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PUBLICATION IN COPYRIGHT LAW: THE QUESTION OF PHONOGRAPH RECORDS

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Before dealing with phonograph records, *inter alia enormia*, we should bow to tradition by considering the darling of copyright law, the model case of the man who writes a novel. Suppose that after preparing the manuscript the novelist does no more than keep it in his desk drawer or circulate it privately among his friends. In this condition of affairs the courts will protect him in comprehensive fashion against the use or imitation of his work by anyone who may come by it. Such protection goes by the name of common-law copyright, and, as the novelist may keep his manuscript cabined indefinitely and claim common-law rights all the while, this species of copyright is said to be "perpetual."¹

The Federal Copyright Code in Section 2 recognizes but does not delineate the common-law copyright² of which the main source is state law.³ The Code takes hold of the novelist when he does more than nest on his work. If he publishes the novel he may indeed retain exclusive rights but only as limited in dimension and time by the Code—they run, assuming renewal, for fifty-six years from the date

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1. For characteristic statements that the common-law right is "perpetual" and that it "gives the artist a complete monopoly on his particular creation," see SHAFER, *MUSICAL COPYRIGHT* 111 (2d ed. 1939). Of course no case could go so far by way of holding, whatever it might say in dictum, and the cases on common-law copyright leave many problems without specific answer.

2. "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor." 17 U.S.C. § 2 (1952).

3. It is suggested below, text at note 79 *infra*, that, in defining the scope of common-law protection, courts may properly take into account the policies and effects of the scheme set up in the Copyright Code. Cf. *G. Ricordi & Co. v. Haendler*, 194 F.2d 914 (2d Cir. 1952).

of publication.⁴ Moreover they depend on the author's submission to the Code by complying with its formal requirements, notably the requirement that notice of copyright shall be affixed to the published work. Publication without compliance with the Code is held to work a forfeiture of the novelist's exclusive rights;⁵ it casts the work into the public domain, a process sometimes euphemistically called "dedication."⁶

How is the scheme just described justified in reason? Lawyers would explain the common-law copyright by stressing, among other things, the author's interest in privacy and in the integrity of his personality of which his work is an expression.⁷ But it would be said that once the author begins to exploit his work in a public way, preferring profit or fame to the contemplation of his work in private, he should be obliged to come to terms with the public interest if he means to retain any monopoly rights.⁸ The Constitution itself links the promotion of science and useful arts to securing to authors the exclusive right to their writings "for limited Times,"⁹ and the Copyright Code follows suit by imposing limits on the author's rights following publication. Coming to the notice requirement, it would be said that perhaps its principal justification lies in giving warning to an intending copyist.¹⁰ It would be generally conceded that the notice provisions of the Code have not always achieved their purpose, for, as the cases have worked out, a copyist is sometimes held to account even though the work from which he copies gives no warning,¹¹ and is some-

4. 17 U.S.C. § 24 (1952).

5. *White v. Kimmell*, 193 F.2d 744 (9th Cir.), *cert. denied*, 343 U.S. 957 (1952). For formal requirements in respect to works first published abroad, see *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946).

6. Similar to the euphemistic use of "dedication" is the use of "abandonment" to describe a loss of the author's rights against his evident intention. See the discussion by L. Hand, C.J., in *National Comics Pub., Inc. v. Fawcett Pub., Inc.*, 191 F.2d 594, 598 (2d Cir. 1951), *opinion clarified*, 198 F.2d 927 (2d Cir. 1952).

7. See Brandeis and Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 *et seq.* (1890). Drone relates the common law protection to the proposition that "[T]he creator is the first possessor of that which he creates. In labor, then, is found the origin of the right to property." DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 3 (1879).

8. We use "monopoly" in the relative sense suggested by CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 56-62 (6th ed. 1948), quoted in OPPENHEIM, *UNFAIR TRADE PRACTICES: CASES, COMMENTS AND MATERIALS* 12-17 (1950).

9. U.S. CONST. ART. I, § 8, cl. 8.

10. It has been pointed out that a notice system has an advantage over an "automatic" system in that it makes freely available for copying a multitude of publications—*e.g.*, financial statements—which are intended to be open to all comers and are therefore customarily issued without notice.

11. See *De Acosta v. Brown*, 146 F.2d 408, 410 (2d Cir. 1944), *cert. denied*, 325 U.S. 862 (1945). As to copying from phonograph records which embody copyrighted compositions but do not themselves bear notice of copyright, see note 68 *infra*.

times freed of liability even though the work gives ample warning, as where a notice is affixed but is defective in some detail.¹² A central point in the present scheme, in all events, is that the novelist can retain only the rights accorded him by Congress if he brings his product to the market.

Now take the case of a song. If the composer first deals with the public by selling sheet music, the consequences are plain. At most he is left with the congeries of rights described in the statute: he has a qualified monopoly in the composition including certain incidents of it which may not exceed fifty-six years. Among his exclusive rights is that of public performance for profit.¹³ He has also the right of selling phonograph records embodying the composition or licensing another to do so; but by reason of a special Code provision,¹⁴ if he once exploits this medium, anyone is free to produce phonograph records of the composition on paying him a prescribed fee. We have said that upon sale of the sheet music this qualified statutory monopoly is the most the composer can claim; he will have lost all exclusive rights if he has failed to implant the notice of copyright on the sheets as the statute requires.¹⁵

But suppose the composer chooses to deal with the public not by selling sheet music but by selling phonograph records of the composition or by licensing another to do it. Following the general rationale of the Code, we would expect similar results to follow. For when he sells records, as when he sells sheet music, the composer would seem to have reached the point where he should be compelled to make his treaty with the public.

Are these results, which we take to be the plausible ones, in fact compelled by the Code? In the recent "Tzena, Tzena" case,¹⁶ which has been enriching the table talk of copyright lawyers, a district court considered what is the result where a composer, without selling sheet music, manufactures and sells records, making no effort to secure statutory copyright. The court said, in effect, that the composer forfeits all exclusive rights—just as he would if he published sheet music without affixing notice of copyright. For, according to the court, sale

12. *Booth v. Haggard*, 184 F.2d 470 (8th Cir. 1950).

13. 17 U.S.C. §1(e) (1952). Our Copyright Act first secured performance rights in copyrighted music in 1897, 29 STAT. 481 (1897). The "for profit" limitation was introduced in the Act of 1909, 35 STAT. 1075 (1909).

14. 17 U.S.C. §1(e) (1952). This feature was introduced in 1909 when the statute for the first time dealt with mechanical reproduction rights. See also §1(c), as amended by 66 STAT. 752 (1952), and §1(d), regarding recordings of nondramatic literary works and dramatic works.

15. *Cf. Wagner v. Conreid*, 125 Fed. 798 (S.D.N.Y. 1903).

16. *Mills Music, Inc. v. Cromwell Music, Inc.*, 103 U.S.P.Q. 84 (S.D.N.Y. 1954, Leibell, J.).

of records is "publication" and that entails forfeiture unless the Code has been complied with.¹⁷

The dictum in the "Tzena, Tzena" case, anticipated by a few premonitory rumblings in other cases,¹⁸ has aroused concern at the Bar; and well it might. The discomfiture is entirely understandable since a contrary view has been stoutly and reasonably defended by lawyers of exceptional ability¹⁹ and seems to have been acted on in the practical conduct of business.²⁰ According to this view, as the writer understands it, the sale of records is not a "publication" of the embodied composition; hence there is no need to secure copyright under any provision of the Code and a failure to do so does not entail forfeiture. What is more, according to this view the composer continues notwithstanding the sale of records to have the extensive protection associated with common-law copyright, unlimited in time and free of such burdens as the compulsory license. Thus a world of difference is taken between exploitation of a composition by the public rendering of it to the ear, as through records, and exploitation by public delineation to the eye (and to the inner ear), as in sheet music. So also, and more clearly according to this view, the sale of sheet music is to be distinguished from the performance of the composition in public. No matter how long-continued or profitable such performance may be, it is thought neither to forfeit the composer's exclusive rights nor to put limits on them; and this, again, because the composition has not been "published."

