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Copyright and Unfair Competition

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The artistic or literary qualities of commercial advertising and similar sales promotion devices, the garb and form of commodities, all demand protection of the law against piracy and infringement, and within prescribed limits they have been accorded the shelter of the copyright law. Many such creations, however, are not susceptible to copyright protection. Perhaps the author for one reason or another has not met or cannot meet the requirements of the Copyright Act and is unable to claim the exclusive right to “print, reprint, publish, copy and vend the copyright work.” Or, as is often the case, the conduct of the defendant falls short of being an infringement of copyright, although he has usurped the talent, ingenuity and labor of the author. In such situations the claimant may be able to prove a palming-off and thus invoke some doctrine of equity designed for the protection of reputation and goodwill. But if he fails in this, should he be outside the pale of the law’s protection? The thesis of this article is to consider the above problem and suggest a solution in the light of the relationship between the law of copyright and the law of unfair competition.

The much-discussed case of International News Service v. Associated Press serves as a starting point. The facts are too well-known to require a detailed exposition. The defendant was charged with piracy of news, which he regularly copied from plaintiff’s newspaper and bulletins and then published in competition with plaintiff. He contended in defense that any property that may exist in uncopyrighted literary matter such as news is lost after publication, and sought to confine the problem within

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2. Id. at 1075, 17 U.S.C.A. § 1 (1927).

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an artificial concept of property in news matter. However, the Supreme Court refused to so restrict the plaintiff's rights and rested the case on the broad proposition that the defendant had engaged in an unfair competitive practice with a rival news-gathering agency and publisher.4 In the course of the decision, Mr. Justice Pitney made two statements which are particularly noteworthy.

First, he stated that the right to relief from unfair competition arises from the Court's concern with the facilities and processes of publication and with the business of making news known to the world. The plaintiff's claim to protection is not dependent on any general right of property nor is it foreclosed by showing that the benefits of the copyright act are not available.5

The second statement of particular interest here came in response to the defendant's contention that he, like any purchaser of a newspaper had the right to communicate the intelligence which it contains to anybody and for any purpose, even for the purpose of selling it for profit to newspapers published for gain in competition with complainant's members. The court answered:

"The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money and which is salable by complainant for money, and that defendant, in appropriating it and selling it as its own, is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an un-

authorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not, with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.\(^6\) (Italics supplied.)

These, and other statements of similar import point unmistakably to the fact that in the Associated Press case the business of gathering and communicating information was granted the protection of the law on the ground of preserving ethical standards of competition, and this regardless of whether or not the news matter, which is the tangible evidence of complainant's labor, was the proper subject of statutory copyright.

It is apparent that the implications of the Associated Press case are manifold. The statements of the Supreme Court are sufficiently inclusive to embrace a large group of interests which otherwise are only imperfectly recognized. However, the doctrine has been cautiously received and subjected to skeptical comment from sources which cannot be lightly ignored. How true, for example, is the following statement of Judge Learned Hand?

"... we think that no more was covered than situations substantially similar to those then at bar [printed news dispatches]. The difficulties of understanding it otherwise are insuperable. We are to suppose that the court meant to create a sort of common-law patent or copyright for reasons of justice. Either would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject matter.\(^7\)"

Newsmatter is only one of many types of information which are currently derived from some commonly accessible source through the expenditure of money and effort. Reference materials are regularly organized and presented for use in such compilations as directories, maps, guidebooks, consumer and personnel lists, and encyclopedias. The information contained in these and many other similar publications is ferreted out and made avail-

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6. 248 U.S. 215, 239, 39 S.Ct. 68, 72, 63 L.Ed. 211, 221 (1918).
able through the efforts of statisticians and experts. Is it less protected because it is gathered together and expressed in some form other than that of a newspaper or radio broadcast?

I. IMITATION OF INTANGIBLE GOODS

In discussing the protection available to authors or compilers of information designed for commercial use, courts demonstrate a marked tendency to inject considerations of statutory copyright which are wholly inappropriate to the problem. The origin of this treatment probably can be attributed to precedents furnished by the English courts. Several cases decided during the middle of the last century showed a marked inclination to protect money and labor expended in the compilation of fact material against unethical competition. At that time, however, the elaborate network of rules and concepts expressly regulating competitive practices were unknown, and any idea which the courts entertained of protecting the plaintiff's interest in this respect must of necessity have found expression in such protective rules and devices as were then available. It is not surprising, therefore, that mechanical, though laboriously made, collections were held to be proper subject matter of copyright although they completely lacked the element of authorship.8 Interests which now are or should be protected through doctrines of competition were made the determinative factor of copyrightability. The early cases show little regard for the particular character of the work under consideration,9 and decisions relating to historical and literary works quote indiscriminately from cases dealing with directories and annotated editions.10

8. In the American case, Colliery Engineer Co. v. Ewald, 126 Fed. 843 (C.C.S.D.N.Y. 1903) Justice Lacombe says: "It would seem that all books which are not purely literary—that is, are not works of creative or imaginative literature, but merely compilations of statements found elsewhere—should be treated alike in applying the principles of the law of copyright. Legal digests, such educational books as we have here, algebras, arithmetics, etc., statistical yearbooks, directories, gazetteers, business or social registers, are all produced by the same methods, and the use of a skill that is merely clerical. I do not understand that this proposition is a novel one, and should have so held had there been no opinion delivered in Edward Thompson Co. v. American Law Books Co., 121 Fed. 907."

