Vanderbilt Law Review

Volume 3
Issue 2 *Issue 2 - February 1950*

Article 13

2-1950

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PROTECTION OF THE CONTENT OF RADIO AND TELEVISION PROGRAMS BY COMMON LAW COPYRIGHT

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(1) INTRODUCTORY

Common law copyright has reference to an individual's "right in his original, unpublished, intellectual productions," [1] which are protected via the common law. Common law copyright antedates the copyright statutes[2] and can furnish the creative artist adequate and complete protection within limits.[3]

The common law rights are protected independently of the statute until the creative artist has permitted the contents of his work to be communicated generally to the public. As a matter of fact, section 2 of the Copyright Code expressly provides that statutory copyright will not annul or limit the enforcement of common law rights at law or in equity.[4] Similarly, it is believed that the applicable sections of the California Civil Code[5] dealing with common law copyright "are but codifications of the common law." [6]

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The writer acknowledges his indebtedness to Abraham L. Kamenstein, Chief of the Examining Division, Copyright Office, for his aid and critical comment in the preparation of this article. Needless to say, the opinions and conclusions expressed herein are those of the writer.

1. Ketcham v. New York World's Fair, Inc., 34 F. Supp. 657 (E. D. N. Y. 1940), *aff'd,* 119 F. 2d 422 (2d Cir. 1941). *Cf.* Loew's, Inc. v. Superior Court of Los Angeles County, 18 Cal. 2d 419, 115 P. 2d 983, 984 (1941): "There is no doubt that apart from statute the law recognizes certain rights of property in the original intellectual products of an author, which are entitled to the same protection as rights in any other species of property; that the author has the right of first publication and that such right is transferable." See also Johnston v. Twentieth Century-Fox Film Corporation, 82 Cal. App. 2d 796, 187 P. 2d 474 (1947); Golding v. RKO Radio Pictures, Inc., 193 P. 2d 153 (Cal. App. 1948), *aff'd,* 208 P. 2d 1 (Cal. 1949); Schleman v. Guaranty Title Co., 153 Fla. 379, 15 So. 2d 754 (1943); Pushman v. New York Graphic Society, 287 N. Y. 302, 39 N. E. 2d 249 (1942).

2. Duke of Queensberry v. Shebbeare, 2 Eden 329, 28 Eng. Rep. 924 (Ch. 1758); Macklin v. Richardson, Amb. 694, 27 Eng. Rep. 451 (Ch. 1770); Thompson v. Stanhope, Amb. 737, 27 Eng. Rep. 476 (Ch. 1774); Gee v. Pritchard, 2 Swans. 403, 36 Eng. Rep. 670 (Ch. 1818); Press Publishing Co. v. Monroe, 73 Fed. 196, 51 L. R. A. 353 (2d Cir. 1896), *writ of error dismissed,* 164 U. S. 105 (1897); Loew's, Inc. v. Superior Court of Los Angeles County, 18 Cal. 2d 419, 115 P. 2d 983 (1941); Baker v. Libbie, 210 Mass. 599, 97 N. E. 109 (1912); Berry v. Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937).

3. See the discussion *infra,* particularly sections 3 and 6.

4. 61 STAT. 652 (1947), 17 U. S. C. A. § 2 (Supp. 1949): "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor." This section in relation to the Copyright Code is subsequently discussed in greater detail.

5. "The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession." CAL. CIV. CODE § 980 (1941). "If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned." *Id.* § 983.

6. Stanley v. Columbia Broadcasting System, Inc., 208 P. 2d 9, 13 (Cal. 1949).

Obviously the content of radio and television programs can be protected via common law copyright, provided of course there has been no general publication of the same. It is believed that the great bulk of radio programs other than a few network shows have not been copyrighted for two reasons: (1) the Copyright Office has refused to register phonograph records or electrical transcriptions,[7] and (2) common law copyright furnishes adequate protection since the programs are performed only once or twice.[8]

In all probability the great bulk of "live" television programs which will be presented only once or twice will not be copyrighted; common law copyright will afford adequate protection. This excludes copyright protection sought by independent writers and producers who invoke the benefits of the statute to purportedly protect their ideas and to secure a governmental record via copyright registration of their creative efforts. It is believed that television programs preserved on film and syndicated to stations will in all probability be registered with the Copyright Office as a motion picture photoplay or as a motion picture other than a photoplay.[9]

(2) DEFINITION OF COMMON LAW COPYRIGHT

Common law copyright is independent of statute. An author's right in an unpublished manuscript is regarded as literary property at common law and is protected by the courts.[10] To quote Wittenberg:

> "The author produces more than his writing, for in the very act of creating he brings into existence a property right, in himself, in the work produced. The words, phrases, basic ideas, characters, situations, and incidents may all have had prior existence, but his arrangement of them, and the form in which he clothes them, are invested with a special right of property, so that he may thereafter claim his work to the exclusion of others. It is that right of exclusion which is the function of his property.

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7. Waring v. WDAS Broadcasting Station, 327 Pa. 443, 194 Atl. 631, 634 n. 2 (1937): "Plaintiff, in 1935, made application to the Register for a coypright on the 'personal interpretation by Fred Waring' of the musical composition 'Lullaby of Broadway' [phonograph record]. The application was rejected, the Register of Copyrights saying, inter alia: 'There is not and never has been any provision in the Act for the protection of an artist's personal interpretation or rendition of a musical work not expressible by musical notation in the form of "legible" copies although the subject has been extensively discussed both here and abroad.'"

8. *But cf.* Blanc v. Lantz, 83 U. S. P. Q. 137 (Cal. Super. Ct. 1949), discussed in detail, *infra*, section 7.

9. 61 STAT. 652 (1947), 17 U. S. C. A. § 5 (Supp. 1949): "The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs . . .

"(l) motion-picture photoplays.

"(m) motion-pictures other than photoplays."

10. Stanley v. Columbia Broadcasting System, 192 P. 2d 495 (Cal. App. 1948) *aff'd*, 208 P. 2d 9 (Cal. 1949); Golding v. RKO Radio Pictures, Inc., 193 P. 2d 153 (Cal. App. 1948), *aff'd*, 208 P. 2d 1 (Cal. 1949); Johnston v. Twentieth Century-Fox Film Corp., 82 Cal. App. 2d 796, 187 P. 2d 474 (1947); Dieckhaus v. Twentieth Century-Fox Film Corp., 54 F. Supp. 425 (E. D. Mo. 1944), *rev'd*, 153 F. 2d 893 (8th Cir. 1946), *cert. denied*, 329 U. S. 716 (1946).

> For, insofar as he can prevent others from repeating what he has created and can determine the terms upon which others shall enjoy his work, he has property. The essence of that right is monopoly. It is the confirmation by law of a right in the owner to determine to whom, and under what conditions, his work shall be communicated." [11]

In *Ferris v. Frohman,*[12] the Supreme Court of Illinois defined and explained common law copyright:

> "At common law the author of a literary composition had an absolute property right in his production, which he could not be deprived of so long as it remained unpublished, nor could he be compelled to publish it. This right of property exists at common law in all productions of literature, the drama, music, art, etc., and the author may permit the use of his productions by one or more persons to the exclusion of all others, and may give a copy of his manuscript to another person without parting with his property in it. . . . 'So, also, without forfeiting his rights, he may communicate his work to the general public when such communication does not amount to a publication within the meaning of the statute. . . . It may be transmitted by bequest, gift, sale, opera of law, or any mode by which personal property is transferred.' . . . Upon the publication of the production the author's common law rights ceased, and it became public property unless protected by statute." [13]

Thus common law copyright comprehends every new and original product of mental labor embodied in writing or some other visible form which remains unpublished.[14] It has been extended to the following items:

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11. WITTENBERG, THE PROTECTION AND MARKETING OF LITERARY PROPERTY 3 (1937). *Cf.* Baker v. Libbie, 210 Mass. 599, 97 N. E. 109, 111 (1912): "The property right of an author has been described 'as an incorporeal right to print [and, it should be added, to prevent the printing of, if he desires] a set of intellectual ideas or modes of thinking communicated in a set of words and sentences or modes of expression. It is equally detached from the manuscript or any other physical existence whatsoever.' (Miller v. Taylor, 4 Burrows 2303 at 2396). It has been called also 'the order of words in the . . . composition.' (Jeffreys v. Boosey, 4 H. L. C. 815, 867; Holmes v. Hurst, 174 U. S. 82, 86, 19 Sup. Ct. 606, 43 L. Ed. 904; Kalem v. Harper Bros., 222 U. S. 55, 63, 32 Sup. Ct. 20, 56 L. Ed. 92)."

12. 238 Ill. 430, 87 N. E. 327 (1909), *aff'd,* 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492 (1912).

13. 87 N. E. at 328. *Cf.* Golding v. RKO Radio Pictures, Inc., 193 P. 2d 153, 162 (Cal. App. 1948): "Respondents' right is the common law right of an author in an unpublished manuscript. It is the sole right to decide by whom, when, where and in what form his manuscript shall be published for the first time; to restrain others from publishing it without permission and from using it without authority; to recover damages from those publishing it without his permission or using it without his authority." In Golding v. R. K. O. Pictures, Inc., 208 P. 2d 1, 3 (Cal. 1949), the court held that "Literary property in the fruits of a writer's creative endeavor extend to the full scope of his inventiveness. This may well include, in the case of a stage play or moving picture scenario, the entire plot, the unique dialogue, the fundamental emotional appeal or theme of the story, or merely certain novel sequences or combinations of certain hackneyed elements. It is, however, only the product of the writer's creative mind which is protectible."

14. Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177 (Ch. 1888); Palmer v. De Witt, 47 N. Y. 532 (1872); Prince Albert v. Strange, 2 De G. & S. 652, 64 Eng. Rep. 293 (Ch. 1848).

books,[15] manuscripts,[16] dramas,[17] poems,[18] letters,[19] lectures,[20] musical compositions,[21] operas,[22] paintings,[23] photographs,[24] cartoons,[25] plans of an architect,[26] trade papers,[27] ticker tape quotations,[28] radio script,[29] motion picture

15. Holmes v. Hurst, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904 (1899); De Acosta v. Brown, 146 F. 2d 408 (2d Cir. 1944), *cert. denied sub nom.* Hearst Magazines v. De Acosta, 325 U. S. 862 (1945); Dieckhaus v. Twentieth Century-Fox Film Corporation, 54 F. Supp. 425 (E. D. Mo. 1944), *rev'd on other grounds,* 153 F. 2d 893 (8th Cir. 1945), *cert. denied,* 329 U. S. 716 (1946); United States *ex rel.* Twentieth Century-Fox Film Corporation v. Bouvé, 33 F. Supp. 462 (D. C. 1940), *aff'd,* 122 F. 2d 51 (D. C. Cir. 1941); Berry v. Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937).

16. Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055 (U. S. 1834); American Law Book Co. v. Chamberlayne, 165 Fed. 313 (2d Cir. 1908); Root v. Borst, 142 N. Y. 62, 36 N. E. 814 (1894).

17. Maxwell v. Goodwin, 93 Fed. 665 (C. C. N. D. Ill. 1899); Seltzer v. Sunbrock, 22 F. Supp. 621 (S. D. Cal. 1938); Ferris v. Frohman, 238 Ill. 430, 87 N. E. 327, 43 L. R. A. (N.S.) 639 (1909), *aff'd,* 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492 (1912); Cole v. Phillips H. Lord, Inc., 262 App. Div. 116, 28 N. Y. S. 2d 404 (1st Dep't 1941); Columbia Pictures Corp. v. Krasna, 65 N. Y. S. 2d 67 (Sup. Ct. 1946).

18. Press Publishing Co. v. Monroe, 73 Fed. 196 (2d Cir. 1896), *writ of error dismissed,* 164 U. S. 105 (1896); Kreymborg v. Durante, 22 U. S. P. Q. 248 (S. D. N. Y. 1934).

19. Folsom v. March, 9 Fed. Cas. 342, No. 4,901 (C. C. Mass. 1841); Denis v. Le Clerc, 1 Mart. 297, 5 Am. Dec. 712 (La. 1811); Baker v. Libbie, 210 Mass. 599, 97 N. E. 109, 37 L. R. A. (N.S.) 944 (1912); *In re* Ryan's Estate, 115 Misc. 472, 188 N. Y. Supp. 387 (Surr. Ct. 1921).

20. Nutt v. National Institute for the Improvement of Memory, 28 F. 2d 132 (D. Conn. 1928), *aff'd,* 31 F. 2d 236 (2d Cir. 1929); Bartlett v. Crittenden, 2 Fed. Cas. 967, No. 1,076 (C. C. Ohio 1849).

21. McCarthy & Fischer, Inc. v. White, 259 Fed. 364 (S. D. N. Y. 1919); The Mikado Case, 25 Fed. 183 (C. C. S. D. N. Y. 1885); Arnstein v. Marks Music Corp., 11 F. Supp. 535 (S. D. N. Y. 1935), *aff'd,* 82 F. 2d 275 (2d Cir. 1936); Stern v. Carl Laemmle Music Co., 74 Misc. 262, 133 N. Y. Supp. 1082 (Sup. Ct. 1911), *aff'd mem.,* 155 App. Div. 895, 139 N. Y. Supp. 1146 (1st Dep't 1913).

22. The Mikado Case, 25 Fed. 183 (C. C. S. D. N. Y. 1885); Ricordi & Co. v. Columbia Graphophone Co., 263 Fed. 354 (2d Cir. 1920); Brown v. Select Theatres Corp., 56 F. Supp. 438 (D. Mass. 1944); Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177 (Ch. 1888); Tams v. Witmark, 30 Misc. 293, 63 N. Y. Supp. 721 (Sup. Ct. 1900), *aff'd mem.,* 48 App. Div. 632, 63 N. Y. Supp. 1117 (1st Dep't 1901).