Now it must be conceded that, however strange some of the results just mentioned may seem to be at first glance, the notions that

17. "The manufacture and sale of phonograph records in this country by a person or corporation duly authorized by [the composer] . . . would have constituted a publication of his composition. I believe that it would be a publication, capable of destroying his common law copyright." *Id.* at 95. The cases of *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940), and *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950), were cited as supporting this view. See notes 53 and 74 *infra*. The court found, however, that such manufacture and sale of records as had taken place in this country had not been authorized by the composer.

The facts of the case were complicated. "Tzena, Tzena" was composed and performed as an army song in Palestine and was introduced in this country after attaining popularity there.

18. See cases cited note 17 *supra*; *Blanc v. Lantz*, 83 U.S.P.Q. 137 (Cal. Super. Ct. 1949), discussed in note 75 *infra*.

19. See Tannenbaum, *Practical Problems in Copyright*, in *SEVEN COPYRIGHT PROBLEMS ANALYZED* 7, 15 (C.C.H. 1952); Schulman, *Authors' Rights*, in *id.* at 19, 23-25; McDonald, *The Law of Broadcasting*, in *id.* at 31, 45-46; Burton, *Business Practices in the Copyright Field*, in *id.* at 87, 102-04.

20. Burton, *supra* note 19. Records have frequently been issued at the outset in order to test the public reaction, and sheet music may not be published at all if the record fails to catch on. Sheet music has greatly declined in relative importance as a medium of exploiting popular music. On the commonly held view stated in the text, statutory copyright need not be resorted to unless sheet music is issued.

generate them find support in precedent and in a statute whose deficiencies have often been noted and lamented.²¹ Let us start with the last case touched on—the case of public performance of a song *simpliciter*, or rather with a case much like it, the public performance of a play.

II

Copyright law, precisely because it has taken shape around the model of a book communicated to the public by multiplication of copies, has experienced difficulty, not to say frustration, with cases where communication is by performance or representation. Thus the problem of the unprinted play gave trouble in *Ferris v. Frohman* in 1912.²² The dramatist (actually a successor in interest) sought relief against a piratical production. Stripped of detail and foreign entanglements,²³ the facts were that the play, "The Fatal Card," had been given authorized public performances over a considerable period of time; it had not been printed; no resort had been made to our copyright statute as amended through 1891, which provided for the registration of plays and secured to the author not only the right to multiply copies but also the right of public performance.²⁴ Had the play been dedicated through performance without registration under the statute?

The Supreme Court's answer was no. (There is no solid basis for distinction here between a dramatic and musical composition.²⁵) Mr. Justice Hughes's opinion seems to come down to this: Had the

21. A poignant statement of some of the troubles with the statute is contained in BOUVÉ, LETTER TO THE LIBRARIAN OF CONGRESS CONCERNING CERTAIN ASPECTS OF THE COPYRIGHT ACT OF MARCH 4, 1909 (Gov't Print. O. 1938). For discussion on a broader scale, see Chafee, *Reflections on the Law of Copyright*, 45 COL. L. REV. 503, 719 (1945).

22. 223 U.S. 424 (1912).

23. The play was written by British subjects, was first performed in London and was registered under the British statutes. Plaintiffs later secured rights embracing production in the United States. The play was "extensively represented" here (*id.* at 430) by the plaintiff Frohman, but was not copyrighted under our Act. Defendant Ferris was transferee of a play slavishly copied from the original. He copyrighted the piratical play under our Act (a fact which did not improve his case since his transferor was not the "author") and caused it to be performed in this country. On the court's analysis, the performance in England was not to be treated differently from performance here, and the fact of British registration was immaterial.

24. REV. STAT. §§ 4948-71 (1875); 18 STAT. 78 (1874); 20 STAT. 359 (1879); 22 STAT. 181 (1882); 26 STAT. 1106 (1891). See especially REV. STAT. §§ 4952, 4956 (1875), as amended, 26 STAT. 1106-07 (1891).

25. The *Ferris* rule has in fact been applied to musical compositions; see *McCarthy & Fisher v. White*, 259 Fed. 364 (S.D.N.Y. 1919). For other applications, see *Nutt v. National Institute, Inc.*, 31 F.2d 236 (2d Cir. 1929) (lecture); *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934), *modified*, 81 F.2d 373 (1st Cir.), *cert denied*, 298 U.S. 670 (1936) (radio broadcast of dialogues); see also note 82 *infra*.

author published the play in the sense of printing it, he would have lost his common-law rights and been forced to rely on statutory copyright; and as he had not registered the work under the statute, he would presumably have forfeited it altogether. But performing the play in public, as distinguished from printing it, was not publication, and the common-law rights survived.

"At common law, the public performance of the play is not an abandonment of it to the public use. [Citing cases]"²⁶

Nor was there any statute altering the consequence of public performance. "There was no statute here by virtue of which the common-law right was lost through the performance of the unpublished play."²⁷ The effect of the existing statute was "to secure to the author of a copyrighted play the sole right to its performance after it had been printed,"²⁸ but the statute was not destructive of the common-law right in plays "which were not copyrighted . . . and which remained unpublished."²⁹

It has been contended that Mr. Justice Hughes misconceived the position "at common law," and that the rest of his opinion is vitiated by this error.³⁰ The Justice apparently believed that English courts recognized exclusive rights of performance in manuscript plays prior to Bulwer-Lytton's Act of 1833³¹ which first secured statutory stage-right. In fact, however, only minimal support can be found in the early English cases for such a belief.³² There is virtually no light on the question of performance rights in plays in this country prior to 1856 when our copyright statute first secured such rights in registered plays.³³ In later years a view more or less anticipating that of the *Ferris* case

26. *Ferris v. Frohman*, 223 U.S. 424, 435 (1912). The cases cited were: *Macklin v. Richardson*, Ambler 694, 27 Eng. Rep. 451 (Ch. 1770); *Morris v. Kelly*, 1 J. & W. 481, 37 Eng. Rep. 451 (Ch. 1820); *Boucicault v. Fox*, 3 Fed. Cas. 977, No. 1691 (C.C.S.D.N.Y. 1862); *Crowe v. Aiken*, 6 Fed. Cas. 904, No. 3,441 (C.C.N.D. Ill. 1870); *Palmer v. De Witt*, 47 N.Y. 532 (1872); *Tompkins v. Halleck*, 133 Mass. 32 (1882).

27. 223 U.S. at 434.

28. 223 U.S. at 435. See *DRONE, op. cit. supra* note 7, at 612-17; *Boucicault v. Hart*, 3 Fed. Cas. 983, No. 1692 (C.C.S.D.N.Y. 1875).

29. *Ferris v. Frohman*, 223 U.S. 424, 435 (1912).

