

1-1-1968

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Recommended Citation

Paul Goldstein, *Copyrighting the New Music*, 17 Buff. L. Rev. 355 (1968).

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COPYRIGHTING THE NEW MUSIC*

PAUL GOLDSTEIN**

A new and developing emphasis in the arts is upon the initial creative act. The historic concern for the appearance and quality of the final work is being displaced by a modern regard for the threshold spontaneity of the artistic endeavor.¹ Thus in "action art," typified by the splatterings of Pollack and de Kooning, and in modern jazz, stress is upon the instinctive, the generative quality of the art.²

This altered emphasis is reflected in the vacation of form and consistency from the final work; the traditional attempt to communicate with an audience through a common and ordered language has in some areas given way to a single concern for the artist's inchoate impulse.

THE NEW MUSIC IN CONTEXT

This incipient trend is clearly evident in the new music. Its composers look upon traditional harmonic structure as a "recent occidental phenomenon, for the past century in a process of disintegration."³ And although the new music can be viewed as one phase in a development initiated by Stravinsky, Schoenberg, Ives and Varese,⁴ it typically lacks in the sense of order which characterizes the work of these predecessors. Absent a notated basis, its composition is dependent upon the artist's improvisatory technique in dealing with random sounds.⁵

* This article was awarded the National First Prize in the Nathan Burkan Memorial Competition for the best paper on copyright law submitted by contestants throughout the United States. It is published through the courtesy of the American Society of Composers, Authors and Publishers.

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1. The new creative process has been distinguished from the old as "analytic" rather than "synthetic" in character. Salzman, *The New American Music*, in *The New American Arts* 241 (P. Kostelanetz ed. 1965). Under the modern personal emphasis, "whoever undertakes to create soon finds himself engaged in creating himself." H. Rosenberg, *The Tradition of the New* 10 (1959).

Attempts at dealing with the legal context of the new arts are scattered. Copyright implications in the analogous field of electronic music are thoroughly explored in Savelson, *Electronic Music and the Copyright Law*, ASCAP Copyright Law Symposium Number Thirteen 133 (1964). See also Meagher, *Copyright Problems Presented by a New Art*, 30 N.Y.U. L. Rev. 1081 (1955) (Protective problems posed by the new medium of videotape.); Comment, 10 Wayne L. Rev. 702 (1964) (Difficulties in copyrighting the newly popular folk music.).

2. Aside from the new music, other forms characterized by this new emphasis are electronic music, movies of the *nouvelle vogue* and lately of the "underground," and the theatre of the absurd. The most recent and catholic development is "happenings" which often embrace all these other forms in their composition and in which the stress is totally upon the spontaneous or, at least, upon the appearance of spontaneity. See *Village Voice*, June 2, 1966, at 6, col. 2.

3. J. Cage, *Silence* 63 (1961).

4. *Id.* 70-73.

5. If notation is used, rarely is it conventional. The score for Earle Brown's "4 Systems" is a drawing of rectangles of varying lengths and widths. In order to multiply the number of possible variations, the composer gives permission to the conductor "to read the

John Cage, the new music's chief theorist, suggests that its progress must necessarily be carried on by hitting anything—tin pans, rice bowls, iron pipes—everything we can lay our hands on. Not only hitting, but rubbing, smashing, making sound in every possible way.⁶

Thus in Robert Ashley's "Wolfman," the composer stood at center stage and shouted at the top of his voice into a microphone for almost eighteen minutes. One observer noted that it was "difficult to hear him, however, because his electronic accompaniment of piercing shrieks and whistles was played at peak volume and in the din his voice was often obliterated."⁷

In practice the new music may consist of more than sounds. Although one festival dedicated to music of the avant garde⁸ opened with "a droning sound issuing from two loudspeakers on either side of the stage," it subsequently witnessed a "Robot Opera" in which a creaking but "attractive mechanical monster shambled on stage with the gait of a Frankenstein creation."⁹

At its most typical, the music is inclined to use of theatrical effects.¹⁰ In Alvin Lucier's "Composition for Pianist and Mother," an elderly lady comes on stage and seats herself to the right of the piano. The pianist enters, takes off his shoes, runs around the piano in his stocking feet and caresses the piano. The mother blows her nose loudly and the pianist lifts the piano lid and plucks a string. The mother then comes to the piano and blows the pianist's nose on a large napkin. While he knocks on the inside of the piano the mother claps very quietly.¹¹

SHOULD COPYRIGHT EXTEND TO THE NEW MUSIC?

The questions posed by this article are whether, and how, the law is to accord copyright protection to the new music. The answer to the first question encounters no difficulty in the fundamental role of Congress. When extending statutory protection to intellectual properties, its posture is not that of guardian of the old order; rather the constitutional mandate to Congress is clear that it "*promote* the Progress of Science and useful Arts."¹²

Any difficulty lies in the nature of the art itself. In most instances copyright vests in the completed work of art, and it is a nice question whether this attitude of the law is premised upon the traditional cultural concern with the final work.¹³

cardboard in any of four positions: right side up, upside down, sideways, up and down." Or the composer may divide all pitches into high, middle and low and merely indicate to the musicians how many in a given range are to be played, thus leaving to them the real task of composition. J. Cage, *supra* note 3, at 13, 37. See also Salzman, *supra* note 1, at 248-49.

6. *Id.* at 87.

7. N.Y. Times, Sept. 2, 1964, at 29, col. 2.

8. Works of the new music have been primarily aired in the New York Festival of the Avant Garde which has taken place annually since 1963 at Judson Hall in New York City.

9. N.Y. Times, Aug. 31, 1965, at 20, col. 1.

10. J. Cage, *supra* note 3, at 12.

11. N.Y. Times, Sept. 4, 1964, at 18, col. 2.

12. U.S. Const. art. I, § 8 (Emphasis added.).

13. An affirmative answer is suggested by the extensive judicial hair-splitting engendered by the phrase in U.S. Const. art. I, § 8 "securing...the exclusive Right to...*Writings*..." (Emphasis added.). See *infra* notes 53-59. The requirement that a work qualify

That is, should legal protection be withheld when the aesthetic emphasis is not upon the work as an end in itself, when the work is secondary, a mere evidence of the artist's creative grappling?

Two answers are suggested. Regardless of its cathartic origin, the work produced stands as something created, generically indistinguishable from traditional art. A composition like Stravinsky's *Le Sacre du Printemps*, the product of a labored attempt at creating an image of disorder pervaded by an underlying sense of unity, is for legal purposes no different from a new music work in which the chaos is natural and the presence of any unifying scheme accidental.

Secondly, the motive behind copyright law is economic; thus based, it ought to extend protection to the artist who has expended his time and energies in a new and questionable pursuit as well as to the one who has labored, though perhaps more considerably, in the old tradition. The law should not discriminate and forbid a pirate to copy a traditional, copyrighted work yet allow him to reproduce and perform, to his own profit, a work of new music.