23. American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. Ed. 208 (1907); Gerlach-Barklow Co. v. Morris, 23 F. 2d 159 (2d Cir. 1927); Pushman v. New York Graphic Society, Inc., 25 N. Y. S. 2d 32 (Sup. Ct. 1941), *aff'd,* 287 N. Y. 302, 39 N. E. 2d 249 (1942).

24. Cory v. Physical Culture Hotel, 14 F. Supp. 977 (W. D. N. Y. 1936), *aff'd,* 88 F. 2d 411 (2d Cir. 1937); Press Publishing Co. v. Falk, 59 Fed. 324 (C. C. S. D. N. Y. 1894); Moore v. Rugg, 44 Minn. 28, 46 N. W. 141 (1890).

25. Detective Comics, Inc. v. Bruns Publications, Inc., 28 F. Supp. 399 (S. D. N. Y. 1939), *modified on other grounds,* 111 F. 2d 432 (2d Cir. 1940).

26. Walsh v. St. Louis Exposition, 101 Mo. 534, 14 S. W. 722 (1890); Wright v. Eisle, 86 App. Div. 356, 83 N. Y. Supp. 887 (2d Dep't 1903); Larkin v. Pennsylvania R. R., 125 Misc. 238, 210 N. Y. Supp. 374 (Sup. Ct. 1925), *aff'd,* 216 App. Div. 832, 215 N. Y. Supp. 875 (1st Dep't 1926).

27. Burndy Engineering Co. v. Penn-Union Electric Corp., 25 F. Supp. 507 (W. D. Pa. 1938); Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 84 Hun 12, 32 N. Y. Supp. 41 (Sup. Ct. 1895), *rev'd,* 155 N. Y. 241, 49 N. E. 872, 41 L. R. A. 846 (1898).

28. Chicago Board of Trade v. Christie Grain Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031 (1905); McDearmott Comm. Co. v. Chicago Board of Trade, 146 Fed. 961 (8th Cir. 1906); National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294 (7th Cir. 1902); F. W. Dodge Co. v. Construction Information Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810 (1903).

29. Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. Mass. 1934), *modified,* 81 F. 2d 373 (1st Cir. 1936), *cert. denied,* 298 U. S. 670 (1936); Stanley v. Columbia Broadcasting System, Inc., 192 P. 2d 495 (Cal. App. 1948), *aff'd,* 208 P. 2d 9 (Cal. 1949); Yadkoe v. Fields, 66 Cal. App. 2d 150, 151 P. 2d 906 (1944).

scenarios,[30] combination of ideas evolved into a radio program,[31] abstracts,[32] musical rendition by an orchestra,[33] a musical laugh,[34] performance by an actor or singer,[35] a color scheme,[36] the conception and design of a book,[37] a list of department store purchasers,[38] and various kinds of business systems.[39] Thus "an individual has a property right in his original, unpublished, intellectual productions." [40]

The scope and extent of common law copyright are well illustrated in several recent decisions which may now be discussed individually and in detail.

In *Stanley v. Columbia Broadcasting System, Inc.*,[41] plaintiff, who had submitted a format, sample script and recording of a dramatic radio program to defendant, alleged piracy in a suit based on implied contract. Judgment was entered for the plaintiff by the court, which found substantial similarity not in the actual text of defendant's program but in its combination of ideas reduced to a concrete form. The court concluded that the two program formats were similar in that in each: "the program was entitled 'Hollywood Preview'; the title was repeated and emphasized throughout the production; the announcer introduced the master of ceremonies; the latter was prominent in motion pictures; he stated the title of the play and the name of the star; the drama was presented; it was a play not previously seen in motion pictures; its authors were named; listeners were asked to express their opinions of the play." [42]

The court concurred and quoted with approval from defendant's closing

30. Thompson v. Famous Players-Lasky Corp., 3 F. 2d 707 (N. D. Ga. 1925); Universal Film Mfg. Co. v. Copperman, 212 Fed. 301 (S. D. N. Y. 1914), *aff'd*, 218 Fed. 577 (2d Cir. 1914); Golding v. RKO Radio Pictures, Inc., 193 P. 2d 153 (Cal. App. 1948), *aff'd*, 208 P. 2d 1 (Cal. 1949); Italiani v. Metro-Goldwyn-Mayer Corp., 45 Cal. App. 2d 464, 114 P. 2d 370 (1941); Barsha v. Metro-Goldwyn-Mayer Corp., 32 Cal. App. 2d 556, 90 P. 2d 371 (1939).

31. Stanley v. Columbia Broadcasting System, Inc., 192 P. 2d 495 (Cal. App. 1948), *aff'd*, 208 P. 2d 9 (Cal. 1949); Cole v. Phillips H. Lord, Inc., 262 App. Div. 116, 28 N. Y. S. 2d 404 (1st Dep't 1941); Yadkoe v. Fields, 66 Cal. App. 2d 150, 151 P. 2d 906 (1944). *But cf.* Bowen v. Yankee Network, Inc., 46 F. Supp. 62 (D. Mass. 1942); Grombach Productions, Inc. v. Waring, 293 N. Y. 609, 59 N. E. 2d 425 (1944).

32. Clay County Abstract Co. v. McKay, 226 Ala. 394, 147 So. 407 (1933).

33. Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937); *cf.* RCA Mfg. Co. v. Whiteman, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U. S. 712 (1940).

34. Blanc v. Lantz, 83 U. S. P. Q. 137 (Cal. Super. Ct. 1949).

35. Waring v. Dunlea, 26 F. Supp. 338 (E. D. N. C. 1939); and see Savage v. Hoffman, 159 Fed. 584 (C. C. S. D. N. Y. 1908).

36. Ketcham v. New York World's Fair, Inc., 34 F. Supp. 657 (E. D. N. Y. 1940), *aff'd*, 119 F. 2d 422 (2d Cir. 1941).

37. Dutton & Co. v. Cupples & Leon, 117 App. Div. 172, 102 N. Y. Supp. 309 (1st Dep't 1907).

38. Walley, Inc. v. Saks & Co., 266 App. Div. 193, 41 N. Y. S. 2d 739 (1st Dep't 1943).

39. Meyer v. Hurwitz, 5 F. 2d 370 (E. D. Pa. 1925); Meccano Ltd. v. Wagner, 234 Fed. 912 (S. D. Ohio 1916); Prest-o-Lite Co. v. Davis, 209 Fed. 917 (S. D. Ohio 1913), *aff'd*, 215 Fed. 349 (6th Cir. 1914).

40. Ketcham v. New York World's Fair, Inc., 34 F. Supp. 657, 658 (E. D. N. Y. 1940), *aff'd*, 119 F. 2d 422 (2d Cir. 1941).

41. 192 P. 2d 495 (Cal. App. 1948), *aff'd*, 208 P. 2d 9 (Cal. 1949).

42. The quotation is from the lower court opinion, 192 P. 2d at 500.

brief that " 'plaintiff's treatment, development and expression of its [sic.] ideas *resulted, of course in the creation of a piece of literary property as evidenced by his script and audition recording. . .* ' " [43] Thus a "concrete combination of ideas" for a radio program is a protectible property interest at common law.[44]

In *Golding v. RKO Radio Pictures, Inc.*,[45] an action for infringement of common law copyright, the Supreme Court of California held that the "basic dramatic core" or "heart" of a play was a protectible property interest. This basic dramatic situation may consist of a paragraph or two or of two or three pages.[46] "[T]he real value of a story or play may have little to do with specific dialogues or sequence of scenes or locale and there is ample evidence

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43. *Id.* at 503. (Italics and brackets in original). The California Supreme Court disposed of this contention in a single sentence: "It is conceded by the defendant in its brief that plaintiff's plea had been reduced to the concrete form of a script format and recording. . . ." 208 P. 2d at 15.

44. Thus the courts have found a protectible property right in slogans: "No Thanks, I smoke Chesterfield," Liggett & Meyer Tobacco Co. v. Meyer, 101 Ind. App. 420, 194 N. E. 206 (1935); "A 'Macy' Christmas and a Happy New Year," Healey v. R. H. Macy & Co., Inc., 251 App. Div. 440, 297 N. Y. Supp. 165 (1st Dep't 1937), *aff'd*, 277 N. Y. 681, 14 N. E. 2d 388 (1938); "The Beer of the Century," Ryan & Associates, Inc. v. Century Brewing Ass'n, 185 Wash. 600, 55 P. 2d 1053 (1936). *Contra:* O'Brien v. RKO Radio Pictures, Inc., 68 F. Supp. 13 (S. D. N. Y. 1946); Thomas v. R. J. Reynolds Tobacco Co., 350 Pa. 262, 38 A. 2d 61 (1944). When the court protects ideas, denominated as a "protectible property interest," recovery is had upon the theory of contract implied in fact or in law. See Plus Promotion, Inc. v. RCA Mfg. Co., 49 F. Supp. 166 (S. D. N. Y. 1943); Stanley v. Columbia Broadcasting System, Inc., 208 P. 2d 9 (Cal. 1949).

45. 193 P. 2d 153 (Cal. App. 1948), *aff'd*, 298 P. 2d 1 (Cal. 1949).

46. The court described the basic situation of the play in the case as follows:

"The central dramatic situation or core in which the plaintiffs claim property is as follows: The action takes place on board a ship. Only one person aboard, a passenger, suspects the captain of being a murderer. He accuses the captain who neither admits nor denies the accusation, in fact, to his crew and passengers the captain clearly infers that his accuser is either guilty of hallucinations or himself desires to kill him. The accuser knows that he is subject to the captain's whims and is in a position where he can be killed or imprisoned. The captain, sure of his authority, informs the accuser that he is free to try to convince anyone on board ship of the truth of his suspicions. The passenger tells his story to the first mate and to others on the ship but they refuse to believe him and instead suspect the passenger of hallucinations or malice. Finally, however, the captain becomes aware that he is suspected by at least one other person and he threatens to kill, or does kill that person as an intermeddler. Knowledge that his murders are about to be uncovered causes him to lose his mind and brings about his own undoing and death.

"In the plaintiffs' play this basic dramatic core was filled out by placing the passengers and crew upon a pleasure cruise and making the captain an imposter who has come to show his superiority to the man in whose shadow he has worked for years; this man is the person throughout who knows the captain's true identity. There are various other sub-characters who give body and filling to the central plot, but as testified to by both Golding and Faulkner, this matter was all superficial and could be changed in innumerable ways without affecting the literary property and its value.

"The moving picture 'Ghost Ship' has its captain as the dominant figure of the story. The locale of the drama is on a freighter with members of the crew having the subordinate roles. The ship carries no passengers and, to that extent, the minor characters are quite different from those in the play. However, the captain and his obsession with authority and the fact that no one aboard can successfully challenge his position is found in the picture, as is the dramatic struggle between the captain and his adversary, the one person who knows his true nature. Basically, the psychological situation is that described by the plaintiffs as the dramatic core of their work." 208 P. 2d at 2-3.

tending to prove that the basic dramatic core of the plaintiffs' play constitutes the truly original and valuable feature of it. . . ." [47]

It is not believed that the *Golding* opinion extends the principles of common law copyright so as to furnish protection to abstract ideas or generalized themes.[48] Neither common law nor statutory copyright may be invoked to withdraw ideas or materials from the stock of materials used by others.[49] There can be no monopoly in a basic idea since common law and statutory copyright protect only the form of expression in which a concept is clothed.[50] In the *Golding* case, the "basic dramatic core," although condensed to a few paragraphs in the court's opinion, had been reduced to a stage play and included scenes, incidents, characters, characterizations, motivation, treatment and full dramatic expression. Thus plaintiff's common law copyright reflected the form and substance of literary property.[51]

In the Louis-Walcott litigation,[52] one of the counts in the complaints alleged that the defendants' unauthorized telecasts of the boxing bout would violate plaintiffs' common law property rights. None of the courts which were involved in this litigation rendered any written opinions explaining the bases or reasons for the issuance of injunctions in all four cases. It is believed that the courts would have no difficulty in finding common law copyright in

47. *Id.* at 4.

48. MacDonald v. DuMaurier, 144 F. 2d 696, 700 (2d Cir. 1944): "Ideas or basic plots are not protected by copyright. Holmes v. Hurst, 174 U. S. 82, 86, 19 Sup. Ct. 606, 43 L. Ed. 904; Dymow v. Bolton, [11 F. 2d 690] at 691; Nichols v. Universal Pictures Corp., 2 Cir., 45 F. 2d 119, 121, *cert. denied* 282 U. S. 902, 51 Sup. Ct. 216, 75 L. Ed. 795. Neither are isolated incidents, Shipman v. R. K. O. Radio Pictures, 2 Cir., 100 F. 2d 533, 536; Eichel v. Marcin, D. C., 241 F. 404, 409; Rush v. Oursler, D. C., 39 F. 2d 468, 472, 473; Seltzer v. Sunbrook, D. C., 22 F. Supp. 621, 628, nor even groups of incidents following necessarily or naturally from the plot or environment. Roe-Lawton v. Hal E. Roach Studios, D. C., 18 F. 2d 126, 127; Cain v. Universal Pictures Co., D. C., 47 F. Supp. 1013, 1017; Ornstein v. Paramount Productions, D. C., 9 F. Supp. 896, 901. Such incidents, however, may be selected, arranged and stated in such manner as to constitute the author's expression of his plot or part thereof, and if so, that arrangement and mode of expression is protected by copyright. Daly v. Webster, 2 Cir., 56 F. 483, 486, 487; Dymow v. Bolton, 2 Cir., 11 F. 2d 690, 691; Sheldon v. Metro-Goldwyn Pictures Corp., 2 Cir., 81 F. 2d 49, 54, 55, *cert. denied* 298 U. S. 669, 56 Sup. Ct. 835, 80 L. Ed. 1392."