30. See *Selvin, Should Performance Dedicate?*, 42 CALIF. L. REV. 40 (1954), and *Collins, Playright and the Common Law*, 15 CALIF. L. REV. 381 (1927), analyzing the case authorities including those cited by Mr. Justice Hughes in the *Ferris* opinion. Compare *WEIL, AMERICAN COPYRIGHT LAW* 139 (1917), with *DRONE, op. cit. supra* note 7, at 553 *et seq.* Selvin is particularly incisive. We have borrowed from him at various points.

31. 3 & 4 WM. 4, c. 15.

32. See note 30 *supra*.

33. 11 STAT. 138 (1856); see *Ferris v. Frohman*, 223 U.S. 424, 434-35 (1912).

began to be held by some American courts. It drew encouragement from the dubious English authorities and made much of the implicit understanding between the dramatist and his audience deriving from the audience's apprehension of the dramatist's probable intent not to "abandon" the work.³⁴ The *Ferris* case, concentrating on the proposition that manuscript plays were not within the copyright statute, announced the blanket rule that performance does not dedicate without making any studied effort to rationalize that rule in the light of general copyright policy.³⁵

It is not a fatal reproach that the *Ferris* case is less than satisfactory in its treatment of the old English case law, especially as a fair critic must concede that the cases are at best unclear.³⁶ Moreover, the supposed rule that performance did not dedicate where the statute did not secure performance rights had at least this much to be said for it: it provided a measure of judge-made protection for the dramatist before the legislature had awakened to the need. The further position taken in the *Ferris* case, that performance did not dedicate even though a means existed under the statute to secure performance rights, also made an appeal to common sense so long as the statute required the dramatist to publish as a condition of obtaining that protection. (Mr. Justice Hughes evidently thought that not merely reproduction of

34. The way courts reached the position that performance does not dedicate can be traced in *Tompkins v. Halleck*, 133 Mass. 32 (1882), relied on in the *Ferris* opinion. The view that the author of a manuscript play who had performed it publicly could prevent another from printing it led to the proposition that the author could secure a valid copyright notwithstanding his own prior performance of the play. It was first doubted whether the author who had publicly performed the play but refrained from printing it could restrain public performance by another. Then it was intimated that he could get such relief against a performance that imitated more than those parts of the play retained in audience-memory from a performance sanctioned by the author. From this position, which rested in part on the supposed understanding between the author and his audience at the time of public performance, it was not hard to go further and restrain any imitative performance, whether or not traceable to audience-recollection. In the *Ferris* opinion this last result is approved and is stylized as a rule that performance does not dedicate.

35. Brandeis, J., dissenting in *International News Service v. Associated Press*, 248 U.S. 215, 248 (1918), sought to explain the *Ferris* rule on the basis that performance is a "restricted communication" which he puts in the same class as a "private circulation of a literary composition" (*id.* at 253-54). But he falters when he comes to contrast performance, which is taken not to dedicate, with the public posting of a bulletin, which does (*id.* at 256-57). It is indeed hard to distinguish these instances on the basis that a posted bulletin will necessarily reach more people than a performed play. A. N. Hand, J., in the same case on application for preliminary injunction, 240 Fed. 983, 992-93 (S.D.N.Y. 1917), may possibly have related the *Ferris* rule to the idea that as performance is only one of the means of profitable exploitation of a play, it ought not in itself to dedicate. But this would leave unexplained why issuance of copies, even in relatively small numbers, should dedicate completely. See also 1 LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 288-92 (1938).

36. Thus Selvin, *supra* note 30, at 48.

copies but actual printing was required.³⁷) Few authors of plays had any independent economic incentive to publish, and it may have been thought an undue burden to force this as the means of securing the stage-right.

Whatever our ultimate critical judgment on the *Ferris* case may be, we must not overlook the reservation which Mr. Justice Hughes himself made, namely, that a new régime could be introduced by statute: "The public representation of a dramatic composition, not printed and published, does not deprive the author of his common-law right, save by operation of statute."³⁸ The Justice referred in particular to the English Act of 1842, which supplemented the act of 1833 and equated first performance of a play with first publication of a book;³⁹ he referred also to Mr. Scrutton's opinion that "the common-law right . . . [would probably be held] destroyed by the statutory provisions after first performance in public."⁴⁰

Our Act of 1909, already adopted when the *Ferris* case was decided, but not applicable to it, contained a new section which, as amended, appears in the present Copyright Code as Section 12.⁴¹ This makes provision for securing copyright in certain unpublished works, including both dramatic and musical compositions, by depositing one

37. Was actual printing of the play, in addition to printing the title, required under the 1891 legislation, as one would gather from Mr. Justice Hughes's language? The REVISED STATUTES OF 1873, §4956 (1875), called for the delivery to the Librarian of Congress of "a printed copy of the title of the book or other article" (presumably including a play) before publication, and the delivery of "two copies" of the work within ten days from publication. By §4959 the proprietor of the copyright was required to deliver "within ten days after its publication, two complete printed copies . . . of the best edition issued . . . and a copy of every subsequent edition wherein any substantial changes shall be made." For failure to comply with either of these sections, the proprietor was made liable to a penalty by §4960. The difficulties in interpreting these provisions are described by DRONE, *op. cit. supra* note 7, at 275-76. As amended by the Act of 1891, §4956 called for delivery of "a printed copy of the title" of books, dramatic compositions and other enumerated items, and also of "two copies" of these works. But a proviso of §4956, familiarly called the "manufacturing clause," which required that the two delivered copies "shall be printed from type set within the limits of the United States," etc., while specifically mentioning books and certain other items, did not mention dramatic compositions. The amended §4959 required the delivery of "a copy of every subsequent edition wherein any substantial changes shall be made" in terms broad enough to cover all copyrighted works. No change was made in §4960. These provisions do not seem altogether to conclude the question whether a "dramatic composition," especially if it did not have the appearance of a "book," must have been "printed" in order to be admitted to statutory copyright. Cf. *Littleton v. Oliver Ditson Co.*, 62 Fed. 597 (C.C.D. Mass. 1894), *aff'd*, 67 Fed. 905 (1st Cir. 1895); *Hervieu v. Ogilvie Pub. Co.*, 169 Fed. 978 (C.C.S.D.N.Y. 1909); 23 OPS. ATT'Y GEN. 353, 445 (1901); COPYRIGHT OFFICE BULL. No. 3, at 115-42 (2d ed. 1906).

38. *Ferris v. Frohman*, 223 U.S. 424, 435 (1912).

39. 5 & 6 VICT. c. 45, §20.

40. *Ferris v. Frohman*, 223 U.S. 424, 432 (1912), quoting SCRUTTON, *THE LAW OF COPYRIGHT* 77 (4th ed. 1903).

