.[37]

The rule governing this issue states that the Seventh Amendment applies "not only to commonlaw causes of action, but also to 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'"[38] The Court concluded from its review of English and American legal history that before the adoption of the Seventh Amendment copyright suits for monetary damages pursuant to statute were tried in courts of law before juries. Thus, the Court held that the Seventh Amendment provided a right to a jury determination of the amount of statutory damages provided by Section 504(c) of the 1976 Copyright Act.[39]

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[36] 8 Anne c. 19 (1710)(Eng.); The Statute of Anne was the first English copyright statute.
[37] The Supreme Court also cited to *Backus v. Gould*, 48 U.S. 798 (1849); *Millett v. Snowden*, 17 F. Case 374 (SDNY 1844); and, *Dwight v. Appleton*, 8 F. Cas. 183 (SDNY 1843); *Feltner v. Columbia Pictures TV*, 523 U.S. 340, 351-352 (1998).
[38] *Feltner v. Columbia Pictures TV*, 523 U.S. 340, 348 (1998) (*quoting Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989)).
[39] *Feltner* at 348-349.

Section 504(c)(1) states that a copyright owner may elect to recover, instead of actual damages and profits,

> an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just.

If the plaintiff elects to recover statutory damages, the jury must then consider what amount of money, between $750 and $30,000 per work, would achieve justice. And, section 504(c)(2) then gives the court the authority to increase the award of statutory damages to $150,000 if the infringement was willful; or, decrease the award of statutory damages to $200 if the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."[40]

There is a significant contrast between the expectations placed upon jurors by Section 504(c) of the 1976 Copyright Act and Section seven of the 1831 Copyright Act. Where the 1976 Copyright Act expects twelve members of the community to define and to affect justice, the 1831 Copyright Act asked jurors only to determine the number of infringing copies. The above review of the jury trial in *Reed v. Carusi* suggests that a suit for infringement pursuant to the 1831 Act was unpredictable despite such control over the jury. An increase in the expectations of the jury only exacerbates the unpredictability of copyright enforcement.[41]

George P. Reed's complaint indicated that he initially expected to leave Baltimore with at least one thousand dollars. Presumably, he had reason to believe that Carusi had published two

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[40] 17 U.S.C. 504(c); See NIMMER ON COPYRIGHT §14.04(B)(1)(a):

> In the absence of a jury trial, it has been said the determination of statutory damages within the applicable limits may turn upon such factors as "the expenses saved and profits reaped by the defendants in connection with the infringements, the revenues lost by the plaintiffs as a result of the defendant's conduct, and the infringers' state of mind—whether wilful, knowing, or merely innocent." Another approach looks to whether each party has complied with its contractual obligations to the other.

[41] 17 U.S.C. 504; Richard Peters, Esq., IV THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA, 436-439 (Charles C. Little and James Brown 1846).

thousand copies of *The Old Armchair*. The historical record indicates that Reed left Baltimore with only one hundred dollars. Despite the simplicity of section seven's formula for the calculation of damages, when considering the costs and benefits of a lawsuit, Reed was unable to accurately predict the amount of damages where both the particular jury instructions and the jury deliberations were unknown variables. And, if Samuel Carusi considered settlement with Reed, he also could not have accurately predicted that the jury would find him liable for two hundred infringing copies. The statutory formula did, however, offer some predictability of outcome. The parties could have gathered information capable of persuading a jury that there were more or less infringing copies; and, then, they could decide whether or not to take their chances with the given facts.[42]

The House Report states that the "two basic aims" of the Section 504 of the Copyright Act of 1976 were to avoid confusion and uncertainty, and to avoid artificial or overly technical awards.[43] After *Feltner v. Columbia Pictures TV*, there is confusion, uncertainty, and artificial awards due to the lack of predictability regarding statutory damages. While the parties can consider the number of works infringed, the jury is free to choose any number between two hundred and one hundred and fifty thousand dollars per said work, depending on its notion of what is just in the particular case. This is apparent in the remand of *Feltner v. Columbia Pictures TV* where Feltner's hard earned jury trial resulted in liability approximately four times the statutory damages granted by a federal judge in the initial trial. If C. Elvin Feltner, Jr. could have even remotely predicted this outcome, he almost certainly would have saved himself the legal costs of appealing the issue of the right to a jury trial to the Ninth Circuit and the Supreme

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[42] Richard Peters, Esq., IV THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA, 436-439 (Charles C. Little and James Brown 1846); Excerpts from case files, etc., Record Group 21, Stack Area E, Row 02, Compartment 02, Shelf 05, National Archives, Philadelphia, copied by Francis McCormick.
[43] 1976 U.S.C.C.A.N. 5659, 5777.

Court.[44] Then, in 2003, a jury at the United States District Court for the District of Maryland awarded Lowry's Reports, Inc. 19.7 million dollars in statutory damages against Legg Mason.[45] In 2001, a jury at the United States District Court for the Central District of California awarded Ernesto Clark one hundred and ten thousand dollars in statutory damages against Jalisco Films, J&M Productions, and John Beale, Jr.[46] Then, in 2004, another jury in the United States District Court for the Central District of California awarded Michael Sidney Luft only seventy-five thousand dollars in statutory damages against Classic World Productions, Inc.[47]

There is a significant difference between these awards, the majority of them within the same court. As these numbers were determined by juries, there is little or no guidance for future copyright litigation. Defendants with strong arguments may be forced to pay high settlements in fear of plaintiff-friendly juries willing to award up to $19.7 or $31.68 million.[48] Such awards may be ending careers and discouraging newcomers.[49] Plaintiffs with clear cases of infringement may be unwilling to proceed in fear that a jury award of seventy-five thousand or even one hundred and ten thousand dollars will not compensate their losses, and even worse may not cover their expenses in litigation. Outside of litigation, in some circumstances authors may be more likely to infringe another's copyright given the copyright owner's uncertainty regarding

