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LEGAL PROTECTION OF IDEAS

JAMES C. LOGAN*

Modern business methods force the jurist to a reconsideration of an old problem—property in ideas. Our approach might itself be resolved into a maze of abstractions except for the practical importance this question assumes in industry. The business man complains that a competitor has copied his scheme for doing business. The advertising agency finds that its unique advertising plan has been appropriated. The scenario writer discovers that his plot and scenes have been imitated. And a hapless inventor learns that a manufacturer has taken his idea for a new mechanism. Each believes himself aggrieved and each vociferously clamors for redress. Such business practices may justly be condemned on moral considerations, but are they actionable in the courts? The frequency of these cases—caused perhaps by the evanescent nature of ideas and the consequent difficulty in detecting their larceny—demands an answer to the plea of these injured parties.

“. . . we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.”¹ Thus did Lord Mansfield indicate the basis for what must be our solution to the problem of ideas, a problem arising in the fields of copyright, patents, literary property, and unfair competition.

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1. Sayre v. Moore, 1 East 361 (K. B. 1785).

The early cases, for the most part, involved drama and lectures, and undoubtedly the law of ideas was influenced by questions arising from these particular circumstances. New questions now must be answered which often involve attractive financial stakes, and they are being artificially but not improperly settled by rules of a former era. This is but another instance indicating the versatility of our system of jurisprudence. Our consideration here will constitute an effort to explore the methods, if any, by which an originator of ideas may protect himself.

I. ABSTRACT IDEAS AS PROPERTY

A. At Common Law

The courts have never been willing to extend protection to the author of abstract ideas, in the absence of some confidential relationship existing between the parties. Unless the idea is connected with some definite and concrete scheme for carrying it out, it is clearly beyond the protective cloak of the law. The reason for this attitude on the part of the courts is clear, its root lying in considerations of public policy. Until an author has reduced his idea to a concrete form, he has not performed such a service to the public as to merit recognition or reward in the form of legal protection. Until the idea is put into a usable state, its author may claim no rights therein, for otherwise the courts would deprive the world of finished improvements and would retard the progress of the arts. Such would constitute the second of the two extreme points of view of which Lord Mansfield was so rightly apprehensive.

The conclusion having been reached, therefore, in advance, on grounds of policy, that abstractions should not be protected, the question arises as to how the courts reached that result in legal theory. The story is an interesting one. On several occasions the courts compared ideas to *ferae naturae*, property rights in which are dependent on possession; and it was, therefore, concluded that disclosure of ideas operated in the same way as permitting the escape of wild animals, in extinguishing all rights of the purported owner. Other courts pointed out that ideas were similar to negotiable instruments or legal tender, in that title passes by delivery (by disclosure). It has further been noted that ideas often depend for their efficacy upon the voluntary action of persons beyond the control of the author and hence are too inchoate to be capable of dominion. Another court observed that they have no "ear marks" or "distinguishing indicia" which are essential to all property. Finally, it has been held that ideas are part

of the public domain, occupying the same category as the air we breathe or the water of the ocean and, therefore, are not susceptible of private ownership.

By these various devices the courts have all reached the conclusion that ideas in themselves are not property and in this way effectuate their determination to extend no protection. Sometimes, however, in so doing, the courts have overlooked the basic reason of policy behind the doctrine of ideas and, even where the facts have presented situations in which the idea was clothed in a fairly concrete form, no protection was granted.

An early case in which an author of ideas claimed property rights was *Bristol v. Equitable Life Assurance Society*.² Plaintiff alleged that he had written defendant a letter suggesting an advertising system to be used for selling insurance. The letter requested that its contents be considered confidential. A requirement was that the writer become an officer of the company on a salary position in event the plan was accepted. The letter outlined a vague plan for selling of insurance with the suggestions that advertising be reduced, commercial agency reports be used as guides to prospects, \$1,000.00 be spent in mailing a letter "worded just right, not too long, mailed from the right place, from a party having just the right title, and written on a letter-head arranged in just the proper way," personal contact be made by agents with recipients of letters, a friendship be built up between prospect and the company, men of dignity and character be used, and when the applicant was not secured on the first interview succeeding attempts be made every year. This plan was not copyrighted or patented and it clearly appeared that the details were to be worked out later. Nevertheless, plaintiff claimed to be the owner of property rights therein and contended that defendant had no right to use the plan without paying for it. Counsel for the plaintiff contended that "we possess as absolute a right over our thoughts as we have over the brain cells whose rhythm gives to the sensational impulses the thought form, and whether we use the thought form to mould words with our mouth, or bricks with our hands, the product is equally our property."

The court in overruling this contention pointed out that, if it were sound, there would be no occasion for the existence of either the copyright or the patent laws, and said:

"It is difficult to conceive how a claim to a mere idea or scheme, unconnected with particular physical devices for carry-

2. 52 Hun 161, 5 N. Y. Supp. 131 (Sup. Ct. 1889).

ing out that idea, can be made the subject-matter of property. So long as the originator or possessor of the naked idea retains it, whether, germinating under the laws of metaphysics, it be regarded as Platonic or Cartesian in its make-up, it is his property, but it ceases to be his own when he permits it to pass from him."³

The court approved the suggestion made by counsel for defendants, comparing ideas with commercial paper, saying that "as the ingenuous counsel for the defendant say, it is like commercial paper,—it passes by delivery."⁴

The court then compared ideas to *ferae naturae*:

"Ideas of this sort, in their relation to property, may be likened to the interest which a person may obtain in bees and birds, and fish in running streams, which are conspicuous instances *ferae naturae*. If the claimant keeps them on his own premises, they become his qualified property, and absolutely his so long as they do not escape; but if he permits them to go he cannot follow them."⁵

The New York Court of Appeals⁶ affirmed this decision by pointing out that the plaintiff communicated his system to defendant to induce it to employ him and thus used it "as an attractive adjunct to his own self-commendation," but that he was unable to induce the defendant to adopt both the system and the writer and there could be no recourse against a defendant who had merely acted upon the hint plaintiff gave to it and found it profitable to do so.

Another case in which the same point was raised was *Burnell v. Chown*,⁷ in which complainant alleged that he had conceived and put into operation a scheme for collecting, classifying and putting in convenient form information in respect to the financial standing of businessmen in towns or counties, with a key thereto; and that the scheme being intended for the use of businessmen, had wrongfully been appropriated by defendant without plaintiff's consent. Although a *definite key system* had been supplied, the court held that it constituted merely an idea which neither the common law or copyright law could protect. The question was not discussed at length.

In *Maxwell v. Goodwin*,⁸ suit was brought for piracy of a play and a verdict in favor of plaintiff for \$10,000.00 was reversed, for the reason

3. *Id.* at 165, 5 N. Y. Supp. at 132.

4. *Ibid.*

5. *Ibid.*

6. 132 N. Y. 264, 30 N. E. 506 (1892).

7. 69 Fed. 993 (C. C. N. D. Ohio 1895).

8. 93 Fed. 665 (C. C. N. D. Ill. 1899).

that the court found that the lines had not been appropriated but merely the ideas, there being a similarity in general features since both plays had as their theme "Congressional life in Washington." The court held "that there is no inherent property right in ideas, sentiments, or creations of the imagination expressed by an author, apart either from the manuscript in which they are contained, or 'the concrete form which he has given them, and the language in which he has clothed them.'" The court stated that he had read the two plays and compared them, but could find "no copying or imitation in plot, scene, dialogue, sentiment, characters, or dramatic situations, and no similarity, aside from the general features and subjects. . . ."

In *Haskins v. Ryan*,⁹ plaintiff alleged that he had crystallized and formulated a plan which he had laid before defendant by which the white lead industries in the United States not already a part of the National Lead Company could be combined into one corporation; and that he had either purchased options thereon or had opened negotiations for their purchase. An elaborate prospectus had been prepared containing data concerning the white lead industry with respect to production, principal consumers and the desirability of consolidation. An outline of the procedure to be used in putting the plan into effect was set out and the prospectus concluded with a recapitulation concerning the organization of the new company and the issuance of stock. Nevertheless, the court regarded the whole scheme as merely an idea and held that it could not be protected, sustaining a demurrer to a complaint for wrongful appropriation. The court first discussed the nature of property, pointing out that there is no property in a thing over which there cannot be some sort of dominion and that it could not be said that an idea was susceptible to dominion. The court pointed out that in the case before it the idea involved the voluntary action and operation of many individuals beyond the control of complainant, saying:

"The means of carrying out the plan, of giving effect to the idea, lay, therefore, beyond his control. It was an idea depending for its realization upon the concurring minds of many individuals, each of them unbound by contract and free to act as he chose. Such a project or idea can scarcely be called 'property.' It lacks that dominium, that capability of being applied by its originator to his own use, which is the essential characteristic of property. It differs fundamentally from the secret process or patented inven-

9. 71 N. J. Eq. 575, 64 Atl. 436 (Ch. 1906).

tion which is capable of material embodiment at the will of the inventor alone. It is worthless unless others agree to give it life."¹⁰

The court quoted from Lord Brougham in *Jefferys v. Boosey*, as follows:¹¹

"*Volat irrevocable verbum*, whether borne on the wings of the wind or the press, and the supposed owner loses all control over them. . . . He has produced the thought and given it utterance, and, *eo instante*, it escapes his grasp."