9. But see Weil, American Copyright Law (1917) 1143 et seq., in which the author emphasizes the mere utilitarian character of some of these works dealt with under the heading of "fair use" and infringement of copyright.

10. Thus the cases Morris v. Wright, L.R. 5 Ch. App. 279 (1870) and Pike v. Nicholas, L.R. 5 Ch. App. 251 (1869), dealing with historical and literary works quote the directory cases, Kelly v. Morris, L.R. 1 Eq. 697 (1866) and Morris v. Ashbee, L. R. 7 Eq. 54 (1863). The American directory cases, Colliery Engineer Co. v. Ewald, 126 Fed. 843 (C.C.S.D. N.Y. 1903) and Hartford
Perhaps the most instructive of the old cases is *Kelly v. Morris.* Here the defendant compiled a directory or guide book utilizing information which could have been derived from sources common to all, but which he obtained from the book of the plaintiff. The court granted an injunction because the defendant should have obtained and worked out the information independently for himself. The only legitimate use which he was permitted to make of previous works was for the purpose of verifying the correctness of his own findings. The court laid down the following well-known principles:

“The Defendant has been most completely mistaken in what he assumes to be his right to deal with the labour and property of others. In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the milestones for himself. In the case of a map of a newly-discovered island . . . he must go through the whole process of triangulation just as if he had never seen any former map, and, generally, he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained.”

The Court in *Morris v. Ashbee,* also a case of a trade directory, referring to *Kelly v. Morris,* stated the rule as follows:

“. . . no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at these results by some independent road.”

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11. L.R. 1 Eq. 697 (1866).
12. Id. at 701.
13. L.R. 7 Eq. 34 (1868).
14. Id. at 40.
The Court in Hogg v. Scott, also referring to Kelly v. Morris and upon similar facts, said:

"The true principle in all these cases is, that the Defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work—that is, in fact, merely to take away the result of another man's labour, or, in other words, his property."16

Vice-Chancellor Sir G. M. Giffard, who delivered the opinion in Morris v. Ashbee, rendered a concurring opinion in the later case of Pike v. Nicholas. Although the problem then before the court was the alleged piracy of material contained in a historical treatise, Giffard used the occasion to impose limitations on the principle of Kelly v. Morris without expressly referring to the latter case. He stated that the correct principle would not prevent defendant from looking into plaintiff's book for direction to the sources of information he desires.

This rule is probably satisfactory in scientific and historical works, in the preparation of which it is important to discover whether one authority has made fair use of the quotations of a predecessor; but it has been called a very harsh rule when applied to the mechanical works we are considering. In a later case, Moffatt and Paige v. Gill, the court said:

"You cannot where another man has compiled a directory, simply take his sheets, and reprint them as your own, but you are entitled, taking the sheets with you, to go and see whether the existing facts concur with the description in the sheets, and if you do that you may publish the result as your own."

The inequity of the rule was pointed out in the American case, Collier Engineer Co. v. Ewald. The court presented the forceful illustration of B who, in preparing a directory of architects, simply purloined appropriate items from A's business directory and was thus enabled to place on the market a profitable compilation at a merely trifling expenditure of time and trouble, because A had already done the work which B thus appropriated. But it must be admitted that this practice, however doubtful it may be from the standpoint of good business morality, has been

15. L.R. 18 Eq. 444 (1874).
16. Id. at 458.
17. L.R. 5 Ch. App. 251, 267 (1868).
sanctioned in all the other American cases, which have been content to follow the English rule.\(^2\)

Although the attitude of the courts toward competitive practices has been important in influencing the determination as to whether or not a particular compilation is properly subject to copyright, yet the courts have succeeded in avoiding direct reference to the problem of unfair competition, and have directed their attention solely to the fact that the compilation is protected by a valid copyright. Considerations of competition alone should afford protection in proper cases even when copyright is not available.

There arises another question. Many authors do not apply for a copyright, although copyright protection is available. Should this be a bar to relief on the theory of unfair competition? Or is something to be permitted under the law of unfair competition merely because it is permitted under the copyright law? Shall the success of the plaintiff's suit depend upon whether or not he met the requirements of the copyright statute in a case where he complains of the defendant's appropriation of the fruits of his effort and expenditure?