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[44] Feltner v. Columbia Pictures TV, 523 U.S. 340, (1998); Columbia Pictures Television v. Krypton Broad. Of Birmingham, Inc., 152 F.3d 1171 (1998).
[45] JAS MD Ref No. 405454WL.
[46] 1 Trials Digest 5th 8.
[47] 1 Trials Digest 8th 8.
[48] On March 30, 2005 the WASHINGTON POST reported that electronic database operators such as ProQuest, Reed Elsevier Group's LexisNexis, the New York Times, and Dow Jones agreed to pay the National Writers Union, the Authors Guild and the American Society of Journalists and Authors 18 million dollars to settle copyright infringement claims brought under a class-action lawsuit. WASHINGTON POST, March 30, 2005, E02. An article on page 2 of the February 2003 issue of RADIO suggested that SESAC will likely, in future negotiations, contrast its jury award of 1.2 million dollars for copyright infringement by two FM stations in Pittsburgh with its $5,000 per year blanket license.
[49] In 2001, after a jury awarded composer Glenn Monroig 7.7 million dollars in a copyright infringement suit against RMM, Ralph Mercado found himself in bankruptcy court selling his record company and giving up control of his record label. Navarro, Mireya. "For Sale: A Latin Music Legacy; Facing Bankruptcy, a Record Pioneer Draws Gratitude and Reproach." THE NEW YORK TIMES June 7, 2001, at 1.

enforcement. In other circumstances, creativity may be limited as authors fearing potentially large jury verdicts avoid difficult copyright issues.

Although there have been several articles urging Congress to address the uncertainty and cost of copyright litigation caused by jury trials on the issue of statutory damages, seven years have passed since the Supreme Court decision in *Feltner* and Congress has failed to even consider the issue. Following *Feltner*, David Nimmer and Jason Sheasby argued that the Supreme Court should have deferred to Congress for future action; Michael Landau and Donald Biederman employed the unpredictability of copyright litigation as a basis for their plea to Congress to establish a copyright court; and, Karen Calloway suggested that predictability and consistency of statutory damage awards are left to the legislative process.[50] Seven years have passed since the Supreme Court issued its decision in *Feltner*, and it appears that Congress has failed to react.

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[50] In the year following *Feltner*, the issue of a constitutional right to a jury trial for statutory damages became a relatively popular topic amongst the copyright circle. There was both dissatisfaction with Court's reasoning and speculation about the practical effects of the holding. These dissenters focused much of their attention on the potential loss of predictability of statutory damages where juries, not judges, determined the amount.

David Nimmer asked his readers, "[g]iven its view that congressional intent completely disallowed the possibility of a jury trial on statutory damages, how could the court simply allow future juries to assess statutory damages?" He argued that statutory damages jurisprudence involves "extensive analysis of precedent so as to create a statutory-damages regime consistent across a spectrum of cases." Nimmer speculated that a jury could never perform this type of analysis, and there would be no consistent regime of statutory damages. Nimmer concluded that the Court "should instead have waited for Congress to decide what to do." David Nimmer and Jason Sheasby, *After "Feltner," How Will Juries Decide Damages? Case That Rules 7th Amendment Requires Jury Trial For Copyright Statutory Damages Leaves Gaps* 20 THE NAT'L L.J., February 8, 1999, at C19.

Michael Landau and Donald E. Biederman echoed Nimmer's speculations by stating that *Feltner* "will add more unpredictability to an already uncertain area of the law." Landau and Biederman further speculated that the unpredictability of awards of statutory damages by juries "will increase the hazards faced by defendants forced to litigate in the home jurisdictions of those who believe that their copyrights have been infringed." Michael Landau and Donald E. Biederman, *The Case For A Specialized Copyright Court: Eliminating the Jurisdictional Advantage* 21 HASTINGS COMM. AND ENT. L.J., Summer 1999, at 717.

Karen Calloway offered a detailed analysis of *Feltner* which concluded that the Supreme Court pursued the "absolute primacy of tradition" over policy arguments that point strongly towards judicial determination of statutory damages. Calloway directs her readers to the amicus briefs presented in *Feltner*, which reasoned that the assignment of statutory damages to juries will lead to a lack of uniform interpretation, and subsequently uncertainty for copyright participants. Unlike Landau and Biederman, Calloway focused the reader on the consequences of precluding the ability of a plaintiff to unilaterally avoid a jury determination of statutory damages. Calloway speculated that the *Feltner* decision "will impact business strategies and innovation by creators who have relied on the copyright scheme to protect intellectual property whose value runs ahead of the general public's experience." Karen M. Calloway, *Feltner v. Columbia Pictures Television, Inc.* 14 BERKELEY TECH. L.J., 1999, at 23.

Searches of electronic congressional records yield nothing relevant. Congress does not appear to have even acknowledged *Feltner* in its amendments to 17 U.S.C. §504(c)(1). In 1999, Congress amended section 504(c)(1), increasing the amount of statutory damages to a range of seven hundred and fifty dollars to thirty thousand dollars. Pub.L. 106-160 §2(1). Congress raised the stakes in extremely unpredictable litigation without even acknowledging that the Supreme Court had recently declared the language of this statute unconstitutional. Congress returned to section 504(c) in 2004 to add a paragraph regarding domain registration. Pub.L. 108-482 §203. Again, Congress failed even to acknowledge *Feltner*.

Statutory damages are now constrained by the Seventh Amendment to eighteenth and nineteenth century procedure. And, return to the nineteenth century formula for calculating damages would be insufficient, as modern technology causes the concept of measuring damages by the number of infringing copies to be impossible in numerous cases.[51] Chief Justice Taney's jury instructions suggest a possible resolution. His instructions significantly constrained the discretion of the jury. He manipulated the 1831 Copyright Act by instructing the jury to hold Carusi liable for one dollar per sheet which he caused to be printed for sale within two years before suit was commenced. The Supreme Court could address this issue; but it did not even attempt to do so in *Feltner*. Congress is left to create uniformity and predictability in statutory damages for copyright infringement by amending section 504(c). Congress assumes the burden of constraining the discretion of juries by defining justice as it applies to statutory damages for copyright infringement.

