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USE OF THE DOCTRINE OF UNFAIR COMPETITION TO  
SUPPLEMENT COPYRIGHT IN THE PROTECTION  
OF LITERARY AND MUSICAL PROPERTY

By PAUL OBERST\*

Of all the property rights which the law secures to man, one of the most peculiarly entitled to protection in a highly civilized society is a right to the products of one's mental effort. This is especially true of what is denominated literary property,<sup>1</sup> a classification which has grown to include books, musical compositions, plays, pictures, operas, art works, radio scripts, and the like.

By the common law of England, it has been said, the author of any book or literary composition had the sole right of first printing and publishing the work for sale, and might bring an action against any person who printed, published and sold it without his consent.<sup>2</sup> The law did not take this right away upon his publishing the book or literary composition, the author and his assigns having the sole right of printing and publishing it in perpetuity.<sup>3</sup> So uncertain and ill-defined was this common law copyright, however, that in 1709 the first copyright Act was passed by Parliament.<sup>4</sup> It provided that upon compliance with certain requirements, an author should be entitled to the sole right to print his book for a period of 14 years, with a right to renew for a similar term if he was living at the expiration of the first term. Upon construction of this act it

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<sup>1</sup> Copinger, *Law of Copyright* (7th ed. 1936), 3. Quoted by Meekins, D. J. in *Waring v. Dunlea*, 26 F. Supp. 338, 9 (1939); "Nothing can with greater propriety be called a man's property than the fruit of his brains." The property in any article or substance accruing to him by reason of his own mechanical labor is never denied him; the labor of his mind is no less arduous and consequently no less worthy of the protection of the law. And see *Wheaton v. Peters*, 33 U. S. 591, 656 (1894): "The argument that a literary man is as much entitled to the product of his labor as any other member of society cannot be controverted."

<sup>2</sup> *Donaldsons v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (1774).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Stats. at Large*, 8 Anne, Chap. 19 (1709).

was determined that an author's common law copy-right remained until publication,<sup>5</sup> but that after publication his claim for protection had to be based on his statutory right, if any, his common law right being merged into the statutory right upon publication.<sup>6</sup> Parliament went still further in the Copyright Act of 1911,<sup>7</sup> and by statute abolished all copyright except that under provisions of the act.<sup>8</sup>

The United States Constitution provides that "The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>9</sup> Pursuant thereto, Congress passed the first Copyright Act in 1790. In construing this act, the Supreme Court followed *Donaldsons v. Beckett*<sup>10</sup> in holding that any common law copyright that had existed after publication was swallowed up by the statutory provisions.<sup>11</sup> The court went so far as to suggest that the English common law copyright before publication was not in force in the United States, it being "not suited to our conditions", but a common law copyright to unpublished work is now clearly established in the United States

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<sup>5</sup> *Donaldsons v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (1774). "Prior to the Copyright Act of 1911, a common law copyright in unpublished works was admitted." Copinger, *op. cit. supra* note 1, 4.

<sup>6</sup> *Donaldsons v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (1774).

<sup>7</sup> Stats. at Large, 142 Geo. 5, c. 46 (1911).

<sup>8</sup> The Act of 1911 provides: Part III, sec. 31, "No person shall be entitled to copyright, or similar right, in any literary, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence."

<sup>9</sup> Cons. Art. 1, sec. 8.

<sup>10</sup> 4 Burr. 2408 (1774).

<sup>11</sup> *Wheaton v. Peters*, 33 U. S. 591 (1834); *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 362 (1898); *Caliga v. Inter Ocean Newspaper*, 215 U. S. 182, 188 (1909); *O'Neill v. General Film Co.*, 171 N. Y. App. Div. 854, 157 N. Y. Supp. 1028 (1916); "While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words, that while a right did exist by common law, it has been superseded by statute." *Holmes v. Hurst*, 174 U. S. 82, 85 (1898). See also Ladas, *The International Protection of Literary and Artistic Property* (1938) 686.

by decision,<sup>12</sup> and is specifically recognized under the present Copyright Act.<sup>13</sup>

An author or composer, therefore, has the right of first publication by common law, and the right to a monopoly in publishing copies for a definite period by statute. He may enforce these rights by suits for injunction,<sup>14</sup> damages,<sup>15</sup> an accounting,<sup>16</sup> or statutory penalties,<sup>17</sup> when another has unlawfully infringed the author's monopoly.