41. 17 U.S.C. §12 (1952). The predecessor provision was §11 of the 1909 Act, 35 STAT. 1078 (1909).

copy—it may be a manuscript copy—of the work with claim of copyright. Here, it has been argued, is a statute fitting Mr. Justice Hughes's reservation. As it has now become possible for the dramatist or composer to secure statutory protection of his unpublished work, that gap in the statutory scheme has been filled which gave at least some reason for the decision in the *Ferris* case. It would follow, according to this argument, that where the first communication to the public of a play or a song is through performance, the composition is forfeited unless resort has been had to Section 12.⁴²

The current of decision has not gone in this direction. It was early suggested that even after deposit under Section 12 the author could claim common-law protection.⁴³ This view has not been adopted: if deposit is made under Section 12, the measure of rights is to be found in the statute and not elsewhere;⁴⁴ the statutory copyright of the unpublished work displaces the common-law copyright in much the way that the ordinary statutory copyright of a published work under Section 10 displaces the pre-existing common-law copyright. But it has been regularly assumed that there is no compulsion to deposit under Section 12, even where the work has been publicly performed: the section provides a means by which the author may obtain statutory copyright of his unpublished work, but he is not penalized for his omission to use it.⁴⁵ There are certain gains in obtaining a Section 12 copyright of an unpublished work, but these accrue only in the event of litigation⁴⁶ and can be achieved only at the cost of being confined to the

42. See Selvin, *supra* note 30, at 44-46. In *WELL, op. cit. supra* note 30, at 153-57, a query was raised whether performance without registration under § 12 should not forfeit at least the performance rights. Even Drone, writing before the Act of 1909, seemed to have anticipated some such result if manuscript plays were given protection by statute, *DRONE, op. cit. supra* note 7, at 573-74. (As to Drone's emphatic ideas about the wide scope of common-law rights, see L. Hand, C.J., in *Fashion Originators Guild v. FTC*, 114 F.2d 80, 83 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941)). See also, Collins, *supra* note 30, at 389-90.

43. See *DEWOLF, AN OUTLINE OF COPYRIGHT LAW* 33-35 (1925); 2 *LADAS, op. cit. supra* note 35, at 695.

44. *Shilkret v. Musicraft Records, Inc.*, 131 F.2d 929 (2d Cir. 1942), *reversing* 43 F. Supp. 184 (S.D.N.Y. 1941), *cert. denied*, 319 U.S. 742 (1943); *Marx v. United States*, 96 F.2d 204 (9th Cir. 1938); see *Photo-Drama Motion Picture Co. v. Social Uplift Film Corp.*, 220 Fed. 448, 450 (2d Cir. 1915), *affirming* 213 Fed. 374 (S.D.N.Y. 1914). *Cf. Loew's, Inc. v. Superior Court*, 18 Cal.2d 419, 115 P.2d 983 (1941), where it was held that, after a § 12 registration of a dramatic composition, suit for infringement by a motion picture (viewed as an infringement of the work through performance) could not be maintained at common law in a state court but must be brought under the Copyright Code in a federal court; the court however was willing to assume that the author still had a common-law right of "first publication" enforceable in a state court. The latter assumption is criticized in *HOWELL, THE COPYRIGHT LAW* 106 (3d ed. 1952).

45. See *Nutt v. National Institute, Inc.*, 31 F.2d 236, 238 (2d Cir. 1929).

46. *HOWELL, op. cit. supra* note 44, cites the prima facie effects of the certificate of registration, availability of federal courts in suits for infringement, and statutory damages.

substantive rights secured by the Code. It is no wonder, therefore, that unless he desires to publish—to disseminate copies of the play or the sheet music—the dramatist or composer may prefer to have no traffic with the Copyright Office and place his reliance on his common-law rights.

Is there reason for holding that Section 12 is merely optional so that failure to resort to it cannot be the occasion for forfeiture? Courts must after all deal with the precise words of the section. Section 12 cannot be said to disclose clearly a purpose to force registration of the unpublished works therein described. One of the many troubles with Section 12 is that it does not specify a time for the deposit of the single copy, except that it is to be accomplished before the reproduction of copies, at which time other steps are set out more or less as in respect to an ordinary Section 10 copyright of a book or sheet music upon publication.⁴⁷ Performance of the work is not mentioned in Section 12, and, for aught that the section says, deposit may be made before, upon, or after performance. But the period of statutory protection apparently starts to run from the time of initial deposit.⁴⁸ As the section does not in terms fix upon the date of performance as the limiting date for deposit, it becomes awkward to hold that a failure to deposit before or upon performance of the unpublished play or song shall work a forfeiture. This is not to argue that judges would be wrong to fashion such a rule of forfeiture. The fact, however, is that they have to deal with an unsatisfactory form of words.

There is, moreover, an argument *ab inconvenienti* which supports both the merely optional reading of Section 12 and the refusal to regard performance as "publication" bringing to bear the usual rules with regard to published works. A play or musical composition does not always spring full-grown. It is often revised and tinkered with not only while the author is struggling with the manuscript in private, but after it has been performed in public. A play or musical as produced in Boston may differ from the version previously produced in New Haven;

47. An initial deposit under § 12 seems a condition of obtaining that statutory copyright. There is no requirement of deposit to initiate an ordinary § 10 copyright; this requires only publication with notice. While § 13 says that after such publication "there shall be promptly deposited . . . two complete copies," *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30 (1939), held that the § 10 copyright was preserved without deposit. (But if the Register of Copyrights demands deposit and it is refused, the copyright becomes void, § 14; and deposit, which need not be "prompt," is a condition of maintaining an action for infringement, see § 13.) In the case of a § 12 copyright, two copies are to be deposited when the work is reproduced in copies for sale, see §§ 12, 13. Will this requirement be watered down on analogy to the *Washingtonian* case? For a statement contrasting the § 12 and § 10 procedures in providing notoriety, see *Swan, C.J.*, in *Shilkret v. Musicraft Records, Inc.*, 131 F.2d 929, 931 (2d Cir. 1942), *cert. denied*, 319 U.S. 742 (1943).

48. *Marx v. United States*, 96 F.2d 204 (9th Cir. 1938).

it may be altered materially before it reaches New York; and it may again be changed during the Broadway run and thereafter. It would be hard to compel deposits from time to time under Section 12 on pain of forfeiture of such parts of the work as were publicly performed without deposit, and it would be even harder to deal with these cases on the assumption that public performance is tantamount to "publication" in the usual sense.⁴⁹ And what, finally, is to be done with the extreme example of a play or a song first improvised before an audience without the benefit of any prepared script? Perhaps reasonable administrative rules could be worked out for all these cases which would be within the Code and would serve its general policy, but again the text of the law provides little foothold. It is not clear that these considerations of convenience, arising from the transitory or evanescent nature of performance, have been consciously in the minds of judges who have pronounced and applied the rule that performance does not dedicate, but they may have builded better than they knew.

These things can be said for the *Ferris* rule, and yet the principal objection to it, suggested at the start, remains. The objection is that it is abhorrent to the central theme of copyright to permit the dramatist (or composer) to exploit his work, and that in a way most appropriate to the medium, without exacting the usual limits on his monopoly. If the *Ferris* rule is not to be overthrown, then at least its extension to other fields should be carefully watched.

III

If it should be held that public performance dedicates the composition unless statutory copyright has been obtained, it would very likely be held that the manufacture and sale of phonograph records should be given the same effect. But should the manufacture and sale of records dedicate the composition even if performance does not?

This question must be distinguished from another on which the literature is copious: whether the performer's distinctive art frozen on a record may be the subject of copyright or of any other form of legal protection.⁵⁰ That raises issues beyond any that need be considered here. Our question relates to the composition proper as it is revealed in the record,⁵¹ and the composition is surely a subject of copyright.

49. These considerations are developed by Schulman, *supra* note 19, at 23-25. He stresses also the desirability from the administrative viewpoint of having "publication" occur at a fixed and recognizable point in time so that unintended loss of rights may be avoided.

50. See, e.g., Chafee, *supra* note 21, at 733-37; see also Strauss, *Unauthorized Recording of Radio Broadcasts*, 11 FED. COMMUNICATIONS BAR J. 193 (1950).