The court further quoted from Justice Yates in his dissenting opinion in *Millar v. Taylor*:¹²

"Now where are the *indicia* or *distinguishing* marks of ideas? What distinguishing marks can a man fix upon a set of intellectual ideas, so as to call himself the *proprietor* of them? They have *no ear-marks* upon them. . . ."

Two cases have arisen in which it was alleged that there had been a wrongful appropriation of the "Morris Plan," described as "a unique plan of lending to poor people money, returnable in weekly installments and reinvesting these weekly installments." In *Stein v. Morris*¹³ it was alleged that plaintiff had written defendant a letter containing an elaborate system of figures to be used in making loans. Plaintiff had organized a corporation in Virginia for the purpose of putting this plan into operation and it had thereafter been appropriated by defendant. The court held that this was a mere idea and denied recovery, saying that plaintiff could not put such an idea into operation "without it at once escaping his own grasp and becoming the property of mankind."¹⁴

In *Universal Savings Corp. v. Morris Plan Co.*,¹⁵ the court dismissed a bill in equity for an accounting and for an injunction to prevent defendant from using the plan, saying that there could be no property right in an idea for conducting business "without physical means or devices for carrying it out."

The New York Court of Appeals again had occasion to consider the general question in *Fendler v. Morosco*,¹⁶ in which suit was brought for the

10. *Id.* at 579, 64 Atl. at 438.

11. 4 H. L. Cas. 815, 965 (1854).

12. 4 Burr. 2303, 2366 (K. B. 1769).

13. 120 Va. 390, 91 S. E. 177 (1917).

14. *Id.* at 394, 91 S. E. at 179.

15. 234 Fed. 382 (S. D. N. Y. 1916).

16. 253 N. Y. 281, 171 N. E. 56 (1930).

appropriation of plaintiff's drama, which at the time of the appropriation had been unpublished and uncopyrighted. Plaintiff contended that she had submitted the play to defendant, that he had refused to accept it, but later used it in writing another play. In affirming the dismissal of the complaint, the court of appeals pointed out that, although the scene of both plays was laid in Hawaii and in both an American fell in love with a native girl, and although both plays contained an attractive and novel local color by presenting Hawaiian customs, religious rites, songs and dances, it was possible that the plays might have been conceived independently. The court said:

"There may be literary property in a particular combination of ideas or in the form in which ideas are embodied. There can be none in the ideas.

" 'Ideas, it has always been admitted, even by the Stationers' Company, are free as air. If you happen to have any, you fling them into the common stock, and ought to be well content to see your poorer brethren thriving upon them.' 'Copyrights in Books,' by Augustine Birrell, page 167."¹⁷

In *Moore v. Ford Motor Co.*,¹⁸ plaintiff alleged that he had written a letter to the Ford Motor Company submitting a sales plan for the selling of cars through weekly deposits in banks, by which the Ford Company was to pay 10% interest on such deposits. This plan was elaborately discussed in the letter, but the details were not worked out, and the court in dismissing the complaint pointed out that "it is the form, sequence, and manner in which the composition expresses the idea which is secured to the author, not the idea."

In *Lueddecke v. Chevrolet Motor Co.*,¹⁹ plaintiff brought an action on an alleged implied contract on the part of defendant to pay the reasonable value of an idea and suggestion furnished it by plaintiff. It was alleged that plaintiff wrote defendant a letter suggesting that the latter experiment with the shifting units of the Chevrolet motor car so that the body would not sag on one side and permit the fender to rub on the tire. No designs or drawings were submitted with the letter, and in sustaining a demurrer to the complaint the court pointed out that whatever interest plaintiff had in his idea became common property upon its disclosure.

17. *Id.* at 287, 171 N. E. at 58.

18. 28 F. (2d) 529 (S. D. N. Y. 1928), *aff'd*, 43 F. (2d) 685 (C. C. A. 2d, 1930).

19. 70 F. (2d) 345 (C. C. A. 8th, 1934).

In *Midwest Recordings, Inc. v. Mid-Continent Petroleum Co.*,²⁰ arising in the United States District Court for Minnesota, a suit was brought for wrongful appropriation of an advertising idea submitted for approval by plaintiff to defendant's agent. The plan was to broadcast three programs a week, which should consist of a playlet, music and commercial announcements all in connection with the publication of an amateur newspaper of a small town variety, and the radio audiences were to be invited to become reporters of the newspaper by sending in contributions for publication. The newspaper was to be distributed at retail outlets of defendant. Plaintiff admitted that "there was nothing new in the idea," but contended that "the various steps as outlined in his scheme taken together were novel in advertising through radio broadcasting." In directing a verdict for defendants, the court held that there could be no property right in an abstract idea for "an abstract idea once published becomes common property subject to the use of all persons."

Thus it is seen that by various devices of legal theory the courts have all reached the conclusion that there is no property in abstract ideas.

B. Protection by Patent

Abstract ideas do not fall within the cloak of patent protection. "Any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof" may be patented.²¹ An idea does not come within any of these categories.²²

(1) "any new and useful art"

An idea does not constitute an art. Thus it was held that an idea for a joint or consolidated tariff index that would show all the tariffs in force on a number of railroads, was unprotected, because "what gives the breath of life to such a patent is not the system or the good advice contained in the disclosure, but the means shown and described."²³ Ideas to

20. (1938, unreported).

21. 29 STAT. 692 (1897), 35 U. S. C. § 31 (1929): a patent may also be obtained by one "who has invented, or discovered and asexually reproduced any distinct and new variety of plant other than a tuberpropagated plant".

22. 48 C. J. 21: "An art or process is not a mere abstraction. An art or process includes only such operations as are capable of producing a tangible product or of accomplishing a change in the character or quality of some material object." 48 C. J. 28: "The mere existence of an intellectual notion that a certain thing could be done, and, if done, might be of practical utility, does not furnish a basis for a patent."

23. *Guthrie v. Curlett*, 10 F. (2d) 725, 726 (C. C. A. 2d, 1926).

be used later in the discovery of chemical processes²⁴ and scientific theories²⁵ are not patentable. A method of cash registering and coin checking is likewise held not to constitute a patentable art or process, for, "no mere abstraction, no idea, however brilliant, can be the subject of a patent. . . ."²⁶ Neither is a system of code messages an art.²⁷ Nor is an idea for a method of distributing and regulating alternating electric currents by secondary generators susceptible of patent protection.²⁸ In one of the early cases it was held that there could be no infringement of a patent covering a mode of collecting combustible gases ordinarily escaping from a gas furnace.²⁹

24. *Monsanto Chemical Works v. Jaeger*, 31 F. (2d) 188 (W. D. Pa. 1929).

25. *Miller v. National Broadcasting Co., Inc.*, 16 F. Supp. 47, 53 (D. Del. 1934).

26. *Hotel Security Checking Co. v. Lorraine Co.*, 160 Fed. 467 (C. C. A. 2d, 1908).

27. *Berardini v. Tocci*, 190 Fed. 329, 332 (C. C. S. D. N. Y. 1911), in which the court said: "In the sense of the patent law an art is not a mere abstraction. A system of transacting business, disconnected from the means for carrying out the system, is not, within the most liberal interpretation of the term, an art. Advice is not patentable."

28. *Westinghouse Electric & Mfg. Co. v. Saranac Lake Electric Co.*, 108 Fed. 221, 223 (C. C. N. D. N. Y. 1901), in which the court said: "What he did can hardly be called an abandoned experiment for there was no experiment to abandon; it was only a tentative suggestion, an ingenious theory, a clever idea which is altogether too nebulous a foundation upon which to rest a patent which seeks to levy an immense tribute from the art and which was not thought of until five years afterwards. . . . In contemplation of law an invention does not exist until the inventor's theories and ideas have been reduced to practical form. It cannot be predicated of mere speculation and conjecture; it must be based upon something ascertained, something definite and certain."