If this were the only protection afforded literary property, however, the author or composer often would be without remedy. The ingenuity of the literary pirate has devised many ways in which literary property may be appropriated without copyright infringement. One may publish and copyright a successful book, only to discover that much of the profit is being diverted by the book of another which is similar in title, subject-matter or appearance. Or one may create literary property, such as a newspaper article, which is not susceptible of copyright, and hence cannot be protected under the Copyright Act.

It has been said that the "author or owner of a book or play, by publishing it, which is a condition precedent to obtaining a copyright, waives and abandons his common law rights therein, and must thenceforth depend upon the statutory rights conferred by the acts of Congress."<sup>18</sup> This is not literally true, however. Supplementing the Copyright Law in the protection of literary property, we find the common law doctrine of unfair competition. It is proposed to consider herein some of the situa-

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<sup>12</sup> *Palmer v. DeWitt*, 47 N. Y. 532 (1872); *Jenkins v. News Syndicate*, 128 N. Y. Misc. 284, 219 N. Y. Supp. 196 (1926); *Goldmark v. Kreling*, 35 Fed. 661 (1888).

<sup>13</sup> Sec. 2 of the Act provides that "nothing in this act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or equity, to prevent the copying, publication, or use of such unpublished work without his consent and to obtain damages therefore."

<sup>14</sup> U. S. C. A. Title 17, sec. 25a, 36. "In cases of infringement of copyright, an injunction has always been recognized as a proper remedy, because of the inadequacy of the legal remedy." *Pierpont v. Fowle*, 19 Fed. Cases 652 (1846).

<sup>15</sup> U. S. C. A. Title 17, sec. 25b, and footnotes 175-182, pp. 131-137.

<sup>16</sup> The right to an accounting of profits is incident to the right to an injunction in copyright cases. *McCaleb v. Fox Film Corp.* (C. C. A. 1924) 299 Fed. 48.

<sup>17</sup> U. S. C. A. Title 17, sec. 25b, and footnotes 101-107, pp. 110-112.

<sup>18</sup> *O'Neill v. General Film Co.*, 171 N. Y. App. Div. 854, 157 N. Y. S. 1028 (1916).

tions in which the law of unfair competition has been utilized to protect literary property, copyrighted or uncopyrighted.

The law of unfair competition had its origin in the demand for the protection of merchant's trademarks. At first the gravamen of the action was the damage done to a merchant's reputation by the passing off of inferior goods under his trademark.<sup>19</sup> As the concept developed, no damage to the merchant's reputation had to be proved and emphasis was placed upon the dishonesty of taking, by unfair means of any sort, the business and good will built up by a merchant.<sup>20</sup> The basis of the action, however, continued to be the passing off of one's goods as those of another, unfairly and fraudulently, and the action is referred to in England today as "passing off."<sup>21</sup>

In recent years the law of unfair competition seems to be expanding greatly in America and some cases seem to hold that any wrongful misappropriation of the labors of another is unfair competition, even though no element of deceit or of passing off is present.<sup>22</sup> One writer has named the doctrine the "free ride" doctrine—equity will not allow one to take a "free ride" at his competitor's expense.<sup>23</sup> It is proposed to examine the law of unfair competition as it has been applied to the protection of literary property: first, in "passing off" cases; and second, in "free ride" cases.

#### TITLES

The commonest type of passing off in the literary field is the use of the same or a similar title for a different work. The titles to books and plays generally cannot be copyrighted because they are not original literary compositions.<sup>24</sup> It would

<sup>19</sup> *Blofeld v. Payne*, 4 B. & Ad. 410, 110 Eng. Rep. 509 (1833).

<sup>20</sup> *Weever v. Brayton*, 152 Mass. 101, 25 N. E. 46 (1890).

<sup>21</sup> *Haines, Efforts to Define Unfair Competition* (1919) 29 Yale S. J. 1.

<sup>22</sup> *International News Service v. Associated Press*, 248 U. S. 215 (1918); *Fonotopia, Ltd. v. Bradley*, 171 Fed. 951 (1909); *Waring v. WDAS*, 327 Pa. 423, 194 Atl. 631 (1937).

<sup>23</sup> Note (1933) 46 Harv. L. R. 1171.