51. The embodied composition is the more clearly revealed in the degree that the composition is simple and the recording a good one. A competent musician would have no difficulty "translating" the record of a popular song into musical notation.

It is said that a record is nothing but a captured performance of the composition, and if the rule of the *Ferris* case stands, the sale of records should not be treated otherwise than public performance. But the judge who said in the "Tzena, Tzena" case that the sale of records would dedicate evidently believed that he was not being unfaithful to the rule of the *Ferris* case; indeed he emphasized his allegiance to that rule by saying that even a radio broadcast of the song by authority of the composer from a record made for that purpose would not dedicate.⁵² He viewed sale of records as "publication," but was not prepared to characterize public performance as such. The same distinction was taken *arguendo* by Judge Learned Hand in *RCA Manufacturing Co. v. Whiteman*⁵³ which, however, dealt in its holding with rights in the performance captured on phonograph records rather than rights in the musical composition proper.

One who reserves a doubt whether the *Ferris* case is compatible with the general policy of copyright law may be inclined to exaggerate the differences between sale of records and public performance in order to circumvent or limit that case; but even allowing a discount for such a bias there are still some fairly substantial differences. The argument for refusing to give mere performance the status of "publication" on the ground that it is evanescent, creates no tangible things which can be the subject of purchase and sale, or is not a full communication since of itself it leaves no permanent memorial, seems to have little

52. *Mills Music, Inc. v. Cromwell Music, Inc.*, 103 U.S.P.Q. 84, 95 (S.D.N.Y. 1954).

53. 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940). It is not easy to assess the weight to be given Judge Hand's language since he made a number of successive points *arguendo*. He assumes that a common-law right could exist in the style of performance, distinct from the composition, and further assumes that public performance, say by a broadcast, would not dedicate this separate contribution of the performer. Then he says that even if this common-law right survived the sale of phonograph records on which the performance was inscribed, it would be difficult to see how the performer could impose valid restrictions upon their resale. He adds at 88: "We do not, however, have that question to decide, for we think [1] that the 'common-law property' in these performances ended with the sale of the records and [2] that the restriction [against broadcast of the records for profit] did not save it; and [3] that if it did, the records themselves 'could not be clogged with a servitude.'" The point we have marked "1" is then elaborated, at 88-89, in a way which shows that Judge Hand probably meant that sale of records was a divestive publication of the distinctive contribution of the performer. There is also an intimation that such sale would suffice to dedicate the composition proper (unless the composition had been copyrighted under the Code). See also *Granz v. Harris*, 198 F.2d 585, 587 (2d Cir. 1952) (approving remarks of the district judge at 98 F. Supp. 906, 910 (1951)), and *Blanc v. Lantz*, 83 U.S.P.Q. 137, 142 (Cal. Super. Ct. 1949), both dealing with the *Whiteman* case.

While Judge Leibell in the "Tzena, Tzena" case cited the *Whiteman* case for the point of divestive publication of a composition by sale of records, he had said in a previous case that "the meat" of the *Whiteman* case was that the records themselves could not be clogged with a servitude. *Capitol Records, Inc. v. Mercury Record Corp.*, 109 F. Supp. 330, 345 (S.D.N.Y. 1952). But it is hard to say which point was crucial in Judge Hand's mind.

application to phonograph records; the more natural analogy is to a book or sheet music. And the argument *ab inconvenienti* for refusing to compel compliance with statutory formalities appears to lose its force where the composition has been embodied in a record. At that time the composition has presumably attained stable form, and it does not seem too much to require the composer to proceed under the Code, using for the purpose sheets with the musical notations or the records themselves (if the Copyright Office is authorized to accept them, a point later referred to). It is true that the composition may be changed even after the issuance of records, but that would present no larger problem than the copyright of a new edition of a book.

The text of the Copyright Code must be unravelled. It has been contended that the procedure for securing and preserving statutory copyright is geared to the use of "copies" of the work, but a phonograph record is not a "copy" within the meaning of the Code. It has then been argued that as a record cannot itself be used as a means of "investing" statutory copyright, neither may its issuance or sale be given the effect of "divesting" copyright, *i.e.*, of forfeiting protection.⁵⁴ The argument goes almost if not quite to the point of asserting that only through a dissemination of sheet music may a musical composition be divestively published.⁵⁵

References to "copy" invite attention to *White-Smith Music Co. v. Apollo Co.*,⁵⁶ decided in 1908. There the owner of the statutory copyright in a musical composition sued another for bringing out perforated music rolls by which, with the aid of other mechanisms, the music could be reproduced as sound. The words of the then applicable statute describing the composer's monopoly rights in copyrighted music included the following: "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending" the "musical composition."⁵⁷ The Supreme Court bore down on "copying" and

54. See Kupferman's statement: "As copyright is obtained by publication plus proper copyright notice, it is argued, in opposition to this decision [the *Shapiro, Bernstein* case, see note 74 *infra*], that an action which cannot invest copyright should not divest copyright in as much as a record is not such a 'copy' of the work as could be registered." *Rights in New Media*, 19 LAW & CONTEMP. PROB. 172, 174 n.20 (1954).

55. On the question of divestive publication of music by means of a motion picture sound track, compare note 69 *infra* (2d par.) and the discussion of the *Blanc* case, *infra* note 75.

56. 209 U.S. 1 (1908).

57. U.S. COMP. STAT. SUPP. 1907, § 4952, at 1021. Of the 1897 amendment, 29 STAT. 481, securing performance rights in copyrighted music, the Court said that it could not have "the effect of enlarging the meaning of the previous sections of the act" (209 U.S. at 16) including the provision quoted in the text. "There is no complaint in this case of the public performance of copyrighted music; nor is the question involved whether the manufacturers of such perforated music rolls when sold for use in public performance might be held as contributing infringers." *Ibid.*

decided that the perforated roll was not a copy, with the result, surprising to today's reader of the opinion, that an action for infringement could not be maintained against the manufacturer of the rolls. The same result was foreshadowed for phonograph records. Mr. Justice Day said that the definition of a copy of a musical composition that most commended itself to the Court was "a written or printed record of it in intelligible notation"; and he spoke of a "form which others can see and read."⁵⁸ Mr. Justice Holmes wrote a special concurring opinion reluctantly acquiescing in this reading of the statute, but remarking that "the result is to give to copyright less scope than its rational significance and the ground on which it is granted seem to me to demand."⁵⁹ The Court was conscious of the large questions raised by the emergence of mechanical reproduction devices and it plainly preferred to leave them to legislative solution.⁶⁰ In fact, as is well known, these questions loomed large in the arguments and hearings that preceded the Act of 1909.⁶¹ That Act gave mechanical reproduction rights to the owner of the statutory copyright in a musical composition, subject to the provision regarding compulsory license.

Although the unauthorized manufacture and sale of phonograph records has been made an infringement of a statutory copyright properly obtained, it is very doubtful whether the Code admits of obtaining copyright through the medium of a phonograph record as distinguished from a paper with notations. Various sections of the Code dealing with the procedures for securing and maintaining copyright refer to "copies."⁶² It is natural to read the provisions in the light of the *White-Smith* definition⁶³ even though that concerned infringement

Today the compulsory license of §1(e) goes only to production of records and does not comprehend a license to play the records publicly for profit. See *Irving Berlin, Inc. v. Daigle*, 31 F.2d 832 (5th Cir. 1929).