See also Dellar v. Samuel Goldwyn, Inc., 150 F. 2d 612 (2d Cir. 1945), *cert. denied*, 327 U. S. 790 (1946); O'Brien v. RKO Radio Pictures, Inc., 68 F. Supp. 13 (S. D. N. Y. 1946); Gropper v. Warner Bros. Pictures, Inc., 38 F. Supp. 329 (S. D. N. Y. 1941); Lewys v. O'Neill, 49 F. 2d 603 (S. D. N. Y. 1931); Ornstein v. Paramount Productions, Inc., 9 F. Supp. 896 (S. D. N. Y. 1935).

49. *Cf.* Mr. Justice Brandeis, dissenting, in International News Service v. Associated Press, 248 U. S. 215, 248, 250, 262, 39 Sup. Ct. 68, 63 L. Ed. 211 (1918), that as a "general rule of law . . . the noblest of human productions—knowledge, truths ascertained, conceptions and ideas—become, after voluntary communication to others, free as the air to common use." See Eichel v. Marcin, 241 Fed. 404, 408, 409 (S. D. N. Y. 1913).

50. See note 48 *supra;* see also Grant v. Kellogg Co., 58 F. Supp. 48 (S. D. N. Y. 1944), *aff'd*, 154 F. 2d 59 (2d Cir. 1945); De Montijo v. 20th Century Fox Film Corp., 40 F. Supp. 133 (S. D. Cal. 1941); Brunner v. Stix, Baer & Fuller Co., 352 Mo. 1225, 181 S. W. 2d 643 (1944).

51. Universal Pictures Co. v. Harold Lloyd Corp., 162 F. 2d 354 (9th Cir. 1947).

52. This litigation has been published in pamphlet form by the National Broadcasting Company, entitled "Proceedings in Philadelphia Actions in C. P. No. 1, June Term, 1948, to enjoin commercial uses of the Louis-Walcott Fight."

any television program. Any television program, including a news, sport, or dramatic show, is an "original, unpublished, intellectual production." [53] It requires the use of technical and artistic skills—*viz.*, lighting effects, camera angles, integration and synthesis of sight and sound to produce a finished television production. It is submitted that there is as much a property right in the finished television picture[54] as in a photograph or painting, and the evanescent character of a telecast does not destroy its common law copyright.[55]

In *Blanc v. Lantz*,[56] Mel Blanc, the plaintiff, claimed a protectible property interest in the "so-called musical laugh, 'Ha-ha-ha-ha-ha,' allegedly created by him and well known to the public as the laugh of that fictitious character, Woody Woodpecker." The court granted defendant's motion for judgment on the pleadings on the ground that there had been a publication of the musical laugh with a consequent loss of plaintiff's common law property right. The court assumed for the purposes of the motion that there was a common law property right in the musical laugh. In the concluding paragraphs of the opinion the court not only reaffirms its conclusion that the musical laugh is an original intellectual production but also suggests that plaintiff could copyright this "musical composition."

It is believed that the court reached the correct conclusion in dismissing the complaint, but not for the reasons stated in its opinion. It is doubtful whether the dissemination of plaintiff's musical laugh via radio broadcasts and on the sound track of motion pictures constitutes a general publication. This subject will be discussed subsequently.[57] Defendant's motion for judgment on the pleading required the court to assume that plaintiff's musical laugh constituted an original intellectual production. It is believed that if this issue were tried on the merits, the court might conclude that the musical laugh was not a protectible property interest.

It is doubtful whether plaintiff's laugh has the requisite length for common law copyright.[58] Of course length is not a prerequisite for common

53. *Cf.* Ketcham v. New York World's Fair, Inc., 34 F. Supp. 657 (E. D. N. Y. 1940), *aff'd*, 119 F. 2d 422 (2d Cir. 1941).

54. In Universal Film Mfg. Co. v. Copperman, 218 Fed. 577, 579 (2d Cir. 1914) the court stated that there was a "common-law right of property in the intellectual conception of the scenario of the play expressed in words and in the intellectual conception of the photoplay expressed in actions."

55. *Cf.* Patterson v. Century Production, Inc., 93 F. 2d 489, 493 (2d Cir. 1937), *cert. denied*, 303 U. S. 655 (1939).

56. 83 U. S. P. Q. 137 (Cal. Super. Ct. 1949).

57. See sections 4 to 7 inclusive. The *Mel Blanc* case is discussed in detail in section 7.

58. Maxwell v. Hogg, L. R. 2 Ch. 307, 318 (1867): "I apprehend, indeed, that if it were necessary to decide the point, it must be held that there cannot be what is termed copyright in a single word, although the word may be used as the fitting title for a book. The copyright contemplated by the Act must not be in a single word, but in some words in the shape of a volume, or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author of the work. All arguments, therefore, for the purpose of maintaining this

law copyright. A gem of literature reflecting originality may be compressed within a few words.[59] Thus such slogans as "Beer of the Century," [60] "A Macy Xmas and a Happy New Year" [61] and "No Thanks, I Smoke Chesterfields" [62] have been considered original intellectual productions and protected under the theory of implied contract.[63] The slogan cases can be explained only on the basis that they had a substantial economic value to their users and that they were protectible via implied contract without regard to common law copyright. It is believed that neither common law nor statutory copyright should be invoked to protect plaintiff's musical laugh. It is "too small for the court to attach any value to it." [64] In other words the maxim, *de minimis non curat lex,* should be applicable—common law copyright will not be invoked to protect the trifle of a guffaw repeated five times.

Furthermore, a court might conclude that because of the brevity of the musical laugh, it lacks originality.[65]

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bill on the ground of copyright appear to me to fall to the ground." In Sinanide v. La Maison Kosmeo, 139 L. T. 365 (1928), plaintiff claimed copyright in the slogan, "Beauty is a social necessity, not a luxury." Scrutton, L. J., speaking for the court, held there was no copyright in the phrase "because the matter in which copyright is claimed is too small for the court to attach any value to it." And see SHAFTER, MUSICAL COPYRIGHT 215 *et seq.* 215 (2d ed. 1939).

59. *Cf.* concurring opinion of Greer, L. J., in Sinanide v. La Maison Kosmeo, 139 L. T. 365, 367 (1928): "I wish to guard myself against being taken to decide that there cannot be a copyright in what is called a 'slogan.' A 'slogan' may, for instance, consist of an original composition in four lines of verse, in which there may be copyright; and the same may be said of an original composition in phrase." In Heim v. Universal Pictures Co., 154 F. 2d 480, 487 n. 8 (2d Cir. 1946), Judge Frank suggested that statutory copyright might exist in the following phrases: "Euclid alone has looked on Beauty bare," or "Twas brillig and the slithy toves."

60. Ryan & Associates v. Century Brewing Ass'n, 185 Wash. 600, 55 P. 2d 1053 (1936).

61. Healey v. R. H. Macy & Co., Inc., 251 App. Div. 440, 297 N. Y. Supp. 165 (1st Dep't 1937), *aff'd,* 277 N. Y. 681, 14 N. E. 2d 388 (1938).

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

63. Golding v. RKO Radio Pictures, Inc., 193 P. 2d 153 (Cal. App. 1948), *aff'd,* 208 P. 2d 1 (Cal. 1949); Stanley v. Columbia Broadcasting System, Inc., 192 P. 2d 495 (Cal. App. 1948), *aff'd,* 208 P. 2d 9 (Cal. 1949); Yadkoe v. Fields, 66 Cal. App. 2d 150, 151 P. 2d 906 (1944).

64. Sinanide v. La Maison Kosmeo, 139 L. T. 365 (1928). And see Wilkie v. Santly Bros., 91 F. 2d 978 (2d Cir. 1937); Arnstein v. Marks Music Corp., 82 F. 2d 275 (2d Cir. 1936). Shafter contends that "four bars of music constitutes the arbitrary minimum—a ridiculous standard; for this would place almost every popular song, no matter how original, under suspicion, simply because there are so few effective openings for these works. The average popular song is based upon a prescribed formula. It has three parts in the chorus: the opening strain, which usually runs for eight bars and is repeated for another eight; a 'middle' tune of eight bars, and a concluding eight, which repeats the first strain with little variation. The opening strain is composed of two phrases, each of four bars, which are not only similar or identical to each other, but are repeated in the first part and in the concluding eight bars. Thus, what began supposedly as four bars may turn out to be eight, twelve, or sixteen. Therefore, if we are going to count bars and base our decision upon that, the entire method is falsified at the very outset." He suggests a test of "quality," but even "quality" requires a minimum standard. SHAFTER, MUSICAL COPYRIGHT 215 (2d ed. 1939).

65. *But cf.* Stanley v. Columbia Broadcasting System, Inc., 208 P. 2d 9, 15 (Cal. 1949): "Furthermore the question of originality of plaintiff's program is not one of law to be determined by the court but is one of *fact* for the jury's determination." (Italics in original.) But a court might consider the issue of originality as one of law because of its brevity. See Maxwell v. Hogg, L. R. 2 Ch. 307, 318 (1867); Dick v. Yates, 18 Ch. D. 76, 88-89 (1879).

The extent to which common law or statutory copyright may be invoked to protect a musical laugh, slogans, mottoes or the like requires clarification by the courts. A musical laugh containing but five notes does not represent a fully expressed idea. The latter, it is believed, suggests a minimum standard which may be employed as a yardstick for common law and statutory copyright. The basic philosophy of this minimum standard which would measure copyright by an original, fully expressed idea is the public policy which abhors monopolies in words, phrases and sounds which are removed from the English language.[66]

(3) RIGHTS CONFERRED BY COMMON LAW COPYRIGHT

Common law copyright is frequently referred to as "copyright before publication" to distinguish it from "statutory copyright" or "copyright after publication." [67] An author's rights before publication are:

> "The sole, exclusive interest, use, and control. The right to its name, to control, or prevent publication. The right of private exhibition, for criticism or otherwise, reading, representation, and restricted circulation; to copy, and permit others to copy, and to give away a copy; to translate or dramatize the work; to print without publication; to make qualified distribution. The right to make the first publication. The right to sell and assign her interest, either absolutely or conditionally, with or without qualification, limitation, or restriction, territorial or otherwise, by oral or written transfer." [68]

As stated in the previous section, common law copyright is independent of statute. Section 2 of the Copyright Code confirms its existence.[69]

Common law copyright is thus an absolute incorporeal right which is protected to the same extent by the common law as other personal property.[70] This view considers common law copyright as a rule of property law based on the idea of creation through labor.[71] Continental jurisprudence on the

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66. See the quotation from the dissenting opinion of Mr. Justice Brandeis in International News Service v. Associated Press, 248 U. S. 215, 248, 250, 262, 39 Sup. Ct. 68, 63 L. Ed. 211 (1918), *supra* note 49. *Cf.* Judge Wyzanski in Triangle Publications v. New England Newspaper Publishing Co., 46 F. Supp. 198, 204 (D. Mass. 1942): "I could hardly be unmindful of the probability that a majority of the present justices of the Supreme Court of the United States would follow the dissenting opinion of Mr. Justice Brandeis in the International News case . . . because they share his view that monopolies should not be readily extended, and his faith that legislative remedies are to be preferred to judicial innovations for problems where adjustment of many competing interests is necessary."

67. Palmer v. DeWitt, 47 N. Y. 532, 7 Am. Rep. 480 (1872). See BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 471 *et seq.* (1944).

68. Harper & Bros. v. Donohue & Co., 144 Fed. 491, 492 (C. C. N. D. Ill. 1905).

69. 61 STAT. 652 (1947), 17 U. S. C. A. § 2 (Supp. 1948).

70. Commissioner v. Affiliated Enterprises, 123 F. 2d 665 (10th Cir. 1941), *cert. denied* 315 U. S. 812 (1942); Clay County Abstract Co. v. McKay, 226 Ala. 394, 147 So. 407 (1933); Baker v. Libbie, 210 Mass. 599, 97 N. E. 109 (1912). And see SCHULMAN, OUTLINE OF COMMON LAW COPYRIGHT (1949).

71. BOWKER, THE COPYRIGHT, ITS LAW AND ITS LITERATURE 13 (1886); DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 2 *et seq.* (1879); WEIL, AMERICAN COPYRIGHT LAW 3 *et seq.* (1917).

other hand has abandoned the "property right" concept of common law copyright because of the difficulties of reconciling the generally accepted characteristics of an author's right with the juristic conception of property.[72] The European view considers copyright before publication as a personal right of the author[73] or as a right *sui generis*[74] which must be distinguished from the traditional classification of rights. The juristic approach which considers common law copyright as an extension of the author's personality and would protect such rights via the privacy doctrine would solve many of the difficulties inherent in copyright law.[75] Anglo-American jurists have concluded that since a protectible property interest exists in an intellectual production on its creation, a creator's rights before publication will be treated as full-fledged property rights.[76]

Since common law copyright is governed by the rules of property law, it exists separate and apart from the physical substance in which it is embodied.[77] This is illustrated by the Mark Twain case which held that the possession of an unpublished manuscript which the defendant acquired by purchase, did not confer upon him the ownership or right of first publication of the literary property.[78] Viewed from this perspective, the courts have had no difficulty in finding a common law right in a concrete combination of ideas[79] evolved into a radio program or an evanescent telecast.[80]

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72. It should be pointed out that a substantial number of foreign countries draw no distinction between published and unpublished works, and the statutes furnishing such copyright protection have no dual system of common law and statutory copyright as exemplified by the United States. See 2 UNESCO COPYRIGHT BULL. [No. 2-3] 20 (1949). The present copyright law of Great Britain (Copyright Act, 1911, 1 & 2 GEO. 5, c. 46) abolished common law copyright in unpublished works and conferred statutory copyright upon such unpublished works by § 1 (1). See LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 882 (1938).