Let us consider a few cases: A rival has appropriated the plaintiff's edition of Shakespeare's plays, not in order to spread the author's work to the mass of interested people, but in order to enable himself, the rival, to compete successfully with the plaintiff; a plaintiff's colleague liberally helps himself to the former's lectures, not to furnish eager youth with the wisdom of his brother in science, but to spare his own time and effort and to take advantage of another;\(^2\) one person lifts material from the other's draft of application and contract forms.\(^2\) In all the above situations the courts appear satisfied to determine the rights of the plaintiff through a simple inquiry into the existence of a copyright or common law literary property. If the copyright or property can be found, the plaintiff will be protected; if the copyright was not secured, or the claim to literary property was lost through publication, he is without further remedy.


In Bamforth v. Douglass Post Card and Machine Co.\textsuperscript{24} the plaintiff manufactured post cards impressed with pictures photographed from living models. The defendant made exact copies of the plaintiff's photographs and sold them upon post cards at a much lower price than the plaintiff could possibly afford. However, when application for an injunction was made, the court refused relief because, in the absence of copyright protection "neither a book nor a photograph can continue to be the author's exclusive property, after it has been printed and offered to the public for sale."\textsuperscript{25} Again, in another case\textsuperscript{26} the plaintiff issued a pamphlet on which appeared advertisements of the various merchants comprising an association, and proposed an ingenious system for giving coupons with every cash purchase. The defendant issued a similar pamphlet in which he appropriated the plaintiff's scheme. Here the question of whether or not relief was available was made by the court to depend on the fact that the plaintiff had procured a copyright. This inquiry was again made the determinative factor where one defendant copied chromolithographs of vegetable products,\textsuperscript{27} and still again where a defendant imitated a plaintiff's colored photographs of natural scenes.\textsuperscript{28}

The situations and cases to which we have referred all relate to unfair practices by competitors, and the decisive point in each instance should be that the defendant did not independently work out his compilation, artistic reproduction, or advertising scheme. The competitive relationship was obvious and the sole aim of the defendants was to emerge victorious in the struggle of competition. The common element is the appropriation of a competitor's work, which is adapted to suit the defendant's need and then turned against its author in the economic struggle. Yet in all these cases we seek in vain for a word about unfair competition. The courts took only the law of copyright into their consideration.

The copyright act serves a genuine need by protecting artistic and literary works against definite types of infringement. But it does not follow that it embraces within the zone of its protection every right and interest which can arise in connection with written or printed matter.

\begin{thebibliography}{28}
\bibitem{24} 158 Fed. 355 (C.C.E.D. Pa. 1908).
\bibitem{25} Id. at 357.
\bibitem{26} Mutual Advertising Co. v. Refo, 76 Fed. 961 (C.C.S.C. 1896). This case marks the boundary of the availability of a copyright.
\bibitem{28} Cleland v. Thayer, 121 Fed. 71 (C.C.A. 8th, 1903).
\end{thebibliography}
At this point we may profitably examine the scope of the copyright act with a view toward determining its proper function. The different exclusive rights of the proprietor of copyright may be grouped under three headings:

1. The right of copying and dissemination of copies.
2. The right of modification or transformation.
3. The right of performance or representation.

Are all or any of these rights the true bases for the protection invoked in the cases already considered? It can hardly be contended that the conduct of the defendants in those situations amounting to a copying of the original work. They made no simple reproduction for the purpose of allowing the community to enjoy the original under more favorable conditions. The protection granted by the act against modification and transformation is the only safeguard which relates to the issuance of a copy not identical with the original. The prohibition here is against translation into other languages, dramatization and adaptation to other means of expression. Even in these cases the original work must be popularized.

To understand the significance of these rights for the cases we have put, we must consider the different relationships which obtain in copyright and in unfair competition cases. In the copyright situation the typical relationships are: creator—intermediary—public. Who the intermediary is depends upon the nature of the work. Where works of art are concerned he may be the promoter of an exhibition, or the vendor, or the copyist. With respect to musical works he is the performer or publisher of the music. In the case of literary works he is the performer, publisher, translator, or dramatizer (according to the purposes of the publication). All these intermediaries serve functions similar to those of the middleman in the process of distributing goods. Consequently, there is no room for any competitive relationship unless the competitor is a rival of one of the intermediaries, that is, a rival in the effort to communicate the work to the public. It is this competitive relationship which is the index of any unfair competition situation. Hence, the rival of the author who wants to utilize the work of another only to assist himself in producing his own, stands outside the sphere of the copyright relationships and moves exclusively in the sphere of competition.