58. 209 U.S. at 17. Compare the definition of publication contained in the Universal Copyright Convention of 1952, art. VI, 1 U.S. CODE: CONG. & ADMIN. NEWS 53 (1954): "'Publication,' as used in this Convention, means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." Exec. M., 83d Cong., 1st Sess., ratified June 25, 1954, see 100 Cong. Rec. 8487-95 (June 25, 1954), 8754-56 (June 29, 1954), 8866-88 (June 30, 1954). This language was adopted with knowledge that the nations differed in their handling of phonograph records for copyright purposes and is probably intended to render sale of records not an act of publication under the Convention. See *Report of the Rapporteur-General*, 5 UNESCO COPYRIGHT BULL. Nos. 3-4, at 55 (1952). The Convention covers unpublished as well as published works. For legislation enacted in connection with the Convention, see 68 STAT. 1030 (1954) amending 17 U.S.C. (1952).

59. 209 U.S. at 19-20.

60. 209 U.S. at 18.

61. See H.R. REP. No. 2222 (to accompany H.R. 28192), 60th Cong., 2d Sess. (1909), explaining the bill which became the Copyright Act of 1909.

62. See 17 U.S.C. §§ 10, 13, 14, 19, 26, 101, 208, 209 (1952); see also § 20.

63. To the effect that a phonograph record cannot itself be copyrighted, see *Jerome v. Twentieth Century Fox-Film Corp.*, 67 F. Supp. 736, 742 (S.D.N.Y.

rather than initial copyrightability, and they make sense most easily when so read. There is language in the committee report explaining the 1909 Act which gives comfort to the view that phonograph records cannot be used as a means of securing statutory copyright,⁶⁴ and the Copyright Office has taken the position that they do not qualify for registration under the Code. Until recently the question has been a serious one only in regard to the copyright of records intended to secure statutory protection of the particular style of performance;⁶⁵ but with the current trend to market records without first publishing sheet music, the question has been presented of securing copyright of the composition proper by the use of records, notwithstanding the ease with which such a copyright can be obtained by the use of sheets with notations. A labored argument can be made against the grain of the statute for accepting records for this purpose. One can point to the fact that courts have on various occasions applied an expansive meaning to the words of the Code in order to give it more rationally satisfying coverage—the treatment of motion and talking pictures over the years is a prime example.⁶⁶ The word “copy” itself has been broadly interpreted.⁶⁷ Records could conceivably qualify as a means of securing and maintaining

1946) (Leibell, J.), *aff'd*, 165 F.2d 784 (2d Cir. 1948). In *Yacobian v. Carroll*, 74 U.S.P.Q. 257 (S.D. Cal. 1947), it was held that the issuance of records was not a reproduction of copies for sale of a musical composition previously copyrighted under § 12; hence deposit of two “copies” was not required under §§ 12, 13. See note 68 *infra*.

64. “It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices.” H.R. REP. No. 2222, *supra* note 61, at 9. Conceivably this can be read as an intention to prohibit copyright protection of the performer’s distinctive art, rather than to prohibit use of records as a means of obtaining copyright of the embodied composition.

65. The letter of the Copyright Office to Fred Waring in 1935, partially reproduced in *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 438 n.2, 194 Atl. 631, 633 n.2 (1937), refusing to admit a record to registration, was in response to an effort to copyright Waring’s distinctive contribution as a performer. As indicated in the text, the Copyright Office is now disposed also to deny registration of records intended to secure copyright of the musical composition itself.

66. See, e.g., *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911). The difficulties that have had to be overcome are that the Act of 1912, 37 STAT. 488, introducing the classifications for motion pictures, now 17 U.S.C. § 5(1), (m), did not appropriately adjust or enlarge various other relevant sections, and that talking pictures and other inventions were not in mind in 1912.

67. In *Patterson v. Century Prod., Inc.*, 93 F.2d 489, 493-94 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938), it was said not only that the making of a positive from plaintiff’s negative motion picture film (a documentary), and negatives from the positive, was infringement by copying, but that the exhibition of defendant’s film was the making of enlarged copies although created with the aid of a projecting mechanism; the *White-Smith* case was distinguished.

It will be interesting to see how a magnetic tape recorder capable of recording and reproducing images (both in color and black and white) will be treated under the Copyright Code. See Walker, *Color TV from Tape; “Talking Pictures” Next?*, Editor & Publisher, Dec. 5, 1953, p. 40; “Sarnoff Predicts Electronic Light,” N.Y. Times, Oct. 20, 1954, p. 39, col. 4.

copyright of the embodied composition by a somewhat heroic reading of the specific provisions of the Code⁶⁸ or possibly by going to the general reservation contained in Section 4.⁶⁹

The argument which would equate divesting with investing acts or limit the divestive publication of a musical composition to the issuance of copies *stricto sensu* seems in any event questionable. It has often been remarked that the publication necessary to perfect a copyright under Section 10 is not the same in quantitative terms as the publication that is held to work a forfeiture in the absence of statutory copyright,⁷⁰ and there is no compelling reason why it should be the same in qualitative terms. The proposition that a Section 10 copyright cannot be secured by issuing phonograph records with notice of copy-

68. Section 10 provides that a person entitled "may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published. . . ." Section 19 describes the form of "the notice of copyright required by section 10." Then § 20 says that the notice shall be affixed "in the case of a book or other printed publication, upon its title page or the page immediately following . . . or if a musical work either upon its title page or the first page of music." These sections can be tolerably well complied with, viewing phonograph records as copies of the embodied musical composition, by inscribing the notice on the label of the record; but if § 20 is considered to apply only to a "printed publication" in the nature of sheet music, records would stand outside § 20 and the place for affixing notice would be left to a rule of reason, which again points to the label. The difficulties of accommodation to the text of the Code would perhaps be greater in the case of tape or wire recordings.

Some liberties had to be taken with the language of the Copyright Code in other cases. The Code will be searched in vain for any explicit regulation of how notice of copyright should be affixed on a motion picture; see the resolution of the question of notice in *Patterson v. Century Prod., Inc.*, 93 F.2d 489 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938). The Copyright Office has moved with the times in admitting to registration in March 1952 a microfilm of dance action in "Kiss Me, Kate" written in the Laban system of dance notation, a form of choreostenotype. The form of deposit, at least, was unusual.

On the current view that a phonograph record is not a "copy," notice is not commonly inscribed on it even where the musical composition has been copyrighted as sheet music. But a person who plays the record publicly for profit (or plagiarizes it) is liable without regard to the notice. See note 11 *supra*; *Buck v. Heretis*, 24 F.2d 876 (E.D.S.C. 1928).

69. Section 4 says that "the works for which copyright may be secured under this title shall include all the writings of an author"; and § 5, after listing 13 classes of works (including "Musical compositions"), states: "The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title. . . ." If a record is a writing (*cf. Mazer v. Stein*, 347 U.S. 201 (1954); *Chafee, supra* note 21, at 733-37), but is not within any of the classes listed in § 5, it is presumably to be dealt with on the best analogy.

Is the sound track of a motion picture a proper vehicle for securing statutory copyright of the embodied musical composition, if a phonograph record is not? Copyright of the motion picture could be held to cover the music on the sound track, *see L. C. Page & Co. v. Fox Film Corp.*, 83 F.2d 196, 199 (2d Cir. 1936); compare, however, the argument, despite *Jerome v. Twentieth Century Fox-Film Corp.*, 67 F. Supp. 736 (S.D.N.Y. 1946), *aff'd*, 165 F.2d 784 (2d Cir. 1948), that a sound track may be within § 1(e). See *Dubin, Copyright Aspects of Sound Recordings*, 26 So. CALIF. L. REV. 139, 147-49 (1953), and consider *Foreign & Domestic Music Corp. v. Licht*, 196 F.2d 627, 629 (2d Cir. 1952).

