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Publication As a Relinquishment of the Common Law Right in Literary Property

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The Alumni Prize for maintaining the highest scholastic average during the entire three year course of study was divided between Harry W. Jones and Lewis A. Sigler. Mr. Jones also received the Richard Wagner Brown Prize, awarded annually to the member of the graduating class who, in the estimation of the faculty, best exemplifies the qualities of scholarship, leadership and character. The Mary Hitchcock Thesis Prize was awarded to Arthur C. Gaines.

Notes

PUBLICATION AS A RELINQUISHMENT OF THE COMMON LAW RIGHT IN LITERARY PROPERTY

Legal recognition of creative genius and its right to protection against piracy antedates any statutory move in its behalf. The rights of an author in the unpublished manuscript of his book or play, of the artist in his sketches, of the architect in his concept reduced to blueprint—came to be regarded by the common law judges as "literary property," and was accorded protection the same as any other personal property.[1] Literary property has been defined as "the right which entitles an author or his assigns to all use and profit in his composition, to which no independent right is, either by action or omission on his or their part, vested in another person." This definition is considered an improvement on the ordinary one which is said to be "the exclusive right of a proprietor to multiply copies of a composition." The latter is too narrow a view because the circulation of copies is only one of the ways in which the subject of literary property may be used.[2]

The creator's use may be by withholding his work from the world altogether,[3] or by causing it to be printed and hiding away the volumes,[4] or by permitting a restricted use among a selected group of friends.[5] It is he who has right of first publication,[6]

[1] Palmer v. DeWitt (1873) 47 N. Y. 532 at 537; Note (1922) 35 Harvard Law Rev. 600.

[2] 5 Words and Phrases (1st Series) 4187.

[3] Note (1922) 35 Harvard Law Rev. 600.

[4] Jewelers Merc. Agency v. Jewelers Weekly Pub. Co. (1898) 155 N. Y. 241, 49 N. E. 872.

[5] Palmer v. DeWitt, *supra*, at 537; Prince Albert v. Strange (1899) 2 De-Gex 652; 64 Eng. Rep. 293 at 302.

[6] Bobbs Merrill Co. v. Strauss (C. C. A. 2, 1906) 147 F. 15.

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but the rule is broadly stated that when once his work is published, his common law rights cease,[7] and his only protection is through statute. Thus it may be said that the law recognizes an intangible estate in literary property,[8] which is considered distinct from any right of ownership under the laws of copyright.[9]

Under what circumstances courts will declare that there has been a publication amounting to an abandonment of the common law rights, is to be developed herein.

The common law required that the product of intellectual labor be embodied in material form, capable of identification before it was protected.[10] Thus, mere ideas as such were not subjects of literary property until put into sequence, and then it was merely the arrangement of thoughts that was protected against duplication without the author's consent.[11]

Like all property, literary property consists of a bundle of claims, privileges, powers and immunities.[12] The statutory right is of no value until there has been a publication; the common law right is lost as soon as there has been a publication.[13] In effect, protection under the latter is sought mostly in situations where the subject either may not be copyrighted, or where for some other reason the owner has not come under the federal statute.

The term "publication" is used, with some confusion, in two senses throughout the cases. Legally speaking, it denotes the point at which, for purposes of this topic, the common law rights in literary property are relinquished, but this should be distinguished from the use of the term in the ordinary sense, meaning merely the transformation of a manuscript, for instance, into a printed copy, which act may or may not, depending on circumstances, amount to a legal relinquishment of the author's exclusive rights. To promote clearness, the term "publication" will be used in its lay meaning, and the legal result referred to as an abandonment to the public of the common law right.

The cases raising the question of abandonment fall into two broad classes. The first group involves the situation where the owner of a literary property right seeks consciously to preserve it for himself or his assignee, by placing an express restriction

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[7] Keene v. Kimball (1860) 82 Mass. 545 at 549; Aronson v. Baker (1887) 43 N. J. Eq. 365; 12 Atl. 177; Gilmore v. Sammons (Tex. Civ. App. 1925) 269 S. W. 861 at 862.

[8] Note (1927) 75 U. of Pa. L. Rev. 458.

[9] 169 L. Times 419; Note (1922) 35 Harv. Law Rev. 600.

[10] Note (1922) 35 Harv. Law Rev. 600.

[11] Note (1930) 15 Cornell L. Q. 633.

[12] (1922) 22 Col. L. Rev. 182.

[13] Warren and Brandeis "The Right to Privacy" (1890) 4 Harv. L. Rev. 193, at p. 200.

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on the use of his work, when its value to him demands its communication in some way to others.

