

# Louisiana Law Review

---

Volume 3 | Number 1  
November 1940

---

## Copyright Protection and Radio Broadcasting

Cyrus A. Greco

---

### Repository Citation

Cyrus A. Greco, *Copyright Protection and Radio Broadcasting*, 3 La. L. Rev. (1940)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol3/iss1/18>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# LOUISIANA LAW REVIEW

PUBLISHED QUARTERLY, IN NOVEMBER, JANUARY, MARCH AND MAY  
LOUISIANA STATE UNIVERSITY LAW SCHOOL  
UNIVERSITY, LOUISIANA

Subscription per year \$4.00 (Foreign \$4.50)

Single copy \$1.00

VOL. III

NOVEMBER, 1940

No. 1

## STUDENT BOARD

KENNETH J. BAILEY, *Editor-in-Chief*

JOHN M. SHUEY, *Comment Editor*

MILTON M. HARRISON, *Case Note Editor*

WILLIAM M. SHAW, *Case Note Editor*

ALVIN B. RUBIN, *Index Editor*

HOWARD W. WRIGHT, JR., *Index Editor*

AUBREY BACON

JOHN W. LANDRY

EARL A. MORGAN

JOSEPH T. BOSTON

GILBERT D. LITTON

HARVEY H. POSNER

WILLIAM R. COBENEN

RUSSELL B. LONG

WESLEY R. WIRTZ

## FACULTY ADVISORY BOARD

WEX S. MALONE, *Faculty Editor*

ROBERT LEE TULLIS

JOSEPH DAINOW

PAUL M. HEBERT

JEFFERSON B. FORDHAM

IRA S. FLORY

HENRY G. McMAHON

DALE E. BENNETT

J. DENSON SMITH

PIERRE CRABITÈS

CLYDE W. THURMON

HARRIET S. DAGGETT

BEVERLY E. DENBO, *Secretary*

Publication in the REVIEW does not imply agreement with the views expressed in any of the contributions.

Unless otherwise indicated, the authors of COMMENTS and NOTES are students of Louisiana State University Law School.

## Comments

### COPYRIGHT PROTECTION AND RADIO BROADCASTING†

In 1920 there was only one radio station in the United States.<sup>1</sup> Expenses for its operation were met by means of the toll system. This was very unsatisfactory, so for a time the growth of radio was slow. In 1924, however, the American Telephone and Telegraph Company hit upon the idea of leasing broadcasting facilities to advertisers.<sup>2</sup> The effectiveness of this new medium of advertising was soon recognized. Thereafter radio became a business in the United States.<sup>3</sup>

Radio is now one of the most important factors in our eco-

† This comment was a prize winning essay in the 1940 Nathan Burkan Memorial Competition.

1. Shafter, *Musical Copyright* (1932) 246.

2. Caldwell, *Piracy of Broadcast Programs* (1930) 30 Col. L. Rev. 1087.

3. *Id.* at 1087-1088.

conomic life. In twenty years the business has grown from virtually nothing to giant super corporations with capitalizations of millions of dollars. It has created vast markets for its own products as well as markets for the products of others. Moreover, in its need for technical experts, radio has made possible thousands of new jobs that have contributed to the income of the working American public. Consequently, it can be said that radio today is an indispensable part of the American economic scheme.

The development of this new business in so short a time has brought a myriad of new legal problems to occupy the attention of the copyright lawyer. These problems have been occasioned by the rapid technical developments which are being made in radio. Consequently, the use of judicial precedent is not readily adaptable. The legal panorama is constantly changing. For that reason the purpose of this paper is to discuss *as of today* the rights possessed by composers, artists and performers in the field of radio broadcasting.