29. *Detmold v. Reeves*, 7 Fed. Cas. No. 3831, 547, 549 (C. C. E. D. Pa. 1851). The opinion shows such profound consideration on the part of the judge that we quote profusely from it:

"The abstract must have been resolved into the concrete. The patent must be for a thing—not for an idea merely.

"The limitation, it may be said, denies to some of the more important products of mind what it concedes to others of lower grade. But it is not the less true on that account. Men may be enriched, or made happy, by physical, as well as by moral or political truths, which, nevertheless, go without reward for their authors. He who devised the art of multiplication could not restrain others from using it after him, without paying him for a license. The miner who first found out that the deeper veins were the richer in metal, could not compel his neighbor to continue digging near the surface.

"The more comprehensive truths of all philosophy, whatever specific name we give them, can not be specially appropriated by anyone. They are almost elements of our being. We have not reasoned them out, perhaps, and may be even unconscious of their action; yet they are about us, and within us, entering into and influencing our habitual thoughts, and pursuits, and modes of life—contributing to our safety and happiness. And they belong to us as effectively as any of the gifts of Heaven. If we could search the laws of nature, they would be, like water and the air, the common property of mankind; and those theories of the learned which we dignify with this title, partake, just so far as they are true, of the same universally diffused ownership. It is their application

(2) "machine"

Neither does an idea constitute a machine. It has been held that an idea for a machine is not patentable, although the machine, if fully developed, would have been.³⁰ Where the idea is merely for the working out of mechanical skill, it is held that there may be no patent protection.³¹ An idea for a machine to measure fabric and compute prices was held unprotected.³² Likewise it was held that a mechanical idea for handling the large number of passengers who patronize the public vehicles provided for rapid transit in large cities was not protected by patent.³³

(3) "manufacture"

An idea does not constitute a manufacture within the meaning of the statute. Thus an idea for a phonograph disc³⁴ was held not a manufacture, as well as an idea for a vacuum pressure frame,³⁵ or a power-life implement.³⁶

(4) "composition of matter"

It could scarcely be contended that an idea would constitute a composition of matter, and, in *Corrington v. Westinghouse Air Brake Co.*,³⁷ the court held that an idea for a pressure brake fluid could not be protected by a patent, saying: "He may have had a mental conception thereof, but, so far as the testimony shows, there was no tangible reduction to practice, no practical illustration. . . ."

to practical use which brings them within the domain of individuals; and it is the novelty of such an application that constitutes it the proper subject of a patent. But the contract of the public is not with him who has discovered, but with him who also makes his discovery usefully known."

30. *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481 (1891).

31. *Tropic-Aire, Inc., v. Sears, Roebuck & Co.*, 44 F. (2d) 580 (C. C. A. 8th, 1930), which involved an idea for a heating system. The court said: ". . . new thoughts which merely involve the working out of mechanical skill to produce a result are not patentable." See also *A. R. O. Equipment Corp. v. Hering-Wissler Co.*, 84 F. (2d) 619, 622 (C. C. A. 8th, 1936), which involved a patent for a lubricant gun.

32. *Measuregraph Co. v. Grand Rapids Show Case Co.*, 29 F. (2d) 263, 275 (C. C. A. 8th, 1928).

33. *Fowler v. City of New York*, 121 Fed. 747, 748 (C. C. A. 2d, 1903), in which the court said: "If a scheme for handling the traveling public in congested districts can, for patent purposes, be regarded as a machine, it is by no means easy to perceive why a new plan for reorganizing the police force, or mobilizing the army or manipulating the guests at crowded public functions, may not also be aptly described as a machine and patented as such."

34. *Dyer v. Sound Studios of New York, Inc.*, 85 F. (2d) 431 (C. C. A. 3d, 1936).

35. *Directoplate Corp. v. Donaldson Lithographing Co.*, 51 F. (2d) 199 (C. C. A. 6th, 1931).

36. *Killefer Mfg. Co. v. Dinuba Associates, Ltd.*, 67 F. (2d) 362 (C. C. A. 9th, 1933).

37. 178 Fed. 711, 715 (C. C. A. 2d, 1910).

(5) "or any new and useful improvements thereof"

An idea for a useful improvement of a machine, manufacture, art, or composition of matter is not patentable. In *Miner v. T. H. Symington Co.*,³⁸ the United States Supreme Court held that a patent covering an improvement in draft rigging for railroad cars failed to protect the inventor for the reason that his idea had never been reduced to concrete form, the court saying that there was disclosed at most "a mental conception in process of development which occasionally was outlined on scraps of paper and then committed to the waste basket and was roughly worked into a wooden model four or five inches long with a pen knife." The Supreme Court has also held that an idea for an improvement in the machinery for the making of hat bodies could not be protected, because no authority could be found "to grant a patent for a 'principle' or a 'mode of operation,' or an *idea*, or any other abstraction."³⁹ Neither is an idea for an improvement in tungsten and methods of making the same into filaments of incandescent lamps subject to patent protection.⁴⁰

C. *Protection by Copyright*

Various reasons have been assigned by the courts to their consistent refusal to grant copyright protection to ideas. It is said that the purpose of the Act was to protect only the concrete expression of ideas in manuscript form.⁴¹ It is also pointed out by the courts that ideas generally resemble an art, process or system rather than anything contemplated by the

38. 250 U. S. 383 (1919).

39. *Burr v. Duryee*, 1 Wall. 531, 570 (U. S. 1863).

40. *General Electric Co. v. DeForest Radio Co.*, 17 F. (2d) 90 (D. Del. 1927). In this case it was contended that a mental conception was complete when there was a definite idea of the thing itself, even without a knowledge on the part of anyone as to how to make it, and that when fully disclosed the idea had the effect in law of denying to anyone else the right to perfect patent. The court approved the following quotation from *Robinson on Patents*, § 77: "Every invention contains two elements: (1) An idea conceived by the inventor; (2) An application of that idea to the protection of a practical result. Neither of these elements is alone sufficient."

41. 35 STAT. 1075, 1088 (1909), 17 U. S. C. § 1 (1927), provides protection by copyright against the following acts: to print, reprint, publish, copy, translate, deliver, perform and vend. See *Perris v. Hexamer*, 99 U. S. 674, 675 (1878) (copyright of maps); *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1, 17 (1907) (copyrighted musical composition); *Kalem Co. v. Harper Brothers*, 222 U. S. 55, 63 (1911) (copyrighted book); *Burk v. Johnson*, 146 Fed. 209 (C. C. A. 8th, 1906) (a copyrighted system); *Ansehl v. Puritan Pharmaceutical Co.*, 61 F. (2d) 131, 137 (C. C. A. 8th, 1932) (copyrighted advertising); *Downes v. Culbertson*, 153 Misc. 14, 275 N. Y. Supp. 233, 242 (Sup. Ct. 1934) (bridge system).

Copyright Act, and therefore, the author of an idea must rely on the patent statutes for protection, if there is any protection.⁴² Other courts have relied upon the doctrine of fair use, permitting the appropriation of a mere idea from even a completed literary work.⁴³

Two other reasons have been urged by the courts, and as these reasons are applicable to common law protection of literary property, and have been used by common law cases, the decisions will be noted in greater detail.

(1) *Ideas as Common Property*

Ideas, when disclosed, become part of the public domain and are not susceptible of private appropriation. In this way ideas are similar to air, which is the common property of all. A leading case is *Taylor v. Comm'r of Internal Revenue*,⁴⁴ decided by the Court of Appeals for the Third Circuit. Petitioner had devised a plan for newspaper advertising which he termed the "Taylor Plan." He contended that this plan constituted an exhaustible asset within the meaning of the Revenue Act, which provided for a reasonable allowance for the wear, tear and exhaustion of property used in the taxpayer's course of business. The plan had been copyrighted, but the court nevertheless held that it was not property, saying, "What was the 'Taylor Plan'? Taylor had an idea, theory, or system in his head. It could not be subject to ownership in a legal sense any more than the multiplication table."⁴⁵

In *Park v. Warner Bros.*,⁴⁶ a decree was granted dismissing the bill of complaint for infringement of a copyrighted song, the only similarity being in the central idea. The court pointed out that "neither ideas nor

42. *Baker v. Selden*, 101 U. S. 99, 101 (1879) (a bookkeeping system); *Griggs v. Perrin*, 49 Fed. 15 (C. C. N. D. N. Y. 1892) (shorthand book); *Pellegrini v. Allegrini*, 2 F. (2d) 610, 612 (E. D. Pa. 1924) (statuette); *Brief English Systems, Inc. v. Owen*, 48 F. (2d) 555, 556 (C. C. A. 2d, 1931) (shorthand system); *Affiliated Enterprises, Inc. v. Gantz*, 86 F. (2d) 597, 598 (C. C. A. 10th, 1936) (bank night plan).