No one is harmed if the rival is entirely excluded from any right to the form of the work of his competitor even after the
copyright has expired; since he does not need it for any lawful purpose. It is the form and not the idea of a work that the law of copyright protects. It is designed "to promote the progress of science and useful arts by securing for limited times to authors . . . the exclusive right to their . . . writings." These exclusive rights are the compensation paid by the legislature for the author's surrender of his works to the public. Quite different is the situation with regard to patents on technical inventions. First, it is the idea which is protected by the patent law. Second, it is intended that after its expiration the patent should be ceded to competitive manufacturers. They, however, are only the incidental beneficiaries—the intermediaries between the original owner of the patent and the public. This distinction between patent and copyright finds its support in the diversity of expression in the two statutes: The patent right is granted to exclude others from making, using, and vending the work. Using is subdivided into the three kinds of use mentioned above; a making does not come into question!  

II. "Character" Imitation

The above considerations should also dispose of the cases in which a character created by one author is used by another. Neither copyright nor trademark law is appropriate. It may happen that the effect of an appropriation of a character is also a palming-off, but the appropriation itself should be sufficient to give rise to a cause of action. The following examples are from cases in which the decisions fail to observe the foregoing analysis.

In Munro v. Tousey the plaintiff was the publisher of a series of detective stories for which he had adopted the title "The Old Sleuth Library." "Old Sleuth the Detective" was the name given to the author. The court allowed the defendant publishing a similar series of stories "The New York Detective Library" to use titles containing words "Young Sleuth" and "Sleuth." It held that in the absence of proof of a palming-off, the plaintiff had no property right in the word "Sleuth" which would justify the interference of the court. The same reasoning may be found in another case, in which the title "Charley's Aunt" given to the

32. Frohman v. Miller, 29 N.Y. Supp. 1109, 8 Misc. 379 (1894).
plaintiff's play was held not infringed by the title "Charley's Uncle" given to the defendant's play. In the "Buster Brown" case\textsuperscript{33} the court held that an artist has no such common law copyright in the characters of his pictures as will entitle him to maintain a claim of unfair competition if his publisher should imitate the Buster Brown characters in pictures drawn by another artist. However, it is difficult to deny that the publisher in so doing has assisted the second artist in an unfair competitive practice.

A more straightforward approach to the problem presented by character imitation was adopted in Fisher v. Star Co.\textsuperscript{34} Here the plaintiff, creator of a comic strip which is well-known under the title "Mutt and Jeff," had drawn his cartoons for the defendant and others. He sued the defendant for advertising comic pictures drawn by the latter's employees in imitation of those of the plaintiff. This was done after the contract between plaintiff and defendant had expired. From the facts given it is apparent that there was material susceptible of copyright protection, yet the court based the plaintiff's right to injunctive relief on neither the law of copyright nor of trademark protection. It proceeded wholly on the principle that Fisher's well-known characters had acquired a secondary meaning in the world of comic strips. It is submitted that the court adopted the proper approach to the problem. The dissenting opinion of Crane, J.,\textsuperscript{35} who contended that the plaintiff sought to assert a right that could be maintained only under the law of copyright, entirely ignored the competitive feature of the case.

If the artist is a photographer and has made a reproduction from a scene or a living model, the interests that demand protection are the same as those considered under the comic strip situations. In Gross v. Seligman\textsuperscript{36} a photographer made a picture of a model in the nude. He entitled the photograph "The Grace of Youth" and procured a copyright which he sold to the plaintiff. Thereafter he again procured the same model to assume an identical pose, except that this time she obligingly bedecked herself with a smile and held a cherry in her mouth. This latter work of art was appropriately entitled "Cherry Ripe." It is clear that the real cause of action against the defendant was for the palm- ing-off and for defendant's interference with the contractual rela-

\textsuperscript{34} 231 N.Y. 414, 132 N.E. 133 (1921).
\textsuperscript{35} 231 N.Y. 414, 435, 132 N.E. 133, 140 (1921).
\textsuperscript{36} 212 Fed. 930 (C.C.A. 2d, 1914).
tion between the plaintiff and his artist. The court, however, granted relief on the ground that the defendant had infringed the copyright of the plaintiff.

These competition cases never present pure copyright situations. The competitor does not use the work of another in the manner condemned by the copyright law. He wants to have the work of his rival superseded by his own, rather than to have the original disseminated to the public.