<sup>24</sup> *Osgood v. Allen*, 18 Fed. Cases No. 10603 (1872); *Harper v. Ranous*, 67 Fed. 904 (1895); *Corbett v. Purdy*, 80 Fed. 901 (1897); *Underhill v. Schenk*, 187 N. Y. Supp. 589 (1921). See *Dicks v. Gates*, 18 Chan. Div. 76 (1881), where the court said that it was "conceivable" that there might be a copyright of a title, but only if it were extremely long and elaborate. And see *Ladas, The International Protection of Literary and Artistic Property* (1938) 736.

be difficult on the one hand to create a wholly original title, and on the other hand it is doubtful whether sufficient labor of composition is involved to justify the protection of a title as a literary work,<sup>25</sup> even if it were wholly original. As far as the law of copyright is involved, an author who had written and copyrighted a book or play could not prevent another author from publishing or producing a similar, though different, work with the same title as that of the first author's.<sup>26</sup> By the law of unfair competition, however, this would be wrongful passing off, if it was an attempt to appropriate to one's own benefit a title that had become connected in the minds of the public with the work of the first author,<sup>27</sup> and could therefore be restrained.<sup>28</sup>

One who publishes an uncopyrighted work is likewise entitled to protect himself against the appropriation of his efforts by one who publishes a different work under the same title.<sup>29</sup> Before he can claim protection on the grounds of unfair competition the publisher must show that his title has acquired "secondary meaning", that is, that it is associated in the minds

<sup>25</sup> Copinger, *op. cit. supra* note 1; Glaser v. St. Elmo, 175 Fed. 276 (1909); Warner Bros. Pictures, Inc. v. Majestic Pictures Corp. 70 Fed. (2d) 300 (1934).

<sup>26</sup> "I think that the authorities, particularly the American cases, preponderate that the copyright of a book does not prevent other persons from taking the same title for another book even in the case of an entirely unexpired copyright." Glaser v. St. Elmo Co., 175 Fed. 276, 278 (1909).

<sup>27</sup> ". . . the plaintiff succeeds as soon as he shows an audience educated to understand that the title means his play." Judge Learned Hand in International Film Service, Inc. v. Associated Producers, Inc. v. Associated Producers, Inc., 273 Fed. 585 (1921).

<sup>28</sup> *Paramore v. Mack Sennett*, 9 Fed. (2d.) 66 (1925) (Plaintiff had written and copyrighted "The Ballad of Yukon Jake" and prepared a scenario "Yukon Jake, the Killer" on the same plot. *Held*, the author was entitled to an injunction, an accounting and damages against defendant who had produced an entirely different story under the title "Yukon Jake"); *Warner Bros. Pictures v. Majestic Pictures*, 70 Fed. (2d.) 310 (1934) (Plaintiff owner of motion picture rights of play "Gold Diggers" had produced "The Gold Diggers of Broadway" and "The Gold Diggers of 1933." *Held*, entitled to an injunction against defendant's production of the "Gold Diggers of Paris".)

<sup>29</sup> *Collier v. Jones*, 120 N. Y. Supp. 991 (1910). (The publishers of "The Harvard Classics" or "Dr. Elliott's Five-Foot Shelf of the World's Best Books."); *Hopkins Amusement Co. v. Frohman*, 202 Ill. 541, 67 N. E. 391 (1903). (Play "Sherlock Holmes, Detective" enjoined by Producers of "Sherlock Holmes" on the ground of public deception.) See also, *Social Register Ass'n v. Howard*, 60 Fed. 270 (1894) ("Social Register" is infringed by "Howard's Social Register").

of the public with his particular work.<sup>30</sup> The titles must be sufficiently alike so as to deceive the public, a principle which naturally gives the court some discretion in determining what constitutes infringement.<sup>31</sup>

Where the copyright on a book has expired, or if it never was copyrighted, ordinarily there is nothing to prevent another from publishing that work under its proper title.<sup>32</sup> But if, during the period of copyright, a title becomes associated in the minds of the public with a particular person, even on expiration of the copyright another cannot publish the work without indicating its origin.<sup>33</sup>

The nature of the work sought to be protected has a direct bearing in the determination of whether or not, as a matter of fact, the similarity of titles will cause confusion in the minds of the public, and consequently, unfair competition with the work of the plaintiff. Titles of plays and moving-pictures are more readily protected than titles of books.<sup>34</sup>

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<sup>30</sup> *Manners v. Triangle Film Corp.*, 247 Fed. 301 (1913) (Production of play "Happiness" seven times did not entitle plaintiff to an injunction against defendant's motion picture, based on different story, under the title "Happiness"); *Bowers v. Krugel*, 8 T. M. Rep. 400 (1918) (Play "The Unborn" was presented nine times and published in a magazine. *Held*; Owner not entitled to injunction against production of a different motion picture under the same title. Law of unfair competition applicable, but title had not acquired secondary meaning.)

