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INTERPRETATIVE RIGHTS OF PERFORMING ARTISTS

Nathan Bass*

HAS THE PERFORMING ARTIST—THE SINGER, THE ACTOR, THE MUSICIAN, THE SPEAKER—ANY LEGAL RIGHTS IN HIS PERFORMANCE?

With the advance of radio and phonography, problems once speculative have become acutely real to the performer. The radio has enlarged his audience; the phonograph record, having captured his performance, makes it reproducible at will.¹ His market is broader—for his is a commodity of a kind—and his earnings in consequence are greater. His economic safety, however, depends on his ability to control renditions of his performance, for once they get out of hand his audience may lose its interest in him. In the business of entertainment lost favor is the handmaiden of dwindling returns.

The performer who broadcasts over the radio is under a multiple risk. His performance may be pirated by an interloping broadcasting station and rebroadcast;² picked up by a receiving apparatus and transmitted through loudspeakers or sent by wire to other receiving sets as a part of the original receiver's business;³ recorded⁴ and the records sold to the public⁵ and used in the home or in radio broad-

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¹Music rolls take the category of phonograph records in this discussion. Motion pictures are not considered as they are copyrightable under the Act of March 4, 1909, c. 320, sec. 5, 35 Stat. 1076; as amended by the Act of August 24, 1912, c. 356, 37 Stat. 488, 17 U.S.C.A. 30. Electrical transcriptions, which are made exclusively for broadcast purposes, are also excluded.

²Rebroadcasting is prohibited in the United States by the Communications Act of June 19, 1934, c. 652, sec. 325, 48 Stat. 1091, 47 U.S.C.A. 44 (1936 cum. pocket part). The practice in Europe is discussed in Alfred M. Shafter, *Musical Copyright* (Chicago, 1932) at 276 and n. 23. As to its currency in South America, Central America, and the West Indies, see *Variety*, November 3, 1937, p. 41.

³Cf. *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 51 S.C. 410 (1931) and see n. 5; *Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co., Inc.*, 19 Fed. Supp. 1 (1937).

⁴Unauthorized Records of Performance (1926) 160 L.T. 10; Carl Zollmann, *Law of the Air* (Milwaukee, 1927) at 124; Louis G. Caldwell, *Piracy of Broadcast Programs* (1930), 30 Col. L. Rev. 1087; Shafter, *op. cit.*, supra note 2, at 272-4.

⁵Illustrative of the practice: Recording of the abdication speech of King Edward VIII and public sale of the records.

casts, theatres, restaurants, coin-operated machines, and the like; or dubbed on sound tracks and used in connection with motion pictures.⁶

His consent to these practices is not asked, nor is any compensation paid him beyond the price of the initial broadcast. Should he allow his performance to be recorded, he may not anticipate the endless commercial plugging which may, as it has been put, wear out his welcome. His dilemma is much like that of the Sorcerer's Apprentice who, being almost engulfed in the rush of water let loose by his own incantations, forgot the magic word which would stop it. . . .

These problems have been the subject of a great deal of speculation in this country and abroad. Many divergent theories have been suggested to relieve the performer of the hazards which modern invention has put in his way.⁷ This is certain: in the situations recounted, any remedy at law would more often than not be inadequate and damages conjectural. Should the performer seek the protecting aegis of equity and the injunctive process, he would very likely be stopped *in limine* and asked by what token he sought to enter. Equity is loath to recognize a new face, whatever its moral aspect, unless it comes garbed in old clothes. It would demand at least the indicia of a common law right before assuming jurisdiction.⁸

A reasonably analogous precedent will be found in the struggle of the booksellers to establish a common law right in intellectual and artistic works.⁹ By what has been called the "custom of the realm" and principles of "natural justice," rights in such works were accorded a certain sanction in England's chancery courts of the eighteenth century.¹⁰ *Tonson v. Collins*¹¹ was the first case at law, but this was dismissed because it was collusive. Afterwards, *Millar v. Taylor*¹² established a perpetual common law right. Not until 1774, however, in *Donaldson v.*

⁶Shafter, *op. cit.*, *supra* note 2, at 274; and see testimony of Samuel Tabak in Fred Waring v. WDAS Broadcasting Station Inc., *loc. cit.*, *infra* note 16, Record 85a.