There remains the question whether the new artist will actually desire copyright protection. As his emphasis is upon the creative act, it might be urged that the artist does not highly regard the final work—at least does not regard it sufficiently to seek protection of rights in it. A more practical answer would depend, in large measure, upon the degree of public acceptance his art has attained. A de Kooning or a Pollack painting will today bring a high price on the market. As the new music gains a wider audience, its creator may equally value sharing in the fund that reproductions of his work may bring.¹⁴

THRESHOLD QUESTIONS OF COPYRIGHT

The remainder of this study will deal with various aspects of the second question raised: how to secure copyright protection for the new music. The technical problems engendered by this art are no less difficult of resolution than those posed by its fundamental aesthetics.

As indicated by the description of the new music above, its approaches and content are varied. It is amenable, however, to at least four generalizations. It is usually spontaneous in origin because of the absence of a notated score. It is catholic in its embrace, including not only musical and non-musical sounds, but theatrics, monologues, pantomime and choreography as well.

A new music piece may involve one or one hundred performers, and in some of its more ambitious works the entire audience is engaged in the composi-

as a writing lends credence to the view that this traditional cultural emphasis on the final work—a writing—underlies American copyright law. By way of contrast, the French doctrine of *droit moral* recognizes "certain rights clearly attached to the personality and reputation of the creator [which] remain with him despite a complete and total alienation of his work...." Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law*, ASCAP Copyright Law Symposium Number Eleven 1, 13 (1962).

14. The extent to which new music composers have already sought recompense through recordings of their works is indicated by the "Selected Discography," a six page bibliography of recordings in Salzman, *supra* note 1, at 265-70.

tion.¹⁵ It is intractable; its infinitely varied emission of sounds, and the equally varied antics of its participants, render it difficult of any notation subsequent to performance.

This last characteristic—intractability—poses the chief problem involved in copyrighting the new music: how to render it in some fixed form so that, as a writing, it will be registrable. Yet its other aspects give rise to at least three legal considerations ancillary to registration which should be discussed at the outset: (1) Does the spontaneous, and often haphazard, composition meet the minimum standard of originality required for copyright? (2) If there are any rights in the work, in whom do they vest—in the conductor-composer, or in the individual musicians who are sometimes independently responsible for the creation? (3) As composition is frequently simultaneous with performance, will performance constitute an abandonment of the work to the public domain? And, if not, will manufacture and sale of sound recordings of the uncopyrighted composition work a forfeiture?

A. *Sufficiency of Artistic Merit*

Only a minority of courts today equate a novel use of melody, rhythm or harmony with the originality requisite for copyright in a musical work,¹⁶ or insist that the composition represent more than mechanical skill to be copyrightable.¹⁷ The more modern and predominant view is that lack of melody and musical merit is of no consequence.¹⁸ The courts appear hesitant to act as censors of the arts and will generally hold a musical piece copyrightable absent an actual copying of another work.¹⁹

The majority view is incorporated in the proposed revision of the copyright law. By specifying the subject matter of copyright as simply "original works of authorship"²⁰ the intention of the revisors is to "maintain the estab-

15. In George Brecht's "Exhibit 27" a long rope is passed through the audience; its becoming intertwined in it and the private tugs of war that follow are considered to be part of the composition. *N.Y. Times*, Sept. 4, 1964, at 18, col. 2.

16. *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D. N.Y. 1952); *cf. Smith v. George E. Muehlebach Brewing Co.*, 140 F. Supp. 729, 731-32 (W.D. Mo. 1956). *See also Dworkin, Originality in the Law of Copyright* 39 B.U.L. Rev. 526, 540 (1959).

17. *Smith v. George E. Muehlebach Brewing Co.*, 140 F. Supp. 729, 731 (W.D. Mo. 1956); *cf. Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884) (dictum). *See also Nottage v. Jackson*, 11 Q.B.D. 627 (1883).

18. *Wihtol v. Wells*, 231 F.2d 550 (7th Cir. 1956); *Alfred Bell, Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951); *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, 134 F. Supp. 551 (S.D.N.Y. 1955); *Hein v. Harris*, 175 F. 875, 877 (S.D.N.Y. 1910). *See also Dworkin, Originality in the Law of Copyright*, 39 B.U.L. Rev. 526, 541 (1959).

19. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249-50 (1903); *Dorsey v. Old Sur. Life Ins. Co.*, 98 F.2d 872 (10th Cir. 1938); *Jeweler's Circular Publ. Co. v. Keystone Publ. Co.*, 281 F. 83, 88 (2d Cir. 1922). *But cf. Jackson v. Quickship Co.*, 27 F. Supp. 388 (E.D.N.Y. 1939); *Norden v. Oliver Ditson Co.*, 13 F. Supp. 415 (D.C. Mass. 1936). *See also Dworkin, Originality in the Law of Copyright*, 39 B.U.L. Rev. 526, 531 (1959).

20. Register of Copyrights, 89th Cong., 1st Sess., Copyright Law Revision, Part Six 3 (Comm. Print 1965).

lished standards of originality without implying any further requirements of aesthetic value, novelty, or ingenuity."²¹

B. *The Question of Authorship*

Assuming then that there are protectible rights in the work, the question arises, in whom do they vest? If the function of each performer in non-scored pieces is to create something "out of a store of raw materials"²² it would appear that he is the independent creator of his own musical sounds and so entitled to copyright therein. Two considerations are thus germane: whether the complete composition is to be viewed as a separable aggregate of single works, entitling each author to copyright,²³ or whether it is to be considered a musical unit rendering them joint owners.²⁴ Second is the problem of whether they are authors at all, *i.e.*, whether the composer-conductor is properly the sole author.

Despite the discordance of the new music and the frequent impression that the performers are mutually antagonistic, judicial precedent would tend to characterize their individual efforts as combining to form a joint work. The English requirement that the joint work evidence a "common design"²⁵ is no longer followed in this country. American courts have established instead varied criteria determinative of the joint work, including evidence of a "fusion of effort,"²⁶ "unity of presentation,"²⁷ association "as a unit in the public mind,"²⁸ and intent²⁹ or knowledge³⁰ that others will combine their work with the work being created "to result in a *single* composition."³¹ Thus where a composer wrote a score to which lyrics were later added by writers unknown to him, the combination was held to be a joint work.³²

In terms of these criteria, the factor decisive of a joint work is the individual author's proximity to the completed composition regardless of the indepen-

21. *Id.*

22. J. Cage, *supra* note 3, at 38.

23. A composite work is one which assembles the separate works of different authors. Right to co-ownership do not arise out of such works because of "the absence of any intent to create a unitary product." Comment, 8 U.C.L.A.L. Rev. 1035, 1036 (1961). See generally G. Cary, Joint Ownership of Copyrights, Copyright Law Revision Study No. 12, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the House Comm. on the Judiciary, 86th Cong., 2d Sess. (Comm. Print 1960); Register of Copyrights, *supra* note 20, at 68.