73. See LADAS, *op. cit. supra* note 72, at 7 *et seq.*, particularly his discussion and analysis of the German theorists. This theory, *i.e.*, that common law and statutory copyright reflect rights of personality, is the starting point for the recognition of the moral rights of an author. For a discussion of this concept see Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators,* 53 HARV. L. REV. 554 (1940); UNESCO COPYRIGHT BULL. 58 *et seq.* (1949).

74. This is the French conception of copyright law or *droit d' auteur* which attaches to the person of the author and is considered inalienable. See LADAS, *op. cit. supra* note 72, at 7.

75. See LADAS, *op. cit. supra* note 72, at 4-5; WEIL *op. cit. supra* note 71, at 105. Warren and Brandeis in *The Right of Privacy,* 4 HARV. L. REV. 193, 205 (1890), have intimated that common law copyright may be protected via the right of privacy. But for the most part, American courts have not invoked the privacy doctrine to explain or justify common law copyright.

76. WEIL, *op. cit. supra* note 71, at 105.

77. Italiani v. Metro-Goldwyn-Mayer Corp., 45 Cal. App. 2d 464, 114 P. 2d 370 (1941); Schleman v. Guaranty Title Co., 153 Fla. 379, 15 So. 2d 754, 149 A. L. R. 1029 (1944); Kurfiss v. Cowherd, 233 Mo. App. 397, 121 S. W. 2d 282 (1938); Pushman v. New York Graphic Society, Inc., 287 N. Y. 302, 39 N. E. 2d 249 (1942).

78. Chamberlain v. Feldman, 84 N. Y. S. 2d 713 (1949), 62 HARV. L. REV. 1406; *cf.* American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. Ed. 208 (1907); *In re* Dickens, [1935] 1 Ch. 267.

79. Stanley v. Columbia Broadcasting System, Inc., 192 P. 2d 495 (Cal. App. 1948), *aff'd,* 208 P. 2d 9 (Cal. 1949); Cole v. Phillips H. Lord, Inc., 262 App. Div. 116, 28 N. Y. S. 2d 404 (1st Dep't 1941).

80. *Cf.* Patterson v. Century Production, Inc., 93 F. 2d 489 (2d Cir. 1938), *cert. denied,* 303 U. S. 655 (1939).

Common law copyright is governed by the same rules of transfer and succession and may employ the remedies accorded other personal property.[81] However, creditors cannot execute against an unpublished manuscript and publish it,[82] nor may the purchaser of an unpublished work at a bankruptcy sale.[83] It is doubtful, however, if the dictum which recites that literary property is not subject to taxation, would be binding on the Bureau of Internal Revenue.[84] The common law rights in an unpublished intellectual production can be sold outright or a limited interest may be licensed for a specific period of time.[85] A painting which is a species of common law copyright may be sold to one person with the proprietor retaining all common law rights, including the first right of publication, multiplication of copies and the right to obtain a copyright.[86] Common law copyright passes to the personal representatives of the deceased owner and may be bequeathed by will.[87]

Common law rights are relinquished or abandoned if statutory copyright is obtained.[88] This raises the important issues of similarities and differences between common law and statutory copyright.

The obvious differences may be noted briefly:

Common law copyright is perpetual whereas statutory copyright is for a definite term.[89]

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81. Thus an injunction may issue: Chappell & Co. v. Fields, 210 Fed. 864 (2d Cir. 1914); National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294 (7th Cir. 1902); Thomas v. Lennon, 14 Fed. 849 (C. C. Mass. 1883); an action for conversion may lie: Taft v. Smith, 76 Misc. 283, 134 N. Y. Supp. 1011 (Sup. Ct. 1912); and exemplary damages may be awarded for certain interferences: Press Pub. Co. v. Monroe, 73 Fed. 196 (2d Cir. 1896), *writ of error dismissed,* 164 U. S. 105 (1896).

82. Bartlett v. Crittenden, 2 Fed. Cas. 967, No. 1,076 (C. C. Ohio 1849); Dart v. Woodhouse, 40 Mich. 399, 29 Am. Rep. 544 (1879).

83. Berry v. Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937).

84. Harper & Bros. v. Donohue, 144 Fed. 491, 492 (C. C. N. D. Ill. 1905): "Such literary property is not subject either to execution or taxation, because this might include a forced sale, the very thing the owner has the right to prevent." This dictum was severely criticized by Weil as "the high water mark of the extraordinary claims sometimes asserted in connection with this subject. Property beyond governmental reach or regulation, would indeed be an astonishing phenomenon." WEIL, *op. cit. supra* note 71, at 113-14.

85. Comm'r v. Wodehouse, 69 Sup. Ct. 1120 (U. S. 1949); Hazard v. Columbia Broadcasting System, Inc., 150 F. 2d 852 (9th Cir. 1945); Remick Music Corp. v. Interstate Hotel Co., 58 F. Supp. 523 (D. Neb. 1944), *aff'd,* 157 F. 2d 744 (8th Cir. 1946), *cert. denied,* 329 U. S. 809 (1946); Grant v. Kellogg Co., 58 F. Supp. 48 (S. D. N. Y. 1944), *aff'd,* 154 F. 2d 59 (2d Cir. 1946); Harris v. Twentieth Century Fox Film Corp., 43 F. Supp. 119 (S. D. N. Y. 1942).

86. American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. Ed. 208 (1907); *cf.* Pushman v. New York Graphic Society, Inc., 287 N. Y. 302, 39 N. E. 2d 249 (1942).

87. Folsom v. Marsh, 9 Fed. Cas. 342, No. 4,901 (C. C. Mass. 1841).

88. Loew's, Inc. v. Superior Court of Los Angeles County, 18 Cal. 2d 419, 115 P. 2d 983 (1941); Leven v. Schulman, 178 Misc. 763, 36 N. Y. S. 2d 547 (Sup. Ct. 1942).

89. McCarthy & Fischer, Inc. v. White, 259 Fed. 364 (S. D. N. Y. 1919); Stanley v. Columbia Broadcasting System, Inc., 208 P. 2d 9, 13 (Cal. 1949); Tompkins v. Halleck, 133 Mass. 32 (1882); Palmer v. DeWitt, 47 N. Y. 532, 7 Am. Rep. 480 (1872). Copyright Code, 17 U. S. C. A. § 24 (Supp. 1948), provides: "The copyright secured by this title shall endure for twenty-eight years from the date of first publication. . . . The proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years."

Since common law copyright is an absolute property right, it cannot be copied, mechanically reproduced by any device, arranged, translated, adapted or performed by any means or through any medium without the consent of the proprietor.[90] The unauthorized use of a common law copyright may subject the tortfeasor to an action at law for damages; or equitable jurisdiction will be invoked to enjoin such unauthorized use with a decree for an accounting of the profits.[91] Copyright before publication thus prohibits any kind of unauthorized interference with unpublished works. Statutory copyright, on the other hand, permits a "fair use" of the copyrighted work without deeming it an infringement.[92] Common law copyright is enforceable in the state courts and there is no limit to the damages that may be secured in an infringement suit.[93] Statutory copyright is an exclusive federal matter with statutory damages prescribed on a minimum and maximum scale, where actual damages or profits cannot be ascertained.[94]

Statutory copyright requires formal notice and reservation of copyright as a condition precedent to registration.[95] Common law copyright has no such requirement.

Registration under the Copyright Code is prima facie evidence of ownership.[96] Common law copyright requires proof of prior authorship; this is considered its chief disadvantage. Another disadvantage of common law copyright is the technical legal concept of publication whereby common law rights are frequently lost because a proprietor unknowingly dedicates his work to the public.[97]

90. Maurel v. Smith, 271 Fed. 211 (2d Cir. 1921), *aff'd* 220 Fed. 195 (S. D. N. Y. 1915); Golding v. RKO Radio Pictures, Inc., 193 P. 2d 153 (Cal. App. 1948), *aff'd*, 208 P. 2d 1 (Cal. 1949); Stanley v. Columbia Broadcasting System, Inc., 192 P. 2d 495 (Cal. App. 1948), *aff'd*, 208 P. 2d 9 (Cal. 1949); Loew's, Inc. v. Superior Court of Los Angeles County, 18 Cal. 2d 419, 115 P. 2d 983 (1941); Johnston v. Twentieth Century-Fox Film Corp., 82 Cal. App. 2d 796, 187 P. 2d 474 (1947); Pushman v. New York Graphic Society, Inc., 287 N. Y. 302, 39 N. E. 2d 249 (1942).

91. Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 30 Sup. Ct. 38, 54 L. Ed. 150 (1909); Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055 (U. S. 1834); Maxwell v. Goodwin, 93 Fed. 665 (C. C. N. D. Ill. 1899). In Press Publishing Co. v. Monroe, 73 Fed. 196 (2d Cir. 1896), *writ of error dismissed*, 164 U. S. 105 (1896), it was held that exemplary or punitive damages may be awarded.

92. Hill v. Whalen & Martell, Inc., 220 Fed. 359 (S. D. N. Y. 1914); LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 850 *et seq.* (1938). The following are considered within the scope of "fair use": the right of quotation for research, commentary, criticism or study; incidental or background use of a copyrighted work; the right of parody in the same or a different form; the right of style, *i.e.*, where the piece is written in the style of a copyrighted work, the copyright proprietor cannot claim damages; and a brief synopsis or abridgment of a copyrighted work under restricted conditions.

93. *Cf.* Loew's, Inc. v. Superior Court of Los Angeles County, 18 Cal. 2d 419, 115 P. 2d 983 (1941).

94. Copyright Code, 17 U. S. C. A. § 101 (Supp. 1948.)

95. Copyright Code, 17 U. S. C. A. §§ 10, 11, 13 (Supp. 1948). Washington Publishing Co. v. Pearson, 306 U. S. 30, 59 Sup. Ct. 397, 83 L. Ed. 470 (1939); Heim v. Universal Pictures Co., 154 F. 2d 480 (2d Cir. 1946); Davenport Quigley Expedition v. Century Productions, 18 F. Supp. 974 (S. D. N. Y. 1937).

96. Freudenthal v. Hebrew Pub. Co., 44 F. Supp. 754 (S. D. N. Y. 1942); Edward B. Marks Music Corp. v. Stasny Music Corp., 1 F. R. D. 720 (S. D. N. Y. 1941).

97. SHAFTER, MUSICAL COPYRIGHT 108 *et seq.* (2d ed. 1939).

The few basic similarities between common law and statutory copyright may be noted briefly. Both furnish protection to the incorporeal property separate and apart from its tangible form.[98]

The same standards or tests for infringement resulting from unauthorized use are employed for common law[99] as for statutory copyright.[100] Although the concept of infringement has been developed primarily in the field of statutory copyright, courts apply the same principles in cases dealing with common law copyright with but one exception previously noted. The doctrine of "fair use" is inapplicable to common law copyright.

Another similarity which exists is in the subject mater of common law[101] and statutory copyright.[102] Common law rights not only are as co-extensive as the subject matter of statutory copyright, but extend to certain original intellectual productions which cannot secure the protection and benefits of the Copyright Code. Thus phonograph records[103] and transcriptions[104]

98. Copyright Code, 17 U. S. C. A. §§ 27, 28 (Supp. 1948); Remick Music Corp. v. Interstate Hotel Co., 58 F. Supp. 523 (D. Neb. 1944), *aff'd*, 157 F. 2d 744 (8th Cir. 1946), *cert. denied*, 329 U. S. 809 (1947); McClintic v. Sheldon, 182 Misc. 32, 43 N. Y. S. 2d 695 (Sup. Ct. 1943), *rev'd on other grounds*, 269 App. Div. 356, 55 N. Y. S. 2d 879 (1st Dep't 1945). See notes 77, 78 *supra*.

99. De Acosta v. Brown, 146 F. 2d 408 (2d Cir. 1944), *cert. denied*, 325 U. S. 862 (1945); Dieckhaus v. Twentieth Century-Fox Film Corp., 54 F. Supp. 425 (E. D. Mo. 1944), *rev'd on other grounds*, 153 F. 2d 893 (8th Cir. 1946), *cert. denied*, 329 U. S. 716 (1946); Wilkie v. Santly Bros., 13 F. Supp. 136 (S. D. N. Y. 1935), *aff'd*, 91 F. 2d 978 (2d Cir. 1937), *cert. denied*, 302 U. S. 735 (1937), *aff'd on reargument*, 94 F. 2d 1023 (2d Cir. 1938); Golding v. R. K. O. Pictures, Inc., 201 P. 2d 1 (Cal. 1949); Stanley v. Columbia Broadcasting System, Inc., 208 P. 2d 9 (Cal. 1949).

100. Universal Pictures Co. v. Harold Lloyd Corp., 162 F. 2d 354 (9th Cir. 1947); Heim v. Universal Pictures Co., 154 F. 2d 480 (2d Cir. 1946); Arnstein v. Porter, 154 F. 2d 464 (2d Cir. 1946); Harold Lloyd Corp. v. Witwer, 65 F. 2d 1 (9th Cir. 1933), *pet. for cert. dismissed*, 296 U. S. 669 (1933); MacDonald v. Du Maurier, 75 F. Supp. 655 (S. D. N. Y. 1948).

101. See cases cited note 99 *supra;* and see section 2 *supra*, for the subject matter of common law copyright.

102. Copyright Code, 17 U. S. C. A. § 5 (Supp. 1948): "CLASSIFICATION OF WORKS FOR REGISTRATION.—The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

"(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.
"(b) Periodicals, including newspapers.
"(c) Lectures, sermons, addresses (prepared for oral delivery).
"(d) Dramatic or dramatico-musical compositions.
"(e) Musical compositions.
"(f) Maps.
"(g) Works of art; models or designs for works of art.
"(h) Reproductions of a work of art.
"(i) Drawings or plastic works of a scientific or technical character.
"(j) Photographs.
"(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.
"(l) Motion-picture photoplays.
"(m) Motion pictures other than photoplays.