<sup>31</sup> Thus it was held that the play "Charley's Aunt" was not infringed by the title "Charley's Uncle", the court saying that "it cannot seriously be contended that by adopting the title "Charley's Aunt" for his play, the author monopolized the right to all the other relatives." *Frohman v. Miller*, 29 N. Y. Supp. 1109 (1894). On the other hand the producers of the photoplay "Blind Youth" could enjoin the production of a different motion picture under the title "The Blindness of Youth". *National Pictures Theatres v. Foundation Film Corp.*, 266 Fed. 208 (1928). And "The House of a Thousand Candles" is not infringed by "The House of a Thousand Scandals". *Selig Polyscope Co. v. Mutual Film Corp.*, 169 N. Y. Supp. 369 (1918).

<sup>32</sup> *Merriam v. Ogilvie*, 159 Fed. 638 (1908); *Glaser v. St. Elmo Co.*, 175 Fed. 276 (1909); *Nims*, *Unfair Competition* (3rd. ed. 1929) 746.

<sup>33</sup> *Ogilvie v. Merriam*, 149 Fed. 858 (1907). When the copyright of Webster's Dictionary expired any person had the right to publish the book and call it by its generic name. But the name had also acquired a secondary meaning, and had come to indicate to the public a book published and sold by the publisher who took out the copyright. Hence, while no restrictions could be imposed on use of the name "Webster's", it should not be used to make the public think they are buying a book published by the person who produced the copyright book. See also, *Atlas Mfg. Co. v. Street and Smith*, 204 Fed. 398 (1913).

<sup>34</sup> The cases decided in the U. S. indicate that the courts are more ready to protect titles of plays and motion pictures under the law of

## THE PHYSICAL APPEARANCE OF BOOKS

Another ingenious way in which literary pirates might infringe upon literary property without violating the copyright laws is by imitation of the physical appearance of a copyrighted book, with or without imitation of the title. Copyright is concerned with the order of words, and not at all with the physical appearance of the book in which they are published.<sup>35</sup> Unfair competition would result, however, if one put out a book so similar in physical appearance to the book of another that it might be passed off as the latter's, and hence this practice can be enjoined under the common law.<sup>36</sup> It is not necessary that the infringing work be exactly, or even approximately like that of the complainant's, but "in order to render it necessary that a publication or imitation of this nature should be restrained, it is sufficient that persons who may desire to purchase the plaintiff's publication, might very well accept that of the defendant, supposing and believing it be the same".<sup>37</sup> That the difference might be readily be detected by comparison of one book with the other is no defense,<sup>38</sup> but it is not sufficient that a purchaser inattentively might accept the defendant's publication place of the plaintiff's.<sup>39</sup>

Resemblance in mere form or size is not unfair competition,

unfair competition than titles of books and other publications with the exception of periodicals, dictionaries, and the like. The reason for this is that deception is easier in these cases, whereas in the case of books, stories, etc., the public gives greater attention to the name of the author than to the title of the work," Ladas, *op. cit. supra* note 24, at p. 738.

<sup>35</sup> Copinger, *op. cit. supra* note 1, p. 2.

<sup>36</sup> Thus the publishers of a series of detective stories entitled "Old Sleuth's Own" were entitled to enjoin the owners of the copyright to other stories written by "Old Sleuth" from imitating the distinctive make-up of the former—yellow cover with black and red printed titles and illustrations (see the reproduction in the report). *J. S. Ogilvie Pub. Co. v. Royal Publ. Co.*, 241 Pa. 5, 88 Atl. 316 (1913). Similarly where plaintiff published a series of books containing uncopyrighted hymns, illustrated with illuminated capitals and type adapted from ancient missals, an injunction would lie to restrain defendant from selling a series identical save in artistic merit. *Dutton v. Cupples*, 117 N. Y. App. Div. 172, 102 N. Y. Supp. 309 (1907). This last case is interesting because it illustrates the wrong that the law of unfair competition was first designed to protect—loss of reputation by production of inferior copies by a competitor. See note 19, *supra*.

<sup>37</sup> *Potter v. McPherson*, 28 Sup. Ct. Rep. N. Y. (21 Hun) 559, at 566 (1880).