⁷See Stephen Davis, *The Law of Radio Communication* (New York, 1927) at 147-56. Cf. Louis G. Caldwell, *The Copyright Problems of Broadcasters* (1932) 2 J. Radio L. 287; Same, *International Protection of Broadcasters Against Commercial User of their Programs* (1932) 2 J. Radio L. 479; Brooke Claxton, *Protection Against the Unauthorized Use of A Broadcast in Canada* (1932) 2 J. Air L. 653, mainly oriented from the broadcaster's viewpoint. And see Robert Homburg, *Legal Rights of Performing Artists* (New York, 1934) and Addendum thereto by Maurice J. Speiser; Note (1936) 7 Air L. Rev. 122; *supra* note 4.

⁸2 Lewis' Blackstone's Commentaries (Phila., 1922) 868, and see n.29; Augustine Birrell, *The Law and History of Copyright in Books* (New York, 1899) at 10-23, 102-138.

⁹The publishers of the Stationers' Company (a guild), not the authors, took up the cudgel; "the fact is that after first publication the British author usually disappeared, or if he did reappear, it was in the pillory." Birrell, *op. cit.*, *supra* note 8, at 23.

¹⁰Lord Mansfield, in *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (1769), referred to these cases: (1) *Webb v. Rose* (1732); (2) *Pope v. Curl* (1741); (3) *Forrester v. Waller* (1741); (4) *Duke of Queensberry v. Shebbeare* (1758); all cited 4 Burr. 2330-31. See Birrell, *op. cit.*, *supra* note 8, at 114, n. 1, and 103-105. And see further: (1) *Eyre v. Walker* (1735); (2) *Walthoe v. Walker* (1736); (3) *Tonson v. Walker* (1751); (4) *Tonson v. Walker & Merchant* (1751); all cited 4 Burr. 2325, 98 Eng. Rep. 213.

¹¹W. Bl. 301, 96 Eng. Rep. 169 (1760).

¹²4 Burr. 2303, 98 Eng. Rep. 201 (1769).

Becket,¹³ did the House of Lords consider the question. It confirmed the right but held it to be superseded by the Statute of Queen Anne.¹⁴ That was before the "creative energy of chancery"¹⁵ had begun to exploit the doctrines of Equitable Servitudes on Chattels, Unfair Competition, and the Right to Privacy. In *Fred Waring v. WDAS Broadcasting Station, Inc.*,¹⁶ the Supreme Court of Pennsylvania considered the case of the performing artist.

WARING *against* WDAS

In 1932 Waring's Pennsylvanians, a popular orchestra conducted by Fred Waring, made two records of musical compositions for RCA Victor Company, with the consent of the copyright owners. It was agreed that the records should bear the notice: "Not licensed for radio broadcast." The records were sold by Victor to a distributor who sold them to a retailer who sold them to the defendant. The only notice to the defendant of the restrictive use was the legend appearing on the records. The defendant, which operated a broadcasting station in Philadelphia, played the records on a sustaining program, announcing them to be mechanical recordings.¹⁷ Fred Waring, the plaintiff, sought an injunction against their use for broadcasting or any other commercial purpose. The lower court granted the injunction¹⁸ and its decree, on appeal, was affirmed by the Supreme Court.

The specific problem of the performer was admittedly one of first impression in this country and England. Taking a broad ambit, the case touched four distinct branches of legal thought. The majority opinion¹⁹ held that (1) the performing artist has a property right in his performance in the nature of common law copyright; (2) the legend created an equitable servitude on the use of the records which is enforceable against a purchaser with notice; (3) the defendant unfairly competed with the plaintiff although there was lacking the element of public deception. A concurring opinion²⁰ declared that (4) the unauthorized use or diversion of a performance could be restrained under the principle of the right to privacy. On all four grounds the case has implications which may well go beyond its special facts and the boundaries of the state. The discussion which follows is based on this convenient division of the problem.

¹³2 Bro. P. C. 129, 1 Eng. Rep. 837 (1774).

¹⁴8 Anne c. 19 (1709): the first copyright statute ever enacted.

¹⁵Zechariah Chafee, Jr., *Equitable Servitudes on Chattels* (1928) 41 Harv. L. Rev. 945.

¹⁶327 Pa. 433, 194 A. 631 (1937). See Notes (1937) 51 Harv. L. Rev. 171; 86 U. of Pa. L. Rev. 217.