43. 13 C. J. 1108, 1126; *Dymow v. Bolton*, 11 F. (2d) 690, 691 (C. C. A. 2d, 1936) (plot for drama); *Nutt v. National Institute, Inc. for the Improvement of Memory*, 31 F. (2d) 236, 239 (C. C. A. 2d, 1929) (memory lectures); *Guthrie v. Curlett*, 36 F. (2d) 694 (C. C. A. 2d, 1929) (consolidated freight tariff index); *Rush v. Oursler*, 39 F. (2d) 468 (S. D. N. Y. 1930); *Kaesser & Blair, Inc. v. Merchants' Ass'n*, 64 F. (2d) 575, 577 (C. C. A. 6th, 1933) (copyrights catalog); *Lowenfels v. Nathan*, 2 F. Supp. 73 (S. D. N. Y. 1932) (copyrighted play); *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F. Supp. 632, 635 (S. D. Cal. 1935) (motion picture).

44. 51 F. (2d) 915 (C. C. A. 3d, 1931), *cert. denied*, 284 U. S. 689 (1932).

45. *Id.* at 917.

46. 8 F. Supp. 37 (S. D. N. Y. 1934).

phrases nor ordinary English idioms or words are protected by copyright. They are all in the public domain."

Most of the cases rest on the theory that ideas are common property. Thus it was held that O'Neill's drama "Strange Interlude" was not an infringement of a prior work, for at most, only the idea had been taken, and in order to be a literary larcenist, an author "must do more than filch ideas."⁴⁷ The idea of a romance between a Jewish boy and an Irish girl was held not subject to the protection afforded by a copyright of the drama "Abie's Irish Rose," for the court pointed out that "emotions, like mere ideas, are not subject to pre-emption; they are common property."⁴⁸

Likewise, it was held that the play "Death Takes a Holiday" was not an infringement of a prior copyrighted drama, for the only similarity lay in their common ideas and sentiments "which have long been common property for authors and playwrights to embellish."⁴⁹

(2) *Public Policy*

It would be against public policy to grant a monopoly of ideas, for the reason that abstractions would be withdrawn from public use, thereby discouraging authors and inventors from exploiting their ideas for the common good and restricting the opportunity for progress. This situation is aptly illustrated in the field of drama where it is said there are only a dozen basic plots, and if the law were to extend its protection to ideas, the complete supply of plots would soon be exhausted, making it impossible for an author to write a play without paying royalty to the originator of the basic plot.⁵⁰

The whole object of the copyright laws was to promote public policy by granting protection to authors of concrete works, thereby encouraging them to develop their ideas into usable form. This purpose would be

47. *Lewys v. O'Neill*, 49 F. (2d) 603, 607 (S. D. N. Y. 1931).

48. *Nichols v. Universal Pictures Corp.*, 34 F. (2d) 145 (S. D. N. Y. 1929), *cert. denied*, 51 Sup. Ct. 216 (1930).

49. *Wiren v. Shubert Theatre Corp.*, 5 F. Supp. 358, 363 (S. D. N. Y. 1933). See also *Holmes v. Hurst*, 174 U. S. 82, 86 (1899); *London v. Biograph Co.*, 231 Fed. 696, 698 (C. C. A. 2d, 1916); *Ornstein v. Paramount Productions, Inc.*, 9 F. Supp. 896 (S. D. N. Y. 1935).

50. *Eichel v. Marcin*, 241 Fed. 404, 408 (S. D. N. Y. 1913): "If an author, by originating a new arrangement and form of expression of certain ideas or conceptions, could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field thought open for development and exploitation, and science, poetry, narrative, and dramatic fiction and other branches of literature would be hindered by copyright, instead of being promoted."

frustrated if the courts were to hold that the copyright laws protected ideas. The result would be a fraud on the public, by depriving it of many useful improvements and literary productions.⁵¹

D. Proposed Legislation

Legislation to extend protection of the law to abstract ideas has been seriously considered. It is argued that inventors and authors of embryonic productions are not sufficiently protected by existing law, in that often during the progress of their original thoughts from conception to a concrete form, they are deprived of the fruits of their labor by others appropriating the ideas to their own use and development. With this in mind, Senator King in 1929 introduced a resolution in the Senate authorizing the Committee on Patents to study the advisability of legislation protecting ideas.⁵² Even this resolution, however, would require an idea to

51. *Baker v. Selden*, 101 U. S. 99, 102-03 (1879): "To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. . . . The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." See also *Johnson v. Donaldson*, 3 Fed. 22, 24 (C. C. S. D. N. Y. 1880), and *Carter v. Bailey*, 64 Me. 458, 461-62 (1874).

52. Senate Resolution No. 101, July 19, 1929, which reads in part as follows:

"Whereas it is contended that statutory protection for property and proprietary rights and ownership in original thoughts, conceptions, and ideas in art, literature, science, mechanics, and the useful arts is incomplete and that artists, authors, scientists, and inventors are not now satisfactorily protected by law in their proprietary and property rights and ownership during the progress of their original ideas and works from conception to reduction to practice, and from reduction to practice to and through sale for use, and for application and use of their original conceptions and ideas after reduction to practice or to tangible form; and

"Whereas it is contended by artists, authors, scientists, and inventors that property and proprietary rights exist in original ideas or combinations of original ideas, if definitely formulated and forwarded, and in their use or application irrespective of whether they are combined with physical, material, or tangible means of making practical application of such ideas; and

"Whereas the subject and situation warrant careful investigation and consideration by Congress with a view to defining and protecting property and proprietary rights in such original thoughts, conceptions, and ideas; Therefore, be it

"RESOLVED, That the Committee on Patents, or any duly authorized subcommittee thereof, is authorized and directed (1) to investigate the extent to which the rights of persons engaged in art, literature, science, mechanics, and the useful arts in their original thoughts, conceptions, and ideas leading to invention and discovery have been and may be considered in law, equity, and common usage as property and proprietary rights, and the extent to which such persons have been or may reasonably be protected in the commercial or other use of such original thoughts, conceptions, and ideas, and (2) to report to

be definitely formulated and the precise method indicated by which the thought is to be reduced to practice. It was said that the resolution sought "to open another, entirely new field for protection of creative work, this time in the field of mental endeavor, regardless of whether there is something tangible to show for the idea."⁵³ The date set for the Committee's report was April 15, 1930, but no report was ever made and apparently the proposal has long since been forgotten.

II. PROTECTION OF IDEAS AND THEIR CONCRETE EXPRESSION

A. *Protection of Abstract Ideas by Contract*

Although it is clear that ideas in themselves are not property, some cases indicate that the originator may protect an abstraction by contract. Thus the New York Court of Appeals has said that if an idea "cannot be sold or negotiated or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure. . . ."⁵⁴ This quotation was recently set out and approved by the United States Court of Appeals for the Eighth Circuit.⁵⁵ In both cases, however, these statements were *obiter*.

If an idea is not property, how may it constitute consideration to support a binding promise? No case has been found specifically holding in the affirmative. Suppose that the author of an idea submits it to another person only on condition that the latter pay for it in the event it is used. The use of the idea by the latter would ordinarily constitute an acceptance of the offer, but, because the idea is not property, there can be no con-

the Senate as soon as practicable, but in no event later than April 15, 1930, the results of its investigation, together with its recommendations for necessary legislation to protect for a limited time the property and proprietary rights of such persons in their original thoughts, conceptions, and ideas leading to invention and discovery." (71 CONG. REC. 3090 (1929)).

53. 11 J. PATENT OFFICE SOC. 337 (1929). It was further pointed out that: "The resolution presents the contention that statutory protection for property and proprietary rights and ownership in original thoughts, conceptions and ideas in art, literature, science, mechanics and the useful arts is at present insufficient; that such rights exist in original ideas or combinations of ideas, if definitely formulated and forwarded, and in their use irrespective of whether they are combined with physical or tangible means of making practical application of them."

54. *Bristol v. Equitable Life Assurance Society*, 132 N. Y. 264, 30 N. E. 506, 507 (1892).

55. *Lueddecke v. Chevrolet Motor Co.*, 70 F. (2d) 345 (C. C. A. 8th, 1934). A statement to this effect also appears in *Hamilton Mfg. Co. v. Tubbs Mfg. Co.*, 216 Fed. 401 (C. C. W. D. Mich. 1908). The rule was likewise indicated in *Hughes v. West Pub. Co.*, 225 Ill. App. 58, 80 N. E. 59 (1922).

sideration to support the promise to pay for its use and hence there can be no contract.⁵⁶

An express agreement to pay for an idea to be later disclosed is without consideration and there is no binding contract even though the idea is in fact disclosed. In *Soule v. Bon Ami Co.*,⁵⁷ suit was brought for the breach of a contract whereby defendant had agreed to pay plaintiff for a method of increasing its profits without expense. When disclosed, the idea was merely to raise prices and the court held that this would not constitute consideration for the promise to make payment, saying:

“ . . . does any consideration exist for the agreement by defendant to pay plaintiff one-half of its increased profits? The plaintiff, according to his complaint, was to impart to the defendant valuable information, and this information was to suggest a way or method of increasing the defendant's profits. When this information was furnished to the defendant, it consisted merely of the suggestion that the defendant should increase its price upon its product, and thereby an increased profit would result.