#### BASIS OF COPYRIGHT LAW

The copyright law of the United States is founded both on the Constitution and the common law. Article I, Section 8, of the Federal Constitution provides: "The Congress shall have power . . . to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." As this power is given exclusively to the federal government, any legislation concerning copyright must emanate from Congress. It is entirely within the discretion of that body as to what rights shall be protected under the copyright laws. However, the power vested in Congress has not prevented the courts from granting relief to individuals in those instances where Congress has failed or refused to afford protection under the copyright laws. This has been done by resort to the common law. The theory is that the only effect of the constitutional provision giving the copyright power to Congress is to enable that body to create a new group of rights as a substitute for those given by the common law. In the absence of legislation the old common law rights remain unaffected. Today, therefore, it would seem that every expression of human thought is protected.<sup>4</sup>

The difference between the protection given under the com-

---

4. See Well, *American Copyright Law* (1917) 159 et seq., 406 et seq., where the cases are collated. *Cory v. Physical Culture Hotel*, 14 F. Supp. 977 (W.D. N.Y. 1936), noted in (1936) 7 *Air L. Rev.* 319.

mon law right<sup>5</sup> and that given under the statutory right<sup>6</sup> is fundamental. Under the common law, so long as a work remains unpublished an author is given a perpetual monopolistic right in his creation. Sometimes a limited and restricted publication is permitted; but general publication means loss of rights.<sup>7</sup> Furthermore, such rights are enforced under state law.<sup>8</sup> On the other hand, statutory rights are those rights which attach if the procedure prescribed in the copyright act has been followed. Such rights include principally the privilege of unlimited publication for a period of twenty-eight years, with a like privilege of renewal for an additional twenty-eight years. The right of publication is exclusive and any question concerning it is decided according to federal law.<sup>9</sup> In short, the common law rights are those which protect *before* publication while statutory rights are those given *after* publication.<sup>10</sup> These two types of rights have been consecrated in the copyright act of 1909, which is the latest legislative expression on copyright law.<sup>11</sup>

#### PUBLICATION

Since, as has been seen, all rights must ultimately depend on a congressional act or the common law, and since the rights that flow from these two sources differ, it becomes necessary to determine when each type is applicable in order to know the applicable rules. When there has been publication and the copyright act has not been complied with, the work is deemed to

---

5. *Donaldsons v. Beckett*, 4 Burr. 2408, 98 Eng. Reprint 257 (1774); *Wheaton v. Peters*, 33 U.S. 591, 8 L.Ed. 1055 (1834); *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182, 30 S.Ct. 38, 54 L.Ed. 150 (1909); *Palmer v. DeWitt*, 47 N.Y. 532, 7 Am.Rep. 480 (1872).

6. 35 Stat. 1075 (1909), 17 U.S.C.A. § 1062 (1927), as amended.

7. Shafter, *op. cit. supra* note 1, at 85 et seq.

8. *Wheaton v. Peters*, 33 U.S. 591, 8 L.Ed. 1055 (1834).

9. See notes 5 and 7, *supra*.

10. See footnote 5 in *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 439, 194 Atl. 631, 634 (1937). "It has long been a subject of discussion as to whether common-law rights in literary property survive publication, and whether, therefore, the copyright statute has restricted or broadened such rights. The early English view seems to have been that publication does not defeat the rights of proprietorship at common law: *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Reprint 201 (1774); *Donaldsons v. Beckett*, 4 Burr. 2408, 98 Eng. Reprint 257 (1774). The American view has been to the contrary, and holds that the common law right is confined to the first publication: *Wheaton v. Peters*, 33 U.S. 591, 8 L.Ed. 1055 (1834); *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182, 30 S.Ct. 38, 54 L.Ed. 105 (1909); *Palmer v. DeWitt*, 47 N.Y. 532, 7 Am.Rep. 480 (1872); *Bamforth v. Douglass Post Card Machine Co.*, 158 Fed. 355 (E.D. Pa. 1908).