<sup>38</sup> *Id.*

<sup>39</sup> *Stokes v. Allen*, 56 Hun 526, 9 N. Y. Supp. 846 (1896).



however, since that alone is not enough to connect a volume in the mind of the public with the original publisher.<sup>40</sup> Where there is a resemblance sufficient to constitute infringement it is not necessary to prove that the similarity was intentional, since the law presumes that the similarity was intentional and fraudulent with a view of appropriation of the trade and good will of another.<sup>41</sup>

#### NEWS

Newspapers are specifically named by the United States Copyright Act as one of the classifications for registration,<sup>42</sup> and a contribution to a newspaper, as a literary product, is the subject of copyright, though it may also convey news.<sup>43</sup> News as such, however, is not the subject of copyright.<sup>44</sup> There are two reasons for this. First, a news item is not an original literary creation, but a mere report of happenings; second, it was not the intention of Congress to give the one who first reported an historic event the exclusive right for any period to spread knowledge of it.<sup>45</sup> Nor is news capable of being protected under principles of common law copyright, or right of first publication, since the very value of news lies in publication, which is a dedication to the public.<sup>46</sup>

No relief under the copyright laws was available, therefore, when International News Service, a news-gathering agency, began to copy news items from the bulletin boards and columns of newspapers served by the Associated Press, a rival news agency, and to distribute the pirated news items to its member papers. On the very face of it, such conduct would seem unjust, and a wrongful taking of what seems to be another's property. Relief was afforded in the landmark case of *International News Service v. Associated Press*<sup>47</sup> by application of common law principles of unfair competition.

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<sup>40</sup> *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. 944 (1892) (a Webster's dictionary case).

<sup>41</sup> *Potter v. McPherson*, 28 Sup. Ct. Rep. (N. Y.) (21 Hun) 559, at 567 (1880); *Day v. Webster*, 23 App. Div. 601, 49 N. Y. Supp., 314 (1897).

<sup>42</sup> U. S. C. A. Title 17, sec. 5(b).

<sup>43</sup> *International News Service v. Associated Press*, 248 U. S. 215 (1918).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See notes 6 and 11, *supra*.

<sup>47</sup> *International News Service v. Associated Press*, 248 U. S. 215 (1918).

The unfair competition of the *International News Service v. Associated Press* is a new kind of unfair competition, however. There is no possibility of damaging reputation by inferior goods<sup>48</sup>; there is not even the element of passing off one's goods as those of another.<sup>49</sup> The charge is rather that the defendant is passing off the goods of another as his own. Nevertheless, even if the news items pirated by International News Service had been published in the member papers under the Associated Press name, justice still would not be satisfied.<sup>50</sup> The case is not put on the basis of "passing off" at all, but on the basis of "misappropriation". "We need not affirm any general and absolute property in the news as such," the court said. "It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience."<sup>51</sup>

Thus we have a new and broader interpretation of the law of unfair competition—one cannot appropriate to his own use the results of the effort and work of another in a manner that is unfair and contrary to good conscience. It is a principle which, if applied liberally, has great possibilities in the protection of literary, dramatic and musical property. The "free ride" doctrine has since been applied several times in cases involving radio broadcasting of items culled from newspapers, and an injunction granted against the radio broadcasts as unfair competition with the newspaper.<sup>52</sup>

#### PERFORMER'S STYLES AND THE "FREE RIDE"

While the "free ride" doctrine of unfair competition has not been widely adopted, it has been applied in several interest-

<sup>48</sup> Cf. notes 19 and 26, *supra*.

<sup>49</sup> Cf. note 20, *supra*.

<sup>50</sup> "Besides the misappropriation, there are elements of imitation, of false pretenses, in defendant's practices. . . . But these elements, although accentuating the wrong, are not the essence of it. It is something more than the advantage of celebrity of which the complainant is being deprived." *International News Service v. Associated Press*, 248 U. S. 215, 242 (1918).

<sup>51</sup> *Id.* at pages 236, 240.