The question in these cases is what is the effect of the restriction; in other words, will the intellectual work be preserved to its creator exclusively, or will the courts hold that notwithstanding his intent, it has been abandoned to the public and his common law rights lost?

The restriction seems in many instances to be fruitless unless there has been some violation of confidence. The result is that even where there has been a breach of contract not to publish, the courts hold that an abandonment has been affected.

In the case of *Jewelers' Mercantile Agency v. Jewelers Weekly Publishing Co.*,[14] the plaintiff agency published a book of information concerning the jewelry business, and furnished copies to subscribers with the understanding that the books were merely loaned, and were plaintiff's property which was to be returned at the expiration of the subscription period. Defendant obtained a book on a subscription and extracted material which he used in a book published by himself. Plaintiff was refused an injunction against the sale of defendant's publication on the ground that the issue of books to a limited list of subscribers on a loan basis was a general publication, and the common law right was lost, the rule being stated that a publication in print of an uncopyrighted work and a subsequent circulation is a complete dedication.[15] The court declared that if a book is put within reach of the general public, no matter what limitation is put on the use of it by the "lender," it is an abandonment. In this case any member of the public who paid the subscription price could borrow the book.

The following year, a New York court held that even a breach of contract by the author to his assignee cuts off the common law rights which the latter has acquired.[16] Herman Sudermann, the German composer, sold the original manuscript of his play, "Die, Erhe" to one Lederer for use in the United States, England, Canada and Australia. Sudermann promised not to permit the manuscript to appear in book form anywhere, but in violation of his agreement, allowed the drama to be published and sold in Berlin and in the United States. Defendant purchased a copy and produced the play on the stage without consent of Lederer or of the plaintiff to whom Lederer had assigned. The court held that while plaintiff had acquired the author's common law right to represent the play in the United States, that exclusiveness was

[14] Jewelers Merc. Agency v. Jewelers Weekly Pub. Co., *supra* n. 4.
[15] Wheaton v. Peters (1834) 8 Peters 591, at 676-7.
[16] Daly v. Walroth (1899) 40 App. Div. 220, 57 N. Y. S. 1125 at 1126.

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cut off when the author permitted the play to be sold in book form, even though in violation of his agreement not to publish. Therefore the defendant might not be enjoined from producing the play which Sudermann had made common property by its release in print.

An effort to distinguish between a loan and a sale or sale or gift was attempted in *Ladd v. Oxnard* at about this time in a Massachusetts federal court.[17] Plaintiff published a book of credit ratings with the stipulation to its subscribers that it was a loan, and, if found in the hands of anyone not entitled to use it, the publisher might take it up. Thus, the restriction was on the use of the book but not on the extent to which it might be distributed. The court held[18] that the distribution itself amounted to an abandonment to the public despite the attempt to restrict its use to a certain purpose—that of giving information to subscribers. This was a copyright infringement case, but the statement was made that if no copyright had been obtained, the circulation would defeat a common law right. The court's refusal to view the "loan" as a restricted publication, seems logical because a person would be able to extend a subscription indefinitely and thus obtain full benefit from its free circulation and still preserve his common law rights. The common law thus would be utilized to give him more than he could get under the copyright law.

An owner of literary property who has released his work to a magazine for publication can not by agreement with the publisher prevent the public's reproduction of the published work. An artist who permitted his picture to be printed in a magazine under an agreement with the publisher that the latter would not license any reproduction of the reproduction was held to have abandoned his work for all purposes, and the agreement with the publisher was of no effect as against the defendant who made crude replicas of the magazine copy and sold them. It was not established whether defendant obtained permission to copy magazine print from the publisher, but it was immaterial whether he did or not.[19]

A contract not to divulge the contents of grain market reports protected the common law right of the gatherer of the information in *Board of Trade v. Christie Grain Company*.[20] Here plaintiffs disseminated lists of information regarding market quotations, under an agreement of confidence, to a large list of subscribers. The court said that the collection of reports was sim-

[17] Ladd v. Oxnard (C. C. Mass. 1896) 75 F. 703.
[18] *Ibid.* p. 731.
[19] Van Veen v. Franklin Knitting Mills (1932) 260 N. Y. S. 163 at 164.
[20] Board of Trade v. Christie Grain Co. (1905) 198 U. S. 235, at 250-51.

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ilar to a trade secret, and plaintiff did not lose his rights by communication. Similarly, in *Dodge v. Comstock*,[21] the distribution of similar information was not an abandonment of plaintiff publisher's common law rights in his reports. In these two cases, the court stressed the confidential relations between the parties and the type of information printed as bearing strongly on the decision. In previous cases there was either no privity between the plaintiff and the infringer, or else the court felt called on to distinguish between types of information disseminated, feeling that protection should be given in some cases, possibly on account of the particular nature of business involved, but was unwarranted in others.