"The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title."

103. Waring v. Dunlea, 26 F. Supp. 338 (E. D. N. C. 1939); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937); *cf.* RCA Mfg. Co. v. Whiteman, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U. S. 712 (1940).

104. Waring v. Dunlea, 26 F. Supp. 338 (E. D. N. C. 1939).

which preserve the interpretative performances of an orchestra, and actors and singers [105] are protected by common law copyright; they cannot invoke the benefits of the Copyright Code since mechanical devices such as phonograph records are not considered the "writings" of an author.[106] Whether a telecast will be deemed the "writings" of an author constitutes a neat problem.[107] As indicated elsewhere, a telecast represents an original intellectual production because of the technical and artistic skills required to produce it. The transitory character of a telecast does not destroy this protectible property interest.[108] Statutory copyright on the other hand is restricted by the constitutional limitation that copyright can be conferred only upon an "author" and his "writings." The courts have broadly construed this phrase. "By 'writings' in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression." [109] This liberal interpretation has been continued by the courts.[110] Although the evanescent character of a telecast precludes the assertion or recognition of statutory copyright in a telecast per se,[111] the unauthorized exhibition of a copyrighted work may be forbidden and its lawful use protected. Thus the Copyright Office permits the registration of dramatic scripts designed for radio or television broadcasts [112] and of motion picture photoplays [113] and motion pictures other than photoplays intended for transmission by tele-

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105. *Ibid.;* Savage v. Hoffmann, 159 Fed. 584 (C. C. S. D. N. Y. 1908); *cf.* Long v. Decca Records, Inc., 76 N. Y. S. 2d 133 (Sup. Ct. 1947).

106. Copyright Code, 17 U. S. C. A. § 1 (e) (Supp. 1948). See H. R. REP. No. 2222, 60th Cong., 2d Sess. 9 (1909): "It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices." And see 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).

107. Copyright Code, 17 U. S. C. A. § 4 (Supp. 1948): "The works for which copyright may be secured under this title shall include all the writings of an author."

108. Patterson v. Century Productions, 93 F. 2d 489 (2d Cir. 1937), *cert. denied,* 303 U. S. 655 (1938).

109. Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 58, 4 Sup. Ct. 279, 28 L. Ed. 349 (1884).

110. Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460 (1903); National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294, 297 (7th Cir. 1902); LADAS, *op. cit. supra* note 72, at 705 *et seq.;* WEIL, *op. cit. supra* note 71, at 28 *et seq.*

111. The test of copyrightability is that the subject matter be visible and susceptible of registration with the copyright office. A telecast is a visible expression but its transitory character precludes registration with the copyright office.

112. Regulations of the Copyright Office, 37 CODE FED. REGS. § 202.5, found in 13 Fed. Reg. 8650 (1948): *"Dramatic and dramatico-musical compositions (Class D).* This class includes works dramatic in character such as plays, dramatic scripts designed for radio or television broadcast, pantomimes, ballets, musical comedies and operas."

113. *Id.* § 202.13: *"Motion-picture photoplays (Class L).* This class includes motion pictures, dramatic in character, such as features, serials, animated cartoons, musical plays, and similar productions intended for projection on a screen, or for transmission by television or other means."

vision.[114] Similarly the unauthorized telecast of a copyrighted drama or work of art would infringe the statutory rights conferred upon the copyright proprietor.[115] As far as television is concerned, both common law and statutory copyright prohibit its unauthorized use and conversely protect its lawful uses. Common law copyright goes one step further and furnishes protection to the telecast per se. But from a practical point of view the concept of infringement other than the doctrine of "fair use," furnishes the same protection for both common law and statutory copyright.

The question of whether common law copyright and statutory copyright can exist concurrently in an intellectual production was raised in the landmark cases of *Millar v. Taylor*[116] and *Donaldson v. Beckett.*[117] It will be recalled that the Statute of Anne, enacted in 1709, provided that anyone who had already printed and published a book prior to April 10, 1710, which was the effective date of the act, should have a copyright for 21 years from that date; anyone who printed and published a book after that date should have a 14-year copyright.[118] In *Millar v. Taylor,* the Stationers' Company secured a temporary victory when the court of King's Bench ruled that their perpetual common law copyright was not abrogated by the Statute of Anne. This triumph was shortlived. Five years later, in *Donaldson v. Beckett,* the House of Lords reversed *Millar v. Taylor* and concluded that the perpetual rights conferred by the common law were abrogated by the copyright statute.[119]

Donaldson v. Beckett has been followed by the American courts. This is illustrated by the fairly recent case of *Loew's, Inc. v. Superior Court of Los Angeles County.*[120] Plaintiff, Al Rosen, invoked the jurisdiction of a local state court, claiming that the picture, "The Mortal Storm," produced by Loew's infringed his unpublished dramatic composition and motion picture scenario, entitled "The Mad Dog of Europe." Loew's petitioned for

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114. *Id.* § 202.14 "(*Class M*). This class includes non-dramatic motion pictures, such as newsreels, musical shorts, travelogues, educational and vocational guidance films, and similar productions intended for projection on a screen, or for transmission by television or other means."

115. Copyright Code, 17 U. S. C. A. § 1 (Supp. 1948).

116. 4 Burr. 2303, 98 Eng. Rep. 201 (K. B. 1769).

117. 2 Brown P. C. 129, 1 Eng. Rep. 837, s.c. 4 Burr. 2408, 98 Eng. Rep. 257 (H. L. 1774). For an excellent analysis of these "landmark" cases see KILROE, OUTLINE OF LECTURE ON COPYRIGHT LEGISLATION (1944).

118. 8 ANNE c. 19 (1709).

119. The House of Lords answered five questions, establishing the following propositions: (1) that at common law the author of a book or literary composition had the sole right of first publishing and printing the same; (2) that publication did not take away the common law copyright of an author in his work (this was dictum which was overruled in Jeffreys v. Boosey, 4 H. L. Cas. 461 (1854), where the House of Lords held that at the common law, common law copyright does not survive publication); (3) that the Statute of Anne took away all of the author's common law rights and precluded him from every remedy not founded on the statute; (4) that the author of any literary composition, or his assignees, had the sole right of printing and publication in perpetuity under the common law; (5) that the right of perpetuity was taken away by the Statute of Anne.

120. 18 Cal. 2d 419, 115 P. 2d 983 (1941).

the issuance of the peremptory writ of prohibition, directed against the Superior Court, claiming that the latter could not entertain this action since Rosen had copyrighted "The Mad Dog of Europe" as an unpublished work. The case turned on the issue of whether the federal courts had exclusive jurisdiction under the provisions of the copyright law. This issue was dependent on whether common law and statutory rights existed concurrently:

> "The rights of one who proceeds under the statute should thenceforth be measured by the provisions of the statute. The common law right exists until the statute has been invoked and rights created thereunder, or the common law right has otherwise been abandoned; and this is so in one case as in the other. The author has the right of election, that is, he may content himself with his common law copyright, or he may elect to substitute therefor the right afforded by the statute by complying with its provisions, whereupon the extent of his copyright and the remedies for infringement are governed by the statutory provisions. Rosen's election was made when he proceeded to secure protection of the dramatic rights in the composition under the copyright statute. He cannot make a different election now. There is no expression in any of the authorities that a common law and a statutory right may exist concurrently, as is here claimed . . . 'No proposition is better settled than that a statutory copyright operates to divest a party of the common-law right.' Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N. Y. 241, 247 . . .; Bobbs-Merrill Co. v. Straus, 2 Cir., 147 F. 15 . . .; Société des Films Menchen v. Vitagraph Co., 2 Cir., 251 F. 258, 260; Universal Film Mfg. Co. v. Copperman, 2 Cir., 218 F. 577; Cohan v. Robbins Music Corp., 244 App. Div. 697, 280 N. Y. S. 571 and cases cited." [121]

Thus the line of demarcation between common law and statutory copyright is "publication" and its legal consequences. Publication with notice is a condition precedent to statutory copyright.[122] And general publication with or without the intent to dedicate the work to the public results in a loss or abandonment of common law rights. [123] Publication has a double-barreled significance which has no theoretical or logical basis of distinction other than the fact that statutory copyright is initiated by publication. The concept of publication which results in the loss of common law rights will be discussed in the following sections.

(4) Publication

The term "publication" is a word of art; its meaning is none too clear. Generally speaking, it may be described as an act of the owner whereby the subject matter is made available to the general public under circumstances permitting copies to be made or which indicate an intention of

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121. 115 P. 2d at 986. See also Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055 (U. S. 1834); Leven v. Schulman, 178 Misc. 763, 36 N. Y. S. 2d 547 (Sup. Ct. 1942). But *cf.* Blanc v. Lantz, 83 U. S. P. Q. 137 (Calif. Super. Ct. 1949).

122. Copyright Code, 17 U. S. C. A. §§ 10, 12, 13 (Supp. 1948).

123. This will be discussed in the following sections.

rendering the work common property and imply an abandonment and dedication of the work to the general public.[124]

Many courts have divided the term "publication" into two classifications: general publication and limited or qualified publication.

A general publication consists of a disclosure, communication, circulation, exhibition or distribution of the work, tendered or given the general public, which implies an abandonment of the copyright or a dedication of the same to the general public.[125]

A "limited or qualified publication" on the other hand is "one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public." [126] A limited publication may be regarded as one with restrictions and limitations on the use and enjoyment of the subject matter to a select number of persons, or a limited ascertained class, or for some particular occasion or definite purpose.[127]

In *Waring v. WDAS Broadcasting Station, Inc.*,[128] the court correctly set forth the applicable principles of law governing "limited" and "general" publication:

> "The law has consistently distinguished between performance and publication,—between what is sometimes referred to as a 'limited' or 'qualified' and a 'general' publication. 'When the communication is to a select number upon condition, express or implied, that it is not intended to be thereafter common property, the publication is then said to be limited. . . . In American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 S. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595, the applicable rule is quoted with approval from Slater on the Law of Copyright and Trade Mark as follows: 'It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public as to justify the belief that it took place with the intention of rendering such work common property.' . . . 'The test is whether there is or is not such

124. Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 30 Sup. Ct. 38, 54 L. Ed. 150 (1909); Holmes v. Hurst, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904 (1899); Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055 (U. S. 1834); Grant v. Kellogg Co., 58 F. Supp. 48 (S. D. N. Y. 1944), *aff'd* 154 F. 2d 59 (2d Cir. 1946); Krafft v. Cohen, 32 F. Supp. 821 (E. D. Pa. 1940), *rev'd*, 117 F. 2d 579 (3d Cir. 1941); D'Ole v. Kansas City Star Co., 94 Fed. 840, 842 (C. C. W. D. Mo. 1899); Ladd v. Oxnard, 75 Fed. 703, 730 (C. C. Mass. 1896); Keene v. Wheatley, 14 Fed. Cas. 180, 198, No. 7,644 (C. C. E. D. Pa. 1861); Golding v. RKO Radio Pictures, Inc., 193 P. 2d 153 (Cal. App. 1948), *aff'd*, 208 P. 2d 1 (Cal. 1949); Stanley v. Columbia Broadcasting System, Inc., 192 P. 2d 495 (Cal. App. 1948), *aff'd*, 208 P. 2d 9 (Cal. 1949); Pushman v. New York Graphic Society, Inc., 25 N. Y. S. 2d 32 (Sup. Ct. 1941), *aff'd* 287 N. Y. 302, 39 N. E. 2d 249 (1942); Berry v. Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937).

125. See cases cited note 124 *supra;* American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 54 L. Ed. 208 (1907): Berry v. Hoffman, 125 Pa. Super. 261, 189 Atl. 516 (1937). See Note, 35 HARV. L. REV. 600 (1922): "Any communication or disclosure by the author which permits an unrestricted use of the subject matter by the public, or by those members of the public to whom it may be committed, is a general publication."

126. Werckmeister v. American Lithographic Co., 134 Fed. 321, 324 (2d Cir. 1904); Kurfiss v. Cowherd, 223 Mo. App. 397, 121 S. W. 2d 282 (1938); and see cases cited note 124 *supra.*

127. "The letter of November 4, 1940 from Cummins to Pasternak, enclosing a copy of the song, was not a publication or offering for sale in the United States. Nor were the playings of the song here, nor was the filing of the copy in the copyright office." Heim v. Universal Pictures Co., Inc., 154 F. 2d 480, 486 (2d Cir. 1946).