“The plaintiff did not prove the contract was supported by a valuable consideration, and the complaint should have been dismissed.”⁵⁸

In *Masline v. New York, New Haven & Hartford R. R.*,⁵⁹ the parties agreed that defendant would pay plaintiff a percentage of the profits resulting from a plan to be submitted by defendant. The plan consisted of a mere advertising idea and was held not sufficient consideration to effect a binding contract, although it had been accepted and used by defendant, the court stating⁶⁰ “that it could have no market value so as to form the consideration for a contract.”

Obviously, a different question is presented when the consideration is not primarily the idea, but the labor involved in producing it. Thus, in the cases just referred to, had it been necessary for plaintiff to engage in extensive research before he could be certain of the advisability of adopting the plan proposed, his labor might be held to constitute good

56. *Moore v. Ford Motor Co.*, 28 F. (2d) 529 (S. D. N. Y. 1928), *aff'd*, 43 F. (2d) 685 (C. C. A. 2d, 1930); *Lueddecke v. Chevrolet Motor Co.*, 70 F. (2d) 345 (C. C. A. 8th, 1934); *Fendler v. Morosco*, 253 N. Y. 281, 171 N. E. 56 (1930), *rev'g* 216 N. Y. Supp. 829 (1st Dep't 1926).

57. 201 App. Div. 794, 195 N. Y. Supp. 574 (2d Dep't 1922), *aff'd*, 235 N. Y. 609, 139 N. E. 754 (1923).

58. *Id.* at 795, 195 N. Y. Supp. at 575.

59. 95 Conn. 702, 112 Atl. 639 (1921).

60. *Id.* at 707, 112 Atl. at 640.

consideration. This question, however, has not been considered by the courts in the field under consideration.

B. *Protection for Material Embodiment*

Where an idea has been reduced to its ultimate form and therefore has become usable and potentially beneficial, the weight of public policy compels protection for the author. In such circumstances to deny protection would constitute the first extreme position condemned by Lord Mansfield, "that men of ability, who have employed their time for the service of the community . . . be deprived of their just merits and the reward of their ingenuity and labor." For this reason, the courts have extended protection to ideas reduced to a concrete form by denominating them "literary property." The basis for this right was said by Blackstone to lie in the mental effort necessary for its production and the right of everyone to the fruit of his labor.⁶¹ The right exists entirely apart from statute⁶² and is governed for the most part by the same rules of transfer and succession as any other personal property.⁶³ Curiously, however, it has been held that this type of property may not be seized and sold on an attachment or execution, but these decisions have been severely and justly criticised.⁶⁴ In order to constitute literary property within the protection of the common law, the material embodiment of an idea must be concrete, novel, original and lawful.

61. 2 BL. COMM. *405. See also *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 291 (1907); *Werckmeister v. American Lith. Co.*, 134 Fed. 321, 324 (C. C. A. 2d, 1904), *rev'g* 126 Fed. 244 (C. C. S. D. N. Y. 1903); 13 C. J. 948.

62. 13 C. J. 947. In England, however, the common law doctrine has been expressly abrogated by the Copyright Act, 1911, 1 & 2 GEO. V., c. 46, § 31. To the extent that the common law protected the right after publication, it has been superseded by the Copyright Statutes in the United States. See *Wheaton v. Peters*, 8 Pet. 591 (U. S. 1834); and *Holmes v. Hurst*, 174 U. S. 82, 85 (1898). *Kurfiss v. Cowherd*, 121 S. W. (2d) 282 (Mo. App. 1938), noted in (1939) 4 Mo. L. Rev. 221, is the only Missouri case. See also *Suddoth v. Bryan*, 39 Mo. App. 652 (1890).

63. See cases cited in 13 C. J. 948, n. 35. In *Aronson v. Baker*, 43 N. J. Eq. 365, 12 Atl. 177 (Ch. 1888), it was said: "The right to literary property is just as sacred, and just as much entitled to the protection of the law, as the right to any other kind of personal property. Its acquisition and succession are governed by the same legal rules which control the acquisition and succession of other property of the same general class, and, if the rights of its owner are violated, he is entitled to the same remedies to which the owner of other personal property may resort for redress."

64. See 13 C. J. 950, n. 53, n. 54.

(1) *The work must be concrete*

By listing concreteness as the first requirement for the protection on an idea we perhaps become guilty of a contradiction of terms, for the very term "idea" negatives concreteness. This, however, has not troubled the courts, who feel that because of reasons of public policy such ideas should be protected, and in order to reach that result call them literary property. It perhaps would be more exact to say that not the idea but its material embodiment is subject to protection.

It has already been demonstrated that this material cloak of an idea must be minutely concrete in order to be considered property. All the details must be developed and their mode of operation indicated. Nothing must be left to the voluntary action of strangers.

A recent example of an idea sufficiently reduced to a concrete form so as to constitute literary property is found in *Liggett and Meyer Tobacco Co. v. Meyer*.^{64a} In this case plaintiff had sent defendant a letter offering to sell it an advertising idea described in the letter as follows: "The idea consists of this: Two gentlemen, well groomed, in working clothes or in hunting togs apparently engaged in conversation, one extending to the other a package of cigarettes, saying, 'Have one of these,' the other replying, 'No thanks; I smoke Chesterfields.'"

It is plain that this suggestion was far more concrete than those already noted which the courts held were not property. No detail remained to be worked out; all that was required was to employ an artist to draw the picture in exact compliance with the suggestion. Suit was brought for wrongful appropriation of the plan, it being contended that defendant had used the idea in its advertising without paying for it. The court held that "While we recognize that an abstract idea as such may not be the subject of a property right, yet, when it takes upon itself the concrete form which we find in the instant case, it is our opinion that it then becomes a property right subject to sale."

Even more apparent is the correctness of the decision by the Washington Supreme Court in *Ryan & Associates v. Century Brewing Ass'n*.^{64b} Plaintiff, an advertising agency, was invited to submit to defendant, then about to begin the manufacture and sale of beer, suggestions for an advertising program. Pursuant to this invitation, plaintiff submitted a slogan

64a. 101 Ind. App. 420, 194 N. E. 206, 210 (1935).

64b. 185 Wash. 600, 55 P. (2d) 1053 (1936).

entitled "The Beer of the Century." Plaintiff knew that other advertising agencies had likewise submitted suggestions and that each desired to obtain the regular employment of defendant in devising and handling its advertising campaign. Plaintiff was not so employed, but nevertheless defendant began to use plaintiff's slogan. The jury awarded plaintiff a substantial verdict for its services in conceiving the slogan, and on appeal the Supreme Court held that while an abstract idea was not property, yet the facts presented an idea in a concrete form susceptible of private ownership, relying on *Liggett & Meyers Tobacco Co. v. Meyer*, and saying:

"So far as the appellant is concerned, we see no difference between a suit such as this for services rendered and a suit based upon the originator's property right in his own idea.

"The value of the property right or the value of the services each depend upon the value of the idea to the user and evidence as to the extent of the use and the volume of sales would be admissible in either case. Again, the respondent being the originator of the idea, and it being a novel one in which it had a property right, and the disclosure being to the appellant alone and being strictly limited and coupled with a warning that a violation of its property right therein would subject the violator to liability, there was no such disclosure as would, under the law, destroy respondent's property right in its idea. If it were held otherwise, the mere offer to sell would destroy the thing offered."

In *Thompson v. Famous Players-Lasky Corp.*,^{64c} it was held that a scenario and synopsis for a photoplay constituted property for the reason that the ideas therein used were put in a concrete form. The court said: "On both English, state, and federal authority it is established that the products of intellectual labor, when brought to a concrete, finished form, and not dedicated by publication to common use, are at common law private property, and to be protected as such."

The court pointed out that although the scenario was not written to be directly presented to the public, yet the sentences contained in it were to be put upon the screen and the remainder constituted stage directions to the actors. Therefore, it closely resembled a written drama and was analogous to architects' plans.