24. The joint work is a "unitary work, the parts of which, although created by several authors, are not considered to be individual works in themselves." G. Cary, *supra* note 23, at 87. For the revision view see Register of Copyrights, *supra* note 20, at 65.

25. *Levy v. Rutley*, L.R. 6. C.P. 523, 529 (1871).

26. G. Cary, *supra* note 23, at 92; *cf.* *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406, 409 (2d Cir. 1946).

27. *Maurel v. Smith*, 220 F. 195 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921). *But cf.* *Herbert v. Fields*, 152 N.Y. Supp. 487, 489 (Sup. Ct. 1915).

28. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42, F. Supp. 859, 864 (S.D.N.Y. 1942), *aff'd*, 140 F.2d 266 (2d Cir. 1944).

29. Comment, *supra* note 23, at 1037.

30. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 F. Supp. 859 (S.D. N.Y. 1942), *aff'd*, 140 F.2d 266 (2d Cir. 1944); G. Cary, *supra* note, 23, at 91.

31. Comment, *supra* note 23 at 1037.

32. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 F. Supp. 859 (S.D. N.Y. 1942), *aff'd*, 140 F.2d 266 (2d Cir. 1944).

dence or uniqueness of his effort. It may be noted here that judicial determination that a composition is a joint work gives rise to a constellation of rights and liabilities among the individual creators *inter se*.³³

There remains the more difficult question of the performers' rights vis-à-vis the composer-conductor. The status of these rights may be easily settled in a contract between the performers and the composer who has brought them into concert, "authorship" vesting solely in the latter. Such contracts are used widely in the motion picture industry,³⁴ and rest upon the statutory provision that "the word 'author' shall include an employer in the case of works made for hire."³⁵

Absent a contractual determination of authorship, resolution of the problem will depend in each case upon the role played by the composer. If he takes an active part in the performance and is the effective cause of the final composition, rights will probably vest in him.³⁶ Presence of a written score created by him will be further evidence of his central position in the work. Thus the closer the composer comes to the bounds of conventional composition, the more responsibility he takes for the final product, the greater is his chance of being adjudged the sole author of the work. For purposes of convenience in the discussion that follows, it will be assumed that rights in the work are in the composer. Were the performers the owners, like considerations would, in any event, apply.

C. *Divestitive Publication: After Performance*

Because of the spontaneous nature of the new music, such rights as have been discussed must, of necessity, remain abstract until the actual performance of the piece. There is not, as in conventional composition, an intermediate stage—setting a completed score down on paper—at which the composer's rights vest. While the traditional composer can consolidate his rights by copyrighting the score, the creator of a work of new music must await performance before any rights come into being.

At least one writer has urged that public performance of an uncopyrighted musical composition should constitute its dedication to the public and consequently work a forfeiture of the common law copyright in the composition.³⁷ If such a view were to prevail, the composer of new music would be placed in the unique position of having created a work only to observe the instantaneous disappearance of all his rights in it.

Courts in this country have, however, uniformly adopted the rule that

33. For an extensive discussion of the rights and liabilities arising from the joint ownership situation, see Comment, *supra* note 23, at 1035.

34. G. Cary, *supra* note 23, at 88; Zissu, *The Copyright Dilemma of the Screen Composer*, 1 *Hollywood Q.* 317 (April 1946).

35. 17 U.S.C. § 26 (1964).

36. The author is "the person who effectively is as near as he can be, the cause of the picture which is produced, that is, the person who has superintended the arrangement . . . by putting the persons in position. . . ." *Nottage v. Jackson*, 11 Q.B.D. 627 (1883), cited with approval in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884).

37. Selvin, *Should Performance Dedicate?*, 42 *Calif. L. Rev.* 40 (1954).

public performance of an uncopyrighted work does not result in its abandonment to the public domain.³⁸ This doctrine has been followed in a case involving public choral performances of a composition³⁹ and is applied regardless of whether the performance is for profit.⁴⁰ Ostensibly the rule rests upon the premise that performance of a work at a concert hall is not a "copy" of the work.⁴¹

D. *Divestitive Publication: After Recording*

Despite the fact that his rights will be protected after public performance, the composer is placed, by the nature of his art, at a subsequent disadvantage. If aesthetic dogma precludes him from notating the composition before performance, so does the often non-musical quality of the work make it difficult to transcribe a score in traditional form during performance. In order to preserve his rights he must, of course, in some manner preserve the composition. The most obvious and economical means would be through a sound recording of the performance.

The absence of statutory copyright for sound recordings will be discussed below. To be dealt with at this point is the problem facing the composer who seeks to benefit financially by manufacturing and selling sound recordings of the performance and at the same time retain his common law copyright in it.

Until 1950 such a course would have been safely open to him. Before the decision in *Shapiro, Bernstein & Co. v. Miracle Record Co.*,⁴² in that year, it was generally believed that the manufacture and sale of phonograph records of a performance of a work did not divest the composer of his common law copyright in the underlying composition.⁴³ Judge Igoe's statement that "production and sale of a phonograph record is fully as much publication as production and sale of sheet music,"⁴⁴ though clearly dictum, has been found persuasive in subsequent cases.⁴⁵

The *Miracle* rule, as later construed, is perhaps not so harsh as would first

38. *Ferris v. Frohman*, 223 U.S. 424 (1912); *Jerome v. Twentieth Century-Fox Film Corp.*, 67 F. Supp. 736, 739 (S.D.N.Y. 1946); *Waring v. Dunlea*, 26 F. Supp. 338, 340 (E.D.N.C. 1939) (dictum); *Metropolitan Opera Assoc. v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951); *Kaplan, Publication in Copyright Law: The Question of Phonograph Records*, 103 U. Pa. L. Rev. 469, 484 (1955); *Nimmer, Copyright Publication*, 56 Colum. L. Rev. 185 (1956).

39. *Mills Music, Inc., v. Cromwell Music, Inc.*, 126 F. Supp. 54, 69-70 (S.D.N.Y. 1954).

40. *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946); *McCarthy & Fischer, Inc. v. White*, 259 F. 364 (S.D.N.Y. 1919).

41. A. M. Shafter, *Musical Copyright* 130-131 (2d ed. 1939).

42. 91 F. Supp. 473 (N.D. Ill. 1950).

43. *Yacoubian v. Carroll*, 74 U.S.P.Q. 257 (S.D. Cal. 1947); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937). *But cf. RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 88 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940); *Blanc v. Lantz*, 83 U.S.P.Q. 137 (Cal. 1949).

44. *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473, 475 (N.D. Ill. 1950).