11. This has been held to be constitutional although no time limit is specified in the copyright act. *Marx v. United States*, 96 F. (2d) 204 (C.C.A. 9th, 1938).

have been dedicated to the public. The result of such dedication is loss by the author of both common law and statutory rights. The copyright act defines publication as "the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority."<sup>12</sup> However, as subsequently defined by the courts, this section merely fixes the date from which the copyright term begins to run and is not a general definition of publication.<sup>13</sup> Consequently, the decided cases must be examined in order to determine if there has been a publication. There exists great confusion among the authorities. It has been held that the production of a play,<sup>14</sup> the delivery of a lecture,<sup>15</sup> the playing of a musical composition,<sup>16</sup> the exhibition of a painting,<sup>17</sup> or a performance over the radio,<sup>18</sup> does not constitute a sufficient publication to operate as an abandonment to public use. On the other hand, the single sale of a book is a publication<sup>19</sup> as is the leasing<sup>20</sup> or lending<sup>21</sup> of copies of a book to any member of the public who applies therefor. It has even been held that the public deposit of copies of a book, though made to procure a copyright, is a publication.<sup>22</sup> Therefore, the question that arises is: What test should be used to determine when there has been a publication?

The better considered cases seem to make the apparent intent of the publisher the determinative factor.<sup>23</sup> This theory, however, is subject to the criticism that a strict compliance therewith would permit the publisher to secure to himself a right greater than that granted him by the copyright statute merely by making clear his intention not to abandon the material to the public.<sup>24</sup>

12. 35 Stat. 1087-1088 (1909), 17 U.S.C.A. § 62 (1927).

13. *Cardinal Film Corp. v. Beck*, 248 Fed. 368 (S.D. N.Y. 1918); *Patterson v. Century Productions*, 93 F. (2d) 489 (C.C.A. 2d, 1937).

14. *Ferris v. Frohman*, 223 U.S. 424, 32 S.Ct. 263, 56 L.Ed. 492 (1912).

15. *Nutt v. National Institute, Inc. for the Imp. of Memory*, 31 F. (2d) 236 (C.C.A. 2d, 1929).

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

17. *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 28 S.Ct. 72, 52 L.Ed. 208 (1907).

18. *Uproar Co. v. National Broadcasting Co.*, 8 F.Supp. 358 (D.C. Mass. 1934).

19. *Wheaton v. Peters*, 33 U.S. 591, 8 L.Ed. 1055 (1834).

20. *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N.Y. 241, 49 N.E. 872, 41 L.R.A. 846 (1898).

21. *Ladd v. Oxnard*, 75 Fed. 703 (C.C. Mass. 1896).

22. *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N.Y. 241, 49 N.E. 872, 41 L.R.A. 846 (1898).

23. *Werckmeister v. American Lith. Co.*, 134 Fed. 321, 68 L.R.A. 591 (C.C.A. 2d, 1904); *Berry v. Hoffman*, 125 Pa.Super. 261, 189 Atl. 516 (1937).

24. *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 155 N.Y. 241, 49 N.E. 872, 41 L.R.A. 846 (1898).

This objection, though, might be met by the argument that the courts can be relied on to prevent such an abuse. Furthermore, this particular objection would be more than offset by the certainty which would result in the law of copyright with respect to publication. The facts and circumstances of publication would indicate whether or not the publisher intended to relinquish dominion over the property.<sup>25</sup>

The case of *Uprou Company v. National Broadcasting Company*,<sup>26</sup> illustrates how an application of the doctrine of intent would operate. In that case one Wynn wrote a script for the Texaco Company. Later he reprinted the script and assigned it to the plaintiff with the promise that he would mention the assignment and publication on the radio program. Wynn was prevented from doing this by defendant, the Texaco Company. Plaintiff thereupon applied for an injunction to prevent the defendant from interfering with Wynn. The defendant, in turn, applied for an injunction to prevent the plaintiff from printing or selling the script. The court held that the contract of employment between Wynn and the Texas Company implied a covenant that the author would not authorize another to use the script and that the plaintiff, as a member of the public, obtained no rights through publication since "the rendering of the performance before the microphone cannot be held to be an abandonment of it to the public at large." Had the decision been based on the theory of intent either result could have been reached. It is submitted that this theory would have been the proper basis. The ground on which the court placed its decision was that no performance over the radio will constitute a performance within the meaning of the copyright act. This appears too broad.