While legislative inquiry into the issue of whether jurors should be determining statutory damages in copyright litigation is highly recommended, Congress has yet to act. Thus, court

[51] NIMMER ON COPYRIGHT §14.04(C)(2); Karen M. Calloway, *Feltner v. Columbia Pictures Television, Inc.* 14 BERKELEY TECH. L.J., 1999, at 23.

procedure may be the best current approach to limiting the uncertainty and cost of copyright litigation regarding statutory damages decided by juries. Appellate decisions could strengthen the elements of civil procedure that already temper the uncertainty of jury awards.

The best opportunity to limit the uncertainty of jury awards lies in the court's ability to take the issue away from the jury. A significant opportunity for copyright suits to be diverted away from the jury lies in summary judgment. Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the United States Supreme Court explained that a dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The judge, then, at this stage in the proceedings, can take the issue of statutory damages away from an unpredictable jury by deciding how a reasonable jury would act. Such a decision builds on precedent and creates new precedent. Potential parties to copyright litigation, then, are in a good position to consider the costs and benefits of litigation.

This opportunity to strengthen the predictability and certainty of statutory damages, though, has already been threatened. The United States District Court for the District of Oregon has held that the Supreme Court's decision in *Feltner* precludes the court from determining statutory damages on summary judgment. *Matlow v. Solomon*, 2005 WL 309976 at *2 (D.Or. 2005). The District Court offers no explanation. This decision is incorrect. The Supreme Court's opinion in *Feltner* does not address Rule 56 of the Federal Rules of Procedure.[52]

[52] The United States District Court for the Central District of California denied Feltner's request for a jury trial, and granted a final judgment after a bench trial regarding statutory damages against Feltner. *Columbia Pictures*

Further, other courts, such as the United States District Court of the Northern District of Illinois have granted summary judgment on the issue of statutory damages in copyright litigation. *BMG Music v. Gonzalez*, 2005 WL 106592 (N.D.Ill. 2005).

This split among courts only strengthens uncertainty and possible jurisdictional advantages. The United States Courts of Appeals should resolve this split in favor of summary judgment on statutory damages in copyright litigation.

IV) Conclusion

The laws governing intellectual property are of great social significance, and appear to become a greater part of life in the twenty-first century with each passing day. The issues involving the creation and enforcement of these laws are extremely complex; and, the historical foundation with which society approaches these issues is weak. Those involved in the creation and enforcement of these laws, then, must examine the issues diligently and carefully evaluate the historical record that is available. Congress claims to be trying to avoid confusion and uncertainty in awarding remedies for copyright infringement; yet, it does not appear to have acknowledged the Supreme Court decision in *Feltner*. While judges have a variety of tools to minimize the confusion and uncertainty caused by *Feltner*, the burden is now on Congress to inquire into both the current status of copyright enforcement and the historical foundation. Cases such as *Reed v. Carusi* offer legislators a unique insight into the development of copyright law in the nineteenth-century; into the reasoning of the twentieth-century United States Supreme Court decision of *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998); and, into the role of juries in copyright litigation during the twenty-first century.

Television v. Krypton Broadcasting of Birmingham, Inc., 106 F.3d 284, 288 (9th Cir. 1997). The Supreme Court decision in *Feltner* did not concern summary judgment.

V) Appendix A: *Reed v. Carusi*: Biographical Information

A) George P. Reed, Plaintiff

George P. Reed was born in Boston, Massachusetts in 1814; and, died there on March 18, 1890. He established a business as an instrument dealer and music publisher at 17 Tremont Row in 1838. Then, in 1849, Reed made his clerk George D. Russell a partner in the business, which, in 1855, became a founding member of the Board of Music Trade. An 1856 copy of DWIGHT'S JOURNAL OF MUSIC described George P. Reed & Co. as one of Boston's three leading publishers, "all of whom seem anxious to identify their names with the best list of works that have enduring value."[53]

B) Samuel Carusi, Defendant

Samuel Carusi, the eldest son of Gaetano and Philippa Carusi, was born at the end of the Eighteenth Century in Sicily.[54] He died, a resident of Washington D.C., on December 22, 1877.[55]

The story of Carusi's immigration to the United States began with the formation of the United States Marine Corps Band.[56] The Marine Corps Band was created by an act of Congress

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[53] C.M. Ayars, CONTRIBUTIONS TO THE ART OF MUSIC IN AMERICA BY THE MUSIC INDUSTRIES OF BOSTON, 1640 TO 1936, (1937); Stanley Sadie, 16 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS, 404 (Macmillan Publishers Limited 1980).

[54] Samuel Carusi's United States Marine Corps record states that he was enlisted on February 17, 1805 at the age of ten years old; and, that he was born in Sicily, Italy. National Archives, Washington D.C.

[55] *Howard v. Carusi*, 109 U.S. 725, 728 (1884).

[56] There is reason to believe that Thomas Jefferson may have been the ultimate cause of Carusi's immigration to the United States. Jefferson was well known for his knowledge of music and his abilities as an instrumentalist; and, his private library included numerous musical compositions by Italian composers. A letter written from Jefferson states:

> The bounds of an American fortune will not admit the indulgence of a domestic band of musicians, yet I have thought that a passion for music might be reconciled with that economy which we are obliged to observe. I retain, for instance, among my domestic servants a gardener…, a weaver…, a cabinet maker…, and a stone cutter…to which I would add a vigneron. In a country, where like yours music is cultivated and practiced by every class, I suppose there might be found persons of those trades who could perform on the French horn, clarinet or hautboy and bassoon, so that one might have a band of two French horns, two clarinets and hautboys and a bassoon, without enlarging their domestic expenses…Without meaning to give you trouble, perhaps it might be practicable for you in ordinary intercourse with your people to find out such men disposed to come to America.