Where the contract between the parties refers to a "publication" of the play, it will be assumed by the court to have been a general one in relinquishment of all common law rights, in the absence of specific allegations in the petition that it was restricted.[22]

The second class of cases involves the situation where the subject matter of the literary property right is made use of by its owner by being printed or otherwise made known to the public without his expressly placing any restriction on its use, as, for instance, the sale of a book which has been published, the production of a play on the stage, the release of news in newspapers and bulletins, or the advertisement of the property by some form of public representation thereof. The question here is what types of use or conduct by the owner will be construed by the courts as an implied abandonment of the common law rights.

The mere use by an author of his work in public before an audience for a particular purpose does not dedicate that work to the public. This proposition is illustrated by the situation of lectures given publicly or before a class of pupils.[23] In the latter case he may even give them copies of the lecture without their acquiring the right to print, publish or use orally for profit.[24] Here, the dissemination of the information is implied to be restricted to the use to which the owner puts it, even though he has not so stated.

The drama presents problems all its own. It has been said that the rights of the author of a play are two-fold: to profit by its performance and by the sale of printed copies of his manuscript.[25] Courts have therefore been called upon to decide the effect of the production on the stage of an unpublished manu-

[21] Dodge v. Comstock (1931) 251 N. Y. S. 172 at 176.
[22] Allen v. Goldwyn Pictures Corp. (1924) 203 N. Y. S. 304 at 305.
[23] Abernathy v. Hutchinson (1825) 1 H. & T. W. 28, 47 Eng. Rep. 1913.
[24] Bartlett v. Crittenden (1852) 2 Fed. Cases 971.
[25] Palmer v. DeWitt, *supra* n. 1, at 543.

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script as giving others the right (1) to cause the lines of it to be printed, the extract of the manuscript having been obtained by hearing the play on the stage, and (2) to produce it on the stage.

Palmer v. DeWitt[26] established the rule that the stage production of an unpublished manuscript is not such a dedication to the public as to authorize others to print and sell copies. T. W. Robinson of London had composed a drama, "Play," and assigned to plaintiff the exclusive right of printing, publishing and reproducing the manuscript on the stage. It has been previously performed at the Prince of Wales Theatre in London and later in New York. Defendant, a resident of New York, obtained a transcript of the lines from persons who had heard it in London, and began printing and selling copies in New York City. An injunction against his so doing was granted.

The matter of preserving the exclusive right to represent the drama on the stage after it had once been produced in the theatre was attended with more difficulty. The early view[27] was that the release of an uncopyrighted dramatic work on the stage was an abandonment to the public of the owner's right of profiting solely from its performance. The court said that when the proprietor permitted its representation before "an indiscriminate audience for money," he destroyed his exclusive rights.[28] This seems to be the basis of the decision. The opinion went on to state, it would seem, inconsistently, that the decision should not be thought to sanction a taking for profit of the substance of a lecture or other written discourse, or an operatic or concert number, under similar circumstances. There seems to be no justifiable basis for this distinction. The court contents itself by stating "There is nothing to show that defendant has done anything beyond that which the dedication of plaintiff's property authorized him to do," but fails to point out why there would be a dedication in the case of a drama and none as to a concert or lecture under the same circumstances.

The distinction drawn here has not gone unchallenged. Judge Devens of Massachusetts, in a subsequent case[29] vigorously critical of this view, says, "The late Charles Dickens was an accomplished reader from his own works. If he had selected a story of his own to read, himself, before an audience, nobody would have had a right to turn it to his own benefit. But the celebrated novelist was also dramatically inclined. If he had elected to represent the same piece on the stage, it would have been released to the world."

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[26] *Ibid.* at p. 537.
[27] Keene v. Kimball, *supra* n. 7, at 545.
[28] *Ibid.* at p. 550.
[29] Tompkins v. Halleck (1882) 133 Mass. 32 at 40.

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The rule of *Keene v. Kimball* was overruled by the case of *Tompkins v. Halleck*,[30] and it is now settled that the stage production of an unpublished manuscript is not such a dedication to the public as to authorize others to produce it on the stage, even though representation is made possible from a copy obtained by a spectator who attended a public performance for money, and later wrote it out from memory. In such cases, a curious distinction had previously been drawn between obtaining the substance of the lines of the play by remembering what one heard while a spectator at a play, and later transcribing them from memory, and the practice of obtaining the lines by taking stenographic notes during the performance. The former was considered perfectly ethical, while the latter was frowned upon, and use of lines so obtained would not be permitted by the courts. In *Tompkins v. Halleck* both practices were considered equally objectionable because they produce the same result. "It is not the method of copying, nor even the copying itself," said the court, "but the use from the copy to the detriment of the plaintiff's rights that is an infringement."[31]

It is likewise held that public performance of a musical composition of a theatrical nature is not an abandonment to the public that would defeat a subsequent copyright. In *McCarthy & Fischer, Inc. v. White*,[32] plaintiff allowed his song to be sung in acts in defendant's show for several weeks before obtaining a copyright. The court stated that only a publication of the song in print would amount to an abandonment of the rights of the author. It was not a dedication to the public to give copies of the song to a limited group of artists for a similar purpose.