#### THE PUBLIC PERFORMANCE FOR PROFIT CLAUSE

Once it has been determined that there has been no dedication to the public the next question that presents itself is: With special reference to broadcasting, when has there been an infringement of a copyrighted work? When the copyright act was passed, radio broadcasting had not yet come into existence. Fortunately for the composer, however, his right to broadcast was

---

25. In *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 444, 194 Atl. 631, 636 (1937), the court said: "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."

26. 8 F.Supp. 358 (D.C. Mass. 1934). See also *Brown v. Nolle*, 20 F.Supp. 135 (S.D. N.Y. 1937).

not considered any new right which had to be created specially by Congress: the courts merely extended the "public performance for profit" clause of the copyright act to cover the case.<sup>27</sup> That clause gives to anyone complying with the provisions of the act ". . . the exclusive right . . . to perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit. . . ." What acts come within the clause is a matter for determination by the courts.

That the rendition of any artistic endeavor before a microphone is a performance is a proposition too obvious for successful contradiction. Perhaps this accounts for the dearth of cases on the point. At any rate, the arguments advanced for the non-applicability of the "public performance clause" to radio are generally grounded on three theories: (1) A performance before a microphone is not public; (2) If the original broadcast is licensed, then a license to receivers to pick up the broadcast and use it for any purpose is implied; and (3) There is no profit. The first theory is used exclusively by broadcasters; the second is used by receivers only; the third is used by both.

#### *When a performance is public*

Concerning the first theory mentioned above it was early argued that performance before a microphone was not a public performance within the meaning of the copyright act. But in *Jerome H. Remick & Co. v. American Automobile Accessories Company*,<sup>28</sup> a case which has apparently settled the law on the point, the court had no difficulty in finding the performance a public one. The court stated that for a performance to be public it is not necessary that it be rendered in a stadium, public square, theater or any other place where such things are usually held; nor is it necessary that there be a visible audience. Broadcasting is merely a new mode of rendering a performance, and the fact that a person is able to enjoy it in the privacy of his home does not make it any the less public. This case had the effect of sweeping away the old definition of performance which depended on a simple criterion: Are the people who attend the performance

---

27. 35 Stat. 1075 (1909), 17 U.S.C.A. § 1(e) (1927).

28. 5 F. (2d) 411 (C.C.A. 6th, 1925), cert. denied 269 U.S. 556, 46 S.Ct. 19, 70 L.Ed. 409 (1925). See Sprague, *Copyright-Radio and the Jewell-LaSalle Case* (1932) 3 Air L. Rev. 417, in which the author questions whether the Remick case is still good law in view of the holding in *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 51 S.Ct. 410, 75 L.Ed. 971 (1931), to the effect that the public does not receive the broadcaster's performance but a reproduction of it which the listener creates through the medium of his receiving set.

of the type likely to pay for admission to hear it performed at a theater or concert hall?<sup>29</sup> In short, by the new rule the performance itself, rather than the audience, becomes the test.<sup>30</sup> England and the Dominions have also unqualifiedly recognized this view.<sup>31</sup>

### *Implied License*

Not infrequently a person devises a scheme whereby he picks up a broadcast and utilizes it for commercial purposes. It has been argued that this practice is permissible under the original license to broadcast. This view finds support in one district court case<sup>32</sup> and in a footnote to a Supreme Court decision.<sup>33</sup> However it is well settled that an unauthorized public reception for profit of an unlicensed broadcast constitutes an infringement.<sup>34</sup> Since the Supreme Court has held that reception and broadcasting are individual performances,<sup>35</sup> it is difficult to see how a license to the receiver can be implied. Furthermore if the spirit of the copyright act is looked to, it will be seen that its purpose was to adequately reward composers and authors for their creations. Since radio has undoubtedly damaged the composers' previous chief source of income (sheet music sales) it would seem only fair that radio should supply the revenue needed to balance the loss.