Elise Kirk, MUSIC AT THE WHITE HOUSE,. 30 (University of Illinois Press 1986).

Gaetano Carusi then, in his *Narrative of Gaetano Carusi, in Support of His Claim before the Congress of the United States*, speculated:

on July 11, 1798. Commandant William Ward Burrows ordered Captain John Hall, who was about to leave for the Mediterranean, to recruit Italian musicians for enlistment into the Marine Corps Band. Hall joined Commodore Samuel Barron's fleet in the Mediterranean, where Barron instructed Hall to "procure a band of Music for the ship in any part of Cecily."[57]

Gaetano Carusi, a reputable musician living in Catania, repeatedly rejected Halls' efforts for an entire year. Hall eventually succeeded when he offered also to enlist Gaetano's sons as part of the Marine Corps Band, and to pay a monthly ration to Philippa, Gaetano's wife.[58] There are records that indicate Gaetano, his eldest son Samuel, and his second son Ignatio (aka Nathaniel) signed enlistment papers on February 17, 1805.[59] The Carusi family along with several other musicians and their families were taken aboard the *President*. Describing Gaetano's enlistment in *Gaetano Carusi: From Sicily to the Halls of Congress*, James Heintze states: "Carusi expected to sail immediately thereafter for America but was surprised to learn that the *President* was on its way to the port of Tripoli in order to serve in blockading maneuvers against the so-called Barbary powers (Tripoli, Algeria, Morocco, and Tunisia)." Samuel and Ignatio were instructed to hand cartridges to the cannoniers.[60]

The *President* arrived in Washington, D.C. on September 19, 1805. The Carusi's and the other Italian musicians were not entirely welcome. James Heintze suggests that Hall never

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> I have discovered that the said Captain John Hall, previous to his departure for the Mediterranean, received orders from Colonel Burrows to form this band. Captain John Hall, in consequence of this double charge of Colonel Burrows and Commodore Samuel Barron, which by-the-by, I am better informed originated with President Jefferson, who proposed to Congress a plan for this purpose, which, however was not adopted, endeavored by every means to meet with some individual not only capable of directing and commanding one band, but calculated likewise to form others.

James R. Heintze, *Gaetano Carusi: From Sicily to the Halls of Congress* AMERICAN MUSICAL LIFE IN CONTEXT AND PRACTICE TO 1865, 79 (Garland Publishing, Inc. 1994).

[57] James R. Heintze, *Gaetano Carusi: From Sicily to the Halls of Congress* AMERICAN MUSICAL LIFE IN CONTEXT AND PRACTICE TO 1865, 76-77 (Garland Publishing, Inc. 1994).

[58] Heintze at 77.

[59] Carusi United States Marine Corps Records, National Archives, Washington D.C.

[60] James R. Heintze, *Gaetano Carusi: From Sicily to the Halls of Congress* AMERICAN MUSICAL LIFE IN CONTEXT AND PRACTICE TO 1865, 79-81 (Garland Publishing, Inc. 1994).

received correspondence from Burrows' replacement, Commandant Franklin Wharton, which stated that Hall lacked the authority to recruit a band of musicians for the Marine Corps, and that there were insufficient funds to maintain Hall's recently recruited Italian musicians. Soon after the Carusi family arrived in Washington, they were forced out of their barracks and denied their promised payment. Despite a year of positive reception by Washington society, Wharton not only refused to pay Gaetano and his band of musicians, but also ordered his discharge. Wharton harassed the Italians until they finally accepted their discharge on August 15, 1806.[61]

Gaetano then began his numerous efforts to return his family to Catania. Gaetano arranged for his family to depart from Norfolk, Virginia on the *Chesapeake* on June 21, 1807. A British Man of War, the *Leopard*, began tracking the *Chesapeake* at Lin Haven Bay at 9 a.m. June 22. That afternoon the *Leopard* attacked the *Chesapeake*, which was then forced to return to Hampton Roads, Virginia on June 23. Due to war with England, Gaetano was unable to attempt additional efforts to return to Italy for several years. During this time, Gaetano worked as the conductor for the Baltimore Circus, composed music, and opened a music school in Philadelphia.[62]

On April 13, 1816, the Carusi family traveled to Boston to board the *Washington*. The *Washington* arrived in Annapolis, Maryland on May 16. For several weeks, the Carusi family endured the threats and insults of Captain John Ordo Creighton. Overwhelmed by their maltreatment, the Carusi family left the ship in Annapolis on June 4.[63]

The Carusi family apparently became relatively resigned to their life in the United States. Samuel, Ignatio, and Gaetano applied for naturalization. Gaetano and his sons, Samuel, Ignatio,

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[61] Heintze at 82-83, 85-89.
[62] Heintze at 89, 91-95.
[63] Heintze at 96-97, 100-101.

and Lewis taught music and dancing, composed and published music, and opened music stores in Philadelphia, Pennsylvania; Alexandria, Virginia; and, Easton, Maryland.[64]

In 1820, Samuel joined the Musical Fund Society of Philadelphia, "a group of eighty-five musicians dedicated to the practice and performance of musical works," in which he performed the trumpet and bassoon. Later that year, Samuel and Gaetano opened a music store and advertised their availability to teach music in Washington, D.C. In 1821, Samuel conducted a concert at Tennison's Hotel in Washington. And, in 1821, Gaetano purchased property at the corner of C Street north and 11th Street west in Washington, on which he developed the Washington Assembly Hall, or Carusi's Saloon, in 1822. For several decades this was one of Washington's most popular places for entertainment, hosting music instruction, concerts, and balls.[65]