The motion picture industry has also invoked the aid of the common law for the protection of the photoplay, which is the interpretation of a play expressed in actions on the screen, as distinguished from the scenario, the concept of the play expressed in words. The question to be considered is what will be deemed to be an abandonment of either to the public, and what is the effect of such release on (1) the right to perform or show the positive film, and on (2) the right to reproduce the film itself either by re-enacting the play and taking a negative, or by refilming the photoplay acquired, and selling the new negatives.

The mere giving up of the photoplay to another under a license agreement, for the purpose of permitting it to be shown for a limited period is not a dedication of it to the public by the owner, so as to give the license the right to copyright it for his own bene-

[30] *Ibid.* p. 32; Ferris v. Frohman (1912) 223 U. S. 424.
[31] Tompkins v. Halleck, *supra* n. 29, at 45.
[32] McCarthy & Fischer, Inc. v. White (D. C. S. D. N. Y. 1919) 259 F. 364.

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fit to the exclusion of the owner. In *DeMille v. Casey*,[33] the court said, "the motion picture rights under the license agreement did not fall into public use. The agreement shows a clear intent that they should revert to plaintiff on termination of the license *period.*"[34]

However, the outright sale of the positive film gives the purchaser the right to *show* that particular photoplay himself or to hire it out to others or dispose of it altogether. The sale is thus an abandonment of the common law rights of exclusive exhibition of that film as such. But it does not confer on the purchaser the right to create other film copies of the photoplay by refilming the one sold or by re-enacting the same play in the same way before a camera and selling the negatives.[35]

A question that has been presented both as to plays and movies is the effect of their prior performance in a foreign country. It is the rule that such a presentation even with the author's consent is not a publication in this country which works an abandonment of his common law rights. This is true even where the laws of the country where first performed declare that putting it on the stage is a publication and require a public performance as a prerequisite to getting a license to present it.[36] The author in this country still has his common law rights for purposes of making motion pictures,[37] or for printing and selling copies of the drama in this country,[38] or for putting it on the stage here. On the latter point, it was said in one case[39] that the English statute regulating performance in England did not have the effect of depriving any British citizen of exercising his common law rights in other countries. Such an enactment merely governed his rights in England.

Just how far a proprietor may go in advertising his work by displaying a portion thereof to public scrutiny, without dedicating it to the public is brought out by cases dealing with billboard posters, circulation of dodgers, and publication in newspapers. It is held that public posting of billboard advertisements showing photographs of scenes of a play taken by flashlight from the actual performance, is not a publication amounting to a dedication.[40] It is rather an incident in the presentation of the play which is not itself a dedication thereof. Here, again is the refer-

[33] DeMille v. Casey (1923) 201 N. Y. S. 20.
[34] *Ibid.* p. 27.
[35] Universal Film Co. v. Copperman (C. C. A. 2, 1914) 218 F. 577.
[36] O'Neill v. Gen. Film Co. (1916) 171 App. Div. 854, 157 N. Y. S. 1028.
[37] *Ibid.* p. 1028.
[38] Palmer v. DeWitt, *supra* n. 1, at p. 532.
[39] Ferris v. Frohman (1912) 223 U. S. 424 at 433.
[40] O'Neill v. Gen. Film Co., *supra* n. 36 at 1028.

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ence to the requirement of publishing the manuscript in order to effect a destruction of the common law rights, for the court in *O'Neill v. General Film Company* said "the posters did not tell the story of the play in connected form."[41] Even a newspaper criticism giving an account of the story of the play with comments upon its presentation is not a relinquishment.[42] From this one may assume that it is not merely the telling of the story but telling it in words of the author that would work an abandonment.

However, material distributed in the form of dodgers is not protected against being copied, on the theory that the articles therein are freely circulated to the world. In *D'Ole v. Kansas City Star*,[43] the plaintiff was a photographer who got up a pamphlet entitled, "How to Sit When Having a Photo Taken," in advertisement of his methods, and before obtaining a copyright of his articles in the booklet, he permitted 10,000 copies to be scattered about the city streets and in business houses. Defendant published an article taken from a Philadelphia paper containing several paragraphs that plaintiff had composed and put into the pamphlet. The court refused relief on the ground that the circulation amounted to an abandonment. The situation here is of course obviously different from the previous cases. In the latter, the advertising of the thing taken did not effect a publication because the subject was not itself circulated, but merely accounts of it. Here, the thing advertised was plaintiff's photography, but the thing taken was his article in the magazine telling about it, which was freely distributed. This case merely follows the general rule that publication in print and turning over copies of the manuscript to the general public is a dedication.