¹⁷As required by the Rules and Regulations of the Federal Communications Commission.

¹⁸Per Harry S. McDevitt, P. J., in 27 D. & C. 297 (1936).

¹⁹Per Horace Stern, J.

²⁰Per George W. Maxey, J.

I

THE PROPERTY RIGHT

What is commonly, if loosely, called common law copyright²¹ recognizes a right of property in the product of mental labor.²² If intellectual conceptions²³ be considered the genus of this type of property, literary productions may be said to be a species, the first,²⁴ of that genus. The copyright laws have enlarged the scope of their protection to admit other species, such as letters,²⁵ maps,²⁶ paintings,²⁷ engravings,²⁸ dramatic²⁹ and musical compositions.³⁰ The rendition of a musical or other work requires mental effort and interpretative skill, good or bad, and cannot in principle be distinguished from these other species of property. In postulating the performer's right the court made clear its reliance on this analogy.

The right is in the performance and not in the record of it. Although subjects of property consist of material substance as a rule, corporeality is not essential. The performance can be identified—and no more is required.³¹ This right is a true monopoly, giving its owner absolute control over the use of his product until it has been published.³² Any invasion of it before publication would be unlawful. Where the performer makes no record of his performance, the theory of redress is thus indicated.

II

Not every performance, but only such as are "unique," "distinctive," "artistic," or "creative" are made the subjects of property. There seems to be no

²¹"Copyright" has a dual sense: (1) The right to multiply copies. (2) The right in copy, as exemplified in a printer's call for an author's copy. Multiplication of copies is associated with the statutory right. Since common law copyright allows any use of a product before general publication, the term is obviously a misnomer. However, it has the warrant of time and fashion. See *Jefferys v. Boosey*, 4 H. L. C. 815, 10 Eng. Rep. 681 (1854); Richard R. Bowker, *Copyright: Its History And Its Law* (New York, 1912) at 1.

²²*Palmer v. DeWitt*, 47 N. Y. 532 (1872); *Aronson v. Baker*, 43 N. J. Eq. 365, 12 A. 177 (1888).

²³*Holmes v. Hurst*, 174 U. S. 82, 19 S. C. 606 (1899).

²⁴See *supra* note 10.

²⁵*Pope v. Curl*, 4 Burr. 2330, 98 Eng. Rep. 216 (1741); *Dennis v. Le Clerc*, 1 Mart. 297 (La. 1811); *Folsom v. Marsh*, Fed. Cas. No. 4901, 2 Story 100 (1841); *Dock v. Dock*, 180 Pa. 14, 36 A. 411 (1895); *Baker v. Libbie*, 210 Mass. 599, 97 N. E. 109 (1912).

²⁶*Commonwealth v. Desilver*, 3 Phila. 31 (1858); *Rees v. Peltzer*, 75 Ill. 475 (1874).

²⁷*Parton v. Prang*, Fed. Cas. No. 10,784, 3 Cliff. 537 (1872).

²⁸*Prince Albert v. Strange*, 2 DeG. & Sm. 652, 64 Eng. Rep. 293 (1849).

²⁹See *supra* note 22.

³⁰The "Iolanthe" case, 15 Fed. 439 (1883); *Aronson v. Fleckenstein*, 28 Fed. 75 (1886).

³¹Cf. *Eaton S. Drone*, *A Treatise on the Law of Property in Intellectual Productions* (Boston, 1879) at 6, 98.

³²*Bartlett v. Crittendon*, Fed. Cas. No. 1076, 5 McLean 32 (1849); *Jefferys v. Boosey*, *loc. cit.*, *supra* note 21; *Holmes v. Hurst*, *loc. cit.* *supra* note 23; *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15 (1906).

cogent reason for the qualification. The law of copyright has developed away from the notion that only artistic works may secure protection.³³ Property in certain generic products of the the mind depends on intrinsic worth but little more than property in the basest article of possession. Originality is required,³⁴ but in such a case this means no more than that the performance must be identifiable as the claimant's. The position that there is property in *any* performance is ably supported by Justice Maxey in his concurring opinion, and his view seems consonant with principle. Certainly it meets the conception of literary property at the height of its development.