### *Profit*

The argument which has given the courts most trouble with regard to the public-performance-for-profit clause has been based on the word "profit." A lower federal court early construed the word and the phrase in which it occurs as nothing more than a protection to those persons who do not perform the composition publicly and for profit.<sup>36</sup> By way of dicta the court said that the protection extended to street parades, schools, educational or similar public occasions and exhibitions. Some time later the Supreme Court of the United States held that there was no pro-

29. *Harms v. Martans Club* [1927] 1 Ch. 526; *Messenger v. British Broadcasting Co., Ltd.* [1927] 2 K.B. 543.

30. *Shafter*, op. cit. supra note 1, at 205.

31. *Ibid.* See also *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.*, 49 T.L.R. 410 (1933), noted in (1934) 5 Air L. Rev. 83; *Canadian Performing Right Soc. v. Ford Hotel*, 2 D.L.R. 391 (1935).

32. *Buck v. Debaum*, 40 F. (2d) 734 (S.D. Cal. 1929).

33. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (note 5), 51 S.Ct. 410, 75 L.Ed. 971 (1931).

34. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 51 S.Ct. 410, 75 L.Ed. 971 (1931).

35. *Ibid.*

36. *Hubbell v. Royal Pastime Amusement Co.*, 242 Fed. 1002 (S.D. N.Y. 1917).

tection in the case of an hotel which hired an orchestra to play copyrighted songs in its dining room, although no direct charge was made.<sup>37</sup> Mr. Justice Holmes, in the course of the opinion, correctly pointed out that the defendant's performances were not eleemosynary. "They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere."<sup>38</sup> Similarly, it has been held that the playing of excerpts of copyrighted musical compositions in moving picture theaters to which a charge for admission has been made is a "performance for profit" within the meaning of the copyright act,<sup>39</sup> as is also an unauthorized performance in a dance hall to which admission has been charged.<sup>40</sup>

With this wealth of precedent to rely on, in cases involving broadcasting, the courts showed reluctance in imposing liability when there was an unauthorized performance of a copyrighted composition. This was because it was difficult to show a direct profit. However, the matter was settled in 1923. A department store selling radio equipment conducted a radio station, the cost of which was charged against the general expenses of the business. Every program was prefaced with the statement that the program was being presented through the courtesy of that particular department store. Each program ended the same way. An unauthorized rendition of a copyrighted composition was given and the court properly granted an injunction, holding that the purpose of the performance was profit for the store, whether this purpose was realized or not.<sup>41</sup> Since then there seems to have been no question as to the liability of the person promoting the program, whether he is broadcaster himself or the individual who purchased the privilege of using the broadcasting facilities.

A different question is presented when "time" has been bought from a broadcaster and the program is presented entirely by the person purchasing the time. In such cases the program to be presented is entirely under the control of the sponsor. What is the broadcaster's liability if there is an unauthorized rendition of a copyrighted composition? In the early days of radio, the acts

---

37. *Herbert v. Shanley Co.*, 242 U.S. 591, 37 S.Ct. 232, 61 L.Ed. 511 (1917).

38. *Ibid.*

39. *Harmes v. Cohen*, 279 Fed. 276 (E.D. Pa. 1922).

40. *Irving Berlin, Inc. v. Daigle*, 31 F. (2d) 832 (C.C.A. 5th, 1929).

41. *Witmark & Sons v. Bamberger & Co.*, 291 Fed. 776 (D.C. N.J. 1923).

of the broadcaster were considered as passive. He was likened to a workman who rigged up a loudspeaker in an auditorium so that all might hear. Broadcasting was considered as giving the authorized performer a larger audience, and not as a distinct performance of the copyrighted composition on the part of the broadcaster. Consequently, if the performer was authorized, there could be no action against the broadcaster.<sup>42</sup> But this idea of passivity did not last long. Two years later another federal court held that the acts of the broadcaster must be considered as active. The court argued that the analogy to the workman is not proper. It could not be said that ". . . the broadcaster merely opens the window, and the orchestra does the rest. On the contrary, the acts of the broadcaster are found in the reactions of his instruments, constantly animated and controlled by himself, and those acts are quite as continuous and infinitely more complex than the playing of the selection by the members of the orchestra."<sup>43</sup>

The foregoing discussion of the profit argument and the manner in which it has been handled by the courts shows that as yet the word "profit" has no settled meaning. This is because the profit is sometimes so well concealed that all facts have to be considered before it can be found. It is submitted that the term should continue to have no fixed meaning. This will enable the courts to examine every case anew and will afford them an opportunity to crush any ingenious scheme to evade the letter or the spirit of the copyright act.