It should be noted that it makes no difference whether the circulation or release is gratuitous or for a price; an abandonment may result if the public is given access to the thing. In the case of *Bamford v. Douglass Post Card & Machine Co.*,[44] plaintiff was in the business of taking pictures of living models and making post cards and selling them. Defendant copied the photos by the half-tone process and undersold them, reproduced on cards. The court held for the defendant on the ground that plaintiff had by repeated sales, dedicated his work to the public and since the cards were not trade marks to distinguish any product of plaintiff, there was nothing in the way of unfair competition. The release may constitute merely an exposure to public gaze in order to constitute a dedication. Architectural concepts are usu-

[41] *Ibid.* p. 1037.
[42] D'Ole v. Kansas City Star (C. C. W. D. Mo. 1899) 94 F. 840.
[43] *Ibid.* p. 843.
[44] Bamford v. Douglass Post Card & Machine Co. (C. C. E. D. Pa. 1908) 158 F. 355.

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ally protected until they emerge from blueprint, but when they take on material form in a building, they are not protected against piracy. A plaintiff who had erected a porch of novel and artistic design was refused an injunction against defendant's building a copy of it on the theory that since the physical expression of the plans had stood several years open to the public eye, this was a publication that destroyed plaintiff's common law rights.[45] Even plans as such may not be protected if they are communicated to members of the public by being filed with the city building department and superintendent for construction of the building.[46]

As a legal problem, publication of news seems to stand in a class by itself because of its own unique qualities. Unlike a dramatic or literary work, it is unoriginal as to substance. It is rather a chronicle of facts descriptive of events that have occurred and are thus open to public knowledge. To be of any value at all it must be disseminated while fresh. The question is how far may a publication of it go and yet preserve the gatherer's rights in it to his own benefit.

The latest development on this point tends to favor the protection of common law rights against destruction by publication of news. The *International News Service v. Associated Press*[47] advances the proposition that news is not abandoned for all purposes by publication in newspapers of plaintiff's members and by being posted on bulletins of the plaintiff for purposes of being read by the public; publication does not confer on plaintiff's competitor the right to use the substance for its own aggrandizement to the detriment of plaintiff. The decision does not preserve the property right indefinitely, but only until the members have been enabled to realize a return from their investment. It may be said then that here is a recognition of an abandonment for some purposes—as against the public in general there is no right after first publication—but an absence of abandonment for others—as between the parties themselves, to protect against unfair competition.[48]

In his dissenting opinion, Brandeis prefers to treat news as possessing characteristics of ordinary subjects of literary property, whereby the first general distribution would destroy the author's common law rights. He discredits the theory that this is a restricted publication, his concept of "restricted" seeming to go on the range or number of persons who receive copies, as opposed to the majority view which implies a restriction in pur-

[45] Note (1927) 75 U. of Pa. L. Rev. 459.
[46] Wright v. Eisle (1903) 86 App. Div. 356, 83 N. Y. S. 887 at 889.
[47] International News Service v. Associated Press (1918) 248 U. S. 215.
[48] *Ibid.* pp. 219-20.

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pose—that in each issue of the paper, there is an implied condition that the news shall not be used gainfully in competition with the Associated Press. According to Brandeis, where the publication is general, even express words of restriction are ineffective, regardless of the intent of the owner. He acknowledges there have been instances where the publication has been held to be restricted, but says in these cases there was no general publication in print comparable to issue in a daily newspaper.[49]

Transmission of news over a telegraph instrument does not constitute a general publication. This is said to be analagous to the writing and delivery of letters which is not a publication, telegraphy being merely a means which modern science has devised for speedy communication between persons at a distance, and is only a qualified publication.[50]

It is said that dedication is a matter of intent,[51] and where the circumstances indicate that the owner does not intend to relinquish all right but merely wishes to gives the public a limited or partial use and reserve to himself what is not given, the public acquires what is given and nothing more.[52] To illustrate, if a composer of an orchestral score of an opera arranges it for piano use in whole or part and causes piano arrangement to be published and sold, he donates his music to the public for use on the piano only, but not for purpose of authorizing another composer to make a new orchestration of his music and performing it in public for profit.[53]