III

The Waring contention that the performer's right survives publication because the Copyright Act gives him no protection was rejected.³⁵ The court patently intended to keep it at a parity with the right accorded the creator of literary property. Publication was therefore a real issue. The court distinguished between general publication, which forfeits the right, and limited publication, which does not. It found that only a limited publication had taken place, thereby preserving to Waring his common law rights. If this were so, the decision may well have rested upon this holding. Any unpermitted use of the record would have infringed his rights and justified the injunction. The elaborate discussion of equitable servitude on chattels and unfair competition was then no more than dictum. *But was the publication limited?*

General publication is said to be such a dissemination or use of a product as shows an intention to dedicate it to the public.³⁶ The term takes on nuances of meaning which depend upon such variable factors as the type of product involved³⁷ and the nature of the restriction imposed.³⁸ Performance itself is not publication,³⁹ for then the performer's right would be destroyed at the moment of its creation. Record the performance, however, and publication will be determined by the disposition which is made of the record. Here it was sold to the public: an act which, in the case of books, amounts to general publication.⁴⁰ It

³³By no means inclusive: *Henderson v. Tompkins*, 60 Fed. 758 (1894); *Bleistein v. Donaldson Lith. Co.*, 188 U. S. 239, 23 S. C. 298 (1903); *Hein v. Harris*, 175 Fed. 875 (1910) and see *Drone*, op. cit., supra note 31, at 211.

³⁴*Burrows-Giles Lith. Co. v. Sarony*, 111 U.S. 53, 4 S.C. 279 (1884); *Fisher v. Dillingham*, 298 Fed. 145 (1924); *Victor Talking Mach. Co. v. George*, 69 Fed. (2d) 871 (1934).

³⁵See the discussion in *Drone*, op. cit., supra note 31, at 116-120. The argument is sound on authority, but stands little chance of judicial approbation in the United States as a matter of principle.

³⁶*Werckmeister v. Amer. Lith. Co.*, 134 Fed. 321 (1904).

³⁷*Universal Film Co. v. Copperman*, 212 Fed. 301 (1914).

³⁸See supra note 36.

³⁹*Ferris v. Frohman*, 223 U. S. 424, 32 S. C. 263 (1912); *Brown v. Ferris*, 122 Misc. 418, 204 N. Y. S. 190 (1924).

⁴⁰One sale is enough: *Wheaton v. Peters*, 8 Pet. 591 (1834); *Stern v. Remick*, 175 Fed. 282 (1910).

was argued that the restrictive notice on the record limited the publication and the court took this view, presumably on the ground that the restriction showed an intent on Waring's part not to release his rights to the public.

The court's rationale seems to depend on the fact that the restriction was a reasonable one. Reasonableness may be important where the validity of an equitable servitude on chattels is in question, but it has no place where publication is the point at issue. The copyright owner may impose any restriction, no matter how frivolous or unreasonable, and be protected so long as his conduct does not accomplish a general publication. Any other conclusion would not be compatible with the performer's monopoly.

The nature of the restriction is material, however, if in some way it limits the dissemination of the product, thereby indicating there was no intention to abandon it to the public. Thus, a restriction which confines the dispersal of the records to a class, such as one's friends,⁴¹ may limit the publication. But a sale of records which is so indiscriminate that it may reach millions of persons is hardly limited by a notice which seeks to prevent their use by radio stations.⁴² The plaintiff's intention to retain his rights is unavailing in the face of what he did. The law must look to his conduct, not to his state of mind.⁴³

Restrictions which affect publication are not in the same class as restrictions on the use of chattels. Intrinsicly they are unrelated legal concepts, while historically copyright preceded the equitable servitude by more than a hundred years. To their consideration together in one section, from a common angle, may be ascribed the unfelicitous result on this point. The cases designated by the court as "early cases"⁴⁴ appear to control the question. Only *Universal Film Mfg. Co. v. Copperman*⁴⁵ may justify a momentary doubt.

The facts of this case were as follows: The Nordisk Company made a motion picture film in Denmark and sold prints to purchasers who in effect agreed to limit their exhibition to the country where the sale took place. The defendant bought the film in England, without notice of the restriction, and showed it in the United States. Nordisk later copyrighted the film in this country and assigned its rights to the plaintiff, who sought to enjoin the defendant's exhibition.

The district court held that the sale of the films in Europe constituted a general publication; and since the notice of copyright was omitted, the copyright was thereby invalidated. The bill was accordingly dismissed. It would appear from the opinion that the plaintiff's counsel conceded general publication. The Circuit Court of Appeals affirmed the decision on appeal, but on different grounds.