There are many ways in which an idea may be put into a concrete

64c. 3 F. (2d) 707 (N. D. Ga. 1925).

form, namely, a drama,⁶⁵ musical composition,⁶⁶ painting,⁶⁷ etching,⁶⁸ photograph,⁶⁹ letter,⁷⁰ architectural drawing,⁷¹ lecture,⁷² book,⁷³ map,⁷⁴ slogan,⁷⁵ news article⁷⁶ or scenario.⁷⁷

(2) *There must be both novelty and originality*

Literary property is both novel and original. The work must be novel in that it is new to the world, and it must be originated by him who claims it or by his assignor. Thus, there was no right in the suggestion that prices be raised in order to increase profits, for "it cannot be claimed that the plaintiff had any monopoly of the idea that an increase in price would result

65. *Aronson v. Fleckenstein*, 28 Fed. 75 (C. C. N. D. Ill. 1886); *Maxwell v. Goodwin*, 93 Fed. 665 (C. C. N. D. Ill. 1899); *Uproar Co. v. Nat. Broadcasting Co.*, 81 F. (2d) 373 (C. C. A. 1st, 1936); *Shook v. Rankin*, 21 Fed. Cas. No. 12804 (C. C. N. D. Minn. 1875); *Aronson v. Baker*, 43 N. J. Eq. 365, 12 Atl. 177 (Ch. 1888); *Palmer v. Dewitt*, 47 N. Y. 532 (1872); *Fleron v. Lackaye*, 14 N. Y. Supp. 292 (N. Y. City Super. Ct. 1891); *Toole v. Young*, L. R. 9 Q. B. 523 (1873).

66. *Thomas v. Lennon*, 14 Fed. 849 (C. C. D. Mass. 1883); *Corte v. Ford*, 15 Fed. 439 (C. C. D. Md. 1883); *Mikado Case*, 25 Fed. 183 (C. C. S. D. N. Y. 1885); *Wilkie v. Santly Bros., Inc.*, 91 F. (2d) 978 (C. C. A. 2d, 1937); *Stern v. Carl Laemmle Music Co.*, 74 Misc. 262, 133 N. Y. Supp. 1082 (Sup. Ct. 1911); *Casino Productions, Inc. v. Vitaphone Corp.*, 163 Misc. 403, 295 N. Y. Supp. 501 (Sup. Ct. 1937).

67. *American Tobacco Co. v. Werckmeister*, 207 U. S. 284 (1907); *Werckmeister v. Springer Lith. Co.*, 63 Fed. 808 (C. C. S. D. N. Y. 1894); *Caliga v. Inter Ocean Newspaper Co.*, 157 Fed. 186 (C. C. A. 7th, 1907), *aff'd*, 215 U. S. 182 (1909); *Parton v. Prang*, 18 Fed. Cas. No. 10,784 (C. C. D. Mass. 872); *Oertel v. Wood*, 40 How. Pr. 10 (N. Y. 1870); *Mansell v. Valley Printing Co.*, [1908] 2 Ch. 441; *Turner v. Robinson*, 10 Ir. Ch. R. 121 (1860).

68. *Prince Albert v. Strange*, 2 DeG. & S. 652 (Ch. 1848).

69. *Bowden Bros. v. Amalgamated Pictorials*, [1911] 1 Ch. 386.

70. *Grigsby v. Breckenridge*, 1 Bush 480 (Ky. 1867); *Denis v. Leclerc*, 1 Mart. 159. (La. 1811); *Baker v. Libbie*, 210 Mass. 599, 97 N. E. 109 (1912); *Woolsey v. Judd*, 11 N. Y. Super. 379, 11 How. Pr. 49 (1855); *Barrett v. Fish*, 72 Vt. 18, 47 Atl. 174 (1899).

71. *Wright v. Eisle*, 86 App. Div. 356, 83 N. Y. Supp. 887 (2d Dep't 1903).

72. *McDearmott Comm. Co. v. Chicago Board of Trade*, 146 Fed. 961 (C. C. A. 8th, 1906); *Keene v. Kimball*, 16 Gray 545 (Mass. 1860); *N. J. State Dental Soc. v. Dentacura Co.*, 57 N. J. Eq. 593, 41 Atl. 672 (Ch. 1898); *Abernathy v. Hutchinson*, 1 Hall & T. 28 (Ch. 1825).

73. *Dart v. Woodhouse*, 40 Mich. 399 (1879); *Banker v. Caldwell*, 3 Minn. 94 (1859); *Watson v. Cowdrey*, 23 Hun 169 (N. Y. 1880); *Berry v. Hoffman*, 125 Pa. Super. 261, 189 Atl. 516 (1937); *Vernon Abstract Co. v. Waggoner Title Co.*, 49 Tex. Civ. App. 144, 107 S. W. 919 (1908).

74. *Rees v. Peltzer*, 75 Ill. 475 (1874).

75. *Liggett & Meyers Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N. E. 206 (1935); *Healey v. R. H. Macey & Co.*, 251 App. Div. 440, 297 N. Y. Supp. 165 (Sup. Ct. 1937); *Ryan v. Century Brewing Ass'n*, 185 Wash. 600, 55 P. (2d) 1053 (1936).

76. *Jenkins v. News Syndicate Co.*, 128 Misc. 284, 219 N. Y. Supp. 196 (Sup. Ct. 1926).

77. *Thompson v. Famous Players Lasky Corp.*, 3 F. (2d) 707 (N. D. Ga. 1925); and *Brown v. Ferris*, 122 Misc. 418, 204 N. Y. Supp. 190 (N. Y. City Mun. Ct. 1924).

in an increase of profits.”⁷⁸ The suggestion that a railroad sell advertising space in its stations, cars or right of ways, was not property because “the idea was not new nor exclusively within the plaintiff’s knowledge, but was perfectly obvious and well known to all men.”⁷⁹ A system of finance was not property because “the scheme was not original but was an old one which had been in operation in Europe for many years.”⁸⁰ A plan for selling cars through weekly deposits in banks was held “not a new idea.”⁸¹

Property rights were denied to the author of a suggestion as to the construction of a motor car for the reason that it was not original with the alleged author, the court saying:

“But it must be the plaintiff’s idea. Upon communication to the defendant it at once did appear that the idea was not original with the plaintiff, but was a matter of common knowledge, well known to the world at large.”⁸²

With respect to the question of originality, an interesting question arises as to property rights of an artist in the performance of a musical composition composed by another. He clearly has no rights in the composition itself because he cannot claim authorship, but he may claim originality in the manner in which he has rendered its performance. May a radio station broadcast the phonograph recording of his performance? Only one case has arisen in which this problem was considered, *Waring v. WDAS Broadcasting Station, Inc.*,⁸³ decided by the Supreme Court of Pennsylvania. There, plaintiff was conductor of an orchestra which had been incorporated under the laws of New York and had achieved a world wide reputation. The orchestra had made phonograph recordings for the Victor Talking Machine Company which had been duly licensed by the copyright

78. *Soule v. Bon Ami Co.*, 201 App. Div. 794, 195 N. Y. Supp. 574, 576 (2d Dep’t 1922), *aff’d*, 235 N. Y. 609, 139 N. E. 754 (1923). The court said further: “No person can by contract monopolize an idea that is common and general to the whole world.”

79. *Masline v. New York, N. H. & H. R. R.*, 95 Conn. 702, 112 Atl. 639 (1921).

80. *Stein v. Morris*, 120 Va. 390, 91 S. E. 177 (1917). See also *Universal Savings Corp. v. Morris Plan Co. of N. Y.*, 234 Fed. 382 (S. D. N. Y. 1916).

81. *Moore v. Ford Motor Co.*, 28 F. (2d) 529, 537 (S. D. N. Y. 1928).

82. *Leuddecke v. Chevrolet Motor Co.*, 70 F. (2d) 345, 348 (C. C. A. 8th, 1934). See also, *Victor Talking Machine Co. v. George*, 69 F. (2d) 871, 875 (C. C. A. 3d, 1934); *Liggett & Meyers Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N. E. 206, 210 (1935); *Stern v. Carl Laemmle Music Co.*, 74 Misc. 262, 133 N. Y. Supp. 1082 (Sup. Ct. 1911); and *Ryan and Associates v. Century Brewing Ass’n*, 185 Wash. 600, 55 P. (2d) 1053 (1936).

83. 327 Pa. 433, 194 Atl. 631 (1937). This question was involved but not decided in *April Productions, Inc. v. Harms, Inc.*, 165 Misc. 883, 1 N. Y. Supp. (2d) 382 (Sup. Ct. 1937).

owners. Plaintiff had inserted the following notation on each record: "Not licensed for radio broadcasting." Defendant was a commercial broadcasting station and reproduced the recordings after having procured a license from the copyright owners. Plaintiff sought an injunction to protect his common law rights in the manner in which he had performed the composition. The court frankly admitted that the problem had never been raised in an English or American case.