70. See *Henn, The Quest for International Copyright Protection*, 39 CORNELL L.Q. 43, 51 n.39 (1953); compare *White v. Kimmell*, 193 F.2d 744 (9th Cir. 1952), with *Atlantic Monthly Co. v. Post Pub. Co.*, 27 F.2d 556 (D. Mass. 1928).

right is compatible with a holding that the sale of records entails forfeiture unless the composition has been copyrighted through the means, for example, of a sale of sheet music bearing notice of copyright. No serviceable definition of publication, either of the investive or divestive type, is set forth in the Code,⁷¹ and a court would seem to be justified in falling back on the reason of the thing. The argument has been forcefully made that it is not wise to make the definition so vague as to create unmanageable risks of loss of rights.⁷² This argument is not fairly answered by showing that the definition is already dimly drawn in other connections; ⁷³ it may however be enough to say that administrative clarity would not be imperiled by a holding that sale of records passes the line of publication.

The refusal to equate divestive with investive acts is joined with a direct appeal to the general rationale of copyright law in the *Shapiro, Bernstein* opinion upon which the judge in the "Tzena, Tzena" case relied:

" . . . The brief argues that phonograph records are not copies of a musical composition, that public sale of records therefore cannot constitute publication of the musical composition, and that sale of records prior to copyright therefore does not destroy common law rights in the musical composition.

"It seems to me that publication is a practical question and does not rest on any technical definition of the word 'copy'. Nor do the notice and registration provisions of the Copyright Act . . . determine the issue here. Modern recording has made possible the preservation and reproduction of sound which theretofore had disappeared immediately upon its creation. When phonograph records of a musical composition are available for purchase in every city, town and hamlet, certainly the dissemination of the composition to the public is complete, and is as complete as by sale of a sheet music reproduction of the composition. The Copyright Act grants a monopoly only under limited conditions. If plaintiff's argument is to succeed here, then a perpetual monopoly is granted without the necessity of compliance with the Copyright Act.

71. This is recognized in *Patterson v. Century Prod., Inc.*, 93 F.2d 489 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938).

72. Schulman, *supra* note 19.

73. Note, *e.g.*, the difficulty in distinguishing a "limited" publication, insufficient to dedicate, from a publication that is sufficient, even in the case of printed matter, *White v. Kimmell*, 193 F.2d 744 (9th Cir. 1952); the uncertainty, even today, as to when (or whether) a motion picture, licensed and exhibited in the customary way, has been published, compare *Patterson v. Century Prod., Inc.*, 93 F.2d 489 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938); *Universal Film Mfg. Co. v. Copperman*, 218 Fed. 577 (2d Cir. 1914), and *DeMille Co. v. Casey*, 121 Misc. 78, 87-88, 201 N.Y. Supp. 20, 28 (Sup. Ct. 1923), *with Jewellers' Mercantile Agency v. Jewellers' Pub. Co.*, 155 N.Y. 241, 40 N.E. 872 (1898).

"It has been held that the 'common law property' in a particular rendition of a musical composition ended with the sale of the records. *RCA Mfg. Co. v. Whiteman*. . . . This is very close to our case, and the reasoning of the opinion applies with equal force to the case at bar.

"It is my opinion that when Lewis permitted his composition to be produced on phonograph records and permitted those records to be sold to the general public, the common law property in the musical composition did not survive the sale of the phonograph records, and the public sale of those records was a dedication of the musical composition to the public. . . ." ⁷⁴

And in *Blanc v. Lantz*—a case in which a "musical laugh" was held to have been divestively published through exhibition of a sound picture rather than sale of phonograph records—the court went to the basis of the rule that publication may have divestive effect, refused to consider the *White-Smith* case controlling, and laid stress on the vice of according protection outside the bounds of the Copyright Code to a work which had been commercially exploited.⁷⁵

A final point remains to be considered. Discussions of the subject have generally assumed that either of two results must follow from the sale of records without statutory copyright of the composition: either the composer retains all the rights associated with common-law copyright because the composition has not been "published," or he for-

74. *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473, 475 (N.D. Ill. 1950) (Igoe, J.). The quoted passage is dictum since the plaintiff failed to establish authorship, etc.

75. 83 U.S.P.Q. 137 (Cal. Super. Ct. 1949, Stevens, J.). The *Blanc* case may stand on a special footing because an applicable state statute (CAL. CIV. CODE § 983, prior to amendment in 1947) provided that "a product of the mind" fell into the public domain if its owner "intentionally makes it public"; this may have led to a non-technical view of publication. And if a sound track is a copyrightable component of a motion picture, see note 69 *supra*, the *Blanc* case is consistent with the supposed "divestive-investive" equation; but the court did not seek to rest on this ground.

Judge Stevens said: "The decision in that case [*White-Smith*] that a player piano roll was not a 'copy' as contemplated by the federal statute by no means is authority for the proposition that a player piano roll, phonograph record, or movie sound track is not a copy of the musical composition which, when distributed generally, does not result in a 'publication' of the composer's creation so as to result in termination of his common-law right. On the contrary, as stressed by Mr. Justice Holmes and as indicated by subsequent Congressional enactment, a rational analysis of the problem leads to the conclusion that such reproduction in tangible form for general distribution is a publication of the composer's work." (83 U.S.P.Q. at 140) The judge dealt with the argument that exhibition of motion pictures is performance not publication (as to which see also *Tiffany Prod., Inc. v. Dewing*, 50 F.2d 911, 914 (D. Md. 1931), and cases cited). He analyzed the *Whiteman* opinion (see text note 53 *supra*) and pointed out that the *Waring* case, 327 Pa. 433, 194 Atl. 631 (1937), which stands opposed in holding, did not go on the ground that sale of records was not a publication, but that the restriction on the records rendered the publication a limited one. See also, *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907); *Wright v. Eisele*, 86 App. Div. 356, 83 N.Y. Supp. 887 (2d Dep't 1903) (compare *O'Neill v. General Film Co.*, 171 App. Div. 854, 860, 157 N.Y. Supp. 1028, 1033 (2d Dep't 1916)); *Kurfiss v. Cowherd*, 233 Mo. App. 397, 121 S.W.2d 282 (1938).

feits all his rights, because it has been "published." Forfeiture is a drastic thing, and a court may prefer to leave the composer with full common-law protection if the only perceived alternative is to deprive him of all rights. Forfeiture would be especially cruel when, as we have seen, the profession has had ground for the belief that issuance of records would not disturb the common-law protection.⁷⁶

The question need not be settled on an all-or-none basis. The notion that an author holds full rights in his work so long as it remains unpublished started with the model case of the book manuscript kept in the desk drawer—the case where no exploitation had been attempted calling for adjustment of rights in the public interest. We may assume for argument's sake that precedent or the exigencies of statutory construction require us to say that sale of records is not a "publication" of the work; still the fact remains that here exploitation has commenced, often in a most substantial way. To deal with the exploited but unpublished song in the same way as the unexploited and unpublished book manuscript is to attach merely talismanic, not rational, significance to the concept of publication.