128. 327 Pa. 433, 194 Atl. 631 (1937).

a surrender as permits the absolute and unqualified enjoyment of the subject-matter by the public or the members thereof to whom it may be committed.' Werckmeister v. Amer. Lith. Co. (C. C. A.) 134 F. 321, 68 L. R. A. 591, 596. Berry v. Hoffman, 125 Pa. Super. 261, 267, 268, 189 A. 516, 519. Thus the production of a play, Ferris v. Frohman, 223 U. S. 424, 32 S. Ct. 263, 56 L. Ed. 492, the delivery of a lecture, Nutt v. National Institute, Inc., for the Improvement of Memory (C. C. A.) 31 F. (2d) 236, the playing of a musical composition, McCarthy & Fischer, Inc. v. White (D. C.) 259 F. 364, the exhibition of a painting, American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 S. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595, a performance over the radio, Uproar Co. v. National Broadcasting Co. (D. C.) 8 F. Supp. 358, does not constitute a publication which operates as an abandonment to public use. In determining whether or not there has been such a publication, the courts look partly to the objective character of the dissemination and partly to the proprietor's intent in regard to the relinquishment of his property rights." [129]

(5) Publication Applied to Specific Situations

The general rule is that publication is effected when copies, made by any means whatsoever, are available for distribution to the general public and disseminated without restriction.[130]

Thus a book is published when printed copies are exposed for sale or gratuitously offered the general public.[131] Printing does not constitute a publication since a book may be withheld from the public long after it is printed.[132]

Two fairly recent cases involving publication in foreign countries warrant discussion. In *Basevi v. Edward O'Toole Co.*,[133] it was held that a general publication of a foreign work in a foreign country, without notice of United States copyright, destroyed the author's common law rights in the United States; and that a subsequent copyright obtained under the copyright laws was ineffective. The doctrine of the *Basevi* case was reversed in *Heim*

129. 194 Atl. at 636. See also Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. Mass. 1934), *modified*, 81 F. 2d 373 (1st Cir. 1936), *cert. denied*, 298 U. S. 670 (1936); Universal Film Mfg. Co. v. Copperman, 218 Fed. 577 (2d Cir. 1914); Harper & Bros. v. Donohue & Co., 144 Fed. 491 (C. C. N. D. Ill. 1905); Stanley v. Columbia Broadcasting System, Inc., 192 P. 2d 495 (Cal. App. 1948), *aff'd*, 208 P. 2d 9 (Cal. 1949).

130. In American Tobacco Co. v. Werckmeister, 207 U. S. 284, 299, 28 Sup. Ct. 72, 52 L. Ed. 208 (1907), it was held: "It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property." See also Berry v. Hoffman, 125 Pa. Super. 261, 268, 189 Atl. 516, 519 (1937).

131. Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 84 Hun 12, 32 N. Y. Supp. 41, 44 (Sup. Ct. 1895), quoting Drone, Copyrights 291 (1879): "A book is published when printed copies are sold unconditionally to the public. . . . [T]o constitute a publication, it is essential that the work shall be exposed for sale, or gratuitously offered to the general public; so that the public, without discrimination as to persons, may have an opportunity to enjoy that for which protection is granted. Printing itself cannot amount to a publication, for the obvious reason that a book may be withheld from the public long after it has been printed."

132. *Ibid.* The typewriting or mimeographing of radio or television scripts for use by performers for rehearsal, etc., is not a general publication. *Cf.* Press Pub. Co. v. Monroe, 73 Fed. 196 (2d Cir. 1896); Bartlette v. Crittenden, 2 Fed. Cas. 931, No. 1,082 (C. C. Ohio 1847); Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N. Y. 241, 49 N. E. 872 (1898), *rev'g* 84 Hun 12, 32 N. Y. Supp. 41, 44 (Sup. Ct. 1895).

133. 26 F. Supp. 41 (S. D. N. Y. 1939).

v. Universal Pictures Co., Inc.,[134] where it was held that "publication in a foreign country by a foreign author . . . [does] not . . . require, as a condition of obtaining or maintaining a valid American copyright, that any notice be affixed to any copies whatever published in such foreign country, regardless of whether publication first occurred in that country or here, or whether it occurred before or after registration here." [135] This means that the term "general publication" is a divisible concept: "general publication" of a work may be effected outside the United States without destroying common law copyright of the same work in the United States. It is believed that the *Heim* case, which involved certain specific provisions of the Copyright Code, cannot be reconciled with the case law on common law and statutory copyright.[136]

Publication is likewise effected when copies of a pamphlet are given away or left in a hotel office for the benefit of the hotel's guests.[137] Publication takes place when picture postcards are offered for sale to the general public;[138] when a manuscript is released serially in a magazine and is later sought to be printed in book form;[139] when musical works are offered for sale to the general public;[140] and when the plans of an architect are filed with a city.[141]

On the other hand, the submission of the manuscript of a literary work to persons for their consideration and acceptance is not publication.[142] In

134. 154 F. 2d 480 (2d Cir. 1946). The majority opinion states: "Basevi v. Edward O'Toole Co., D. C., 26 F. Supp. 41, 46, we think was wrongly decided on this point." *Id.* at 487 n. 6.

135. 154 F. 2d at 486.

136. Compare the concurring opinion of Judge Clark: "The opinion holds that American copyright is secured by publication abroad without the notice of copyright admittedly required for publication here. This novel conclusion, here suggested for the first time, seems to me impossible in the face of the statutory language that the person thereto entitled 'may secure copyright for his work by publication thereof with the notice of copyright required by this title,' § 9 of the Copyright Act, 17 U. S. C. A. § 9, and § 18, defining the 'notice of copyright required by section 9 of this title,' with the provision that as to work of the character here involved 'the notice shall include also the year in which the copyright was secured by publication.' It is against the view of such expert copyright judges as Hough, J., in Italian Book Co. v. Cardilli, D. C. S. D. N. Y., 273 F. 619 and Universal Film Mfg. Co. v. Copperman, D. C. S. D. N. Y., 212 F. 301, affirmed 2 Cir., 218 F. 577, certiorari denied, 235 U. S. 704, . . . and Woolsey, J., in Basevi v. Edward O'Toole Co., D. C. S. D. N. Y., 26 F. Supp. 41, and apparently the universal assumption of text writers. See Howell, The Copyright Law, 1942, 73; Ladas, The International Protection of Literary and Artistic Property, 1938, 698; Ball, The Law of Copyright and Literary Property, 1944, 217; Copyright Protection in the Americas (Law & Treaty Series No. 16) 66; 18 C. J. S. Copyright and Literary Property, § 66, p. 190." 154 F. 2d at 488-89.

137. D'Ole v. Kansas City Star Co., 94 Fed. 840, 842 (C. C. W. D. Mo. 1899). Sale of a single copy, Stern v. Jerome H. Remick Co., 175 Fed. 282 (C. C. S. D. N. Y. 1910); Gottsberger v. Aldine Book Pub. Co., 33 Fed. 381 (C. C. Mass. 1887); or a public offer of copies of a work for sale, Francis, Day & Hunter v. Feldman & Co., [1914] 2 Ch. 728, constitute publication.

138. Bamforth v. Douglass Post Card & Machine Co., 158 Fed. 355 (C. C. E. D. Pa. 1908).

139. Holmes v. Hurst, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904 (1889).

140. Wagner v. Conried, 125 Fed. 798 (C. C. S. D. N. Y. 1903).

141. Wright v. Eisle, 83 N. Y. Supp. 887 (2d Dep't 1903).

142. See Heim v. Universal Pictures Co., 154 F. 2d 480 (2d Cir. 1946); Gerlach-Barklow Co. v. Morris & Bendien, 23 F. 2d 159 (2d Cir. 1927); Allen v. Walt Disney Produc-

Press Publishing Co. v. Monroe,[143] plaintiff was invited by the Chicago World's Fair of 1892 to compose and deliver an ode at the dedicatory exercises. Copies of the final version of the ode were delivered to a committee on ceremonies and to a special literary committee for their decision as to whether the ode submitted was suitable. Fifty-six lines of the ode were set to music and these lines were printed and distributed among members of the chorus for the purpose of rehearsal. The court held that neither the delivery of copies of the ode to the committees, nor the printing and distribution of the ode to the chorus for rehearsal purposes constituted publication. However, a newspaper which printed the ode prior to its delivery at the fair and without the author's permission, infringed plaintiff's common law rights and was liable in damages. The court held that the plaintiff had reserved her copyright in the composition, although she supplied the committee with copies for publication in the press and for free distribution; in addition the ode was published in the official history of the dedicatory ceremonies.

For the most part, the courts have held that a performance is a "limited" or "qualified" publication.[144] Thus there is no general publication when copies of a poem are given to a body to judge its suitability;[145] nor when copies of an etching are circulated among friends;[146] nor when a public lecture or address is delivered;[147] nor when a song is sung to a paid audience;[148] nor when a newspaper account of the presentation of a play is published;[149] nor when a play is performed before a paid audience;[150] nor when a script is broadcast.[151]

Ferris v. Frohman,[152] which involved the presentation of a play upon the stage, warrants discussion. Two English authors had written and pro-

tions, 41 F. Supp. 134 (S. D. N. Y. 1941); Basevi v. Edward O'Toole Co., 26 F. Supp. 41 (S. D. N. Y. 1939).

143. 73 Fed. 196 (2d Cir. 1896), *writ of error dismissed,* 164 U. S. 105 (1897).

144. Ferris v. Frohman, 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492 (1912); Aronson v. Fleckenstein, 28 Fed. 75 (C. C. N. D. Ill. 1886); McCarthy & Fischer, Inc. v. White, 259 Fed. 364 (S. D. N. Y. 1919); Stanley v. Columbia Broadcasting System, Inc., 208 P. 2d 9 (Cal. 1949); Palmer v. DeWitt, 47 N. Y. 532 (1872).

145. Press Publishing Co. v. Monroe, 73 Fed. 196 (2d Cir. 1896), *writ of error dismissed,* 164 U. S. 105 (1897).

146. Prince Albert v. Strange, 2 De G. & S. 652, 64 Eng. Rep. 293 (Ch. 1848), *aff'd,* 1 Mac. & G. 25, 41 Eng. Rep. 1171 (Ch. 1849).

147. Nutt v. National Institute Inc. for the Improvement of Memory, 31 F. 2d 236 (2d Cir. 1929); Bartlette v. Crittenden, 2 Fed. Cas. 981, No. 1,082 (C. C. Ohio 1847); Caird v. Simes, 12 App. Cas. 326 (1887).

148. McCarthy & Fischer, Inc. v. White, 259 Fed. 364 (S. D. N. Y. 1919).

149. O'Neill v. General Film Co., 171 App. Div. 854, 157 N. Y. Supp. 1028 (1st Dep't 1916).

150. Ferris v. Frohman, 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492 (1912); Palmer v. De Witt, 47 N. Y. 532 (1872). Some early cases held that if a play could be reproduced from memory, no relief would be had. Keene v. Wheatley, 14 Fed. Cas. 180, No. 7,644 (C. C. E. D. Pa. 1861); Keene v. Kimball, 82 Mass. 545 (1860). This approach was repudiated in Tompkins v. Halleck, 133 Mass. 32 (1882); and Ferris v. Frohman, *supra.*

151. Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. Mass. 1934), *modified,* 81 F. 2d 373 (1st Cir. 1936), *cert. denied,* 298 U. S. 670 (1936).

152. 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492 (1912).

duced a play entitled "The Fatal Card" in England. The plaintiff bought one of the author's right, title and interest in the play, with the exclusive right to produce and perform it in the United States and Canada. The play was never copyrighted in the United States. It was publicly produced under the supervision of the plaintiff in various cities in the United States and Canada. Afterwards, one George E. MacFarlane adapted the play, and called it by the same name, "The Fatal Card." He transferred it to the defendant who copyrighted it in the United States and thereafter produced it in various cities of the United States. Plaintiff sought to enjoin the further presentation of the play by the defendant relying on his common law rights as against defendant's copyright. The Supreme Court applied the common law rule "that the public representation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right, save by operation of statute." The public performance of the play in England did not deprive the proprietor-assignee thereof, of the common law copyright in the United States. Plaintiff enjoincd defendant's unauthorized adaptation of the play, although under the English statute, the first public performance of a play is deemed publication, thus cutting off all common-law rights in England.[153]

One further group of cases warrants discussion. The typical case is where an owner offers a work for sale but intends a limited or qualified publication. The latter is effectuated by explicit restrictions on its use. The leading case is *Jewelers' Mercantile Agency, Ltd., v. Jewelers' Weekly Publishing Company.*[154] Plaintiff, a mercantile agency, prepared and printed twice a year a book containing information on the business credit of persons in the jewelry trade. These books were furnished to the plaintiff's subscribers under a contract which provided among other things that the information contained in the book should not be divulged. This proviso was declared invalid. "[I]f a book be put within reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common law copyright, or right of first publication, is gone." [155] The court concluded that the publisher's restriction on the use of the book did not take away the real character of the act which was that of publication. In another case it was held that when an edition of a musical work has been offered for sale to the general public, a notice that "this copy must not be used for production on the stage" was "ineffective to reserve the very

153. See also Crowe v. Aiken, 6 Fed. Cas. 904, No. 3,441 (C. C. N. D. Ill. 1870); Tompkins v. Halleck, 133 Mass. 32 (1882).

154. 84 Hun 12, 32 N. Y. Supp. 41 (Sup. Ct. 1895), *rev'd,* 155 N. Y. 241, 49 N. E. 872 (1898).

155. 49 N. E. at 876.

right which such publication dedicates to the public." [156] In the *Whiteman* case,[157] the restriction on the phonograph records prohibiting their use by broadcast stations did not preserve the common law rights; it was destroyed by the sale of phonograph records to the general public. The *Waring* case [158] reached a contrary conclusion; the Pennsylvania Supreme Court held that the restrictive label on the records effected a limited publication. It is believed that the court erred in its application of the principles of law governing "limited" and "general" publication. The court correctly distinguished between "limited" and "general" publication; it disregarded the point that this distinction turns upon the extent to which the work has been made available to the general public, rather than the form of its dissemination. The "comparatively early cases" which held restriction on the use to be made of the work by its purchasers ineffective to save common law rights were rejected because they were based "upon an assumed doctrine that restrictions and servitudes cannot be judicially recognized when imposed as conditions attaching to the sale of chattels." [159] The court then confused the issue of the reasonableness of the restrictive legend with publication. The reasonableness of an equitable servitude has no bearing on publication since the former must be considered as evidence of the extent to which the proprietor has authorized the dissemination of his work. From this confused discussion the court concluded that the sale of the phonograph records to the general public effected a limited publication and that the restrictive label imposed a servitude on the use of the record, which was enforceable in equity.