It was strongly contended that a musical artist does not produce anything novel or original merely by playing a composition, but merely renders articulate the silent composition of the author. In meeting this contention the court, however, pointed out that "it must be clear that such actors, for example, as David Garrick, Mrs. Siddons, Rachel, Booth, Coquelin, Sarah Bernhardt and Sir Henry Irving, or such vocal and instrumental artists as Jenny Lind, Melba, Caruso, Paderewski, Kreisler and Toscanini, by their interpretations, definitely added something to the work of authors and composers which not only gained for themselves enduring fame but enabled them to enjoy financial rewards from the public in recognition of their unique genius. . . ."⁸⁴

The court thereupon reviewed many cases holding that operatic arrangements, news reports of observations, translations, and other types of revisions and arrangements were literary property. These, the court held, were analogous to the recorded performance of a musical composition, saying:

"A musical composition in itself is an incomplete work; the written page evidences only one of the creative acts which are necessary for its enjoyment; it is the performer who must consummate the work by transforming it into sound. . . . All that need now be decided is that such a property right inheres in the case of those artists who elevate interpretations to the realm of independent works of art."⁸⁵

84. *Id.* at 440, 194 Atl. at 635.

85. The court also said that the decision might be based on the law of unfair competition, but Justice Maxey, in a separate concurring opinion, rejected this application of unfair competition and based his decision on a breach of privacy. Another interesting problem arises when the owner of a radio receiving set picks up an unauthorized broadcast; is he liable? The affirmative was held in *Performing Right Society, Ltd. v. Hammonds' Bradford Brewery Co., Ltd.*, [1934] 1 Ch. 121. See also *Chaplin v. Amador*, 16 T. M. Rep. 21 (Cal. 1925), in which defendant was enjoined from exporting a motion picture in which Charles Chaplin's methods and mannerisms were imitated.

(3) *The work must be moral and lawful*

A work which is immoral and contrary to law cannot be literary property. An immoral play, book or song will be accorded no protection by the courts even though copyrighted.⁸⁶ Dissemination of market quotations was not prohibited where it was shown that 90% of the sales executed in the pits of the board of trade were gambling transactions.⁸⁷

C. *Protection of ideas to prevent unfair competition*

Although abstract ideas are not property, their appropriations may constitute unfair competition. Mr. Harry Nims, who is the outstanding authority in this field, says:

“Frequently there are designs, ideas and methods more or less original in character which are not patentable, but which have a distinct commercial value. Often the originator expends time and money in their development, only to find, when they are in successful operation, that a competitor has appropriated them bodily, and is using them to sell his own goods. Within narrow limits, acts of this character have been enjoined.”⁸⁸

Conceivably, an idea may constitute a trade secret. Suppose a manufacturer's laboratory staff is engaged in developing an idea for a new machine, and before the idea has assumed a concrete form, a competitor, by means of bribery, obtains information concerning the idea from the former's employee, and proceeds to make use of it. Could it successfully be contended that the competitor was not guilty of unfair competition?

In *Meyer v. Hurwitz*,⁸⁹ complainant was a manufacturer of picture post cards representing stage and athletic celebrities, and had designed an automatic vending machine to dispense the cards. Defendant manufactured similar cards and sold them for use in machines designed and manufactured by complainant. In a suit for injunction the court held

86. *Broder v. Zeno Mauvais Music Co.*, 88 Fed. 74 (C. C. N. D. Cal. 1898).

87. *Chicago Board of Trade v. Donovan Comm. Co.*, 121 Fed. 1012 (C. C. E. D. Mo. 1903), *rev'd on other grounds*, 145 Fed. 28, 31 (C. C. A. 8th, 1906); *Chicago Board of Trade v. Kinsey Co.*, 125 Fed. 72 (C. C. D. Ind. 1903), *rev'd on other grounds*, 130 Fed. 507 (C. C. A. 7th, 1904), 198 U. S. 236 (1905).

88. NIMS, UNFAIR COMPETITION AND TRADE-MARKS (3d ed. 1929) § 289. See also 63 C. J. 466, wherein it is stated: “Although it has been said that there is apparently no authority holding that at common law there is a proprietary right in a system, device, plan, or scheme and injunctive relief has been refused where no competition or damage was shown, yet, where a person established a business system peculiarly his own, another has been guilty of unfair competition in attempting to appropriate such business system and substitute his goods for those of the originator of the system.”

89. 5 F. (2d) 370 (E. D. Pa. 1925), *aff'd*, 10 F. (2d) 1019 (C. C. A. 3d, 1926). See also *Meccano v. Wagner*, 234 Fed. 912 (S. D. Ohio 1916), *decree modified*, 246 Fed. 603 (C. C. A. 6th, 1918).

that complainant had no right to prevent defendant from copying his cards after they had been published nor could defendant be restrained from entering the same business as complainant, but nevertheless granted an injunction on the ground of unfair competition, saying:

“But after the plaintiff has, through years of effort and expenditure, built up a system and organized a business, the defendant may not, by associating therewith a right which is not denied him, that of imitating the plaintiff’s uncopyrighted cards, appropriate to himself the plaintiff’s system or organization for the purpose of underselling him and appropriating to himself profits to which the plaintiff through his efforts, expenditures, and industry is entitled.”⁹⁰

To hold that wrongful appropriation of an idea may constitute unfair competition does not necessarily presuppose a general property right in the idea. Ideas are not property in themselves, but if the parties are competitors, ideas may give rise to duties and obligations when their misuse constitutes an unfair trade practice. Unfair competition does not presuppose an absolute property right in the specific article appropriated. This was made clear by the United States Supreme Court in *International News Service v. Associated Press*,⁹¹ in which it was sought to enjoin defendant from copying complainant’s uncopyrighted news article from bulletin boards and early editions of newspapers in the East and selling them, either bodily or after re-writing, to its own customers for re-publication in other sections of the country. Complainant contended that this conduct violated its property right in the news articles as well as constituted unfair competition. Clearly, there was no common law of property in the articles after they had been published, but the court said that a consideration of the question was unnecessary as their appropriation by a defendant constituted unfair competition which “does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent; nor is it foreclosed by showing that the benefits of the copyright act have been waived.”⁹²

In holding that the defendant was guilty of unfair competition, Mr.

90. *Meyer v. Hurwitz*, 5 F. (2d) 370, 371 (E. D. Pa. 1925).

91. 248 U. S. 215 (1918). See also *Affiliated Enterprises, Inc., v. Truber*, 86 F. (2d) 958 (C. C. A. 1st, 1936); and *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W. D. Pa. 1938).

92. 248 U. S. 215, 235 (1918).

Justice Pitney said that "The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other."⁹³

The court pointed out that although there was no property right of either party in the articles as against the public, yet complainant had a "quasi property" as to defendant, and hence defendant would not in equity be heard to complain that this right was "too fugitive or evanescent to be the subject of property," for it had "all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience."⁹⁴

The courts have not always followed the rule suggested by the cases thus far noted in this connection, as they are reluctant to grant protection of any kind to ideas. Thus, in the recent case of *Affiliated Enterprises, Inc., v. Gruber*,⁹⁵ an attempt was made to enjoin a competitor from using and selling to theaters a bank night plan originated by complainant. It was contended that such misuse by defendant constituted unfair competition. As only the idea had been copied, the court held that there was no infringement of complainant's copyright, the idea itself not constituting property at common law.⁹⁶ *Meyer v. Hurwitz*,^{96a} was distinguished by the court saying that it involved the taking of a business consisting of manufacturing and selling post cards. But was not an entire business system appropriated in both cases, and can it make any difference that the system consisted of selling post cards or a bank night plan?

There was, however, a factual distinction with respect to the *International News Service* case, for there it may be said that while the news had been published in the East, yet it still remained unpublished in other localities, at least as between the parties competing in that field. This distinction was not made, however, by the court of appeals, which, instead, attempted to base a distinction on the ground that the *International*

93. *Id.* at 235.

94. *Id.* at 240.

95. 86 F. (2d) 958 (C. C. A. 1st, 1936).

96. *Id.* at 961: "However good and valuable an idea, plan, scheme or system is, the moment it is disclosed to the public without the protection of a patent, it becomes public property, and the fact that it has been made popular by advertising and the expenditure of effort, time, and money on the part of the originator does not alter the situation."

96a. 5 F. (2d) 370, 371 (E. D. Pa. 1925).