The Copyright Code does not compel a court to deal with these classes of cases on an equal footing. Section 2 provides that nothing in the Code shall annul or limit the rights of an author of an "unpublished" work, but this is a saving clause; it does not define the scope or duration of these rights, nor does it mean that all varieties of "unpublished" works must be treated alike. The measure of the rights to be accorded to unpublished works is indeed essentially a matter for determination by the states⁷⁷ until Congress deals with the matter, as it has power to do. The rules which together comprise the common-law copyright are certainly no more fixed or invariant than other rules of the common law;⁷⁸ they must be intelligently shaped and applied to the emergent and developing facts of intellectual production. The existence and the economic and other consequences of the Copyright Code are themselves important facts which should not be overlooked in the decision of common-law cases.⁷⁹ It is open to the courts to say that, while sale of records does not automatically dedicate, neither is it a

76. In arguing that public performance of a dramatic (or musical) composition should dedicate it, Selvin, *supra* note 30, at 51, recognizes the cruelty of forfeiture as applied to works heretofore dealt with in reliance on *Ferris v. Frohman* and suggests that his proposed rule might be given only prospective force.

77. See STINE, REPORT ON STATE LEGISLATION CONCERNING COPYRIGHT (Copyright Office Memo.), listing several state statutes dealing with unpublished works.

78. See note 7 *supra*, bearing on the connection between common-law protection of literary property and evolving ideas about "privacy."

79. See Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934).

wholly colorless act without effect on the scope of the common-law protection. Sale of records could be held to entail appropriate limitations of the composer's exclusive rights, limitations which could be given form by reference to the scope of the monopoly secured to works copyrighted under the Code but which need not follow the limits of that monopoly in all their details. It is in the spirit of the common-law process not to seek here to predetermine the rules which would ultimately be hammered out if this approach were pursued. But it would not be astonishing to find that, upon sale of records, common-law protection would extend for a period no longer than statutory copyright; public performance of the composition not for profit would be held non-tortious; the measure of damage for infringement by production of competing records would take into account the fee payable under the Code for exercising the compulsory license.⁸⁰

IV

Better than any solution open to the courts (or to the state legislatures acting severally) would be a proper rewriting of the Copyright Code to take care of the question of phonograph records⁸¹—and, beyond that, of the question of public performance and the problem of publication in its entirety. The concept of publication has been seriously distorted and now bedevils much of the law of copyright. The early great cases held that statutory copyright displaced common-law rights. As the statute took effect after publication, it came to be held by a kind of natural inversion that publication without a com-

80. This would not necessarily turn on whether, as an original matter, the court would approve the policy which lies back of the § 1(e) license. There is in fact considerable reason for Congress to eliminate or alter radically the present license provision and make mechanical reproduction rights something more than a stepchild of copyright. See Wattenberg, "*Compulsory License*" as *Obsolete as the Penny Arcade*, *Variety*, Oct. 20, 1954, p. 46, col. 1; Report of the Copyright Committee to the Board of Trade, Cmd. 8662, ¶¶ 82-84 (1952).

In the *Whiteman* case Judge L. Hand declined to undertake any protection of the performer's art and said that the recognition of such a right must come from Congress (114 F.2d at 90). Similar considerations do not seem to apply to our problem, for here the question is not one of creating a new right but of accommodating common-law principle to the known policy of Congress. (Mr. Justice Brandeis, dissenting in the *International News* case, *supra* note 35, thought it best to await legislation rather than protect "news" against appropriation, but it appears that Judge L. Hand did not agree, MASON, BRANDEIS: A FREE MAN'S LIFE 579 (1946), although he has since applied the *International News* decision most restrictively.) Cf. *Chamberlain v. Feldman*, 300 N.Y. 135, 89 N.E.2d 863 (1949), 62 HARV. L. REV. 1406.

81. If the question is to be handled without a general revision of the Code, solution may move in the direction of insuring that recordings will be treated as copies of the composition. Forfeitures in past cases could be prevented by a saving provision carefully drawn. Here the principle could be that one who issued recordings in reliance on common-law rights should not fare better than if he had simultaneously obtained statutory copyright of the composition.

pliance with statutory requirements resulted in forfeiture. This built up a pressure to avoid forfeiture by qualifying and limiting the idea of publication. The statute at first failed to provide protection for various forms of intellectual production, and on occasion it gave only a narrow monopoly or a monopoly on onerous or inconvenient terms in the forms of intellectual production which it did undertake to protect. Hence a further pressure built up to grant protection outside or beyond the statute. But publication without resort to the statute had now become almost synonymous with forfeiture. So again in order to accord protection it became necessary to say that the work had not been published or had been published in only a limited way or under a special understanding or the like. All this has joined with inadequate statutory draftsmanship to disfigure the idea of publication. Because of this disfigurement similar treatment is now being claimed for cases which are different in point of the policies that ought to apply to them (the song kept in manuscript, unperformed; the song disseminated on records), and conversely different treatment is claimed for cases which are alike in point of policy (the song disseminated as sheet music; the song disseminated on records). If plays and songs exploited through performance or sale of records and material of various sorts broadcast over the radio or by television can claim common-law protection as unpublished works⁸² by assimilation to material that has never reached the public's eye or ear, as the conventional view asserts, it is time to take a fresh look at basic doctrine.

A fundamental inquiry into publication in copyright law will have a far reach, for publication now implicates a variety of matters in addition to those with which this discussion has been mainly concerned. The answers to a large number of questions—ranging from the jurisdiction of courts, requirement of affixing notice, formalities on assignment, to the treatment of alien authors, acts of infringement, scope of derivative rights,⁸³ devolution of rights on author's death—are now made to depend upon whether a work is published and copyrighted under the Code or unpublished and entitled to common-law protection. In the degree that publication is determined by merely adventitious considerations, the two bodies of law are today strikingly incongruous. Some sheep are being treated like goats and the resulting *mélange* can satisfy no one except those who happen to profit from the confusion. On a full analysis it may be seen that half measures will not suffice, that publication as now conceived has outlived its usefulness as a governing

82. See the broad claims made in *WARNER, RADIO AND TELEVISION RIGHTS* c. 20, § 200 *et seq.* (1953).

83. See especially *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469 (2d Cir. 1951).

concept in our domestic law of copyright.⁸⁴ Publication has been assigned only a minor rôle in the present English statute.⁸⁵

We have spoken of the song circulated as sheet music and the song disseminated on records as being alike in point of policy. They are so in the respect here stressed; both are exploited works. We do not mean to say that on a careful examination of the facts a lawmaker might not rationally conclude that the cases call for quite different regulation. It might be found that a fifty-six year period should be allowed the author for multiplication and sale of sheet music, while a shorter period should be allowed him for the exploitation of the phonograph record medium. If thought about copyright is irrigated by study of the facts, economic and social, of the modern marketing of works of the mind, it may be found that the various works and their various media of circulation demand far more individualized treatment than they now get under the Code.⁸⁶ Our submission is that the distinction between the published and the unpublished, as that is now taken, has become to a considerable extent a false criterion of regulation.

84. Compare the proposed Shotwell Bill, §§ 2, 45, 86 CONG. REC. 63-77 (1940), criticized in Note, 12 *AIR L. REV.* 49 (1941).

85. Copyright Act, 1911, 1 & 2 *Geo. V*, c. 46.

86. Cf. PLANT, *THE NEW COMMERCE IN IDEAS AND INTELLECTUAL PROPERTY* (Stamp Memorial Lecture, London University 1953).