#### RIGHTS OF THE ARTIST

Primarily, in turning from a consideration of the rights that composers have in their musical compositions to the rights of artists, we turn from a consideration of rights that have statutes as their mainsprings to a determination of rights that have been worked out wholly by the courts. The courts have been consistent in holding that no copyright has at any time afforded protection to an actor, singer or musician.<sup>44</sup> But this fact has not prevented the application, perhaps unconsciously, of the spirit of copyright, which is to reward for any artistic endeavor. This has been done by a singular method.

It has been suggested that a performing artist through his

---

42. *Remick & Co. v. General Electric Co.*, 4 F. (2d) 160 (S.D. N.Y. 1924).

43. *Ibid.*

44. *Fuller v. Bemis*, 50 Fed. 926 (S.D. N.Y. 1892); *Barnes v. Miner*, 122 Fed. 480 (S.D. N.Y. 1903); *Bloom & Hamlin v. Nixon*, 125 Fed. 977 (E.D. Pa. 1903).

industry, skill and individual personality creates a product different from the rendition of the same musical selection by other performers.<sup>45</sup> For that reason it has been suggested that this new creation should be subject to protection by the copyright statute.<sup>46</sup> However, no case has arisen wherein this idea was considered by the court as a basis for its decision, at least not since the adoption of the copyright act of 1909.<sup>47</sup> Instead, the courts have given relief on the asserted ground of protecting a common law property right. This protection has been effected by means of a restriction on the performance through an extension of the theory of unfair competition.<sup>48</sup>

The courts have made fairly clear the manner in which cases involving the rights of artists are to be handled. Foremost among the decisions is the case of *Waring v. WDAS Broadcasting Station*<sup>49</sup> wherein the plaintiff sought to prevent the broadcasting of his recorded performances. When he made the recordings the legend "For home use only" was stamped on the records. The defendant unauthorizedly used these records in his broadcasts, whereupon plaintiff brought suit for an injunction. The court chose to treat the case as one of novel impression and after pointing out that the rights of an orchestra were not subject to protection by the copyright act, the court proceeded to hold that: (1) A musician who by his interpretation contributes something of novel, intellectual, or artistic value to a musical composition of another, has participated in the creation of a product in which he is entitled to a right of property; (2) This right is not lost by publication when sold for use in records that have the legend "For home use only" on them; (3) Such a restriction is not in restraint of trade and not so unreasonable that it cannot be enforced in equity. Having decided these primary principles, the court proceeded to a discussion of the equitable doctrine of unfair competition,<sup>50</sup> and held that, although this doctrine rests on the restraint of fraud and deception generally, the presence of these elements is not an indispensable prerequisite to equitable

---

45. See Note (1939) 10 Air L. Rev. 315.

46. See Note (1938) 9 Air L. Rev. 99.

47. See note 44, *supra*.

48. McClintock, *Handbook of Equity* (1936) 259 et seq., 262 et seq., §§ 144, 146; Walsh, *A Treatise on Equity* (1930) 221 et seq., 244 et seq. The foundation case for the theory of unfair competition is *Associated Press v. International News Service*, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918).

49. 327 Pa. 433, 194 Atl. 631 (1937).

50. See note 48, *supra*. See also *Cheney Bros. v. Davis Silk Corp.*, 35 F. (2d) 279 (C.C.A. 2d, 1929); *Associated Press v. KVOS, Inc.*, 80 F. (2d) 575 (C.C.A. 9th, 1935).

relief; and that, under certain circumstances equity will protect the unfair appropriation of the products of another's labor or talent.