III. A Pure Copyright Case

Courts not only have invoked the law of copyright to dispose of cases which should have been determined by principles of unfair competition, but have sometimes resorted to the converse practice, and relied on rules of competition in situations which were properly within the exclusive sphere of copyright. A good illustration is found in the recent Pennsylvania case, Waring v. WDAS Broadcasting Station, Inc.\(^7\) The facts were as follows: The publishers and copyright owners of two songs licensed the Victor Talking Machine Company to use these on records, but not for public performance for profit. The company employed Fred Waring, the conductor of a nationally known orchestra to record the songs. The records, labelled "not licensed for radio broadcast" were then sold to the public. The defendant, proprietor of a radio station, purchased one of the records and obtained a license to broadcast the songs from the American Society of Composers, Authors and Publishers (assignee of the exclusive right of public performance under the copyright). It then broadcast the records as a part of its program and made the customary announcement that the music heard was a mechanical reproduction. Waring, the conductor, filed a bill to enjoin the defendant from broadcasting the records. Mr. Justice Stern disposed of the case by raising three major questions: (1) Have the performers any enforceable property rights in their artistic interpretation of the work of a composer? (2) If so, to what extent can such rights be reserved at the time of what the law designates as publication? (3) Under what circumstances can performers be afforded equitable relief ancillary to such rights on the ground of unfair competition? The court correctly answered the first question in the affirmative and also asserted that the restriction placed upon the use of the records was to be enforced in equity. However, the court held

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\(^7\) 327 Pa. 433, 194 Atl. 631 (1937).
that the plaintiff was entitled to an injunction on the ground of unfair competition. It relied on the Associated Press case and Fonotipia Ltd. v. Bradley. The propriety of applying principles of competition to the facts above given is open to serious question.

It may be readily admitted that in one sense of the word Waring and the defendant were competitors. The court pointed out that they both furnish entertainment to the public over the radio. Also, as the opinion stated, "the defendant can in effect 'sell' to its advertising customers and to the public at practically no expense to itself, the identical musical renditions of plaintiff's orchestra," and finally, it is doubtless true "that such competition is extremely harmful to plaintiff and his orchestra. . . . It probably must become increasingly difficult for them to demand and obtain $13,500 for a single performance over the radio if innumerable reiteration of their renditions can be furnished at a cost of seventy-five cents." But all this is not sufficient to inform us as to the nature of the competitive relationship and the nature of the unfair competition. Using the terms of our statement above, we may designate the parties as rivals in the effort to communicate the work of an author to the public. The broadcasting of the defendant would have been lawful if there had not been a copyright. But it is here that the Waring case must be distinguished from both the Associated Press and the Fonotipia cases. In neither of these latter cases was the protection of copyrightable material in issue. In the Associated Press case the object of protection was the organization with which the Associated Press gathered news, rather than the contents of particular news dispatches; in the Fonotipia case it was the commercial and technical efforts of the plaintiff in producing records, and not the subject-matter of the record. But in the Waring case, if there had not been a copyright, the consequent enrichment of the defendant, as well as the benefit to the public by the cheapness of the

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38. 171 Fed. 951 (C.C.E.D. N.Y. 1909). In this case the plaintiff produced and put on the market music records for use upon machines, and the defendant copied records directly from the original discs of the plaintiff. Chatfield, J., granted relief and stated: "Where a product is placed upon the market under advertisement and statement that the substitute or imitating product is a duplicate of the original, and where the commercial value of the imitation lies in the fact that it takes advantage of and appropriates to itself the commercial qualities, reputation, and salable properties of the original, equity should grant relief." Id. at 964.


40. Ibid.

41. Supra, p. 656.
price, would have been a contemplated result of the copyright law.\textsuperscript{42}

The relationship between plaintiff and defendant in the \textit{Waring} case should be differently analyzed. As a rule, the orchestra conductor (like the radio station) is an intermediary through whom the composer of songs reaches the public. In this sense they are rivals. But if the conductor is claiming an exclusive right in his orchestral performance, he then should be considered in the position of a composer, and the radio station becomes the intermediary between him and the public.\textsuperscript{43} To this extent there is no competitive relationship between them.\textsuperscript{44} It is not sufficient to determine the relationship between parties simply by broad reference to their callings or professions. We must consider the relationship of their particular activities in the concrete case.\textsuperscript{45} It follows that when the court based its decision

\textsuperscript{42} See supra, p. 657. In \textit{Waring v. WDAS Broadcasting Station, Inc.}, 327 Pa. 433, 455, n. 13, 194 Atl. 631, 641 (1937) it is said: "It was testified that between 350 and 450 broadcasting stations in the United States use records almost exclusively instead of 'live talent', both for their commercial and their sustaining programs."

\textsuperscript{43} Mr. Justice Maxey rendered an opinion in which he concurred in the conclusion but dissented from the rationale of the majority. He points out that any interpreter of a musical or other type of composition has an interest in his interpretation to which a law accords the status of a right and which it will protect. This statement is to be preferred to that of the majority opinion which confined protection to an interpretation constituting a product of "novel and artistic creations" which "elevates interpretations to the realm of independent works of art."