<sup>52</sup> *Associated Press v. Sioux Falls Broadcast Assn.* (Dis. Ct. S. Dak.—unreported 1933); and Note (1934) 46 *Harv. L. R.* 1171, 1175, where it is suggested that although there was benefit to the defendant, it is doubtful that the broadcasts were detrimental to the business of the Associated Press; *Associated Press v. K. V. O.* S. 80 *Fed. (2d.)* 575 (1935), reversed on jurisdictional grounds 299 U. S. 269 (1936).

ing cases to the protection of musical and dramatic property, in addition to the newspaper cases referred to above. In *Charlie Chaplin v. Amador*<sup>53</sup>, Charlie Chaplin was given an injunction against one Amador, who, under the name of "Charlie Aplin" produced a series of comedies in which he closely imitated the costume, mannerisms, and method of performance of Chaplin. It is clear that an actor can have no copyright in his methods of playing under the present Copyright Act,<sup>54</sup> and it has been decided that there is no common law copyright in performances of dancers and singers.<sup>55</sup> Under the principles of unfair competition, however, Amador was enjoined "from imitating the role which the plaintiff originated, and thereby injuring plaintiff and deceiving the public . . ." While there is some discussion of fraud on the public, the court seemed to recognize clearly that the imitation of the role created by Chaplin was a real wrong to the plaintiff, and declared that even if Amador dropped the name "Charlie Aplin" the injunction would still stand.

A more recent application of the "free ride" doctrine of unfair competition is the case of *Waring v. W.D.A.S.*<sup>56</sup> Waring, who had perfected a unique style of playing popular music, had made recordings which were labeled "not licensed for radio broadcasting". Defendant radio station, which broadcast some of these records, was enjoined from doing so in a decision based partly on the grounds of unfair competition. Quoting the broad language of the Associated Press case, the court recognized a right of property in musical style in the creator and a right to be protected against any unfair appropriation "for its own profit of the musical genius and artistry of the plaintiff's orchestra in commercial competition with the orchestra itself."<sup>57</sup> There was clearly no attempt to defraud the public in any way nor was there any element of surreptitious conduct. The grievance was that a band which could secure \$12,500 for an hour's broadcast should have to compete with a

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<sup>53</sup> 93 Cal. 358, 269 Pac. 544 (1928).

<sup>54</sup> Ladas, *op. cit. supra* note 24. Ladas expresses a doubt as to whether the Act could be amended to include methods of playing, since the Constitution gives Congress power to legislate in connection with "writings" only.

<sup>55</sup> *Savage v. Hoffman*, 159 Fed. 584 (1908).

<sup>56</sup> 327 Pa. 433, 194 Atl. 631 (1937).

<sup>57</sup> *Id.* at 640.

recorded program of its own music purchased by the defendant at seventy-five cents per record and broadcast without the plaintiff's consent.

In the case of *Waring v. Dunlea*,<sup>58</sup> Waring again secured an injunction under somewhat similar circumstances. Waring had made certain recordings for the Ford Motor Company programs, and had distributed the recordings with a notice that their use was limited to those programs only. The defendant, who was not a licensee, broadcast one of the records without the plaintiff's consent. The court recognized a right of imposing equitable restrictions on chattels, but also put its decision on the ground of unfair competition: "To allow respondent to benefit financially by complainants work and skill would be an unfair trade practice and equity will enjoin such effort on the part of the respondent."<sup>59</sup>

In *E.C.A. Mfg. Co. v. Whiteman*<sup>60</sup> the court recognized "a common law property right in and to his unique interpretation of musical selections"<sup>61</sup> in favor of Mr. Paul Whiteman, another prominent dance band leader. In a suit to enjoin the playing of Whiteman recordings by station WNEW, the defendant station pointed out that some of the earlier recordings did not bear the notice found on recordings made subsequent to November, 1932: "Not Licensed for Radio Broadcast". The court held, however, that the sale of a Whiteman record, without any restrictive notice, gave the purchaser no right to broadcast its contents over the radio, without special permission, because to do so would be unfair competition. The decision is based squarely on the *International News Service case*, and the "principles on unfair competition, so convincingly expressed by Mr. Justice Pitney."<sup>62</sup>

Further decisions along this line could go far to secure to authors and composers the "fruit of their brains." Nevertheless, the "free ride" doctrine has by no means met with universal approval and application in the courts, and failure to point out contrary decisions might leave a very erroneous impression.

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<sup>58</sup> 26 F. Supp. 338 (1939).

<sup>59</sup> *Id.* at 340.

<sup>60</sup> 28 F. Supp. 787 (1939).

<sup>61</sup> *Id.* at 790.

<sup>62</sup> *Id.* at 794.