⁴¹See supra note 28.

⁴²An effective restriction must limit *both* the use and the dissemination: 13 C. J. 981-2.

⁴³See: (1879) Drone, op. cit., supra note 31, at 290-1; (1915) 6 R. C. L. 113; (1917) 13 C. J. 981-2; Arthur W. Weil, *American Copyright Law* (Chicago) at 117-53; (1936) Leon H. Amdur, *Copyright Law and Practice* (New York) at 358-365.

⁴⁴327 Pa. at 444, 194 A. at 636.

⁴⁵218 Fed. 577 (1914), aff'g 212 Fed. 301 (1914).

It held that the sale of the films carried an implied license to exhibit them, but did not forfeit the plaintiff's rights in the scenario or the screen play as enacted. There was no express discussion of publication, but the copyright was held valid, subject to the license. Neither court gave any effect to the restriction. The appellate opinion has frequently been cited to illustrate a common law property right which was not lost by an effective publication.⁴⁶

If this decision is law it is impossible to conceive of a situation in which moving picture films could be generally published without an express abandonment of all rights to the public. The court could not have intended to give films rights superior to those in literary productions, such as books. Weil has given several pages of his keen treatise on copyright to what seems to be a complete negation of this decision.⁴⁷

If the restriction in the *Waring* case can be said to have limited the publication, the result will be very nearly like that in the *Copperman* case. Fortunately, the ultimate decision in both cases balanced the equities nicely. The performer's outlook, however, is still uncertain, and if he is to get any substantial relief it will probably have to come from Congress. It will not help him if he seeks or is given greater rights than his brethren in the art and business of creative effort.

THE EQUITABLE SERVITUDE

The doctrine of equitable servitudes on chattels has been little more than a vagrant theory looking for an apt situation to which it could attach itself. It got a bad start in *DeMattos v. Gibson*,⁴⁸ which was a suit for specific performance, and has since then been floundering, for the most part, in dicta. In the United States, its career, to stretch the metaphor, has been checkered. Its acceptance has been resisted, on the one hand, by the static quality of the law, which demands precedent; and on the other, by certain dogmas of convenience which are vaguely embodied in the rules relating to the free alienation of chattels, restraint of trade, and public policy.⁴⁹

In the *Waring* case the facts "hurdled" these forensic dogmas and the court approached its problem realistically. Here was a restriction which evaded the usual objections. It protected the business interests of the plaintiff;⁵⁰ permitted the normal use of the record, in the home; and, as the court said, "unless such a restriction can be imposed and enforced, it will be impossible for distinguished

⁴⁶Es. g., Weil, op. cit., supra note 43, at 282-5; 13 C. J. 986, n. 12; Note (1936) 7 Air L. Rev. 125.

⁴⁷Weil, op. cit., supra note 43, at 282-5.

⁴⁸4 De G. & J. 276, 45 Eng. Rep. 108 (1859).

⁴⁹The doctrine is most ably discussed in: Chafee, loc. cit., supra note 15; E.C.S.Wade, Restrictions on User, (1928) 44 L. Quar. Rev. 51; Harlan F. Stone, The Equitable Rights and Liabilities of Strangers to a Contract (1918) 18 Col. L. Rev. 291; Same, (1919) 19 Col. L. Rev. 177.

⁵⁰"Why should not patrimony or business be the quasi-dominant property?" Wade, loc. cit. supra note 49, at 59.

musicians to commit their renditions to phonograph records— except possibly for a prohibitive financial compensation—without subjecting themselves to the disadvantages and losses which they would inevitably suffer from the use of the records for broadcasting. Such a restriction, therefore, works for the encouragement of art and artists."⁵¹ And presumably, what encourages art is of benefit to the public.

This seems to be the first outright recognition in this country by a court of last resort, of a use restriction which is not supported by a patent—a statutory monopoly.⁵² There is no indication that the rule was meant to be circumscribed by the performer's property right and to be impaired by general publication. The test of an enforceable restriction is its reasonableness—and that is reasonable which promotes a good purpose; which benefits its creator and the public; which works no hardship on a purchaser with notice.