45. *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681, 682-83 (S.D. Cal. 1958) (dictum); *Mills Music Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54, 69-70 (S.D.N.Y. 1954) (dictum); *Biltmore Music Corp. v. Kittinger*, 29 Copy. Dec. 32 (S.D. Cal. 1954).

appear. The courts that have followed it have generally given it credence only to the extent it requires a divestitive publication of the recorded performance and not of the underlying composition. Aside from *Miracle*, only one case has dicta to the effect that the manufacture and sale of records works a dedication of the composition to the public.⁴⁶ The other cases often cited as following the *Miracle* rule⁴⁷ apply on their facts not to compositions but rather to arrangements of an already copyrighted work⁴⁸ or orchestral renditions of it.⁴⁹ In the latter case, Judge Learned Hand was careful to distinguish between abandonment of rights in the composition and in the performance.⁵⁰

Although this distinction would represent an aspect of security for the composer of conventional music who has not copyrighted his score, it raises difficult questions with regard to the new music. Performance of the new music is by nature inextricable from its composition. Indeed, analytically it is questionable whether such a work is anything more than a performance. Thus a court, in conceding that divestiture goes to the recorded performance alone, may well leave the composer with nothing, there being no evidence of a subsisting composition. Again, the closer he approaches musical convention by creating the minimum of a written score, the more secure will be the composer's rights.

This is not to say that the courts are uniform in viewing the manufacture and sale of records as constituting a divestitive publication of even the performance contained therein. At least three cases have held that placing recordings of a performance on sale does not dedicate the right to copy the record.⁵¹ These decisions rest on the rationale that as a recording is no more than a captured performance of the composition, the sale of records should not be treated otherwise than as public performance.⁵² The assumption that underlies this line of decisions—that there are protectable rights in a performance—will be explored below with regard to unfair competition.

STATUTORY COPYRIGHT I.

THE POSSIBILITY OF REGISTRATION UNDER THE PRESENT STATUTE

That the composer is precluded from preserving and statutorily protecting his work by making a sound recording of it was settled in 1908 when the Supreme Court held that a perforated music roll is not a "copy" of the musical composi-

46. *Mills Music, Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54, 69-70 (S.D.N.Y. 1954); *Nimmer*, *supra* note 38, at 192.

47. For a somewhat different view of this distinction, see *Nimmer*, *supra* note 38, at 191.

48. *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681, 682-83 (S.D. Cal. 1958); *Biltmore Music Corp. v. Kittinger*, 29 Copy. Dec. 32 (S.D. Cal. 1954).

49. *RCA Mfg. Co. v. Whiteman*, 144 F.2d 86, 88 (2d Cir. 1940), *cert denied*, 311 U.S. 712 (1940); *cf. Yacoubian v. Carroll*, 74 U.S.P.Q. 257 (S.D. Cal. 1947).

50. *RCA Mfg. Co. v. Whiteman*, 144 F.2d at 88.

51. *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955); *Gieseking v. Urania Records, Inc.*, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. 1956); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937); *cf. Corcoran v. Montgomery Ward & Co.*, 121 F.2d 572 (9th Cir. 1941). See generally *Kaplan*, *supra* note 38.

52. *Kaplan*, *supra* note 38, at 480. *But cf. Nimmer*, *supra* note 38, at 195-96.

tion recorded on it.⁵³ It is generally agreed in this country that a phonograph recording is similarly not a "visible expression" of the "ideas in the mind of the author,"⁵⁴ and hence is not registrable under the copyright law.⁵⁵ Although a liberal reading of section five of the present Act⁵⁶ might view recordings as registrable apart from the thirteen specifications of copyrightable works, neither the courts⁵⁷ nor the Copyright Office⁵⁸ have been disposed to such an interpretation. The courts have chosen not to follow the concurring opinion in *White-Smith Publishing Co. v. Appollo Co.*, where Justice Holmes wrote,

On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or if the statute is too narrow ought to be made so by a further act. . . .⁵⁹

The *White-Smith* decision is critical for the new music composer. The most economical way for him to preserve his non-notated work is by making a sound recording of it. The status of his common law copyright once a recording has been manufactured and sold has been rendered questionable by the *Miracle* rule. And, as under *White-Smith* statutory copyright is not available for sound recordings, he must look to other devices which will secure statutory rights for his non-notated work.

A. *Copyrighting a Transcript*

Against the legal problems engendered by the lack of a formative base in the new music is the compensating aspect of its catholicity, its ability to embrace other forms of art in its composition. Paradoxically it is this most modern characteristic that affords the new music its greatest chance for statutory copyright. If the composition incorporates other forms—for example, pantomime, monologue and dance—it may be amenable to registration in one of the other recognized art categories.

One tactic, then, would be to have someone transcribe the composition as

53. *White-Smith Publ. Co. v. Appollo Co.*, 209 U.S. 1, 17 (1908).

54. *Burrow-Giles Lithographic Co. v. Sarony*. 111 U.S. 53, 58 (1884). *Donoghue v. Allied Newspapers, Ltd.*, [1938] 1 Ch. 106, expresses the English view that "writing" is not limited to the physical act of putting something on paper. For a discussion of this problem as found in a modern context, see Meagher, *Copyright Problems Presented by a New Art*, 30 N.Y.U.L. Rev. 1081, 1085 (1955).

55. 37 C.F.R. § 202.8(b) (1959) provides: "A phonograph record or other sound recording is not considered a 'copy' of the compositions recorded on it, and is not acceptable for copyright registration."

56. 17 U.S.C. § 5 (1964) provides: "The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title. . . ."

57. *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955); W. Derenberg, *The Meaning of "Writings" in the Copyright Clause of the Constitution*, Copyright Law Revision Study No. 3, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the House Comm. on the Judiciary 86th Cong., 2d Sess. 74 (Comm. Print 1960).

58. Regulations of the Copyright Office, 21 Fed. Reg. 6021 (1956). See also, H. R. Rep. No. 2222, 60th Cong., 2d Sess. 10 (1909): "Section 4 [presently 5] is declaratory of existing law and use of the term 'writings' in it was not intended to alter the construction the courts had given it."

59. *White-Smith Publ. Co. v. Appollo Co.*, 209 U.S. 1, 19-20 (1908).

it is performed, describing the action in scenario form, noting musical passages as they appear. The resulting conglomerate might well shock the Register of Copyrights, but as it is merely an admixture of traditional notations there is no reason why it cannot be accepted for registration as a dramatico-musical composition⁶⁰ or as a simple musical composition.⁶¹ If there is a question as to which it is, it may be registered alternatively as one or the other⁶² and, in any case, there is no penalty for erroneous classification.⁶³

In this regard the creator of the new music stands in a better position than the composer of the more widely accepted electronic music whose work is devoid of dramatic trappings, is "indifferent in motive, originating in no psychology nor in dramatic intentions, nor literary or pictorial purposes."⁶⁴

B. *Copyrighting a Motion Picture*

The task of transcribing a new music concert on paper is a difficult one, accounting as it must not only for a wide range of actions but for a cacophony of sounds as well. An easier, though more costly, alternative would be in making a sound-synchronized film of the performance, registering it as a motion picture photoplay⁶⁵ or as a motion picture other than a photoplay.⁶⁶ The technique of filming a work and registering it under sections 5(1) or 5(m) is relevant to the other developing arts as well and therefore will be discussed below in some detail.⁶⁷

The addition of motion picture classifications to the Copyright Act by the Townsend Amendment of 1912⁶⁸ represents the last congressional extension of the statute. Under the terms of the Act, exhibition of copyrighted films of a new music performance without the copyright owner's consent would appear to constitute infringement of the owner's rights in the sound track as well as in the film in its purely visual aspect.⁶⁹

The spontaneous quality of the musical composition should pose no barrier to registration if it is filmed, as it is accepted doctrine that the courts will not

60. 17 U.S.C. § 5(d) (1964).