Drummond v. Altemus[54] presents a situation showing that under certain circumstances the unauthorized use of a literary article will be enjoined even though it has been published in a legal sense. Plaintiff sent to the *British Weekly,* a journal, certain reports of his lectures permitting it to print them in its columns. Defendant read the articles and then composed a book purporting to contain lectures delivered by plaintiff, founded on matter taken from them and stated incorrectly. The court gave as its reason for allowing relief that defendant under color of editing plaintiff's work, presented the material incorrectly, and also created impressions that the entire series was included when really there was only a part. But it was stated that if the matter had been literally copied and there had been no misrepresentations as to its character and extent, plaintiff would have been without remedy, since there had been a complete abandon-

[49] *Ibid.* p. 224.
[50] Kiernan v. Telegraph Co. (N. Y. 1876) 50 How. Practice 1943.
[51] International News Service v. Assoc. Press, *supra* n. 47, at 221.
[52] Aronson v. Baker, *supra* n. 7.
[53] *Ibid.* p. 370.
[54] Drummond v. Altemus (C. C. E. D. Pa. 1894) 60 F. 338.

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ment as result of the first publication. Protection here was accorded against falsely representing the work to be the plaintiff's. This was a fraud on him and on the purchaser.

Business ideas as such do not get much protection from the courts on a basis of literary property. Practical difficulties account for this attitude. When one submits his scheme to a company, and it is rejected, it is difficult indeed for him to prove that the project, subsequently launched by the company, in which he can see germs of his own thought, was really suggested to them by him in the first instance. Moreover, the fact that more than one person may have the same notion makes it hard to prove that it was altogether original. The cases indicate that when one makes a proposition to a business concern it is common property after its disclosure.[55]

By contrast, literary concepts have fared better. In *Thompson v. Famous Players Lasky Corporation,*[56] plaintiff wrote a scenario and mailed it to defendant for acceptance but received no answer. A movie was subsequently produced which was substantially the same as plaintiff's scenario, and defendant was required to pay her for it. There was no attempt here to suggest that by sending the scenario to defendant plaintiff released it to the world.

It is well-settled that the common law right is terminated when the owner of literary property seeks protection under the copyright statutes.[57] The purpose in doing the latter is to enable the author to distribute copies of his work to others and yet preserve his own right of profit from their use, as contrasted with his claiming the common law right of keeping and using them exclusively.

But what is the effect of an attempt to copyright which for some reason fails? In such a situation it is held that a deposit of copies of a book with the Librarian of Congress as a prerequisite to obtaining a copyright constitutes a publication which will be an abandonment to the public of the literary property right. By this delivery it is said that the book is put within reach of the general public without another act on the part of the author.[58] The fact that one is required to make a delivery of the book to secure the copyright does not save the common law right.[59]

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[55] Moore v. Ford Motor Co. (D. C. S. D. N. Y. 1928) 28 F. (2d) 529; 27 Mich. L. Rev. 708; 25 Mich. L. Rev. 886 at 887.

[56] Thompson v. Famous Players Lasky Corp. (D. C. N. D. Ga. 1925) 3 F. (2d) 707.

[57] Werkmeister v. Amer. Litho. (C. C. A. 2, 1904) 134 F. 321.

[58] Jewelers Merc. Agency v. Jewelers Weekly Pub. Co., *supra* n. 4.

[59] Callaghan v. Myers (1888) 128 U. S. 617.

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The decisions indicate that a subject of literary property may be a composite of a whole set of different rights as to its use, and copyright of one will not necessarily destroy the common law right as to another form of use. Thus, copyrighting of a motion picture representation of an uncopyrighted drama by one owning the literary performing rights is a relinquishment of the owner's common law motion picture rights in the play to the extent of the scenes represented by the copyrighted films. Here there is a distinction drawn between motion picture and literary and dramatic rights, the common law rights in the latter two not being affected by copyright of the movie version of a book or play. A copyright of the photoplay gives the owner of the copyright merely an exclusive right to his own film version. In *O'Neill v. General Film Company*,[60] plaintiff had a contract with Famous Players Company for making a motion picture film adapted from the drama "Monte Cristo." Plaintiff engaged a company of actors who gave a performance of the play before a camera; films were prepared and released for circulation to theatres. The company copyrighted the films, and it was held that plaintiff parted with its motion picture rights in the photoplay copyrighted to the extent of the scenes therein represented, but the question was left open as to whether *all* common law motion picture rights including those scenes in the play but not represented in the copyrighted film, had been abandoned also. This would be pertinent if the owner of the literary performing rights should wish to make a different movie version of the play.

Where the law distinguishes between rights in a scenario and in a photoplay by permitting a copyright of either, a copyright of the photoplay constitutes a relinquishment of the common law rights in it.[61] Whether this also constitutes an abandonment of rights in the scenario has not been decided.