On February 16, 1830, Samuel Carusi's ties to the United States were strengthened as he married Adeline Sophia McLean, daughter of John McLean.[66] That same year, however, Gaetano petitioned the United States Congress, asking for one thousand dollars to take his wife and three sons to Italy. Gaetano pursued this and other petitions to Congress until his death in 1843.[67]

During the 1830's Samuel redirected his efforts away from Carusi's Saloon. Samuel took over Gaetano's music store in Washington and opened another in Baltimore. Records reveal references to a music store at 5 North Charles Street and to a music store at 84 Baltimore

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[64] James R. Heintze, *Gaetano Carusi: From Sicily to the Halls of Congress* AMERICAN MUSICAL LIFE IN CONTEXT AND PRACTICE TO 1865, 102-103 (Garland Publishing, Inc. 1994).
[65] Heintze at 103-106.
[66] Carusi, Dielman Hayward File, Drawer 46, Maryland Historical Society
[67] James R. Heintze, *Gaetano Carusi: From Sicily to the Halls of Congress* AMERICAN MUSICAL LIFE IN CONTEXT AND PRACTICE TO 1865, 109-115 (Garland Publishing, Inc. 1994).

Street.[68] Heintze suggests that Carusi published many of his musical compositions in the Baltimore store.[69]

Samuel died on December 22, 1877. On January 8, 1878 his will was admitted to probate and record in the Orphan's Court of the District of Columbia. By his will, Samuel devised his estate to his wife Adelaide, with the remainder at her death to be divided in equal shares amongst his children, (John McLean Carusi, Samuel P. Carusi, Thornton Carusi, Estelle Caulfield, Genevieve Carusi, and Isolina E. Howard).[70]

C) John Hazlehurst Bonival Latrobe, Plaintiff's Attorney

John H. B. Latrobe, the eldest son of Benjamin Henry Latrobe, Sr. and Mary E. Hazleurst, was born on May 4, 1803 in Philadelphia, Pennsylvania. Benjamin Latrobe was a prominent architect, in charge of the construction of the capitol in Washington. The War of 1812, though, diverted Benjamin and his family to Pittsburgh. The Latrobe family later returned to Washington where John studied at Georgetown College. The Latrobe family then moved to Baltimore and John transferred to St. Mary's College. In September 1818, John left St. Mary's College for West Point.[71]

In 1820, Benjamin died of yellow fever in New Orleans. Subsequently, John left West Point and joined his remaining family in Baltimore. There, John entered the law office of General Robert Goodloe Harper, a friend of his father Benjamin Latrobe; and, in 1825, John was admitted to the Baltimore Bar. The Bench and Bar of Maryland suggests John was forced to supplement a sluggish legal career with income derived from literary and artistic labors.[72]

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[68] Carusi, Dielman Hayward File, Drawer 46, Maryland Historical Society
[69] James R. Heintze, *Gaetano Carusi: From Sicily to the Halls of Congress* AMERICAN MUSICAL LIFE IN CONTEXT AND PRACTICE TO 1865, 108 (Garland Publishing, Inc. 1994).Heintze at 108.
[70] *Howard v. Carusi*, 109 U.S. 725, 728 (1884).
[71] Conway W. Sams and Elihu S. Riley, THE BENCH AND BAR OF MARYLAND: A HISTORY, 1634-1901, 376-378; 578-587 (The Lewis Publishing Company 1901).
[72] Id.

While a law student, John wrote Latrobe's Justice Practice. The Bench and Bar of Maryland describes John as a "sound, clear-minded and well-trained" lawyer. In 1828, John secured a right of way along the Potomac River for the Baltimore & Ohio Railroad Company; and, subsequently, he was retained as counsel for the railroad company for the remainder of his life.[73]

In addition to his legal career, Latrobe served at various times as the commander of the Chasseurs of LaFayette and the First Baltimore Sharpshooters; and, he served as captain of the First Baltimore Light Infantry on a visit to Philadelphia. He founded the Maryland Institute for the Promotion of Mechanical Arts, and was the inventor and patentee of the Latrobe stove. As a founding member and president of the American Colonization Society, Latrobe prepared a map of Liberia, raised two hundred thousand dollars for the emigration of African-American slaves, and drafted the constitution and ordinance for the government of the Maryland colony in Liberia. Further, Latrobe was a grand master of the Masonic fraternity in Baltimore for ten years. He was a member of the board of visitors of the Maryland Hospital for the Insane; founder and president of the Maryland Historical Society; a regent of the University of Maryland; president of the Maryland Academy of Arts; and, president of the board of proprietors of the Greenmount Cemetery.[74]

John Latrobe was married twice. He married a daughter of Dr. James Stewart, and then after her death, a daughter of General Ferdinand Leigh Claiborne of Mississippi. John had four sons, (Ferdinand C. Latrobe, Osmun R. Latrobe, Stewart Latrobe, and John H. B. Latrobe), all of whom became lawyers.[75]

D) William Frederick Frick, Defendant's Attorney

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[73] Id.
[74] Id.
[75] Conway W. Sams and Elihu S. Riley, THE BENCH AND BAR OF MARYLAND: A HISTORY, 1634-1901, 376-378; 578-587 (The Lewis Publishing Company 1901).