61. *Id.* § 5(e).

62. This was a technique employed and approved of by the Supreme Court in *Mazer v. Stein*, 347 U.S. 201 (1954).

63. 17 U.S.C. § 5 (1964).

64. Christian Wolff, *quoted in* J. Cage, *Silence* 68 (1961).

65. 17 U.S.C. § 5(1) (1964); 37 C.F.R. § 202.15(a) (1959); "This class includes published or unpublished motion pictures that are dramatic in character and tell a connected story, such as feature films, filmed television plays, short subjects and animated cartoons having a plot."

66. 17 U.S.C. § 5(m) (1964); 37 C.F.R. § 202.15(b) (1959): "This class includes published or unpublished nondramatic films such as newsreels, travelogs, training or promotional films, nature studies, and filmed television programs having no plot."

67. At least one motion picture has been deposited with the Register as the fixed form of a choreographic work. B. Varmer, *Copyright in Choreographic Works*, Copyright Law Revision Study No. 28, Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the House Comm. on the Judiciary, 86th Cong., 2d Sess. 96 (Comm. Print 1961).

68. Act of Aug. 24, 1919, c. 356, 37 Stat. 488; W. Derenberg, *supra* note 57, at 76.

69. *See* *Foreign & Domestic Music Corp. v. Michael M. Wyngate, Inc.*, 66 F. Supp. 82 (S.D.N.Y. 1946); *Famous Music Corp. v. Melz*, 28 F. Supp. 767 (W.D. La. 1939).

inquire into the artistic structure of a work to determine its copyrightability.⁷⁰ It appears to be a minority view that for a motion picture to be copyrightable it must have some dramatic basis.⁷¹ The prevailing rule is that since the motion picture film is itself a "writing"⁷² there need be no requirement of an underlying plot.⁷³

The composer's chief concern is with the protection of his musical composition and not the ancillary postures of his performers. Although the situation of the traditional film maker is the converse of this, it would seem that if he is protected in the background music to his film, so ought the composer be protected where the music is the *raison d'être* of the film. The question, then, is simply whether the exclusive rights that attach to the visual portion of the film adhere to the sound track as well. The status of motion picture sound tracks under the present law has been characterized as "a very difficult and special problem" since at the time "motion pictures were added to the list of copyrightable works in 1912 the talking picture, with integrated sound track, had not yet been invented."⁷⁴

The silence of Congress on the subject might be presumed to indicate its acceptance of the view that the rights accorded motion pictures in 1912 extend also to synchronized sound tracks. At least one case has accepted this extension by implication,⁷⁵ and one by dictum⁷⁶ and two others have held that copyright in a motion picture protects an original story sequence therein.⁷⁷ These last two decisions analogously apply to the situation where the sound track occupies as vital a position in the film as the story line.

Another case⁷⁸ held that the words, "exclusive moving picture rights" employed in a licensing contract made when "talkies" were not yet a popular genre, were sufficient to embrace not only motion pictures of the sort then known but also such technical improvements in motion pictures as might be developed during the term of the license, namely the term of the copyright.⁷⁹

It would of course be difficult to apply a case in contract squarely to the is-

70. See *supra* p. 358, and *supra* note 19.

71. *Vitaphone Corp. v. Hutchinson Amusement Co.*, 28 F. Supp. 526 (D.C. Mass. 1939).

72. *Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66 (D. Mass. 1933).

73. *Patterson v. Century Product, Inc.*, 93 F.2d 489 (2d Cir. 1937) (by implication); *Tiffany Product, Inc. v. Dewing*, 50 F.2d 911 (D. Md. 1931); *cf. Pathe Exchange, Inc. v. International Alliance of Theatrical Stage Employees*, 3 F. Supp. 63 (D.C.N.Y. 1932).

74. Ringer, *Unauthorized Duplication of Sound Recordings*, Staff of Senate Comm. on the Judiciary, 86th Cong. 2d Sess., Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights 4, 8 (Comm. Print 1961).

75. *Blanc v. Lantz*, 83 U.S.P.Q. 137, 142 (Cal. 1949).

76. *Jerome v. Twentieth-Century Fox Film Corp.*, 67 F. Supp. 736, 741-42 (S.D.N.Y. 1946), *aff'd*, 165 F.2d 784 (2d Cir. 1948).

77. *Loew's, Inc. v. Columbia Broadcasting Sys.*, 239 F.2d 532 (9th Cir. 1956), *aff'd*, 356 U.S. 43 (1958); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947).

78. *L.C. Page & Co. v. Fox Film Corp.*, 83 F.2d 196 (2d Cir. 1936).

79. *Id.* at 199.

sue of legislative intent when the question of protection in sound tracks is before the courts. Yet the reasoning involved is analogous and has been accepted by at least one court.⁸⁰ With the lack of controlling precedent other courts might be persuaded by language to the effect that "the development of a mechanism making it possible to accompany the screen picture with the sound of spoken words was but an improvement in the motion picture art. . . ."⁸¹

Under the present decisions, then, the position of the composer-film producer would appear tenable with respect to his vital interest in the sound track. Passage of the proposed revision bill would render his position even more secure. The bill regards the video and aural portions of the film as inextricable,⁸² and defines "motion pictures" as specifically including synchronized sound tracks.⁸³

With apparently secure rights in the sound track under the present law, and clear rights under the proposed revision, the composer who resorts to filming his work will find himself in a position of advantage with respect to the conventional composer. While profits for the traditional composer usually lie in the sale of recordings of his work, these profits are limited by the statute's compulsory licensing provision which is effective subsequent to the first recording.⁸⁴

As the film with appended sound track is not considered to be a mechanical recording,⁸⁵ the new music composer may profit from its exclusive use although "the extent of copyright protection for a sound track when used separately as a purely aural work is a . . . doubtful question."⁸⁶

In any case, it would appear that the composer could make a phono-recording from the copyrighted film for manufacture and sale although in this course he will necessarily be limited by the mechanical licensing provision. Employing this tactic, he would be in much the same position as his conventional colleague, the difference being only in the nature of the underlying copyrighted "writing" of the composition.