(6) Broadcasting Not a Publication

In *Stanley v. Columbia Broadcasting System, Inc.*,[160] defendant contended that plaintiff's common law copyright in his radio program was dedicated to the general public by its presentation to a studio audience and its performance before a radio microphone. Both of these contentions were rejected, the court holding that the author or owner of a program retains his common law rights:

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156. Wagner v. Conried, 125 Fed. 798, 801 (C. C. S. D. N. Y. 1903). To the same effect are Savage v. Hoffmann, 159 Fed. 584 (C. C. S. D. N. Y. 1908); Universal Film Mfg. Co. v. Copperman, 218 Fed. 577 (2d Cir. 1914). *But cf.* Ladd v. Oxnard, 75 Fed. 703 (C. C. Mass. 1896); Dodge Corp. v. Comstock, 140 Misc. 105, 251 N. Y. Supp. 172 (Sup. Ct. 1931).

157. RCA Mfg. Co. v. Whiteman, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U. S. 712 (1940).

158. Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937).

159. Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631, 636 (1937). The "comparatively early cases" referred to were Larrowe-Loisette v. O'Loughlin, 88 Fed. 896 (C. C. S. D. N. Y. 1898); Wagner v. Conried, 125 Fed. 798 (C. C. S. D. N. Y. 1903); Savage v. Hoffmann, 159 Fed. 584 (C. C. S. D. N. Y. 1908); Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N. Y. 241, 49 N. E. 872 (1898).

160. 192 P. 2d 495 (Cal. App. 1948), *aff'd*, 208 P. 2d 9 (Cal. 1949).

"Publication of a literary work is effected by communicating or dedicating it to the public. This is known as a 'general publication.' There is also a 'limited publication' which is one that 'communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public.' Werckmeister v. American Lithographic Co., 2 Cir., 134 F. 321, 324. 'When a literary work is exhibited for a particular purpose, or to a limited number of persons' it does not thereby become publici juris and the author retains ownership of the work until he relinquishes it either by contract or by an 'unequivocal act indicating an intent to dedicate it to the public.' Palmer v. De Witt, 47 N. Y. 532, 543, 7 Am. Rep. 480; Werckmeister v. American Lithographic Co., supra, 134 F. at page 326; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 299, 28 S. Ct. 72, 52 L. Ed. 208, 217, 12 Ann. Cas. 595. The making of a recording of plaintiff's program in the presence of an invited, limited audience was not a publication of the program to the extent of abandoning it to the public with the right to reproduce it. Nutt v. National Institute, 2 Cir., 31 F. 2d 236, 238; Thomas v. Lennon, C. C., 14 F. 849, 851; Press Pub. Co. v. Monroe, 2 Cir., 73 F. 196, 198. In Ferris v. Frohman, 223 U. S. 424, 435, 32 S. Ct. 263, 56 L. Ed. 492, 497, the court held that the public presentation of an unpublished dramatic composition does not deprive the owner of his common-law right of protection and that at common law the public performance of a play is not an abandonment of it to the public use.

"The rendering of a performance before a radio microphone is not an abandonment of ownership of the literary property or a dedication of it to the public at large. Uproar Co. v. National Broadcasting Co., D. C., 8 F. Supp. 358, 362. This decision was affirmed in 1 Cir., 81 F. 2d 373, where the court held (81 F. 2d at page 376) that the author retained his exclusive rights in the literary material whether or not he had licensed the right to broadcast it by radio. A public performance of a dramatic or musical composition is not an abandonment of the production to the public. McCarthy & Fischer, Inc. v. White, D. C., 259 F. 364. Public exhibition is not necessarily a publication merely because the public generally is given access to the work. The test is whether the exhibition to the public is 'under such conditions as to show dedication without reservation of rights or only the right to view or inspect it without more.' The exhibition of a motion picture without charge to a number of audiences in public places does not constitute a publication dedicating the picture or any material contained in it to the general public. Patterson v. Century Productions, Inc., 2 Cir., 93 F. 2d 489, 492. A scenario and synopsis for a photoplay is a production of intellectual labor and protected against piracy. Thompson v. Famous Players-Lasky Corp., D. C., 3 F. 2d 707. The delivery of copies of a poem to members of a 'literary committee' to enable them to decide whether it was suitable for their acceptance and presentation at a public meeting was not a publication of the poem and did not prejudice the owner's common-law rights. Press Pub. Co. v. Monroe, supra." [161]

161. 192 P. 2d at 507-08. Compare the language of the Supreme Court: "Defendant's contention that there can be no liability to pay for an idea which has been made public is without merit when the facts of this case are considered. When plaintiff made his audition recording before an audience in the National Broadcasting Company's studio he was not making his idea 'public property' within the meaning of the law. Prior to publication an author may make copies of his production and enjoy the benefit of limited or restricted publication without forfeiture of the right of a general publication. The communication of the contents of a work under restriction, known as a 'restricted or limited' publication, is illustrated by performances of a dramatic or musical composition before a select audience, private circulation of the manuscript, etc. Ball, Literary Property and Copyright 473; Werckmeister v. American Lithographic Co., 2 Cir., 134 F. 321, 324; Palmer v. De Witt, 47 N. Y. 532, 543, 7 Am. Rep. 480; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 S. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595; Nutt v. National Institute Inc. for the Improvement of Memory, supra; Ferris v. Frohman, 223 U. S. 424, 32 S. Ct. 263, 56 L. Ed. 492; Uproar Co. v. National Broadcasting Co., D. C., 8 F. Supp. 358, affirmed, 1 Cir., 81 F. 2d 373." 208 P. 2d at 16.

For additional cases holding that broadcasting constitutes a "limited" performance, see Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. Mass. 1934), *modified*, 81

As we have suggested elsewhere, this principle of law—that a broadcast does not constitute a general publication—requires clarification.[162] The broadcast or telecast of any program is intended to be received by the general public in their homes. The listener/viewer thus receives a gratuitous performance in his home. The question presented is whether a gratuitous public performance or presentation amounts to a dedication of the same to the general public with a consequent loss of common law rights. Weil leaves this question open, suggesting that custom and ordinary business and social usages will play an important role in determining whether such common law rights have been destroyed.[163] One or two cases have intimated that a gratuitous public performance is a limited publication, thus preserving common law copyright.[164] Based on custom and usage, a radio performance or telecast is a limited publication since the former is dedicated to the public in their homes. This is evidenced by the restrictive announcements preceding telecasts—*viz.*, that the programs "are intended primarily for home reception and other use may not be made without permission from the Columbia Broadcasting System." [165] Under the foregoing circumstances a radio or television broadcast constitutes a limited publication to the public in their homes; and the proprietor of the program may enjoin any person who interferes with or seeks to appropriate his intellectual effort without his authority.[166]

F. 2d 373 (1st Cir. 1936), *cert. denied*, 298 U. S. 670 (1936); Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W. D. Pa. 1938); Twentieth Century Sporting Club v. Transradio Press Service, 165 Misc. 1, 300 N. Y. Supp. 159 (Sup. Ct. 1937); Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 Atl. 631 (1937).

162. WARNER, RADIO AND TELEVISION LAW § 211b (1949).

163. WEIL, COPYRIGHT LAW 145 (1917): "In the last analysis, publication or dedication to the public, is a question of fact in each case. Custom and ordinary social and business usages, play an important role in determining the implications to be drawn from various acts of a proprietor of a common law copyright. The nature of different media for putting forth ideas and the nature of the rights which enure, in such different classes of works, also have a most interesting bearing." See also SHAFTER, MUSICAL COPYRIGHT 115-16 (2d ed. 1939).

164. *Cf.* McCarthy & Fischer, Inc. v. White, 259 Fed. 364 (S. D. N. Y. 1919); O'Neill v. General Film Co., 171 App. Div. 854, 157 N. Y. Supp. 1028 (1st Dep't 1916); Prince Albert v. Strange, 2 De G. & S. 652, 41 Eng. Rep. 1171 (Ch. 1849).

165. This is the announcement of the Columbia Broadcasting System which precedes its telecasts. The Dumont announcement recites: "All rights in all programs telecast by this station and the reproduction and exhibition thereof in any and every form are reserved. No program nor any part thereof may be exhibited where an admission fee is charged, or where a cover charge is made for entertainment or where mechanical operating charges are made, and no program nor any part thereof may be reproduced in any manner." The announcement of the National Broadcasting Company recites that their programs "may not be used for any purpose except exhibition at the time of their broadcast on receivers of the type ordinarily used for home reception in places where no admission, cover or mechanical operating charges are made."

166. Under the doctrine of "second user," as exemplified by Buck v. Jewell-La Salle Realty Co., 283 U. S. 191, 51 Sup. Ct. 410, 75 L. Ed. 971 (1931), a television station may enjoin the rebroadcast of any television programs or exact a license fee from such secondary users as taverns, etc. Television stations as a practical matter have neither enjoined nor exacted license fees because taverns and hotels have stimulated the public interest in television. This is discussed in detail in WARNER, RADIO AND TELEVISION LAW § 211a (1949).

(7) MOTION PICTURE EXHIBITION NOT A PUBLICATION

The question considered in this section is whether the methods employed by the motion picture industry in the distribution and exhibition of film result in a general publication of uncopyrighted film.[167] This question has a direct and immediate bearing upon the methods to be employed in the distribution of television film. Undoubtedly television film will employ the machinery of distribution and exhibition developed by the motion picture industry. The precise question presented is whether the rental of uncopyrighted television film to a broadcast station will result in the destruction of common-law rights.

At the outset it should be pointed out that practically all motion picture film is copyrighted as an unpublished work.[168] In all probability the television film industry will register films with the Copyright Office as unpublished works.[169] Our inquiry is thus narrowed to the small minority who will rely on common-law copyright to protect the content of television film.

In the motion picture industry films are not produced for sale but remain the property of the proprietor. The proprietor—*i.e.*, motion picture producer—licenses the film to the exhibitor for a specified period of time at an agreed rental. Numerous steps and actions take place from the time the film is shipped by the producer until it is exhibited in the theatre. Thus "positive" prints are reproduced from the original negative film. The "positive" prints are shipped from the studios or laboratory to the exchanges of the distributor and thence to the exhibitor. The distributor who "sells" the film has a "trade-showing" for the press and for exhibitors. The film is subsequently leased to a theatre owner for exhibition to the general public.[170]

None of the foregoing stages constitute a general publication with a consequent loss of common-law copyright.[171] The multiplication of "positive"

167. SHAFTER, MUSICAL COPYRIGHT 116 (2d ed. 1939): "The problem of distribution and circulation has been made so complex and so vast by the methods of modern business organizations, by the introduction of paid lending libraries and the leasing of motion picture films, that the most innocent act is liable to become an act of distribution and, therefore, publication, with consequent loss of rights." For discussion of the problems involved in motion picture exhibition and distribution, see Bernstein, *The Motion Picture Distributor and the Copyright Law*, in 2 COPYRIGHT LAW SYMPOSIUM 119 (1940); McDonough and Winslow, *The Motion Picture Industry: United States v. Oligopoly*, 1 STAN. L. REV. 385 (1949).

168. 61 STAT. 652 (1947), 17 U. S. C. A. § 12 (Supp. 1948). If the film should be made available for sale to the general public, it must be registered again as a published work, 61 STAT. 652 (1947), 17 U. S. C. A. §§ 10, 11, 13 (Supp. 1948). *Cf.* Patterson v. Century Productions, 19 F. Supp. 30 (S. D. N. Y. 1937), *aff'd*, 93 F. 2d 489 (2d Cir. 1937), *cert. denied*, 303 U. S. 655 (1938).

169. *Ibid.*

170. *Cf.* Bernstein, *The Motion Picture Distributor and Copyright Law*, in 2 COPYRIGHT LAW SYMPOSIUM 119 (1940).

171. Patterson v. Century Productions, 19 F. 2d 30 (S. D. N. Y. 1937), *aff'd*, 93 F. 2d 489 (2d Cir. 1937), *cert. denied*, 303 U. S. 655 (1938); Universal Film Mfg. Co. v. Copperman, 218 Fed. 577 (2d Cir. 1914), *cert. denied*, 235 U. S. 704 (1914); De Mille Co. v. Casey, 121 Misc. 78, 201 N. Y. Supp. 20 (Sup. Ct. 1923).

prints from an original "negative" and the "trade-showing" of the picture is a limited publication.[172] There is no intent to dedicate the same to the public. Similarly, the leasing of film and its exhibition to the public is akin to the stage presentation of a play which has always been considered a limited publication.[173]

This is confirmed by *Patterson v. Century Productions, Inc.*,[174] which dealt with the related question of an unpublished copyrighted motion picture film. Plaintiff registered his film with the Copyright Office as an unpublished work under section 11, now 12, of the Copyright Code.[175] The statute provides that if the work is later reproduced for sale, the copyright proprietor must make the necessary deposit of copies. Plaintiff's film, which showed wild animal life in Africa, was exhibited gratuitously to religious, social and educational organizations. Defendant secured a positive print of plaintiff's film and incorporated from 1,000 to 1,500 feet in its copyrighted film "The Jungle Killers." Plaintiff sued for infringement of his copyright. The defendant claimed that the infringement suit could not be maintained because the film had been reproduced for sale and plaintiff had failed to deposit the two copies of the work with the Copyright Office. Whether the film had been reproduced for sale depended on whether or not what the plaintiff did in showing the picture amounted to publication. The court held there was no general publication:

> "Public exhibition is not necessarily a general publication merely because the public generally is shown the work. The test of general publication is whether the exhibition of the work to the public is under such conditions as to show dedication without reservation of right or only the right to view or inspect it without more. American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 S. Ct. 72, 74, 52 L. Ed. 208, 12 Ann. Cas. 595. If the conditions of publication are such that the only right is to look at the copy of the work exhibited, there is no general publication which makes the work thereafter a published work in the copyright sense. McCarthy & Fischer v. White (D. C.) 259 F. 364. Even permission to take notes at the delivery of a lecture is not a general publication. Nutt v. National Institute (C. C. A.) 31 F. (2d) 236.
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> "This motion picture was not distributed except for exhibition in the strictly limited noncommercial way above described. As the distribution was limited to exhibitions of the picture without charge, no one was given the right to use the copies sent out for any other purpose whatsoever. The positive films were merely loaned for that purpose which did not permit copying. There was, therefore, no publication before the registration under section 11 or before this suit was brought. Consequently, the copyright was valid and infringed when this action was commenced." [176]

172. Universal Film Mfg. Co. v. Copperman, 218 Fed. 577 (2d Cir. 1914), *cert. denied*, 235 U. S. 704 (1914); De Mille Co. v. Casey, 121 Misc. 78, 201 N. Y. Supp. 20 (Sup. Ct. 1923). See SCHWARTZ & FROLICH, LAW OF MOTION PICTURES 504 (1917); Statement of Edwin P. Kilroe, in *Hearings before Committee on Patents, etc., on S. 3047*, 74th Cong., 2d Sess. 1185, 1186 (1936).