In *Crumit v. Marcus Loew Booking Agency*,<sup>63</sup> a preliminary injunction to restrain defendants from broadcasting a phonograph record, made by the plaintiff and bearing the customary notice "Not to be used for Radio Broadcasting", was denied on the grounds that there was not sufficient proof of a licensing agreement or that the defendant knew of the terms of such agreement, if it existed.<sup>64</sup> And the New York court again denied an injunction to a publisher who had popularized at great expense an old song, "Gambler's Blues", under a new title, "St. James Infirmary Blues", and who was seeking to restrain defendant from publishing the song under the new title.<sup>65</sup>

We may conclude, however, that the courts, on the whole, have been quite generous in protecting original literary, musical, and artistic creations, in recognizing a property right in them, and in protecting this right on liberal principles of unfair competition. Sports promoters have been similarly protected from competition at the hands of persons who seek to capitalize unfairly on their efforts. Injunctions have been granted against persons who sought to erect stands overlooking the promoters' grounds,<sup>66</sup> and against persons who sought to broadcast an account of the play as it occurred<sup>67</sup> or to photograph it.<sup>68</sup>

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<sup>63</sup> 162 Misc. 225, 293 N. Y. Supp. 63 (1936).

<sup>64</sup> Cf. with the Whiteman case, where the court held that a radio broadcast of a Whiteman record without permission was unfair competition, even though the record did not bear a restrictive notice.

Mr. Whiteman's suit, unfortunately for him, was complicated by the fact that he had conveyed "all rights" to the records made prior to 1934 to RCA Victor. Mr. Whiteman began the suit against the owner of station WNGW and the sponsor of the offending program, and, after intervention of RCA Victor, and withdrawal of the original suit, ended up on the wrong end of the injunction along with the two original defendants. The court after recognizing his right, also recognized his power to bargain it away, and that the broadcasting rights had passed under the terms of earlier contracts. In the contract of Sept. 5, 1934, Whiteman included a provision that the RCA Victor did not acquire a right to sell records for radio broadcasting. Even this did not give him, acting alone, the right to license a broadcasting station to play over the radio a phonograph record manufactured by RCA Victor, without the Corporation's consent.

<sup>65</sup> *Gotham Music Service v. Denton and Haskins Music Pub. Co.*, 259 N. Y. 86, 181 N. E. 57 (1932).

<sup>66</sup> *Detroit Baseball Club v. Deppert*, 61 Mich. 63, 27 N. W. 856 (1886).

<sup>67</sup> *Twentieth Century Sporting Club, Inc. v. Trans-Radio Press Service, Inc.* 165 Misc. 71, 300 N. Y. Supp. 159 (1937); *Pittsburgh Athletic Club v. KQV Broadcasting Co.* 24 F. Supp. 490 (1938). *Contra*, *National Exhibition Co. v. Teleflash, Inc.* 24 F. Supp. 488

On the other hand, injunctions have been denied in cases which, on logical grounds, seem equally appropriate for application of the "free ride" theory. The courts have refused to protect the originator of an advertising scheme,<sup>69</sup> or to prevent one manufacturer from pirating the fabric designs of another.<sup>70</sup>

The prospect of a liberal application of the "free ride" doctrine of unfair competition has met with mixed reception in the legal periodicals.<sup>71</sup> Following the dissenting opinion of Mr. Justice Brandeis<sup>72</sup> in the *International News Service case*, there has been some tendency to view the development of the doctrine as an inadvisable excursion of the courts into fields where legislative action would be more desirable.<sup>73</sup>

Mr. Chafee, in an entertaining article,<sup>74</sup> has pictured the *International News Service case* as presenting a "far-flung proclamation of Conquest"—an extension of unfair competition "over all it popularly means, namely, every unfairness by a competitor", and citing four contrary decisions,<sup>75</sup> concludes that

(1936); *Victoria Park Racing and Recreation Grounds Co., Ltd. v. Taylor*, 43 Argus L. R. 597 (1937).

<sup>69</sup> *Rudolph Mayer Pictures, Inc. v. Pathe News, Inc.*, 235 App. Div. 774 (N. Y. 1932).

<sup>70</sup> *Benj. T. Crump Co. v. Lindsay, Inc.*, 130 Va. 144, 107 S. E. 679 (1921) (motor parts catalog); *Affiliated Enterprises v. Gruber*, 86 F. 2d 958 (1936) (bank night); *Westminster Laundry Co. v. Hesse Envelope Co.*, 174 Mo. App. 238, 156 S. W. 767 (1913).

<sup>71</sup> *Cheney Bros. v. Doris Silk Corp.* 35 F. (2d) 279 (1929).