\textsuperscript{44} Quite different from the facts in the \textit{Waring} case are those of the case of \textit{RCA Mfg. Co. v. Whiteman}, 28 F. Supp. 787 (D.C.S.D. N.Y. 1939). Here there was a competitive relationship between the intermediaries, Radio Corporation of America, Radio Station WBO, and any other firm engaged in the business of manufacturing, producing, recording, selling, and distributing records. There was no competitive relationship between Whiteman and WBO. There was originally no competitive relationship between RCA and Whiteman, but the latter became an accomplice of RCA's competitors in licensing to them records for broadcasting and public performances together with representations to the effect that he alone was entitled to grant such licenses. The support of another's unfair competition is also unfair competition. Hence the opinion of Judge Leibell in the \textit{Whiteman} case was correct in referring to the \textit{Associated Press} case (id. at 793) and we may salute this opinion as one which gives further support to that extremely important case. However, the case is open to question insofar as it also assumes unfair competition by WBO against Whiteman (id. at 794).

\textsuperscript{45} The profession of the musician is a good example of the variety of activities in which the relationships change when observed from different points of view. For instance, note the position of the musician in the following instances: Stokovski conducts a Beethoven symphony (conductor as intermediary); he arranges a Bach Toccata composed for a harpsichord or organ into a composition for a modern orchestra (composer and intermediary); Liszt paraphrased Mozart's \textit{Don Juan} (composer and intermediary) and so forth.
upon the ground of unfair competition it failed to do justice to these particular facts. 46

IV. IMITATION OF ADVERTISEMENTS

In examining those cases in which the copyright idea has been applied to advertising devices, the reader should bear in mind the suggestions already made relative to the position of competitors in the sphere of copyright. 47 They are superfluous as intermediaries between the author and the public, so that no public interest justifies their using a non-copyrighted work. Moreover, literary or artistic works employed in other people's business activities are not indispensable to the conduct of a competing business. There is still another consideration. When, as in the directory cases, the competitor uses the work of another for his own advertising purposes, he is not interested in the literary or artistic value of the work but merely in its effectiveness as advertising. Consequently, the only proper question in advertising cases, where there is no danger of confusion, is: Has one saved his own labor and money by appropriating the advertising matter of a competitor who on his part had to make expenditures of effort and capital?

Limitations of space preclude any detailed treatment of the law of copyright in its relationship to advertising. However, a few cases that illustrate the advantages of the doctrines of unfair competition over the accepted copyright approach may be considered. In Yuengling, Jr. v. Schile, 48 the plaintiff, a brewer, sought to protect a chromolithograph entitled "King Gambrinus and his followers" which showed the jovial monarch and his retinue enjoying lager beer (probably of the plaintiff's manufacture). The defendant, a rival brewer, simulated this picture by a chromo, suggesting possibly that Gambrinus preferred the defendant's Bock to the plaintiff's Lager, despite the fact that legend has attributed the origin of lager beer to that ancient Flemish king. Hilson Co. v. Foster 49 was a case in which the defendant had copied from the plaintiff, rival, a banquet scene in a hotel dining room as an advertisement for cigars. In both of these cases it is obvious that the concept of unfair competition is more

47. See supra, p. 656.
49. 80 Fed. 896 (C.C.S.D. N.Y. 1897).
appropriate for protection of the plaintiff's interests than was the copyright idea invoked by the court. The same may be said of Schumacher v. Schwencke, Jr. Here the subject matter was a painting from a wood-cut, used as an advertising label for cigar boxes. Although the issue decided was copyright infringement, the language of the court is more convincing as support for a claim of unfair competition:

"The complainant has a painting which is concededly valuable. Time, money, and artistic skill were expended in its production. The defendants openly and boldly pirated it, and are now reaping the rewards that fairly belong to the complainant. They have the whole material universe from which to choose. They can make any design of their own and be protected in its use; but the law will not permit them to appropriate the result of others ingenuity and skill, and profit by the wrong thus committed." (Italics supplied.)

The case of Bleistein v. Donaldson Lithographing Co. marks a step forward by recognizing a copyright in advertising material. However, the circus posters, which were the protected subjects of that decision, with their elaborate arrangements of ballet dancers and trick cyclists should not require the intervention of copyright in order to be secured against competitive imitation.