A copyright of a play in a foreign country where the law requires publication as a condition precedent to copyright is a dedication to the public in this country.[62] However, the mere filing of a copy of the play in the foreign country as a condition precedent to obtaining a license to present it is not a dedication here.[63] Thus it is the actual copyright which destroys the common law right, and not the submission of it to a public official, which is said under our law to give the public access to it and to relinquish the common law right.

In considering whether an abandonment has been effected that

[60] O'Neill v. Gen. Film Co., *supra* n. 36, at 1028.
[61] Universal Film Co. v. Copperman (C. C. A. N. Y. 1914) 218 F. 577 at 580.
[62] O'Neill v. Gen. Film Co., *supra* n. 36, at p. 1034.
[63] *Ibid.* p. 1034.

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would vitiate a subsequent copyright the courts look to the substance of the material rather than to the form in which it is released. Serial publication of a book in monthly instalments has been held to be a publication that renders ineffective the copyright of the whole book which is obtained subsequently, although before publication of the book as an entirety. An interesting case involves Oliver Wendell Holmes, who permitted chapters of his "Autocrat of the Breakfast Table" to be published in the *Atlantic Monthly*. His executor, in seeking to restrain Defendant from using copies of the chapters taken from the *Atlantic Monthly*, contended that publication of the chapters was not a publication of the *book*, which was the subject of copyright. The injunction was refused, there being no infringement.[64]

The most recent issues in the realm of literary property are concerned with radio. In the United States, the rights of the broadcaster to protection against unauthorized exploitation of his programs are still largely in the balance, but continental Europe has indicated precedents that may illuminate our way.

At present commercial parasites threaten to enrich themselves at the expense of 600 broadcasting stations in this country, which represent a $180,000,000 per annum industry, and of advertisers whose annual expenditures on the air total approximately $40,000,000.[65] Artists whose talents are broadcast are also claiming protection. Thus, to be entirely adequate, relief must be given three ways.

By strict tests of legal abandonment to the public of literary property, it would seem that the chances of preserving common law rights on the air are scant. The broadcaster has been likened to "a musician who sings before an open window"[66] with a corresponding release to the world. Means for defeating a dedication which have been indicated by the courts as to proprietors of other forms of literary property are unavailing here. The broadcaster can not limit dissemination of his program to a selected group of hearers without choking off his profit at the outset. It is only by a complete surrender of that which calls for protection that its commercial value can be realized. It is obvious that the test of abandonment here can not be the extent of dissemination to the general public. How then is legal theory to be moulded to meet the situation?

The analogy of radio programs to news suggests a solution. Both are equally subject to wide dissemination, and the latter is protected as against a competitor by the decision in the *Inter-*

[64] Holmes v. Hurst (1899) 174 U. S. 83 at 85.
[65] Louis G. Caldwell, "Piracy of Broadcast Programs" (1930) 30 Col. L. Rev. 1087.
[66] *Ibid.* p. 1101.

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national News Service case. The court said there, "abandonment to the public is a question of intent, and the entire organization of the Associated Press negatives such a purpose."[67] Publication by each member of news in its periodical was not deemed abandoned for all purposes merely by release in print. It was the extent of the purpose rather than of the physical dissemination that governed the abandonment.

Why might not the same test of intent be applied to radio? It would be quite reasonable on this basis to hold that a radio program, transmitted for a limited purpose, can not be utilized by competing studios or theatres.

Specific instances of piracy of broadcast programs include intercepting of programs prior to transmission by the station to the public, usually by third persons, by wire-tapping, reproduction of programs by rebroadcasting by another studio or by retransmission by wire, recording on phonograph records offered for sale, operation of loudspeakers in theatres as part of the entertainment paid for, and in other public places for profit.[68]

In the United States we have met these practices by statutes which are expected to be adequate in some cases. In others it may be possible to invoke the common law rights. Section 27 of the Radio Act of 1927 forbids interception of messages and publication of contents of an intercepted message unless authorized by the sender, except communications broadcast by amateurs or others for use of the general public. Section 28 provides that a broadcasting station shall not rebroadcast any program of another station without express authority of the originating station.[69]

It is thought that the protection given is not very broad. It would seem that it extends to programs coming directly from the studio of the originating station but neglects broadcasts of ball games and prize fights from the stadium or ringside. It is uncertain also whether the statute would prohibit piracy by anyone but a competitor broadcaster. But he is not the only offender. Telephone companies have sought to build up good will by picking up programs directly by wire and transmitting them to subscribers.[70]

European response to the problem came in 1925 at the first International Juridical Congress on Radio Communication in Paris. A resolution was adopted that "no commercial exploitation should be made of radio emissions, without the agreement of the sender," and all the nations assured to members of the union

[67] International News Service v. Assoc. Press, *supra* n. 47 at 219.
[68] 55 Amer. Bar Assn. Reports (1930) 370; 30 Col. Law Rev. at 1089-95.
[69] *Ibid.*
[70] 30 Col. L. Rev., *supra* n. 65, at p. 1092.