The device of obtaining copyright in a sound-synchronized motion picture is of use not only to the composer of new music but also to artists engaged in other areas. At least one film has been deposited with the Register as the fixed form of a choreographic work.⁸⁷ Jazz improvisationists could avail themselves of filming to preserve the rights in their fugitive compositions. Even the composer of electronic music might find a secure niche in the motion picture classification by filming a tape recorder playing his work.

80. *Jerome v. Twentieth-Century Fox Film Corp.* 67 F. Supp. 736 (S.D.N.Y. 1946), *aff'd*, 165 F.2d 784 (2d Cir. 1948).

81. *L. C. Page & Co. v. Fox Film Corp.*, 83 F.2d at 199.

82. Register of Copyrights, 89th Cong., 1st Sess., Copyright Law Revision, Part Six 22 (Comm. Print 1965).

83. *Id.* at 5.

84. 17 U.S.C. § 1(e) (1964).

85. *Jerome v. Twentieth-Century Fox Film Corp.*, 67 F. Supp. 736, 741-42 (S.D.N.Y. 1946); *Foreign & Domestic Music Corp. v. Licht*, 196 F.2d 627 (2d Cir. 1952) (by implication); *cf. Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260 (2d Cir. 1957); Comment, 26 Geo. Wash. L. Rev. 745 (1958), Comment, 46 Calif. L. Rev. 621 (1958).

86. Ringer, *supra* note 74, at 8.

87. B. Varmer, *supra* note 67, at 96.

The extent to which courts will sustain this sham is questionable. Yet, in order to overturn it they will have to face a profound issue of policy: how far may a judge go in determining what is the proper subject of a motion picture? The question clearly borders on the settled rule that the courts will not inquire into the artistic merit of a work in order to determine its copyrightability.⁸⁸ If any distinction is to be made it must be on the ground of the creator's purpose—whether it was primarily to create a video film with audio portions only secondary, or vice-versa. Such a distinction would be difficult of proof, and there is a serious policy question of whether it ought to be attempted at all.

STATUTORY COPYRIGHT II.

REGISTRATION OF A SOUND RECORDING UNDER THE PROPOSED REVISION

The proposed revision of the copyright law advances the current position by according statutory copyright to sound recordings.⁸⁹ If passed, it would bring American law into line with the law of England⁹⁰ and most other foreign jurisdictions.⁹¹ Yet the sound recording provision of the bill deals only imperfectly with the difficulties of protection posed by the new music. It finesses certain problems but leaves other, more troublesome ones, untouched.

The bill would provide for the registration of sound recordings in a separate category and afford the copyright owner the right "to duplicate the sound recording in the form of phonorecords that directly or indirectly recapture the actual sounds fixed in the recording."⁹² The revision approach would distinguish the sound recording, as a copyrightable work,

from any musical, literary or dramatic works that are reproduced on "phonorecords." Thus a phonorecord (a disk or tape, for example) of a popular song would usually constitute a reproduction of two copyrighted works under the bill: the song and the sound recording of it.⁹³

In this sense the revision bill embodies the legacy of the *Capitol Records—Gieseking* line of decisions discussed above,⁹⁴ which recognizes a distinction between the underlying composition and the performer's contribution to it of 'novel intellectual or artistic value.'⁹⁵ The prominent trend is clearly directed to

88. See *supra* p. 358, and *supra* note 19.

89. Register of Copyrights, *supra* note 82, at 51.

90. 1 & 2 Geo. V c. 46, § 19(1) (1911).

91. See 1 S. Ladas, *The International Protection of Literary and Artistic Property* §§ 97, 98 (1938).

92. Register of Copyrights, *supra* note 82, at 51. As early as 1908 Nathan Burkan argued for this sort of statutory provision. For an extract from Mr. Burkan's argument see Diamond, Memorandum Submitted in Behalf of Decca Records, Inc. in Connection with Proposed Copyright Legislation (1949) (unpublished paper on file in Columbia Law School Library). Later scholars were also impressed with the need for reform. See Chafee, *Reflections on the Law of Copyright: II*, 45 Colum. L. Rev. 719, 734-37 (1945); Derenberg, *supra* note 57, at 102.

93. Register of Copyrights, *supra* note 82, at 49.

94. See *supra* p. 362, and *supra* note 51.

95. *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 441, 194 A. 631, 639 (1937).

protection of "the performer's rendition or arrangement, or the record company's interpretation, or both and not the music itself."⁹⁶

Thus the proposed revision avoids the problem posed by the new music: how to protect the underlying composition when it is not reduced to fixed notation? Under the bill the composer would be protected from unauthorized duplication of his recording but query whether this is a sufficient shelter inasmuch as the underlying composition might be copied freely.

What has been said above⁹⁷ with regard to the inextricability of performance from composition in the new music is equally applicable here. Although a work of the new music may be conceptually viewed as totally a performance with no underlying composition, the protection of recorded performances under the proposed bill is not a complete protection for the composer. A pirate could imitate every sound of the composer's record and yet remain without the sanctions of the bill. All that he is prevented from doing is copying, dubbing the record itself. The revision is in this respect clearly addressed to protection of the unique sounds produced by the orchestra or performer; the underlying basis of the sounds—the score—is not within its scope. So, although this underlying basis will in the case of the new music be created by the performer himself, copyright in the recording will attach only to the unique rendition.

This distinction between performance and composition is in the case of the new and electronic music logically impossible to make. Yet by looking at the problem from the remedial side, as one of whom protection is afforded against, and not as one of the nature of the subject protected under the bill, logic is clear that all that is protected against is the infringer who dubs the recording.

The impediment thus posed to the composer's rights is all the more serious as the revision is also explicit in denying an exclusive right of public performance in sound recordings.⁹⁸ The explanation given is that recognition of such a right "would make the general revision bill so controversial that the chances of its passage would be seriously impaired."⁹⁹

RIGHTS OUTSIDE THE STATUTE: THE DOCTRINE OF UNFAIR COMPETITION

Equity initiated the doctrine of unfair competition¹⁰⁰ which, in its modern sense, will require the injunction of any "effort to profit from the labor, skill,

96. W. Derenberg, *supra* note 57, at 78.

97. *See supra* p. 355.

98. One writer has made the suggestion that, under the proposed revision, sound recordings, copyrighted by the statutory author, which are not copyrighted by the author in another category should have exclusive performance rights and whatever other rights are given to authors who register their works in other categories. Savelson, *Electronic Music and the Copyright Law*, ASCAP Copyright Law Symposium Number Thirteen 133, 163 (1964).