Chafee has said that "the advocates of equitable servitudes must rest upon principle rather than upon authority."⁵³ The court manifestly took up this challenge, and in maintaining the principle went farther than the cases on which it relied.⁵⁴ However, a curious dictum may (not, it is hoped) break its vigor. The court said: "Moreover, it does not limit the use of the records in private homes or even public halls⁵⁵ where a breach could not readily be detected nor enjoined. . . ."⁵⁶

Is a restriction which operates against public halls (restaurants, theatres, dance halls) less reasonable than one which affects radio stations? Is not any but a non-commercial use of the records bound to hurt the performer?

UNFAIR COMPETITION

The law of unfair competition, as we know it today, is a product of this century.⁵⁷ Historically it is rooted in the law of deceit and trade-marks,⁵⁸ both

⁵¹327 Pa. at 447; 194 A. at 638.

⁵²See: *Henry v. Dick*, 224 U. S. 1, 32 S. C. 364 (1912), overruled by *Motion Picture Patents Co. v. Univ. Film Co.*, 243 U. S. 502, 37 S. C. 416 (1917); and see Chafee, loc. cit., supra note 15, at 954-6.

⁵³Chafee, loc. cit., supra note 15, at 1008.

⁵⁴See 327 Pa. at 446, 194 A. at 637. Equitable Servitudes were mainly obiter dicta in most of the cases cited. No case involved a use restriction. The following is a summary of the issues determined: *De Mattos v. Gibson*, loc. cit., supra note 48; *Erskine Macdonald, Ltd. v. Eyles*, 1 Ch. 631 (1921); and *Lord Strathcona Steamship Co. v. Dominion Coal Co.*, A. C. 108 (1926) were suits for specific performance. *Werderman v. Societe Generale d'Electricite*, 19 Ch. Div. 246 (1881) and *National Phon. Co. of Australia, Ltd. v. Menck*, A. C. 336 (1911) involved charges on patents. *Lorillard Co. v. Weingarden*, 280 Fed. 238 (1922) involved a territorial restriction. *In re Waterson, Berlin & Snyder Co.*, 48 Fed. (2d) 704 (1931), involved an obligation to work a copyright and pay royalties. The other cases cited, known as "ticket scalper" and the "trading stamp" cases, were decided on the ground of interference with contract or unfair competition, not equitable servitudes.

⁵⁵Italics mine.

⁵⁶327 Pa. at 447, 194 A. at 638.

⁵⁷See *Walter J. Derenberg, Trade-Mark Protection and Unfair Trading* (New York, 1936) at 39, 40.

⁵⁸See *Harry D. Nims, The Law of Unfair Competition and Trade-Marks* (New York, 1929) at 6. See also *Coty, Inc. v. Parfums De Grand Luxe*, 298 Fed. 865 (1924).

of which it has outstripped. Deception of the public, the so-called "passing-off" doctrine, has generally been held to be essential to the action;⁵⁹ but *International News Service v. Associated Press*⁶⁰ marked a departure from this requirement. The same case took much of the strength from the maxim, equity protects only property rights, when it declared: "The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right. . . ."⁶¹ Competition has been said to be an unnecessary element,⁶² and the term unfair competition a misnomer.⁶³ Unfair trading,⁶⁴ is perhaps an apter term, and the law "has gone forward to a point that now it may almost be said that any conduct is actionable which artificially interferes with trade expectancy."⁶⁵

In its final approach to the problems of the *Waring* case, the majority opinion turned to this branch of the law; to the *Associated Press* case in particular. A brief reference to this case will serve us here.

The Associated Press, the plaintiff below, and the defendant, the International News Service, two rival news agencies, were engaged in the business of gathering and distributing news to their member newspapers throughout the country. The defendant secured news from bulletin boards and newspapers of the plaintiff and circulated it to its own members. The speed required in transmitting the news made statutory copyright impracticable. It was admitted that whatever common law rights the Associated Press had had in the news were thus lost by "publication."

The Supreme Court, speaking through Mr. Justice Pitney, held: (1) Plaintiff and defendant were competitors. (2) Publication of the news abandoned it to the public. (3) As to a competitor, plaintiff had an implied reservation of property in the news which would be recognized as a quasi property right. (4) Defendant misappropriated plaintiff's quasi property acquired by it at great expense and effort. (5) Defendant's acts constituted unfair competition. (6) An inference of deception might be based on defendant's claim of news as its own which was in fact the plaintiff's, but deception is not essential.