William Frederick Frick, the eldest son of Judge William Frick, was born in Baltimore April 21, 1817. Mr. Frick studied at Baltimore College and Harvard University. He studied the law for four years at David Hoffman's University of Maryland Law Institute, and was admitted to the bar in 1839. Frick's law practice was devoted to commercial and corporate interests. He was also president of the school board for several years.[76]

E) Francis Brinley, Defendant's Attorney

Francis Brinley was born in Boston on November 10, 1800.[77] He graduated Harvard in 1818, studied law with William Sullivan, and was admitted to the Suffolk bar in November 1821. Brinley's record was described by THE BOSTON EVENING TRANSCRIPT as "long and brilliant". He was published in both magazines and newspapers, with an article on dower which was quoted by Chancellor Kent. He was a member of the Boston Common Council in 1832, 1849, 1850, and 1851; he was president of the Council from 1850-51. Brinley was a representative in the Massachusetts legislature in 1832, 1850, and 1854. Then, he became a senator in the Massachusetts legislature in 1852-1853 and 1863. In 1857 he moved to Tyngsboro, and then to Newport, Rhode Island. Brinley's obituary described him as "deeply interested in historical and genealogical matters, having been president of the Newport Historical Society for a number of years past." Francis Brinley died in Newport, Rhode Island on June 14, 1889, after suffering from poor health including almost total blindness.[78]

F) Chief Justice Roger Brooke Taney

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[76] Conway W. Sams and Elihu S. Riley, THE BENCH AND BAR OF MARYLAND: A HISTORY, 1634-1901, 577-578 (The Lewis Publishing Company 1901).

[77] In his letter to President James K. Polk, dated January 14, 1846, Francis Brinley signed his name as "Francis Brinley of Baltimore." There are no other records, however, identifying a Francis Brinley residing in Baltimore. Presumably, Brinley did practice for a period of time in Baltimore, or perhaps there was some procedural or political reason for him to describe himself as "of Baltimore" to President Polk despite his actual residence in Massachusetts.

[78] BOSTON EVENING TRANSCRIPT, Saturday, June 15, 1889; William T. Davis, 1 BENCH AND BAR OF THE COMMONWEALTH OF MASSACHUSETTS, 249 (The Boston History Company 1896).

Roger Brooke Taney, the son of a Roman Catholic Planter descended from the founders of Maryland, was born in Calvert County, Maryland on March 17, 1777. Taney attended Dickinson College, graduating in 1795. He studied law under Jeremiah Townley Chase in Annapolis (along with Francis Scott Key), and was admitted to the bar in 1799. Residing in Calvert County, Taney was elected to the House of Delegates in 1799. In 1801, Taney moved to Frederick County where he was soon retained for the most important cases, presumably because of his style of "apostolic persuasion," which instilled fear in his peers at the bar. On January 7, 1806, he married Anne Phebe Charlton Key, a sister of Francis Scott Key. In 1816, Taney was elected to the Maryland Senate.

In 1824, Taney lent his support to the election of Andrew Jackson to the presidency. Taney became the Attorney General of Maryland in 1827; and, then, in 1831, he was made the Attorney General of the United States, where he became Jackson's closest advisor. In 1833, Taney became the Secretary of Treasury; in 1834, Jackson's nomination to this position was rejected by Senate, and Taney resigned. President Jackson nominated Taney to fill the vacancy on the United States Supreme Court, created by the retirement of Gabriel Duvall. The United States Senate rejected his nomination. In 1836, however, Jackson again nominated Taney to the Supreme Court upon the death of Justice Marshall; and, the Senate confirmed his nomination by a vote of twenty-nine to fifteen. THE BENCH AND BAR OF MARYLAND describes Taney's reputation as a judge as "just, fearless, and profound."[79]

G) Judge Upton S. Heath

Upton Sinclair Heath was born in Maryland in 1785. Although he was never married, Heath was the "head and support of a large family of relatives." Described as a leader of the Maryland

[79] Conway W. Sams and Elihu S. Riley, THE BENCH AND BAR OF MARYLAND: A HISTORY, 1634-1901, 278-291 (The Lewis Publishing Company 1901).

Bar, Heath was elected to the Maryland Senate in 1826, and then appointed by President Andrew Jackson to be the judge of the United States District Court for Maryland. The DIELMAN-HAYWARD FILE states that "[i]n the discharge of the duties of the bench, he exhibited probity, impartiality, and firmness; and in private life, he was distinguished for honor, courtesy, and most expansive benevolence." After a "lingering illness," Judge Heath died in Baltimore on February 21, 1852.[80]

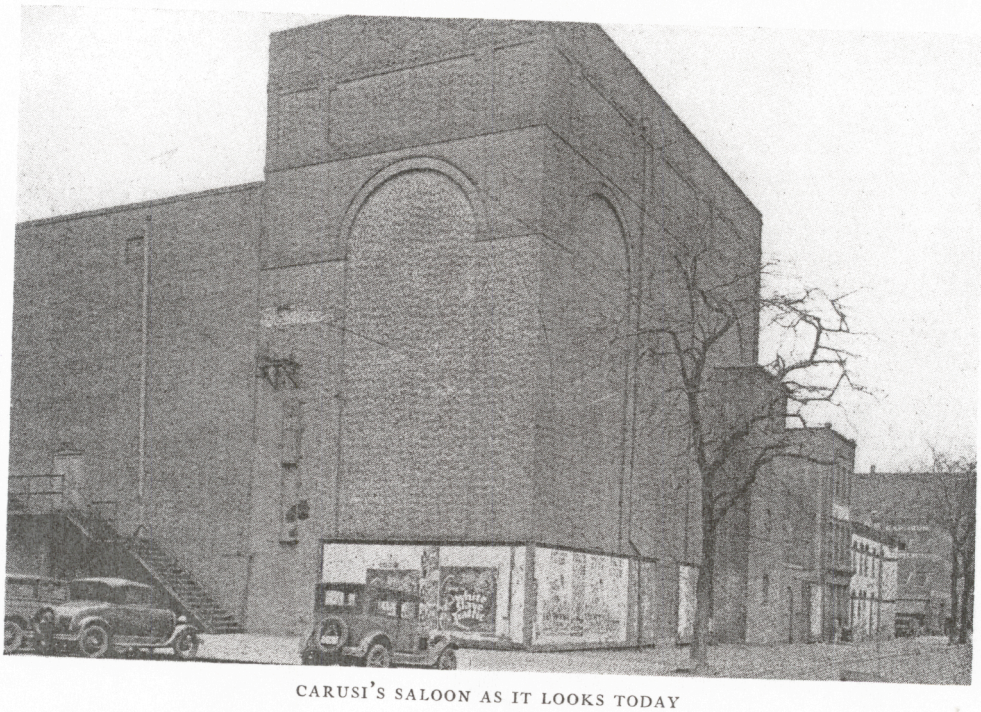
[80] Dielman-Hayward File at the Maryland Historical Society in Baltimore, Maryland; Thomas W. Griffith, ANNALS OF BALTIMORE, 262 (William Wooddy 1833); John D. Lawson, LL.D., AMERICAN STATE TRIALS, 164-165 (F.H. Thomas Law Book Co. 1918).