<sup>72</sup> *Pro, Rogers, Unfair Competition* (1919) 17 Mich. L. R. 490; *Grismore, Are Unfair Methods of Competition Actionable at the Suit of a Competitor?* (1935) 33 Mich. L. R. 321; Note (1933) 46 Harv. L. R. 1171; Note (1939) 37 Mich. L. R. 968; Note (1938) 48 Yale L. J. 288; *Contra Note* (1934) 47 Harv. L. R. 1419; Chafee, *Unfair Competition* (1940) 53 Harv. L. R. 1289.

<sup>73</sup> In pointing out the advisability of leaving the question of regulating new agencies to Congress, Mr. Justice Brandeis said, ". . . the creation or recognition by courts of a new private right may work serious injury to the general public unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules." *International News Service v. Associated Press*, 248 U. S. 215, 263 (1918).

<sup>74</sup> Note (1934) 47 Harv. L. R. 1419, 1427. "The diverse considerations of policy and practice thus involved present a question which might better be met by legislation than by the process of judicial trial and error."

<sup>75</sup> Chafee, *Unfair Competition* (1940) 53 Harv. L. R. 1289.

<sup>76</sup> *Upjohn v. Merrill*, 261 Fed. 209 (1920); *Crump Co., Inc. v. Lindsay, Inc.*, 130 Va. 144, 107 S. E. 679 (1921); *Mosler Safe Co. v. Ely-Norris Safe Co.*, 273 U. S. 132 (1927); *Cheney Bros. v. Doris Silk Corp.*, 35 F. (2d) 279 (1929).

the policy of Conquest has been rejected. Four reasons of social policy render judges cautious, in varying degrees according to the nature of the particular trade practice, Mr. Chafee observes.<sup>76</sup> First, the scope of protection should be capable of reasonably accurate definition. Second, there is a policy against monopolies—and when statutory monopolies are set up, it is clear who has the right and who can grant the licenses. Third, there is a policy of centralizing the protection of morality in the government, rather than at the suit of the individual. Fourth, some trade practices are better handled by administrative agencies, such as the F.T.C., than by the courts.

Mr. Grismore, in his article *Are Unfair Methods of Competition Actionable at the Suit of a Competitor?*<sup>77</sup> doubts whether the courts are less able to deal with unfair competition in the broader sense than the legislature. Since Congress has failed to define unfair competition, and has delegated the duty of defining it to the Federal Trade Commission, he concludes that the courts will be faced with the ultimate solution of the problem.<sup>78</sup>

#### SUMMARY

In the protection of literary and artistic property, the statutory right of copyright and the common law right of first publication are supplemented by the common law principles of unfair competition.<sup>79</sup> The "passing off" doctrine of unfair competition is utilized to protect titles of books, plays, etc. and the physical make-up of books. The "free ride" doctrine is used to protect news from pirating, methods of performance of an actor, and broadcasting rights of musicians who have perfected a unique style. In its broadest scope the doctrine of unfair competition not only prevents the passing off of the defendant's goods as those of the plaintiff, but in some cases extends to mere inequitable appropriation of the fruits of another's labor to his detriment by a competitor.

It is submitted that however valid be the objections to a general extension of the "free ride" doctrine in other fields, they largely fail when applied to literary property. By its very nature it is incapable of well-defined, comprehensive statutory

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<sup>76</sup> 53 Harv. L. R. 1289, 1317-1321 (1940).

<sup>77</sup> 33 Mich. L. R. 321 (1935).

<sup>78</sup> *Id.*, at 333.

treatment, and the judicial monopoly afforded can to no considerable degree endanger the public good. One who objects to this extension of common law principles into a statutory field might well be answered in the words of Chatfield, J., in *Fonotipia, Ltd. v. Bradley*: “. . . It would seem that the appropriation of what has come to be recognized as property rights or incorporeal interests in material objects, out of which pecuniary profits can fairly be secured, may properly, in certain kinds of cases, be protected by legislation; but such intangible or abstract property rights would seem to have claims upon the protection of equity, where the ground for legislation is uncertain or difficult of determination, and where the principles of equity plainly apply.”<sup>80</sup>

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<sup>79</sup> The law of unfair competition is not the only protection available. Equitable servitudes on chattels has been mentioned. There is also the right of privacy, another developing doctrine. See also, Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators* (1940) 53 Harv. L. R. 554 for another suggestion.

<sup>80</sup> *Fonotipia, Ltd. v. Bradley*, 121 Fed. 951, 962 (1909).