99. Register of Copyrights, *supra* note 82, at 51.

100. *See* International News Service v. Associated Press, 248 U.S. 215 (1918). *See generally* Feldman, *The Relationship Between Copyright and Unfair Competition Principles*, ASCAP Copyright Law Symposium Number Ten 266 (1959); Handler, *Unfair Competition*, 21 Iowa L. Rev. 175 (1936); Comment, 33 So. Calif. L. Rev. 190 (1960).

expenditures, name and reputation of others. . . .¹⁰¹ Through this doctrine the courts, in exercising a "pragmatic spirit,"¹⁰² seek to fill the interstices occasioned by the application of an outdated copyright law in a culturally and economically expanding society.¹⁰³

Characteristics of the new music that would be sources of difficulty under a statutory application are uniquely accommodated by the unfair competition doctrine. One problematical aspect is the music's spontaneous quality, its aggregation of individual performances independent of any underlying score. There is also the difficulty posed by the fundamental nature of the new music: its emphasis upon the initial creative act rather than upon the final work.

A. *Unfair Competition and the Spontaneous Performance*

Composition of a spontaneously created new music work is conceptually inextricable from its performance. This quality was discussed above with regard to its divestitive result under the rule of *Shapiro, Bernstein & Co. v. Miracle Record Co.*¹⁰⁴ To be noted here is the converse legal status effected by unfair competition. The doctrine accords rights in a performance and, if a new music work is regarded as solely a "performance," will recognize in it an intellectual property at the time of its creation.

In *Waring v. WDAS Broadcasting Station, Inc.*¹⁰⁵ it was held that the owner and conductor of an orchestra had a recognizable property right in his orchestra's unique rendition of copyrighted works, and the court enjoined a radio station from broadcasting recordings of the performance.¹⁰⁶ Similarly, courts have recognized the property right of a pianist in his performance,¹⁰⁷ of

101. *Metropolitan Opera Assoc. v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 796, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951). *Accord*, *National Tel. News Co. v. Western Union Tel. Co.*, 119 F. 294 (7th Cir. 1902); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937); *Lehrenkrauss v. Universal Tours*, 262 N.Y. 332, 186 N.E. 802 (1933); *Fisher v. Star Co.*, 231 N.Y. 414, 132 N.E. 133 (1921); *Madison Square Garden Corp. v. Universal Pictures Co.*, 255 App. Div. 459, 7 N.Y.S.2d 845 (1st Dep't 1938). *But see* *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1930); *see also* *Handler, supra* note 100, at 190-91.

102. *Yankwich, Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 480 (1951).

103. *See* *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937): "[T]hese latter day inventions make demands upon the creative and ever-evolving energy of equity to extend that protection so as adequately to do justice under current conditions of life." *Id.* at 435, 194 A. at 632.

104. 91 F. Supp. 473 (N.D. Ill. 1950). *See supra* p. 361.

105. 327 Pa. 433, 194 A. 631 (1937).

106. *Accord*, *RCA Mfg. Co. v. Whiteman et al.* 114, F.2d 86, 88 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940) (dictum); *Waring v. Dunlea*, 26 F. Supp. 338, 340 (E.D.N.C. 1939) (dictum); *Fontiopia, Ltd. et al v. Bradley*, 171 F. 951 (C.D.E.D.N.Y. 1909). *But cf.* *G. Ricordi & Co. v. Haendler*, 194 F.2d 914, 916 (2d Cir. 1952); *Miller v. Universal Pictures Co.*, 11 A.D.2d 47, 201 N.Y.S.2d 632 (1st Dep't 1960), *aff'd*, 10 N.Y.2d 972, 180 N.E.2d 248, 224 N.Y.S.2d 662 (1961); *Glory Records, Inc. v. Radio Corp. of Am.*, 213 N.Y.S.2d 875 (Sup. Ct. 1961); *Comment*, 25 Albany L. Rev. 167 (1961).

107. *Gieseking v. Urania Records, Inc.*, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. 1956).

an opera company in its productions,¹⁰⁸ and of a jazz artist in his improvisations.¹⁰⁹

In light of its protective concern for performance, for the doctrine of unfair competition to apply to a new music work it will be necessary for the courts to view the composition as solely an aggregate of performances with rights vesting in the conductor-composer.¹¹⁰ The absence of a written score will thus be to the benefit of the composer as it renders the work more a performance than a traditional composition.¹¹¹ In this it may be seen that the considerations which apply in the area of unfair competition are different from those applicable to the question of divestitive publication by recording where the closer the composer approached the bounds of conventional composition the more tenable his position became.¹¹²

It is not clear whether the courts will require the existence of an underlying composition as a condition precedent to finding rights in performance of it. There is no reason for them to do so and, indeed, traditional considerations of equity might well extend protection to the new music composition as a unitary whole apart from any distinctions based on performers' rights.¹¹³

B. *Unfair Competition and Droit Moral: Protection of the Artist*

The coincidence of unfair competition rules with the needs of the new music composer is more than fortuitous; it suggests a deeper regard of the doctrine for the initial creative act as opposed to the statutory emphasis upon the final work. A concern for the unique aspects of performance is indicative of a concern for the performer himself. In this respect, the implicit tendency of unfair competition approaches the explicit attitude of the French doctrine of *droit moral*.

108. Metropolitan Opera Assoc. v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 797, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951).

109. Granz v. Harris, 98 F. Supp. 906 (S.D.N.Y. 1951), *aff'd in part and rev'd in part, on other grounds*, 198 F.2d 585 (2d Cir. 1952).

110. Cf. Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631 (1937).

111. This was the result in a case involving recordings of jazz performances. Granz v. Harris, 98 F. Supp. 906 (S.D.N.Y. 1951), *aff'd in part and rev'd in part, on other grounds*, 198 F.2d 585 (2d Cir. 1952).

112. The courts' language is in this area largely repetitive of their considerations in another respect: whether the manufacture and sale of records constitutes a divestitive publication of the performance therein. An assumption that rights do inhere in performance would appear essential to a conclusion that rights can be divested. Perhaps, though, the doctrine of unfair competition represents not a step preliminary to this conclusion but, rather, the opposite side of the *Miracle* rule as it has been construed in later opinions. The *Miracle* position may reflect a deeper dissatisfaction with unfair competition's doctrine that rights can exist in a performance. The dissatisfaction remains implicit, yet the courts following *Miracle* achieve an equal result upon a technically supportable basis.

113. New music composers, with their taste for the macabre, might pick up a trick or two by simply looking at the often weird situations with which equity has had to deal in the dramatic field. See, e.g., Rush v. Oursler, 39 F.2d 468 (S.D.N.Y. 1930) (murder in the audience); Green v. Luby, 177 F. 287 (S.D.N.Y. 1909) (vaudevillian presenting songs and recitations while changing costume).

In French law the work of art is viewed as a consolidation of the personality and thoughts of the creator.

French courts . . . have built a body of law, now formally recognized in the 1957 Copyright Act, which enunciates the rule that certain rights clearly attached to the personality and reputation of the creator remain with him despite a complete and total alienation of his work—*les droit moraux*. . . .¹¹⁴

The thrust of both doctrines—*droit moral* and unfair competition—is dual.¹¹⁵ On the one hand, the French doctrine would clearly parallel unfair competition in locating rights in performance alone.¹¹⁶ Secondly, as French law frees the artist's "right to create" from possible incursion,¹¹⁷ so does unfair competition forbid the infringer "to reap where it has not sown."¹¹⁸ The second proposition is simply this: that every step in the artistic process—and not merely the end product to which the statute is directed—is given legal protection under both doctrines.