News Service case involved an appropriation not of a system for doing business but the concrete result of labor and skill, the value of which had not yet been wiped out by publication. Such a distinction would not permit publication of a literary work to alter the common law rights of the author until the monetary value is thereby erased. However, the value of a literary work to the author is seldom reduced by publication until by reason thereof other persons make use of it. Hence, the court evaded the issue.

The case of *Aaronson v. Orlov*⁹⁷ was a suit to enjoin complainant's former employee from disclosing and using an idea for manufacturing petticoats with elastic seams, which idea was claimed to be a trade secret. In granting relief the court was careful to point out that the idea had been developed into a concrete form, saying that "The idea of the improvement . . . was not a mere nebulous phantom of the fancy, but a definite conception of a material device so simple that its mere statement would convey as clear a notion as would a model of a complicated mechanism."⁹⁸

In *Hughes v. West Publishing Co.*,⁹⁹ the complaint charged a wrongful appropriation of a key number system idea designed by plaintiff in connection with law books. As only the general idea had been copied there was no infringement of plaintiff's literary property and the court held that there could be no unfair competition if the parties were not competitors, thereby expressly distinguishing the case from *International News Service v. Associated Press*^{99a}. The case indicated, however, that had the parties been competitors, relief might have been granted.

Thus it is clear that there may be property rights as between competitors in things to which no rights would attach as against the general public. This leads to the conclusion that the appropriation of ideas may in some instances constitute unfair competition.

III. INFRINGEMENT OF LITERARY PROPERTY

The owner of literary property has many of the same rights as the owner of the copyright, except that they are lost by the first general

97. 228 Mass. 1, 116 N. E. 951 (1917).

98. *Id.* at 4, 116 N. E. at 952.

99. 225 Ill. App. 58 (1922).

99a. 248 U. S. 215 (1918).

publication.¹⁰⁰ If he chooses, he may keep his product private and forever unpublished and, therefore, may impose such conditions as he chooses on the first publication. The common law will protect him against the unauthorized appropriation by which another copies or uses the material embodiment of his work.

It has already been shown that an idea is not property. It therefore follows that the appropriation of an idea taken from a literary work in concrete form is not an infringement of the owner's rights at common law or by statute.¹⁰¹ In order to be an infringer, one must appropriate the concrete form itself. Thus in *Haskins v. Ryan*,¹⁰² although the plan was expressed in writing and the court held that the author had a property right in the manuscript, the appropriation of the mere idea expressed in the plan of combining the white lead industries did not constitute an infringement of plaintiff's rights. The New Jersey court there said that "The combination of words of which it is composed (whether written down, or acted or sung before an audience admitted on payment of a fee) is also protected, and publication is restrained even if the manuscript be destroyed and an attempt be made to reproduce it from a copy rightfully in the possession of another, or even from memory."¹⁰³

The New York Court of Appeals in *Fendler v. Morosco*,¹⁰⁴ held that there would be no infringement in copying merely the theme and color of plaintiff's play, the court saying that in an embryonic state the material in the two plays under consideration was the same, because both of

100. This rule arose apparently after the enactment of the copyright law. NIMS, UNFAIR COMPETITION AND TRADE-MARKS (3d ed. 1929) § 273. A general publication should be distinguished from a limited publication, which does not forfeit the author's rights. Publication of news articles in one section of the country is not an abandonment of rights in other localities. *International News Service v. Assoc. Press*, 248 U. S. 215 (1918). A promiscuous sale of copies of a manuscript constitutes general publication. *Wagner v. Conried*, 125 Fed. 798 (C. C. S. D. N. Y. 1903); 13 C. J. 980-992. The publication of a picture on postcards is a dedication to the public. *Meyer v. Hurwitz*, 5 F. (2d) 870 (E. D. Pa. 1925). Rendering of work over radio is not an abandonment of ownership. *Uproar Co. v. National Broadcasting Co.*, 8 F. Supp. 358 (D. Mass. 1934), modified in 81 F. (2d) 373 (C. C. A. 1st, 1936), cert. denied, 298 U. S. 670 (1936). A dramatic presentation for hire is not a general publication. *Brown v. Ferris*, 122 Misc. 418, 204 N. Y. Supp. 190 (N. Y. City Mun. Ct. 1924). Confidential disclosure is not a general publication. *Dodge Corp. v. Comstock*, 140 Misc. 105, 251 N. Y. Supp. 172 (Sup. Ct. 1931). Opening a house to the public constitutes unrestricted publication of architect's plans pursuant to which the house was built. *Kurfiss v. Cowherd*, 121 S. W. (2d) 282 (Mo. App. 1938), noted in (1939) 4 Mo. L. REV. 221.

101. *Moore v. Ford Motor Co.*, 43 F. (2d) 685, 688 (C. C. A. 2d, 1930).

102. 71 N. J. Eq. 575, 64 Atl. 436 (Ch. 1906).

103. *Id.* at 578, 64 Atl. at 437.

104. 253 N. Y. 281, 171 N. E. 56 (1930).

them presented the life and customs of the same tropical islands, but that the material itself had been changed in form and used in entirely different combinations.

In *Burnell v. Chown*,¹⁰⁵ plaintiff complained of defendant's appropriation of a scheme to compile data as to the financial standing of business men. The court said that defendant had adopted plaintiff's general plan for gathering and imparting the information, but this alone was not an infringement for, although the framework and outlines of the books were the same, the second was just as much the product of literary knowledge and literary ability as the former.

In *Maxwell v. Goodwin*,¹⁰⁶ plaintiff's drama was alleged to have been infringed by one written by defendant. The court approved an instruction "that, unless identity was found in the manner and expression showing that one was copied from the other substantially and in material parts, although not in the exact language or form, there was no piracy, and the defendant was not liable in this action."

Any substantial reproduction of the material embodiment of any literary work apart from the ideas themselves constitutes an infringement. This includes copying in shorthand,¹⁰⁷ photographing¹⁰⁸ or even a reproduction from memory.¹⁰⁹

The courts have not hesitated to grant injunctive relief for violation of rights in literary property.¹¹⁰ An accounting of profits¹¹¹ has sometimes been given to the injured party in injunctive relief. Suit may be brought for conversion,¹¹² or on an implied contract for the reasonable value of the property taken¹¹³ or for services rendered in producing the property.¹¹⁴

105. 69 Fed. 993 (C. C. N. D. Ohio 1895).

106. 93 Fed. 665 (C. C. N. D. Ill. 1899).

107. *Nichols v. Pitman*, 26 Ch. D. 374 (1884).

108. *Turner v. Robinson*, 10 Ir. Ch. R. 121, 510 (1860).

109. *Werckmeister v. American Lith. Co.*, 134 Fed. 321 (C. C. A. 2d, 1904), and cases cited in 13 C. J. 990, n. 61.

110. *Ferris v. Frohman*, 223 U. S. 424 (1912); *Goldmark v. Kreling*, 25 Fed. 349 (C. C. D. Cal. 1885), 35 Fed. 661 (C. C. N. D. Cal. 1888).

111. *French v. Kreling*, 63 Fed. 621 (C. C. N. D. Cal. 1894); *Maurel v. Smith*, 220 Fed. 195 (S. D. N. Y. 1915).

112. *Boucicault v. Wood*, 3 Fed. Cas. No. 1693 (C. C. N. D. Ill. 1867); *Haskins v. Ryan*, 71 N. J. Eq. 575, 64 Atl. 436 (Ch. 1906).

113. *Liggett & Meyers Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N. E. 206 (1935); *Taft v. Smith, Gray & Co.*, 76 Misc. 283, 134 N. Y. Supp. 1011 (Sup. Ct. 1912).

114. *Bristol v. Equitable Life Assurance Society*, 52 Hun 161, 5 N. Y. Supp. 131 (Sup. Ct. 1889); *Ryan v. Century Brewing Ass'n*, 185 Wash. 600, 55 P. (2d) 1053 (1936).

In determining the value of an advertising scheme, consideration is given to the amount of money defendant expended in using the scheme, the extent to which it was used by defendant and to any custom of the advertising business with regard to the compensation usually paid for such property.¹¹⁵ In addition to the remedies already mentioned it is held that where property is in a manuscript form replevin will lie.¹¹⁶

IV. CONCLUSION

For reasons of public policy, the courts have refused to extend protection at common law to abstract ideas and by various devices they have reached the conclusion that ideas are not property and therefore not subject to protection. On the contrary, when the ideas have been put into a concrete form, public policy compels protection for the concrete form to which the ideas have been reduced. The material embodiment of an idea in order to constitute property at common law must be concrete, novel, original and lawful. Any unauthorized use of such property before general publication constitutes an infringement, and the unauthorized use of an idea itself in some instances constitutes unfair competition.

115. *Liggett & Meyers Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N. E. 206 (1935).

116. 13 C. J. 991.