⁵⁹Es.g., *Atlas Mfg. Co. v. Street & Smith*, 204 Fed. 398 (1913); *General Baking Co. v. Gorman*, 3 Fed. (2d) 891 (1925); 26 R. C. L. 875, sec. 53; R. C. L. Perm. Supp., Pp. 5813-14.

⁶⁰248 U. S. 215, 39 S. C. 68 (1918); and see *Fonotopia v. Bradley*, 171 Fed. 951 (1909), which foreshadowed it. Accord: *Meyer v. Hurwitz*, 5 Fed. (2d) 370 (D.C.E.D.: Pa., 1925); aff'd, 10 Fed. (2d) 1019 (C.C.A., 3rd, 1926.)

⁶¹248 U. S. at 236, 39 S. C. at 71; and see *Derenberg*, op. cit., supra note 57, at 154.

⁶²*Vogue Co. v. Thompson-Hudson Co.*, 300 Fed. 509 (1924); *Tiffany & Co., v. Tiffany Productions, Inc.*, 147 Misc. 679, 264 N. Y. S. 459 (1932); and see *James F. Oates, Jr., Unfair Trade Practices of Non-Competitors* (1931) 25 Ill. L. Rev. 643.

⁶³*Derenberg*, op. cit., supra note 57, at 102.

⁶⁴Edward S. Rogers, *Protection of Industrial Property* (1929) 27 Mich. L. Rev. at 497.

⁶⁵Edward S. Rogers, *Foreword to Derenberg*, op. cit., supra note 57, at VII.

This decision may be correlated with the *Waring* case, which held: (1) Plaintiff and defendant were competitors.⁶⁶ (2) Sale of the records constituted publication. (3) This was limited by an express restriction. (4) Defendant used plaintiff's property for its own profit. (5) Defendant's acts constituted unfair competition. (6) There was no deception, but deception is not essential.

Since the Pennsylvania court decided that the performer's property right had not been lost by general publication, there was no need for tenuous rationalizations to find a quasi property right. Whether it would have gone so far, had the facts required it, is a nice but useless conjecture at this time. A more pertinent inquiry arises from Justice Linn's concurrence "on the ground of unfair trade competition." Since the finding of unfair competition rested on an unimpaired property right, quære: Did not the concurrence include the performer's property right?

THE RIGHT TO PRIVACY

In 1890 Warren and Brandeis⁶⁷ observed that many decisions which purported to protect property rights in fact involved no such rights; that the object of their protection was the right to enjoy "an inviolate personality."⁶⁸ This was a right to be free from undue publicity; to be allowed to live a private and unsung life—in short, "to be let alone."⁶⁹ They noted instances in which a writer of letters or a sitter for a photograph was saved from exposure of his thoughts or his face. The law relating to literary property, trade secrets, and good-will gave their thesis an analogical basis. Here was a remedial concept which had managed to break loose from the common law tenet of property; which salved hurt feelings and sensitive nerves. They called it the right to privacy.

In 1919 Pomeroy said: "If there is such a thing as a right of privacy, an injunction is certainly a proper remedy for its protection."⁷⁰ Some courts have been no less cautious in asserting a doctrine which might, like Lord Ronald in the Leacock story, fling itself on its horse and dash madly off in all directions. Such a right, they felt, was non-existent apart from statute.⁷¹ However, it has not lacked judicial support. The principle has evolved with new facts, so that now

⁶⁶"They both furnish entertainment to the public over the radio" and both derive their revenue from advertisers; 327 Pa. at 454, 194 A. at 641.

⁶⁷Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy* (1890) 4 Harv. L. Rev. 193.

⁶⁸*Id.* at 205.

⁶⁹Thomas M. Cooley, *Torts* (2d ed., 1888) at 29; and see 4th ed. (Chicago, 1932), vol.1, p. 442 et seq.

⁷⁰John N. Pomeroy, Jr., *5 Equity Jurisprudence and Equitable Remedies* (New York, 1919) 4636-7.