VI) Appendix B: Photographs and Other Illustrations

A) Portrait of the Carusi Brothers: Lewis, Samuel, and Nathaniel. Elise Kirk, MUSIC AT THE WHITE HOUSE, 32 (University of Illinois Press 1986).

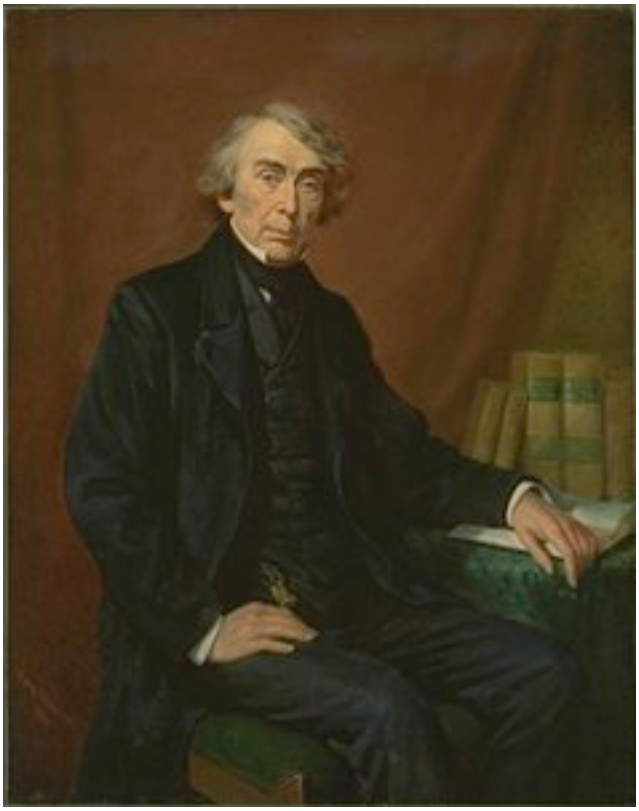
'he sons of Gaetano Carusi, the early Marine Band leader from Catania, Sicily .eft to right): Lewis, Samuel, and Nathaniel. Lewis built the popular Carusi's aloon, site of numerous presidential inaugural balls, concerts, and dancing ssemblies. Painting by Gardner, 1870.

B) Carusi's Saloon. George Rothwell Brown, WASHINGTON: A NOT TOO SERIOUS HISTORY, 182 (The Norman Publishing Company1930).

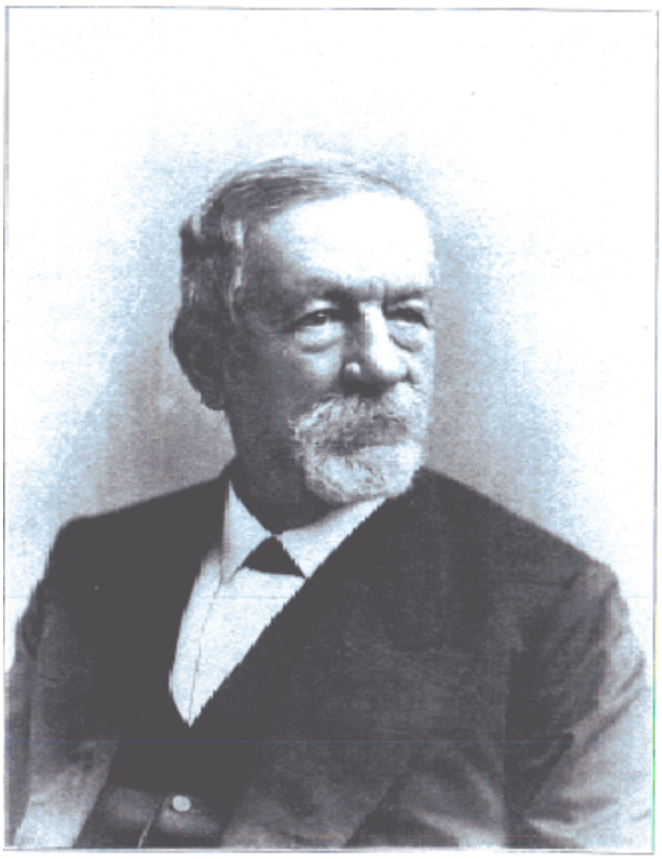


CARUSI'S SALOON AS IT LOOKS TODAY

C) Chief Justice Roger B. Taney painted by Henry Ulke in 1881.
http://www.mdarchives.state.md.us/megafile/msa/speccol/sc3500/sc3520/001500/001500/html/1500images.html (11/29/2004).



D) John H. B. Latrobe. Conway W. Sams and Elihu S. Riley, II THE BENCH AND BAR OF MARYLAND: A HISTORY, 1634-1901, 579 (The Lewis Publishing Company1901).



Hon. J. H. B. Latrobe

E) William Frick.
http://www.mdarchives.state.md.us/megafile/msa/speccol/sc3500/sc3520/001800/001819/html/1819images.html (11/29/2004)).