173. Patterson v. Century Productions, 93 F. 2d 489 (2d Cir. 1937), *cert. denied*, 303 U. S. 655 (1938); Ferris v. Frohman, 238 Ill. 430, 87 N. E. 327, 43 L. R. A. (N. S.) 639, 128 Am. St. Rep. 135 (1909), *aff'd*, 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492 (1912).

174. 93 F. 2d 489 (2d Cir. 1937), *cert. denied*, 303 U. S. 655 (1938).

175. 61 STAT. 652 (1947), 17 U. S. C. A. § 12 (Supp. 1948).

176. 93 F. 2d at 492-93.

It would appear that the *Patterson* and related cases would be conclusive on the issue that the leasing of film does not constitute a general publication.[177] This doctrine was repudiated in the recent case of *Blanc v. Lantz*,[178] which held that "the distribution and exhibition of these films in commercial theatres throughout the world constitutes so general a publication of the contents of the film and its sound track as to result in the loss of the common-law copyright." Although the decision may be distinguished on the ground that the court was construing the California Civil Code dealing with publication,[179] the case requires further judicial clarification because not only does it jeopardize the doctrine that broadcasting is not a publication, but it may disturb the basic relationships between common-law and statutory copyright.

In the *Mel Blanc* case, plaintiff asserted a common-law right in a musical laugh, known to the public as the laugh of the fictitious character, Woody Woodpecker. Plaintiff's amended complaint recited that the musical laugh was broadcast over a local radio station and was incorporated into the sound track of the Woody Woodpecker cartoons. These cartoons containing this musical laugh were distributed and exhibited in commercial theatres throughout the world. Defendants moved for a judgment on the pleadings on the ground that there had been a publication of plaintiff's musical laugh. The court assumed for the purposes of defendants' motion that there was a common-law copyright in the musical laugh. It concluded as a matter of law that such common-law rights were extinguished by the distribution and exhibition of the cartoons. It is siguificant that the court's opinion does not discuss the radio cases which hold that a broadcast performance is not a general publication. Undoubtedly the *Stanley* decision [180] precluded the court from specifically repudiating that doctrine. But if the court's reasoning in the *Blanc* case is approved by the appellate tribunal, the latter court has no alternative other than to repudiate the doctrine of limited publication as set forth in the *Stanley* case. There is as much, if not a greater, publication in the distribution and exhibition of film via television stations as in motion picture theatres. Obviously, if the telecasting of film constitutes a general publication, the court to be consistent must conclude that common-law rights are extinguished by a radio or television broadcast performance. Thus the *Blanc* decision calls for dissection and analysis.

At the outset the court relied on those sections of the California Civil

177. Universal Film Mfg. Co. v. Copperman, 218 Fed. 577 (2d Cir. 1914), *cert. denied*, 235 U. S. 704 (1914); Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co., 3 F. Supp. 66 (D. Mass. 1933).

178. 83 U. S. P. Q. 137 (Cal. Super. Ct. 1949).

179. "If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person without responsibility to the owner, so far as the law of this state is concerned." CAL. CIV. CODE § 983 (1941).

180. Stanley v. Columbia Broadcasting System, Inc., 208 P. 2d 9 (Cal. 1949).

Code dealing with common-law copyright. Despite the *Stanley* case, which described these provisions as "but codifications of the common law," the court concluded from its analysis of these sections, particularly section 983, that a public performance is a general publication.[181] This conclusion was buttressed by the following additional arguments:

The public policy against perpetual monopolies in intellectual property, as exemplified by the copyright clause of the Constitution, applies to common-law copyright, for persuasive authority has held that there is no perpetual common-law copyright in works not copyrightable under federal statutes.[182]

This argument repudiates 300 years of legal history. *Donaldson v. Beckett*[183] and *Wheaton v. Peters*[184] make it clear that an author trades his perpetual monopoly in common-law copyright for various rights of limited duration in statutory copyright. The basic philosophy underlying common-law copyright is the protection of common-law rights. Statutory copyright on the other hand encourages the dissemination of information to the public by protecting the economic value of intellectual property. Over a period of years the courts have attempted to synthesize common-law and statutory copyright into an integrated branch of the law, but not to the extent of destroying this basic philosophic difference which is confirmed in the Copyright Code.[185]

The court misconceives the concept of publication by describing it as "the conflict between the policy calling for the protection of property rights and that for the prevention of monopoly." Publication as discussed elsewhere is an arbitrary line of demarcation between common-law and statutory copyright; it extinguishes common-law rights and initiates statutory copyright; it has no relevancy to the prevention of monopoly. It is this misconception of the true and correct role of publication which caused the court to disturb the basic relationship between common-law and statutory copyright.

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181. Blanc v. Lantz, 83 U. S. P. Q. 137 (Cal. Super. Ct.): "Regardless, however, of whether Sections 980 and 983 are statements of the common law or are statutory modifications of the common-law copyright, the broad language 'make public' may have a wider significance than the words 'publish' and 'publication.' And since these sections specifically state the exclusive rule of responsibility to the owner of the product of the mind 'so far as the law of this state is concerned' (Sec. 983, *supra*), the foregoing difference in language may have an important bearing upon whether the product of the mind is lost by performance as distinguished from 'publication.'"

182. *Ibid.*

183. 2 Brown P. C. 129, 1 Eng. Rep. 837, s. c. 4 Burr. 2408, 98 Eng. Rep. 257 (H. L. 1774).

184. 8 Pet. 591, 8 L. Ed. 1055 (U. S. 1834).

185. *Cf.* American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. Ed. 208 (1907); Holmes v. Hurst, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904 (1889); National Institute for the Improvement of Memory v. Nutt, 28 F. 2d 132 (D. Conn. 1928), *aff'd*, 31 F. 2d 236 (2d Cir. 1929); Ferris v. Frohman, 238 Ill. 430, 87 N. E. 827 (1909), *aff'd*, 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492 (1912); Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co., 84 Hun 12, 32 N. Y. Supp. 41 (Sup. Ct. 1895), *rev'd*, 155 N. Y. 251, 49 N. E. 872 (1898).

The great body of decisional law is to the effect that a public performance is not a general publication. The court in attempting to distinguish and differentiate those cases which hold that the exhibition of motion pictures is a performance and not a general publication, confused the concept of publication as employed by the Copyright Code with its counterpart in common-law copyright.

The court's holding in the *Mel Blanc* case would not only nullify the great body of decisional law but would also close to the proprietor an avenue of communicating original intellectual productions to the public. This means that proprietors of plays, radio and television shows and motion pictures would seek the benefits of statutory copyright in lieu of relying on common-law copyright. With common law copyright unavailable to proprietors, the question is raised whether this approach does not narrow the efficacy of section 2 of the Copyright Code which confirms the existence of common-law rights in original intellectual productions.[186]

The court's approach presents another substantial question of law derived from the teachings of *Erie Railroad Co. v. Tompkins*.[187] That decision implies that all common law copyright actions brought in the federal courts are now governed by local law.[188] But to what extent may state legislation and decisional law narrow the body of common-law copyright expressly reserved by federal statute? In the *Mel Blanc* case, the exhibition of a film constitutes a general publication in California. But the same act may be a limited publication in Nevada. What is the publication status of a film televised in California and received in Nevada? The need for unanimity of decisional law for common-law copyright is readily apparent. A motion picture company or a television network could no longer rely on common-law copyright to protect the content of motion picture or television film. Federal registration would be required to protect the content of intellectual property moving in interstate commerce.

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186. 35 STAT. 1076 (1909), 17 U. S. C. A. § 2 (Supp. 1948): "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

187. 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938).

188. The *Erie* doctrine has provoked considerable comment: Bowman, *The Unconstitutionality of the Rule of* Swift v. Tyson, 18 B. U. L. REV. 659 (1938); Jackson, *The Rise and Fall of* Swift v. Tyson, 24 A. B. A. J. 609 (1938); Long, *A Warning Signal for Municipal Bondholders: Some Implications of* Erie Railroad v. Tompkins, 37 MICH. L. REV. 589 (1939); McCormick and Hewins, *The Collapse of "General" Law in the Federal Courts,* 33 ILL. L. REV. 126 (1938); Schmidt, *Substantive Law Applied by the Federal Courts—Effect of* Erie R. Co. v. Tompkins, 16 TEX. L. REV. 512 (1938); Schweppe, *What Has Happened to Federal Jurisprudence?,* 24 A. B. A. J. 421 (1938); Shulman, *The Demise of* Swift v. Tyson, 47 YALE L. J. 1336 (1938); Stimson. Swift v. Tyson—*What Remains? What Is (State) Law?,* 24 CORNELL L. Q. 54 (1938); Tunks, *Categorization and Federalism: "Substance" and "Procedure" after* Erie Railroad v. Tompkins, 34 ILL. L. REV. 271 (1939); Zengel, *The Effect of* Erie Railroad v. Tompkins, 14 TULANE L. REV. 1 (1939).

Erie Railroad Company v. Tompkins, in overruling *Swift v. Tyson,* [189] terminated the regime of an independent body of "federal general common law," except in the realm of "matters governed by the Federal Constitution or by Acts of Congress." [190] Is section 2 of the Copyright Code an exception to the *Erie* doctrine and thus governed by federal law? The answer to this question is dependent on whether Congress has appropriated the field of common-law copyright to the exclusion of the states. It is believed that Congress in enacting section 2, confirmed and preserved common-law rights. Congress did not add to or subtract from the common-law rights.[191] Absent any federal definition or prescription of common-law rights, the *Erie* doctrine is applicable and common-law copyright is governed by local law.

The disadvantages of applying local law to common-law copyright are the likelihood of divergence of views among the various state courts and the resultant confusion therefrom. This is illustrated by the *Mel Blanc* case. From a practical point of view the disadvantages are not as onerous as they appear. In all probability the state courts in dealing with common-law copyright cases, will be guided by the decisional law of the federal courts.[192] That has been the previous experience and is confirmed by the "unfair competition" cases where the state courts have relied heavily on federal cases.[193] The *Mel Blanc* case constitutes an anomaly in the field of common-law copyright and its holding that a performance is a general publication should be reversed on appeal. Where, as in the *Mel Blanc* case, the state law contravenes the great body of decisional law, causing confusion and jeopardizing the common-law rights of the proprietor, the latter is not helpless. In the illustration previously mentioned—*viz.,* where the telecast of a film is a general publication in California but a limited publication in Nevada—the proprietor may protect the economic value of his intellectual production by invoking the benefits of the Copyright Code. Thus

189. 16 Pet. 1, 10 L. Ed. 865 (U. S. 1842). The *Swift v. Tyson* doctrine was vehemently criticized by Mr. Justice (then Professor) Frankfurter, in *Distribution of Judicial Power Between United States and State Courts,* 13 CORNELL L. Q. 499, 524, 526 (1928). He described it as a doctrine which "with all its offspring, is mischievous in its consequences, baffling in its application, untenable in theory, and . . . a perversion of the purposes of the framers of the First Judiciary Act." *Id.* at 526.

190. Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938); and see also Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92, 58 Sup. Ct. 803, 82 L. Ed. 1202 (1938).

191. H. R. REP. No. 2222, 60th Cong., 2d Sess. (1909). The Committee drafted section 2 "in this form in order that it might be perfectly clear that nothing in the bill was intended to impair in any way the common-law rights in respect to this kind of a work." *Id.* at p. 9.

192. The great bulk of common-law and statutory copyright cases occur in New York and Los Angeles. The state courts, other than that in the *Mel Blanc* case, have consistently followed the federal law.

193. See Note, *The Choice of Law in Multistate Unfair Competition: A Legal-Industrial Enigma,* 60 HARV. L. REV. 1315, 1317 (1947); *cf.* Zlinkoff, Erie v. Tompkins: *In Relation to the Law of Trade-marks and Unfair Competition,* 42 COL. L. REV. 955, 960 (1942); Chafee, *Unfair Competition,* 53 HARV. L. REV. 1289 (1940).

the application of the *Erie* doctrine to common law copyright may have the practical effect of increasing the role of statutory copyright in protecting the content of intellectual productions. If the "publication" holding of the *Mel Blanc* case is affirmed by the appellate court, we will have witnessed the initial stage of the demise of common-law copyright. The latter will no longer be invoked to protect the content of radio and television programs and of motion picture film. Radio and television stations and networks and motion picture producers will seek the benefits of the Copyright Code or rely on an expanded concept of unfair competition to prevent the misappropriation of their intellectual efforts.[194]

194. The extent to which the "misappropriation" theory of International News Service v. Associated Press, 248 U. S. 215, 39 Sup. Ct. 68, 63 L. Ed. 211 (1918), may be employed to protect program content is discussed briefly in WARNER, RADIO AND TELEVISION LAW § 213 (1949).