It is questionable whether discussion of the saving thrust of unfair competition doctrine is today of more than academic significance. Two recent Supreme Court decisions,¹¹⁹ in the course of dealing with patent issues, dealt strong dicta to the effect that state court use of the doctrine to afford copyright-like protection must be restricted.¹²⁰

Any room for state court fashioning of interstitial remedies that has not been foreclosed by the decisions in *Sears* and *Compco* would be completely eliminated by passage of the copyright revision bill in its present form. Under

114. Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law*, ASCAP Copyright Law Symposium Number Eleven 1, 13 (1962).

115. Roeder, *The Doctrine of Moral Right: A Study on the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554, 563, 577-78.

116. *Id.* at 577-78. "[I]nsofar as the performing artist is deemed a creator, some measure of protection to his moral right should be accorded."

117. *Id.* at 558.

118. International News Service v. Associated Press, 248 U.S. 215, 239 (1918).

119. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

120. Federal and state courts have reacted variously to the *Sears-Compco* rule. After dismissing the decisions' broad thrust by way of footnote, the Second Circuit Court of Appeals gave effect to New York's extensive rules against misappropriation in the commercial context. *Flexitized, Inc. v. Nat'l Flexitized Corp.*, 335 F.2d 774, 781 n.4 (2d Cir. 1964), *cert. denied*, 380 U.S. 913 (1965). Its pre-emptive effect has been stretched farther than logic, and probably the Court, would demand, *Columbia Broadcasting System, Inc. v. De Costa*, 377 F.2d 315 (1st Cir.), *cert. denied sub. nom. De Costa v. Columbia Broadcasting System*, 389 U.S. 1007 (1967). One state court, while acknowledging the bar posed by *Sears* and *Compco* to state jurisdiction in unfair competition, accorded an equal remedy to an architect by determining that he had not published his plans and so was still entitled to common law copyright, *Edgar H. Wood Assoc., Inc. v. Skene*, 197 N.E. 2d 886 (1964). Through this latter technique an ambitious state court could substantially circumvent the *Sears-Compco* rule by characterizing the issue of divestitive publication as a state rather than a federal question and then radically extend the criteria determinative of publication. See *King v. Mister Maestro, Inc.* 224 F. Supp. 101 (S.D.N.Y. 1963). This loophole was expressly left open by the Court. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 n.7 (1964).

the "pre-emptive clause" of the bill¹²¹ "to the extent that a right against 'unfair competition' is merely copyright by another name, section 301 is intended to abolish it as a common law cause of action."¹²²

The federal pre-emption of state equity under the bill would

be complete with respect to any work coming within the scope of the bill. . . . For example, since sound recordings are now to be made copyrightable works, it would not be possible to afford them any rights of public performance under State law even though they are denied these rights under section 112 of the statute.¹²³

On the other hand,

the pre-emptive effect of section 301 is not intended to extend to unfixed works such as, for example, a piece of choreography that has never been notated or filmed . . . a musical composition that has been performed from memory but never written down or recorded. These would continue to be protected indefinitely at common law until fixed in some form from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device.¹²⁴

If the proposed bill is passed with Section 301 intact, the implications for the composer of new music are clear. By the very act of preserving his work, fixing it in some reproducible form—most economically in a sound recording—he will be forced to accept the statute as his sole source of protection. The proposed revision's failure to afford him complete protection in the sound recording has already been adverted to.¹²⁵

CONCLUSION

It has been suggested that a revision of American copyright law adopt one analogue of *droit moral*.¹²⁶ It would be quixotic to urge a complete embrace of the French doctrine or, indeed, of any system so fundamentally antithetical to

121. Register of Copyrights, 89th Cong., 1st Sess., Copyright Law Revision, Part Six 95 (Comm. Print 1965).

122. *Id.* Courts in this country are cognizant of the doctrine of *droit moral* and the terms in which they address it savor of the language of unfair competition. *See e.g.*, *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947), *cert. denied*, 335 U.S. 813 (1948); *Seroff v. Simon & Schuster, Inc.*, 6 Misc. 2d 383, 162 N.Y.S.2d 770 (Sup. Ct. 1957), *aff'd mem.*, 12 A.D.2d 475, 210 N.Y.S.2d 479 (1st Dep't 1960), *motion for leave to appeal denied*, 12 A.D. 2d 755, 210 N.Y.S.2d 1000 (1st Dep't 1961). Although Section 301 speaks literally in terms of unfair competition alone, it is difficult to suppose that the doctrine could be resurrected in the guise of moral right to afford protection to the composer of new music.

123. *Id.* at 84.

124. *Id.* Section 301 thus not only follows the *Sears-Compco* line in barring state jurisdiction in unfair competition but, as well, would obliterate the common law copyright handle left available by the Court. *See supra* note 120. By having the federal statutory scheme attach from the moment a work is fixed in a "tangible medium of expression," questions of common law copyright can arise only in the marginal case. Unlike the situation allowed for by common law copyright, hardly a colorable argument can be made that "tangible medium of expression" poses a state rather than a federal question.

125. *See supra* p. 369.

126. Hauser, *supra* note 114. The writer would restrict alteration to the point of coincidence with the *droit de suite*, a discrete economic equivalent of moral right which is extended to creators in only the visual arts.

the cultural emphasis—upon the work and not upon the creator—which underlies the American law. This single trend in the arts, and particularly in the new music, is far too tentative to justify, of itself, such an alteration.

Yet a compromise can, and should, be effected through congressional endorsement of the doctrine of unfair competition. Recognition of the doctrine's evolutionary capacity would assure the statute of a longer life; criticisms that may come in ten or twenty years, asserting the statute to be an anachronism, unfit to the then existing cultural condition, could well be anticipated by allowing room for equity to deal with the new arts on a day to day basis.

Even today, enactment of the proposed revision with section 301 intact will create a curious paradox. The new music composer, situated at the most advanced boundary of present culture, will find that his rights were more secure under the old regime than under the new. In both he has equivalent access to registration of his work as a dramatico-musical composition or motion picture. It is under the new statute that he will necessarily be denied total recourse to the protective influence of equity.

Pre-emption of state jurisdiction in unfair competition may add some measure of order to a difficult and confused area. But any such benefit is clearly outweighed by the stultifying effect such an exclusion must have upon this shelter of the law which, in its traditional reflection of changing economic and social conditions, "will not countenance a state of moral and intellectual impotency."¹²⁷

127. Metropolitan Opera Assoc. v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 802, 101 N.Y.S.2d 483, 498 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d, 795 (1st Dep't 1951).