The protection of copyright to advertising has been extended to an elaborate variety of printed matters. An example of the liberality of the courts is furnished by Ansehl v. Puritan Pharmaceutical Co. A newspaper advertisement, composed of a photograph and an array of advertising and descriptive matter which was ingeniously arranged on the page so as to attract attention was protected in all its features by copyright. The opinion contains the following statement:

"The defendants might appropriate the [plaintiff's] ideas and express them in their own pictures and in their own language, but they could not appropriate the plaintiff's advertisement by copying his arrangement of material, his illustrations and language . . . without subjecting themselves to liability for infringement.",

50. 25 Fed. 466 (C.C.S.D. N.Y. 1885).
51. Id. at 468.
52. 188 U.S. 239, 23 S.Ct. 298, 47 L.Ed. 460 (1903).
54. Id. at 138. In Fargo Mercantile Co. v. Brechet & Richter Co., 295 Fed. 823 (C.C.A. 8th, 1924), a clear case of unfair competition, the Circuit Court of
Still stronger cases of an erroneous application of copyright principles are presented by the cases dealing with the imitation of catalogues. Starting with the English decisions, we find them similar to the directory cases, and it is interesting to note that the courts, whether they recognize the copyright on an advertising catalogue or not, reflect a strong feeling of the unfairness of competition by copying. Where the copyright is affirmed, it is the "fair use" doctrine of the copyright law which the courts employ; and where they feel unable to help the plaintiff because the catalogue is not copyrighted or copyrightable, they often find other ways of expressing their disapproval. If we compare the two leading cases, Hotten v. Arthur and Cobbett v. Woodward, we can easily perceive this. In Hotten v. Arthur the plaintiff, a bookseller of old and curious books, published catalogues which were not mere lists of the books and their prices, but contained in many instances short accounts of the history of the books or notices of their contents and anecdotes respecting them. The defendant copied much verbatim from plaintiff's catalogues. Here, as in the directory cases, the only fair use recognized was the production of an original work, and no mere copying, no merely colorable alterations, no blind repetition of obvious errors is permissible. More interesting, however, is the following passage in the opinion of Vice-Chancellor Sir W. Page Wood which states the essence of the present problem:

"Suppose the case of a professional writer (there may well be such), whose peculiar department it is to make out 'Catalogues Raisonnées' of this kind, and to write such abstracts of the noticeable points in the various books of the catalogue as we have here. A man who is an author for this purpose would naturally expect that the very fact that he had printed such notes for one publisher would lead to his employment for a similar purpose by another. Suppose now this other say to him, 'I have no occasion for your services, "paste and scissors work" will give me all I want,' could it be denied that he would have a right to come here to prevent this unremunerated use of his labor."
In *Cobbett v. Woodward* the court held that an advertising drawing is not subject to copyright. However, costs were refused the defendant. The language of the opinion at this point is instructive.

“At the same time, I am bound to say that where it is shown that the second advertiser has been making use literally of the drawings of the first advertiser, and copying them precisely, I think that the court, though it could not stop him from taking that course, must feel that a use has been made of the works of the first advertiser which would not be considered fair amongst gentlemen, nor (for the rules are the same as regards the usual intercourse of life) amongst fair traders, and would not give costs to the man who deliberately endeavored to profit by the exertions of his fellow tradesman.”

Thus the court condemns the defendant for exercising the very right which it expressly recognized as being his. If the latter's conduct was lawful, it is strange that he should be punished because of it. The path to be pursued is clear. The defendant engaged in unfair competition and the plaintiff is entitled to a remedy without reference to the copyright law.

*Cobbett v. Woodward* was overruled in two later cases, which followed *Hotten v. Arthur. Grace v. Newman*, the first of these cases, dealt with a catalogue containing monumental designs; the other decision, *Maple & Co. v. Junior Army & Navy Stores*, was concerned with a furniture catalogue. In both instances the catalogues were registered under the Copyright Act. In the *Maple Company* case the court said:

“I consider it is substantially made out that, to a very large extent, the Defendants have copied from the books, and availed themselves of the labours and expenditure of the plaintiffs. That being so, it certainly does not incline one to do otherwise than put the case in a state in which, according to honesty and the rectitude of proceedings on the part of the public, it ought to be put.”

In the Court of Appeals Lord Justice Lindley added:

“The defendants have made a use of the plaintiffs' work which, as observed by Lord Romilly in *Cobbett v. Woodward*, would

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59. *L.R. 14 Eq. 407 (1872).*
60. *L.R. 19 Eq. 623 (1875).*
61. *L.R. 21 Ch. D. 369 (1882).*
62. *Id. at 372.*
not be considered fair among fair traders, and we ought not to strain the Act to make such a proceeding legal.\textsuperscript{68}

Finally, in Collis \textit{v.} Cater, Stoffel \& Forth, Ltd.\textsuperscript{64} the plaintiff, a chemist and druggist, issued a catalogue of articles, medicines, and drugs containing under different headings some alphabetical lists of articles with their prices; the defendants inserted in their catalogue copies of the lists from the plaintiff's catalogue. The court held that the lists were subjects of copyright and disclosed the deeper reason for the decision in the following statement:

"What has been done in this case is to leave the neighbour who was the first to prepare a catalogue to bear all the expense and trouble of doing it, and to set to work without trouble or expense to take a copy of that catalogue and have one printed from it. The man who acts thus is simply using his neighbour's expense and labour for his own advantage. He is what is called pirating his neighbour's book. The question is whether that is a thing he has a right to do so. It does not apply to sellers of drugs only, it applies to any other persons carrying on trade under such circumstances that a catalogue of the goods they deal in is desirable. I see no difference between this trade and any other trade. The question is whether a man has a right to appropriate to himself without payment or recognition in any way what it has cost his neighbour expense and trouble to make out. In my opinion he has not."\textsuperscript{65}

We have discussed these English cases somewhat broadly because they reveal, in their opinions, better than the American cases, the competitive considerations which so often appear under the guise of copyright law. The unfair use, which is evident in these cases, cannot be prevented under the copyright law if the catalogue is not of artistic originality but contains "pictures reproduced by photographic or other mechanical processes,"\textsuperscript{66} unless, indeed, we wish to create a copyright regardless of any value and artistic merit of the works subject to it. Where the unfairness of the use consists in the appropriation of another's labor and money, the outcome of litigation should not depend upon whether or not the form of the catalogue is sufficiently ingenious

\textsuperscript{63} Id. at 381.
\textsuperscript{64} 78 L.T. (N.S.) 613 (1898).
\textsuperscript{65} See also W. Marshall \& Co., Ltd. \textit{v.} A.H. Bull, Ltd., 85 L.T. (N.S.) 77 (1901); Davis \textit{v.} Benjamin [1908] 2 Ch. 491.
\textsuperscript{66} National Cloak \& Suit Co. \textit{v.} Kaufman, 189 Fed. 215 (C.C.M.D. Pa. 1911).
to meet the demands of copyright law. The trend the courts have been following leads to an unlimited expansion of the definitions of literature and art in the copyright statutes. The upshot is that the Copyright Act has come to be misused as the asylum of the injured competitor against the piracy of his rival. This is clearly a perversion of the copyright idea.

The temptation to treat a catalogue as a subject of copyright increases in proportion with its artistic character. For example, in *Da Prato Statuary Co. v. Giuliani Statuary Co.* the parties were producer and seller of statuary and other articles for the decoration of churches and religious edifices. The plaintiff, at great expense and labor, prepared and issued a trade catalogue containing pictures and cuts of various statuary and other articles which could be produced only by skilled photographers. The court expressly denied, without giving an explanation, the plaintiff's motion for a temporary injunction against the copying defendant "so far as it is based upon the claim of unfair competition" but granted it on the basis of copyright. Many other cases in which copyright was successfully invoked dealt with drawings that were designed and prepared by "persons of skill and artistic capacity," whose services, the court expressly observed, usually cost the plaintiff considerable amounts of money.

The sense of justice of the uninitiated is shocked on the discovery that a commercial rival who engages in predatory practices and boldly usurps the labor and skill of his competitor is unmolested by the law simply because his victim has failed to grasp the fringe of copyright.

In conclusion, mention should be made of the statement of Justice Sims, in *Crump Co. v. Lindsay.* The plaintiff had expended considerable money and effort in the preparation of a catalogue of automobile parts. The defendant saved himself trouble and expense by photographing twenty or more pages of this catalogue and used these in his own competing publication. The plaintiff sought an injunction on grounds of unfair competi-

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67. 189 Fed. 90 (C.C. Minn. 1911).
70. 130 Va. 144, 107 S.E. 679 (1921).
tion, and relied on the Associated Press case. The petition was dismissed. Justice Sims concurred in the result, saying that "under our system of jurisprudence a court of equity will not adjudicate an abstract question of whether a defendant possesses a right of conduct." He also asserted that there was no evidence of substantial injury. However, he disagreed with the reasoning of the court and pointed out that the plaintiff, in complaining of the defendant's copying, had not contended that he had a copyright, but rather a right to enjoin the defendant from using the method by which he produced his copy.

"The Crump Company [plaintiff] concedes that the Lindsay Company [defendant] had a perfect right to produce the same result which it did produce provided it had done so by some method which was not rendered less expensive by photographic copy and use by it of portions of the Crump Company catalogue. But the claim of the Crump Company is that, the latter method, being an unauthorized appropriation and use by the Lindsay Company of the result of the work and expenditure of the Crump Company, the use by the Lindsay Company of the result of such method constitutes unfair competition in business, and therefore should be enjoined by a court of equity."

It is believed that statements such as the above presage a new period in the law of unfair competition in which the appropriation of literary and artistic qualities will give rise to rights which will be protected by the courts on simple principles of fairness and through an insistence that ideas of decency in competition be observed. The present practice of resort to the law of copyright is productive of unnecessary confusion, depends on attenuated doctrines and offers at best a makeshift and fortuitous approach.

71. 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918).
72. 130 Va. 144, 166, 107 S.E. 679, 686 (1921).
73. Ibid.