VII) Appendix C: Links to Original Source Materials

A) Legislative History

1) Public Statutes at Large, Volume 1, An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned, University of Maryland School of Law Thurgood Marshall Law Library
2) Reports of Committees of The House of Representatives at the Second Session of the Twenty First Congress, Enoch Pratt Free Library
3) An Act Supplementary to an act, entitled "An act for the encouragement of learning by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the time therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints., University Of Maryland School of Law Thurgood Marshall Law Library
4) Public Statutes at Large Vol. IV Chap XVI An Act to amend the several acts respecting copy rights, University Of Maryland School of Law Thurgood Marshall Law Library
5) First Session of the Eighteenth Congress of the United States, Senate Bill 77 (United States Library of Congress, American Memory, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates: 1774-1875)(11/19/2004: http://memory.loc.gov/ammem/amlaw/lawhome.html)
6) First Session of Twentieth Congress: Petitions to Amend Copyright by Senate, Senate Journal (United States Library of Congress, American Memory, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates: 1774-1875)(11/19/2004: http://memory.loc.gov/ammem/amlaw/lawhome.html)
7) First Session of the Nineteenth Congress, Motion to Amend Copyright by House of Represenatives, House Journal (United States Library of Congress, American Memory, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates: 1774-1875) (11/19/2004: http://memory.loc.gov/ammem/amlaw/lawhome.html)
8) First Session of the Twentieth Congress of the United States, House Bill 140 (United States Library of Congress, American Memory, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates: 1774-1875)(11/19/2004: http://memory.loc.gov/ammem/amlaw/lawhome.html)
9) First Session of the Twenty-First Congress of the United States, House Bill 145 (United States Library of Congress, American Memory, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates: 1774-1875)(11/19/2004: http://memory.loc.gov/ammem/amlaw/lawhome.html)
10) Second Session of the Twenty-First Congress of the United States, House Bill 145; and, Committee Report No. 3 published on page cxix of the Appendix to Gales & Seaton's Register of Debates (United States Library of Congress, American Memory, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates: 1774-1875) (11/19/2004: http://memory.loc.gov/ammem/amlaw/lawhome.html)
11) Second Session of the Twenty-First Congress of the United States, House and Senate Journals, and Register of Debates (United States Library of Congress, American

Memory, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates: 1774-1875) (11/19/2004: http://memory.loc.gov/ammem/amlaw/lawhome.html)

12) Second Session of the Twenty-First Congress of the United States, Senate Act (Bill 145) (United States Library of Congress, American Memory, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates: 1774-1875)(11/19/2004: http://memory.loc.gov/ammem/amlaw/lawhome.html)

B) Music

1) *The Old Arm Chair* set to music by Henry Russell, Johns Hopkins University, The Milton S. Eisenhower Library, The Lester Levy Sheet Music Collection, Box 055, #40A.
2) *The Old Arm Chair* set to music by Samuel Carusi, Library of Congress, Washington, D.C., M1.A12.V.8, copied by Francis McCormick
3) *The Old Arm Chair* by Russell arranged by Carusi, Boston Public Library
4) ONE HUNDRED AND FIFTY YEARS OF MUSIC PUBLISHING IN THE UNITED STATES By William Arms Fisher, Boston Public Library
5) CATALOGUE OF VOCAL AND INSTRUMENTAL MUSIC, George P. Reed's Piano-Forte & Music Store, Boston Public Library
6) *Soldier's Tear* By Alexander Lee and T.H. Bayle, Peabody Institute
7) *New England, New England: My Home O'er the Sea*, by I. T. Stoddard, Maryland Historical Society
8) *The Blue Bell of Scotland* By N. Carusi, Maryland Historical Society
9) OUR FAMILIAR SONGS AND THOSE WHO MADE THEM By Helen Kendrick Johnson, *The Old Arm Chair*, Peabody Institute

C) Trial

1) Excerpts from case files, etc., Record Group 21, Stack Area E, Row 02, Compartment 02, Shelf 05, National Archives, Philadelphia, copied by Francis McCormick National Archives in Philadelphia, Pennsylvania.
2) THE LAW REPORTER Volume VIII Edited By Peleg W. Chandler, Library of Congress
3) REPORTS OF CASES AT LAW AND EQUITY AND IN THE ADMIRALTY DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND by Roger Brooke Taney, Chief Justice of the Supreme Court of the United States: April Term 1836 to April Term 1861, By James Mason Campbell of the Baltimore Bar, Enoch Pratt Free Library
4) THE FEDERAL CASES COMPRISING CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, Book 20, University of Maryland School of Law Thurgood Marshall Law Library
5) Baltimore Newspapers, Baltimore Historical Society and Enoch Pratt Library
6) Carusi Copyright, United States Copyright Office
7) Expert Analysis of the Russell and Carusi Versions of "The Old Arm Chair" by Peter Fuchs (pianist, arranger, and conductor) on December 30, 2004

D) Pardon

1) Pardon of Samuel Carusi by President James Polk, Record Group 59, Microfilm ID T967, National Archives, College Park, copied by Francis McCormick
2) Samuel Carusi's Petition for Presidential Pardon, Record Group 59, National Archives College Park, copied by Francis McCormick

E) Biography

3) Marine corps band enlistment documents (Gaetano Caruso, Ignatio Caruso, Samuel Caruso), National Archives, Washington, D.C., copied by Francis McCormick
4) Carusi, Dielman Hayward File, Drawer 46, Maryland Historical Society
5) The Bench and Bar of Maryland Volume II, John H.B. Latrobe and William Frick, Enoch Pratt Free Library
6) The Bench and Bar of Maryland Volume I, Roger B. Taney, Enoch Pratt Free Library
7) Heath, Dielman Hayward File, Maryland Historical Society; Annals of Baltimore and Niles Weekly Register from the Enoch Pratt Free Library

F) Other Litigation Regarding *The Old Arm Chair*

1) Dwight's Journal of Music Volume XV No.23, Peabody Institute