Although the whole court agreed with the conclusion of the case there was a strong dissent as to the rationale. Justice Maxey preferred to base his conclusion on the doctrine of the right of privacy.<sup>51</sup> By drawing an analogy between an artist and a writer of letters,<sup>52</sup> or a photographer,<sup>53</sup> the judge came to the conclusion that "any interpreter of a musical or any other kind of composition has an interest in his interpretation to which the law accords the status of a right and which it will protect." The judge particularly objected to the requirement in the majority opinion that the production constitute a novel and artistic creation. In connection with that, he said, ". . . an individual's right to protection against an invasion of his real property never depends on its value; that is a factor only in the measure of damages. . . . The true test is whether the thing in question is 'capable of identification so that exclusive ownership may be asserted.'"

It is submitted that the position taken in the dissenting opinion is too broad. Although the principles enunciated therein would be much easier to apply than those of the main opinion, they would give rise to innumerable occasions in which, for one reason or another, it would be unwise to restrain a performance. In the principal case, by making the existence of a property right a prerequisite to relief, the court placed itself in a position to deny relief should the occasion demand it. It could do this by an application of the maxim, "Equity will protect only property rights." Although the feudal idea that property is the sole source of human satisfaction is unsound, yet the maxim has served and still serves as a convenient method for the courts in denying relief which they deem inexpedient. As one writer has pointed out, the existence of a property right is seldom a controlling consideration.<sup>54</sup> Be that as it may, the opinion of the majority in the principal case seems to have become firmly established in the lower federal courts.<sup>55</sup> The real solution of the problem lies not

---

51. Warren and Brandeis, *The Right to Privacy* (1890) 4 Harv. L. Rev. 193.

52. *Dennis v. LeClerc*, 1 Mart. (O.S.) 297, 5 Am. Dec. 713 (La. 1811); *Woolsey v. Judd*, 4 Duer. 397 (N.Y. 1855).

53. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).

54. Bennett, *Injunctive Protection of Personal Interests—A Factual Approach* (1939) 1 LOUISIANA LAW REVIEW 665.

55. *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F.Supp. 490 (D.C. Pa. 1938); *Waring v. Dunlea*, 26 F.Supp. 338 (E.D. N.C. 1939); *R.C.C. Mfg. Co. v. Whiteman*, 28 F.Supp. 787 (S.D. N.Y. 1939).

in seeking a remedy in the decisions, but rather, in making the rights of artists subject to the copyright act.

#### CONCLUSION

The foregoing remarks indicate that the courts have gone as far as they can, in view of the legal forms available, in the protection of a property right in human thought. Primarily, the rights founded on the common law are rights which were recognized at a time when the methods for the dissemination of ideas were very limited. Necessarily, since the primitive mind was unable to contemplate the existence of an incorporeal thing, the development of intangible property had to wait until the idea of property rights in tangibles was fully developed.<sup>56</sup> This, coupled with the fact that songs and music have always been considered as the heritage of a people,<sup>57</sup> retarded the recognition of such interests.<sup>58</sup> In 1709 this recognition received an impetus through the passage of the first copyright statute.<sup>59</sup> However, due to the fact that this statute was not considered as destroying the common law rights but as creating new ones,<sup>60</sup> in cases not covered by the statute the courts have constantly reverted to the common law, whose natural growth had been arrested because of the development of the more favorable statutory right. It follows that the courts have had to adapt old forms to new conditions. The results have not been altogether unsatisfactory. It is submitted that the time has now come for a codification of the more satisfactory rules as they have been worked out by the courts. This could best be effected by a complete revision of the first two sections of the copyright act.

CYRUS A. GRECO\*

---

56. Shafter, *op. cit. supra* note 1, at 2; Warren and Brandeis, *The Right to Privacy* (1890) 4 *Harv. L. Rev.* 193.

57. Shafter, *loc. cit. supra* note 56.

58. Warren and Brandeis, *supra* note 56, at 195, n. 1: "Copyright appears to have been first recognized as a species of private property in England in 1558. Drone on Copyright, 54, 61."

59. 8 Anne, c. 19 (1709).

60. See note 5, *supra*.

\* Member of the Louisiana Bar.