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protection against unfair competition. Four congresseses have since been held. At a meeting of the Association for Protection of Industrial Property held in Rome in 1928 it was resolved that broadcasting should be treated according to rules of unfair competition and according to those governing an author's rights.

These efforts have been reflected somewhat in the decisions of the courts. In 1927, a Defendant in Germany picked up a broadcast of a prize fight and made phonograph records of it and sold them. The station sued and on appeal to the Court of Appeal in Berlin, obtained judgment on the ground of unfair competition, but there is no suggestion of any general principle justifying recognition of property rights in broadcasters over their station's emissions.[71] Another case resulted in a decision to the contrary in the German Supreme Court. A broadcasting station sent an announcer to Friedrickshafen for the purpose of giving an account of the arrival of the Graf Zeppelin from America. Defendant published a newspaper "extra," giving the events as broadcast by plaintiff. The court refused an injunction against publishing of news received from the broadcasts, and distinguished between the two cases by saying that in the latter there was mere utilization of that which had been made public and was common knowledge.[72]

In France, the Conseil d'Etat brought to an end in 1929 litigation resulting from unauthorized broadcasting by the Lyons Broadcasting Station of phonograph records of performances by two eminent vocal artists. They were unsuccessful, but the upper court was sympathetic and conceded that the broadcaster's omission to tell the public that the audition was made by phonograph records was a serious wrong but held that the artist must prove specific damage suffered thereby.[73]

In spite of some setbacks, it is thought that the tendency in Europe is in the direction of a more thorough protection of both station and artist.[74]

One decision by the Supreme Court of the United States on the question is a copyright infringement case but it is thought that it may be a forerunner of some protection given to common law rights. Defendant hotel had a master receiving set leading to all public and private rooms, giving radio entertainment to guests. A new musical composition "Just Imagine" was transferred to the American Society of Composers. Authors and Publishers, of which plaintiff was president. The hotel set, without

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[71] Amer. Bar. Assn. Reports, *supra* n. 68.
[72] *Ibid.*
[73] 56 Amer. Bar. Assn. Reports (1932) 445.
[74] 55 Amer. Bar. Assn. Reports (1930) at 372.

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permission of the copyright owners, picked up the broadcast. It was notified by the society that the program was of copyrighted music and asked to desist using it until license was obtained. The district court held that there was no infringement, and that the exclusive right given by the copyright to perform a musical composition does not carry a proprietary interest in waves that go out on the air, as such waves are the common property of all; and, moreover, reception on a radio receiver is not a performance such as would infringe the copyright. The Supreme Court reversed the decision, holding that the rebroadcasting by the public use of a receiving set was a public performance for profit within the copyright act and hence an infringement.[75]

The broadcaster is not the only sufferer from unauthorized use made of his programs after they have been released into the air. The advertiser stands vulnerable to being bereft of his advertising slogans and catch words that have achieved a definite value to him through their meaning in the public mind. To what extent is his release of them on the air to be a donation of his ingenuity to anyone who cares to pick them up and profit by their use? Moreover, the artist is deprived of profit for his performance by unauthorized making of phonograph records from numbers broadcast.[76] It has been suggested that Section 28 of the Radio Act be broadened to cover these practices.

Predictions as to the future of any possible radio literary property rights are interesting. The American Bar Association believes that substantial recognition should be given to a right of property in broadcast programs analagous to that accorded artistic and intellectual property, which will be sufficient to protect those whose investments made the program possible.[77]

Louis Caldwell, "Piracy of Radio Programs,"[78] regards the doctrine of unfair competition as sufficient to protect the broadcaster against most practices. But where the commercial purpose is not so evident, as in the case of broadcasting in hotel lobbies, barber shops and restaurants, the use being usually to establish good will and not for purpose of direct competition with the broadcaster, the unfair competition doctrine will not apply. Legal relations will be simplified if the broadcaster alone has rights against exploiters, for he in turn can be required by contract to protect authors and artists.

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[75] 56 Amer. Bar. Assn. Reports (1932) at 446; 55 Amer. Bar. Assn. Reports (1930) at 410; *ibid.* at 370; Berlin v. Daigle (C. C. A. 5, 1929) 31 F. (2d) 832.

[76] *Supra* n. 68.

[77] *Ibid.* at 372.

[78] *Supra* n. 65, at 1111.

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