⁷¹Examples are: *Atkinson v. Doherty*, 121 Mich. 372, 80 N. W. 285 (1899); *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902); *Henry v. Cherry*, 30 R. I. 13, 73 A. 97 (1909); *Hillman v. Star Pub. Co.*, 64 Wash. 691, 117 Pac. 594 (1911); and see note (1933) 81 U. of Pa. L. Rev. 324.

it may be said to cover cases which Dickler has classified as intrusions, disclosures, and appropriations involving one's personal life and affairs.⁷²

It may be debated whether Waring, who frequently performed over the radio, consented to the sale of the records, and spent \$300,000 in ten years to publicize his orchestra,⁷³ really wanted privacy; whether he did not by his conduct waive the right to be let alone in an orchestral way. Moreover, the right to privacy has been held to be a personal right, not assignable⁷⁴ and not available to corporate entities.⁷⁵ It may be assumed that Justice Maxey agreed with the majority that performers' rights, in the case of an orchestra, devolve upon the orchestra organization and not upon its constituents.⁷⁶ But in this event the right was obviously derivative, not personal.

The right to privacy has developed from the necessity to protect interests passed over by the common law. Subject matter inside the orbit of the common law, however, may not need a new theory to sustain it. If the performer's right derives from the law of copyright, it will not survive publication. Should the right to privacy be used to revive it, there can be but one result—a complete obliteration of the whole law of copyright. The Warren-Brandeis article, recognizing this, stated: "The right of privacy ceases upon the publication of the facts by the individual, or with his consent."⁷⁷

CONCLUSION

It may be that the performer got no more than a diagnostic review of his complaints in the *Waring* decision. He wants license fees, not injunctions. Also, violations of his rights cause damage hard to estimate or prove in a single case. Commercial users of his talents may think it less desirable and more costly to pay an asked price than risk suit. The claim that a particular performance is inartistic may give their defense the disguise of good faith. Waring, of course, has his injunction against WDAS, but others are unaffected. If every performer is to sue every pirate for infractions, a litigious bedlam will result.⁷⁸

⁷²Gerald Dickler, *The Right of Privacy: A Proposed Redefinition* (1936) 70 U.S.L. Rev. 435; collection of authorities at 436, n.5.

⁷³*Waring v. WDAS*, Record, 134 a.

⁷⁴*Von Thodorovich v. Franz Josef Benef. Ass'n.*, 154 Fed. 911 (C.C.E.D. Pa., 1907).

⁷⁵*Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982 (1912).

⁷⁶Fred Waring sued to enforce his *own* interpretative rights. The decision held that such rights in an orchestral performance belong to the conductor and players in aggregate. Waring's decree was given him as owner of the orchestra. However, there was no claim in the pleadings for the players' rights. And to add to the anomaly: the court observed that Toscanini, the conductor, would have an interpretative right (194 A. at 634, 635).

⁷⁷Loc. cit., supra note 67, at 218.

⁷⁸Performers have organized the National Association of Performing Artists, of which Fred Waring is president. This association is modeled after the American Society of Composers, Authors, and Publishers. It takes assignments of mechanical performance rights from its members, and seeks ultimately to establish a licensing system throughout the country.

Pennsylvania has given him a courageous precedent, but whether it will persuade other jurisdictions to like liberality is uncertain. The chance of a uniform interpretation of rights might have been better had Waring sued in the Federal court on the ground of diversity of citizenship. Legislation is a more likely panacea—but who will assume to educate forty-eight legislatures? Federal legislation in the field of copyright, backing moral admonition with penalties, is probably needed.⁷⁹ In this writer's opinion the present Copyright Act can be construed to protect recorded renditions, but the Copyright Office takes a contrary view.⁸⁰

Copyright reform moves slowly; too many opposing interests are involved—each anxious to preserve the status quo against uncertain change. The performer's metier is interpretation, and he may run counter to those other artists who create what he interprets. Their rights cannot be disregarded.

These interests will require some very meticulous balancing against the background of the public good before the performer's right can become really productive. His claim is neither preposterous nor academic. The question posed at the head of this paper has been answered Yes.

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⁷⁹See Senate Bill 2240, proposed April 22, 1937 by Senator Guffey (Pa.) and House Bill 5275, proposed March 3, 1937 by Congressman Daly (Pa.) at 75th Congress, 1st Session, seeking to amend the Copyright Act of 1909 and to permit registration of records of performances. These bills are pending.

In England, the Act of 1911, sec. 19, sub-section 1, provides for registration of records. See James Copinger, *The Law of Copyright* (London, 1936) at 230-2.

⁸⁰See Letter from Register of Copyrights: *Waring v. WDAS*, Record, 151a.